No. 47755-6-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

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

Appellant,

v.

RANDY CAMPADORE, a single person; RAYMOND E. PELZEL, and the marital community composed of RAYMOND E. PELZEL and MERRILEE PELZEL; WILLIAM RILEY and ALTHEA RILEY, husband and wife, and the marital community composed thereof,

Respondents.

BRIEF OF APPELLANT MUFG UNION BANK, N.A.

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I. INTRODUCTION

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

Those assets include the unpaid promissory note (the "Note") of Voight Creek Estates, LLC ("Borrower") and the "absolute and unconditional" guaranties (each, a "Guaranty," and collectively, the "Guaranties") of its only members, Respondents Randy Campadore, Raymond E. Pelzel, Merrilee Pelzel, William Riley and Althea Riley (each, a "Guarantor," and collectively, the "Guarantors"). The Guaranties contain extensive authorizations and waivers of defenses, setoffs, and counterclaims. The text found in each Guaranty making it absolute and unconditional, without set-off or deduction or counterclaim, is attached as Appendix 1. The text providing for authorizations and waivers is attached as Appendix 2. The text providing for the definition of "Indebtedness" is attached as Appendix 3.

Union Bank moved for summary judgment on the absolute and unconditional Guaranties, and the Guarantors cross-moved for summary judgment arguing that they were relieved from their absolute and unconditional Guaranties because the general receiver appointed for Borrower sold Borrower's real property and "Washington law (e.g., Washington's Receivership statute, RCW 7.60) does not expressly authorize a right to pursue deficiency judgments following a general receiver's sale of property." CP 280.

The trial court, in an unprecedented decision, agreed with Guarantors and granted them summary judgment dismissing with prejudice the claims of Union Bank against them on their absolute and unconditional Guaranties (the "Cross Summary Judgment"). CP 448-449. In ruling, the trial court said (RP 49-52):

> THE COURT: I am going to grant the defendants' motion....
>
> ***
>
> MR. THORESON: It's an end [of] the case until it's decided by the Court of Appeals.
>
> MR. HELSDON: It's a dispositive ruling.
>
> MR. THORESON: It's dispositive of all the issues.

> THE COURT: Yeah, it just bothers me because their claim is for breach of contract, and the guarantee is in fact a contract.
>
> MR. BUTLER: And for monies due.
>
> MR. HELSDON: Well, you made the right decision.
>
> THE COURT: I have no idea. I can see the word "reversed" coming my way in the future.
>
> ***
>
> THE COURT: I don't really rely on that. I don't think it's a factual issue. I think *it is a legal issue*.
>
> ***
>
> THE COURT: *I am concluding that the receiver—that having sold the property through a receivership foreclosed their right to sue on the guarantee.*
>
> ***
>
> MR. BUTLER: And *on what basis*? Wording in the contract or some argument that defendants have made?
>
> THE COURT: *It is the arguments made by the defendants as to the receivership statute not allowing that as a remedy.* (Emphasis added.)

II. STANDARD OF REVIEW

This is an appeal from the Cross Summary Judgment in favor of Guarantors and against Union Bank, and the denial of summary judgment in Union Bank's favor.

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

III. ASSIGNMENTS OF ERROR

The trial court erred in denying Union Bank's summary judgment motion and in granting cross summary judgment in Guarantors' favor and against Union Bank, dismissing Union Bank's claims for breach of contract, monies due and attorneys' fees and costs as barred by the Washington Receivership Act.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Receivership Act protects a borrower or its guarantor from a deficiency judgment after a judicial sale of the borrower's property by a court-appointed receiver upon court order when the Receivership Act does not expressly provide for such protection, in contrast to the Deed of Trust Act, which expressly protects a borrower (and sometimes a guarantor) from a deficiency judgment after a trustee's nonjudicial sale, and the Real Estate Contract Forfeiture Act, which expressly protects a purchaser from a deficiency judgment after a seller's nonjudicial forfeiture, and when RCW 7.60.230(1)(6) expressly preserves a creditor's right to a deficiency.

2. Because the Receivership Act does not protect a borrower or its guarantors from deficiency judgments after a judicial sale of the borrower's property by a court-appointed receiver upon order of the receivership court, did the trial court make a mistake in holding that the Receiver's sale of the Property discharged Guarantors from their liability to Union Bank on the indebtedness remaining after application of the sale proceeds?

3. Because Guarantors do not dispute that they signed absolute and unconditional Guaranties that contained extensive waivers, including the waiver of all defenses given to guarantors at law or in equity other than actual payment of the guaranteed indebtedness, and including the express waiver of "any and all rights or defenses based on suretyship or impairment of collateral," should the trial court have ruled that Guarantors are barred from raising the defenses and entered summary judgment in Union Bank's favor?

4. Because Guarantors had actual notice of and actively participated in the Receivership, because they filed their Objection to the Sale Motion of the Property, and because the Property was sold by the Receiver upon the unappealed Sale Order of the Receivership Court, should the trial court have ruled that Guarantors are barred from

complaining about the acts of the Receiver or challenging the Receiver's sale of the Property and entered summary judgment in Union Bank's favor?

V. STATEMENT OF CASE

A. Guarantors, Who Own Borrower, Give Guaranties of Borrower's Indebtedness to Frontier Bank

Voight Creek Estates, LLC ("Borrower") is a limited liability company that owned a 79-acre parcel of land in Orting, Washington ("Property"). CP 91, 430, 434. It was formed in April 2006 by its members, who are the Guarantors. CP 92, 148, 192.

To develop the Property, Borrower got a construction loan from Frontier Bank. To evidence the debt ("Indebtedness"), Borrower executed a Promissory Note, dated April 13, 2006, in the principal amount of $2,500,000.00 (as modified by Change in Terms Agreement, the "Note"). CP 91, 95-109. The Note is secured by a Construction Deed of Trust encumbering the Property. CP 91, 111-122. The Indebtedness is absolutely and unconditionally guaranteed by Guarantors. CP 91-92, 123-142; Appendices 1-3. Borrower and Guarantors defaulted on the Note when it came due over seven years ago, on July 13, 2008. CP 92. The Indebtedness now exceeds $3.3 million. CP 93.

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

On April 30, 2010, the Washington State Department of Financial Institutions closed Frontier Bank, and the FDIC was appointed as the receiver to liquidate it and wind up its affairs. The same day, Union Bank purchased certain assets of Frontier Bank from the FDIC, including the Note and the Guaranties. CP 91.

C. The Pierce County Superior Court Appoints a Receiver for the Property with the Agreement of Borrower and Guarantors

On March 19, 2012, Union Bank filed a complaint for appointment of a general receiver in Pierce County Superior Court (the "Receivership Court") under Cause No. 12-2-07227-8 (the "Receivership"). CP 148.

On April 17, 2012, the Receivership Court entered its Agreed Order Appointing General Receiver ("Agreed Receivership Order"), appointing Elliott Bay Asset Solutions, LLC ("Receiver"), as general receiver for the Property, all associated personal property and lease and rental agreements, and all revenues, rents, security deposits, storage fees, parking fees, lease payments, profits, revenues, accounts and bank accounts, and income thereof (the "Receivership Estate"). CP 148, 151-170. Borrower agreed to the Receivership Order and it was signed by

Borrower's attorney. CP 166. The Receivership Order was recorded with the Pierce County Auditor under Recording No. 201204170438. CP 494-514, 529-549. Notice of the receivership was published in the Tacoma Daily Index three times between May 16, 2012 and May 30, 2012. CP 558-559.

Section 3.3.1 of the Agreed Receivership Order explicitly provides for the sale of the Property by the Receiver (CP 153):

> **3.3.1 Sale of Receivership Estate Property.** Upon thirty (30) days' notice and opportunity for hearing, the Receiver shall have the authority to sell the Receivership Estate [property] whether or not such sale will generate proceeds sufficient to pay in full the amounts owed to Union Bank. . . . The Receiver shall seek and obtain Court approval for any sale of all or a portion of Receivership Estate property, and may seek to invoke sale(s) free and clear of provisions of Wash. Rev. Code § 7.60.015, *et seq.*

On May 15, 2012, Receiver gave written notice of the Receivership to Guarantors. CP 487, 490. This notice included the statutory notice of receivership, the proof of claim form, a copy of the Agreed Receivership Order recorded under Pierce County Auditor file No. 201204170438, Receivership Schedule A—List of Liabilities, and Receivership Schedule B—List of Property. CP 485, 491-521. Because the first name of Merrilee Pelzel was misspelled on the May 15, 2012 mailing of the

notice of receivership, Receiver re-sent the notice and its enclosures to Merrilee Pelzel on June 4, 2012. CP 523-556.

In July 2012, Receiver met and talked with Guarantors Riley and Pelzel about the Property while on the Property with them. He also obtained certain documents and information from Guarantor Riley about the Property. He met with an engineer concerning the feasibility of septic system designs for the Property and with a land development expert. He conducted a market analysis and reviewed a July 19, 2012 appraisal of the Property, which valued the Property at $360,000. CP 370.

On September 19, 2012, the Receivership Court entered an Agreed Order to Amend Agreed Order Appointing General Receiver to correct the legal description set forth on Exhibit A to the Agreed Receivership Order. This was signed for Borrower by Guarantors William Riley, Randy Campadore, and Raymond Pelzel. CP 561-566.

The Receivership Court thereupon entered its Amended Agreed Order Appointing General Receiver ("Amended Agreed Receivership Order") correcting the legal description and making no other changes. The Amended Agreed Receivership Order was signed for Borrower by Guarantors William Riley, Randy Campadore, and Raymond Pelzel. CP 171-190, 568-587. Like the Agreed Receivership Order, the Amended

Agreed Receivership Order explicitly authorized the sale of the Property at § 3.3.1 as set forth above.

D. Receivership Court Rejects Guarantors' Objection and Authorizes Receiver to Sell the Property

On January 23, 2013, Receiver listed the Property for sale in the Northwest Multiple Listing Service for $360,000. He sought purchasers for the Property. Ultimately, Receiver received and considered three offers, each for $360,000, after the Property had been on the market for 110 days. CP 372.

On June 5, 2013, Receiver filed its motion for order authorizing the sale of the Property for $360,000 ("Sale Motion"). CP 148. Notice was given to Guarantors. CP 372. The Sale Motion was supported by the declaration of Stuart Heath on behalf of Receiver. It explained the Receiver's marketing efforts, provided copies of the purchase and sale agreement and the title commitment, and stated that the purchase and sale agreement had been negotiated in good faith and as a result of arms-length negotiations. CP 214-255.

On June 25, 2013, Guarantors Campadore and Riley objected to the sale on grounds that "the sale price for the property is below market

and the sale should not be permitted to proceed" (the "Objection"). CP 199-212.

On July 12, 2013, the Receivership Court considered and granted the Sale Motion. It noted and overruled the Objection. CP 360. It made findings and entered the Order Authorizing Sale of Real Property ("Sale Order"). CP 257-261.

On August 22, 2013, Receiver closed the sale of the Property pursuant to the Sale Order. CP 92, 144-146. From the gross sale price of $360,000, Receiver paid Union Bank the net amount of $332,252.84 on account of its Construction Deed of Trust. CP 92-93. Union Bank applied this amount against the Indebtedness. CP 93.

E. The Sale Order Is Not Appealed and the Receivership Case Is Closed

The Sale Order was not appealed by Guarantors or anyone else.

On April 25, 2014, the Receivership Court approved the Receiver's final report, discharged Receiver, and terminated the Receivership Estate. CP 148, 263-265.

F. This Lawsuit Is Commenced

On August 12, 2014, Union Bank commenced this lawsuit against Guarantors. CP 1-55.

G. Guarantors Assert Affirmative Defenses

On October 6, 2014, Guarantors Raymond Pelzel, Marrilee Pelzel, William Riley and Althea Riley filed their answer and asserted the affirmative defense that their Guaranty obligations were discharged "due to the receivership and ensuing sale of the property by the receiver, thereby rendering the [guaranty] agreement void and unenforceable." CP 56-63.

On October 13, 2014, Guarantor Randy Campadore filed his answer which was virtually identical to the answer of the other Guarantors, and asserted the same affirmative defense. CP 64-70.

H. Union Bank and Guarantors File Cross Motions for Summary Judgment, and the Trial Court Rules in Favor of Guarantors

On March 3, 2015, Union Bank filed its summary judgment motion. CP 71-89. It sought judgment against Guarantors because they had signed absolute and unconditional Guaranties but failed to pay the guaranteed Indebtedness.

In support of its motion, Union Bank filed the declaration of Andrew E. Bembry with its calculation of the amount due and its eight authenticated Exhibits A, B, C-1 through C-5, and D, the declaration of Douglas R. Cameron with its eight additional authenticated Exhibits A-H and the declaration of Stuart Heath with its nine additional authenticated

Exhibits A-I. CP 90-146, 147-275, 369-447. It also filed an opposition to Guarantors' cross-motion and a reply in support of its own motion. CP 312-322, 348-368.

On March 27, 2015, Guarantors filed their cross-motion for summary judgment, opposition to Union Bank's motion, and the declaration of Chuck Sundsmo. CP 276-311.

On April 24, 2015, the summary judgment motions were heard. RP 1-55. The trial court denied Union Bank's motion and granted Guarantors' cross-motion. CP 448-451; RP 49-54.

On May 4, 2015, Union Bank filed its motion for reconsideration. CP 458-483. It also filed the declaration of Joseph E. Shickich, Jr., with its five authenticated Exhibits A-E. CP 484-587.

On May 27, 2015, Guarantor Campadore filed his opposition to Union Bank's motion for reconsideration and the declarations of Randy Campadore and Bradley P. Thoreson. CP 599-630.

On June 2, 2015, the trial court denied Union Bank's reconsideration motion. CP 631-632.

On June 29, 2015, Union Bank filed its Notice of Appeal. CP 633-642.

VI. ARGUMENT

A. The Trial Court's Ruling That the Receivership Act's Silence On Deficiency Judgments Discharges Guarantors Is Backwards: A Borrower or A Guarantor Is Protected From a Deficiency Judgment Only If a Statute Expressly Says So, Not If the Statute is Silent

The Cross Summary Judgment is unprecedented and stands creditor-debtor law on its head by holding that the Receivership Act, by its silence on deficiency judgments, discharges a guarantor whenever a receiver sells property that serves as collateral for the guaranteed indebtedness. The law in Washington is to the contrary: a lender like Union Bank has a right to judgments against a borrower and guarantors for a deficiency unless they "are protected from deficiency judgments under [a statute] after the borrower's property has been [sold]." *Wash. Fed. v. Harvey*, 182 Wn.2d at 336, 340 P.3d 846 (2015). The Receivership Act does not protect a borrower, let alone a guarantor, from a deficiency judgment.

There are statutes that do protect a borrower (and sometimes its guarantor) from a deficiency judgment, and they are very specific and are the result of a well-known creditor-debtor statutory bargain allowing a nonjudicial procedure: (1) The Deed of Trust Act ("DTA"), chapter 61.24 RCW; and (2) the Real Estate Contract Forfeiture Act ("RECFA"), chapter

61.30 RCW. Each statute expressly protects a borrower from a deficiency judgment in exchange for a nonjudicial procedure, and the legislative history of each statute directly discusses protection from a deficiency judgment. Neither provides an express definition for "deficiency," but case law does. It is the "difference between the sale price and the debt." *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 659-660, 303 P.3d 1065 (2013).

Under the DTA, "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." RCW 61.24.100(1). Under the RECFA, "[a]fter the declaration of [nonjudicial] forfeiture is recorded, the seller shall have no claim against and the purchaser shall not be liable to the seller for any portion of the purchase price unpaid or for any other breach of the purchaser's obligation under the contract . . ." and, if a court under limited circumstances orders a public sale, then "a public sale effected under this section shall satisfy the obligations secured by the contract, regardless of the sale price or fair value, and no deficiency decree or other judgment may thereafter be obtained on such obligations." RCW 61.30.100(4); 61.30.120(9).

1. The Deed of Trust Act Expressly Protects A Borrower, and Sometimes a Guarantor, From a Deficiency Judgment

A nonjudicial foreclosure under the DTA is a statutorily authorized "quid pro quo between lenders and borrowers." *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). In exchange for being allowed to elect to foreclose nonjudicially and get "a quick and inexpensive alternative to judicial foreclosure that does not require a court order," the lender agrees that the debt shall become non-recourse to the borrower, limited to the value of the property if the property is foreclosed nonjudicially, and there will be no deficiency judgment against the borrower: "once the lender chooses nonjudicial foreclosure, it must be satisfied with what it gets." *Wash. Fed. v. Harvey*, 182 Wn.2d at 336, 336 n1. But, the DTA also lets a lender elect to foreclose judicially, and if the lender forecloses judicially it does not "sacrifice...a substantial benefit that remains available in a judicial foreclosure:" the debt remains recourse, the borrower remains liable for the balance of the debt, and the lender is entitled to a deficiency judgment. *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1982)

As was explained when the DTA was enacted 50 years ago,

> Recent legislative attempts to remedy this situation [the time-consuming judicial process and a judicial sale which does not vest title in the purchaser] have been unsuccessful because they did not correct these basic shortcomings. The Deed of Trust Act supplements that time-consuming judicial foreclosure procedure by providing an alternative private sale which results in substantial savings of time. Moreover, there is no statutory redemption period following the trustee's sale so the purchaser gets title at once. Thus, the Deed of Trust Act avoids the basic shortcomings of the judicial foreclosure procedure.
>
> There is, however, one sacrifice which the lender must make in utilizing the private sale provision of the Act—he waives the right to a deficiency judgment. The right to a deficiency judgment continues to be available to the lender who elects to foreclose under the existing judicial procedure.

Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 95-96 (1966).

This particular bargain is found at RCW 61.24.100, which is lengthy with 12 subsections, and the result of significant amendments by the legislature in 1998 to the DTA's anti-deficiency rules. *Gardner v. First Heritage Bank*, 175 Wn. App. at 663-665, quoting directly from the House Bill Analysis summarizing the amendments. The protection of the borrower and a guarantor from deficiency judgments are specifically discussed and explained in the legislative history. H.B. BILL ANALYSIS,

Engrossed Substitute S.B. 6191, at 2-3, 55th Leg., Reg. Sess. (Wash. 1998); H.B. BILL REPORT, Engrossed Substitute S.B. 6191, at 2-3, 55th Leg., Reg. Sess. (Wash. 1998).

The bill making the amendments was proposed by the Washington State Bar Association ("WSBA"). H.B. BILL FINAL REPORT, Engrossed Substitute S.B. 6191, at 1, 55th Leg., Reg. Sess. (Wash. 1998). Immediately after enactment of the 1998 amendments, an article was published by the Real Property, Probate and Trust Section of the WSBA that gave an overview of the amendments. Like the legislative history, it specifically discussed the circumstances under which a guarantor would be protected from a deficiency judgment:

> The amended RCW 61.24.100 also clarifies the scope of a guarantor's liability for a post-sale deficiency, an issue which the Washington courts have declined to resolve. . . . Under the new act, the guarantor of a commercial loan is liable for a deficiency judgment but only if the guarantor was given the same statutory notices that are required to be given to the borrower and the action is brought within the limitations period applicable to the borrower and the guarantor. . . . [A]s long as the guarantor is not a borrower, the guaranty itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guarantee to the same extent a borrower's liabilities are terminated by a trustee's sale.

Craig Fielden, *An Overview of Washington's 1998 Deed of Trust Act Amendments*, WSBA Real Prop., Prob & Trust, Summer 1998, at 4, cited in *Gardner v. First Heritage Bank*, 175 Wn. App. at 1073.

Cases about the DTA make clear that the protection from a deficiency judgment for a borrower or a guarantor exists only if the protection is specifically provided by statute.

In *Gardner*, a borrower defaulted on loans secured by deeds of trust on three contiguous parcels of real property, which were foreclosed nonjudicially in succession on each parcel. The borrower argued that the DTA's anti-deficiency provisions prohibited the lender from exhausting multiple items of real property collateral in a series of nonjudicial foreclosures and that the lender violated RCW 61.24.100(1) by, in effect, pursuing a deficiency judgment after the nonjudicial foreclosure of the first parcel by foreclosing nonjudicially on the next parcel. *Id.* at 659. The Court of Appeal rejected this argument because the DTA did not contain an express prohibition on such a deficiency:

> Given the significant 1998 amendments to RCW 64.12.100's anti deficiency provisions, if the legislature had intended to prohibit serial nonjudicial foreclosures in the manner proposed by [borrower], it could have expressly done so. *Absent clear expression of legislative intent, we decline to read into the statute a prohibition* against serial nonjudicial foreclosures. (Emphasis added.)

Id. at 665.

Similarly, in *Wash. Fed. v. Harvey*, the guarantors argued that the DTA's anti-deficiency provisions protected them from a deficiency judgment after the borrower's real property had been foreclosed nonjudicially. The Supreme Court rejected this argument because the DTA did not contain such a protection for guarantors. Instead, if the guarantor wanted to be protected from a deficiency, the guarantor needed to enter into the DTA's "quid pro quo" and offer its own property as collateral:

> The DTA provides a trade-off in relation to nonjudicial foreclosure of secured property; a guarantor of a commercial loan must secure its guaranty by granting a deed of trust in order to be protected from deficiency judgments when the property burdened by the deed of trust is nonjudicially foreclosed. Here the guarantors did not secure their guaranties by granting deeds of trust, and, even if they had, the foreclosed properties were not properties of the guarantors. Therefore, *the guarantors are not protected from deficiency judgments under the DTA.* Accordingly, [the lender] may seek deficiency judgments against the guarantors. [Emphasis added.]

182 Wn. 2d at 848.[1]

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[1] Guarantors made the same argument in a case where they gave guaranties to Union Bank in connection with another loan, and the trial court agreed with them and Union Bank appealed. As a result of the decision in *Wash. Fed. v. Harvey*, the Court of Appeals has reversed the trial court upon the stipulation of the parties. *Union Bank, N.A. v. Pelzel et al.*, Court of Appeals No. 70869-4-I (180 Wn. App. 1049).

In *Beal Bank v. Sarich*, 161 Wn.2d 544, 548, 167 P.3d 555 (2007), the borrower argued that, under the anti-deficiency provision of RCW 61.24.100(1), after a nonjudicial foreclosure by a senior lienholder, the borrower was protected from a non-foreclosing junior lienholder suing the borrower for the debt due to the junior lienholder. The Court rejected the argument because there was nothing expressed in the statute supporting such a claim under the anti-deficiency provisions:

> We turn to the plain language of the relevant portion of RCW 61.24.100 and find the right of nonforeclosing junior lienholders and creditors is simply not implicated. To accept the [borrowers'] argument would render a result whereby all liens attached to the security would be automatically extinguished upon foreclosure. *We find nothing in the statutory scheme supporting this conclusion.* While foreclosure eliminates the security of a junior lienholder, the debts and obligations owed to that nonforeclosing junior lienholder are not affected by foreclosure under the statutes. (Emphasis added.)

In *Boeing Employees' Credit Union v. Burns*, 167 Wn. App. 265, 282-283, 272 P.3d 908 (2012), the borrowers argued that the lender violated the anti-deficiency provisions of the DTA when the lender sought to enforce its note against the surplus from the foreclosure of a prior deed of trust that eliminated the lender's deed of trust. The court rejected the argument because "the plain language of RCW 61.24.100(1) prohibits such a judgment where there is a 'trustee sale of ***that*** deed of trust.'" But,

there was never a foreclosure under the lender's deed of trust and so there was no express prohibition in the statute.

2. The Real Estate Contract Forfeiture Law Expressly Protects a Purchaser From a Deficiency Judgment

Like the DTA, the RECFA is a statutorily authorized "quid pro quo" between a seller and a purchaser under a real estate contract, which is a financing device widely used in eastern Washington because the DTA exempts agricultural property. RCW 61.24.030(2). The RECFA was enacted in 1985 and "creates a nonjudicial procedure for forfeiture of the purchaser's interest in a real contract that terminates the purchaser's right in the contract and in the real property that is the subject matter of the contract." Hume, *The Washington Real Estate Contract Forfeiture Act*, 61 Wash. L. Rev. 803 (1986). "Like the Washington Deed of Trust Law, the seller is not entitled to any deficiency judgment against the purchaser if the seller chooses to terminate the contract." McKeirnan, *Preserving Real Estate Contract Financing in Washington: Resisting the Pressure to Eliminate Forfeiture*, 78 Wash. L. Rev. 227, 235 (1995); RCW 61.30.100(4). While RECFA allows the purchaser to sue for a public sale if the value of the property is "substantially" more than the debt, even after a public sale, the purchaser is protected from a deficiency.

Like the DTA, the RECFA also lets a lender elect to foreclose judicially, and if the lender forecloses judicially it does not give up its right to a deficiency judgment. RCW 61.30.020.

Like the DTA, the RECFA was drafted by the Washington State Bar Association. 61 Wash. Law L. Rev. at 804. RCW 61.30.100(4) is an anti-deficiency provision that protects the purchaser and makes the contract balance non-recourse against the purchaser if the contract is forfeited nonjudicially. It provides:

> After the declaration of forfeiture is recorded, the seller shall have no claim against and the purchaser shall not be liable to the seller for any portion of the purchase price unpaid or for any breach of the purchaser's obligation under the contract. . . .

The comments of the Real Estate Contract Subcommittee of the WSBA explain:

> This section prohibits a "deficiency judgment" against a purchaser once the contract has been forfeited. This section is consistent with the general rationale of the seller's remedy; i.e., the seller is entitled to the repayment of the debt secured by the contract or the return of the purchaser's interest in the property.

Comments to the Proposed Real Estate Contract Forfeiture Act—Real Estate Contract Subcommittee of Real Property, Probate & Trust Section

of the Washington State Bar Association, *The New Real Estate Contract Forfeiture Act* (WSBA CLE 1985).

The Questions and Answers Regarding Contract Form and Real Estate Contract Forfeiture Act, prepared by a WSBA Subcommittee member, likewise explain:

> 44.Q.: Is it possible for the seller to obtain a deficiency judgment after forfeiture?
>
> A.: No. Following the forfeiture, the pursuit of additional remedies for breach of contract is not something which the statute permits, regardless of the terms of the contract. *See* Section 10(3). This is analogous to the anti-deficiency section in the Deed of Trust Act (RCW 61.24.100).

Id., at 4-30.

The analogy to the DTA is made clear by the legislative history for Section 10 of the RECFA, which became RCW 61.30.100(4):

> This power to declare a forfeiture non-judicially is analogous to the power of a trustee under the deed of trust statute. It allows a forfeiting seller to obtain a marketable and insurable interest in the property without an expensive or extended judicial proceeding.

D. Anderson, *Real Estate Contract Forfeiture Act, Legislative History*, 17-18 (September 21, 1985) (Continuing Legal Education Seminar Materials, Univ. of Wash. School of Law Library, KFW126A75R42).

Unlike the DTA, the RECFA makes no provision for a guarantor and does not prohibit the seller from enforcing a guaranty of the real estate contract. A guarantor is not mentioned at all in the RECFA, its legislative history, or in its statutory scheme, and is not protected.

In *Metropolitan Mortgage & Securities Co., Inc. v. Becker*, 64 Wn. App. 626, 630-631, 825 P.2d 360 (1992), the purchasers under a real estate contract borrowed money from a new lender and executed a promissory note and secured it by a deed of trust junior to the real estate contract on the property. After the seller on the real estate contract forfeited the contract and the purchaser's interest in the property, the lender sought to enforce its promissory note directly against the purchasers just as a lender would against a guarantor of a forfeited real estate contract. The purchasers argued that they were protected and the note became non-recourse and unenforceable under the anti-deficiency provisions of the RECFA when the contract was forfeited. The court rejected the arguments stating that the "lender correctly states that the only effect on the [purchaser's] subordinate note that the forfeiture had is that the note is now unsecured. [The lender] is entitled to enforce the promissory note." The same is true with regard to any guaranty. After a forfeiture, a lender is entitled to enforce its guaranty notwithstanding the forfeiture.

3. The Receivership Act Protects Neither a Borrower Nor a Guarantor From a Deficiency Judgment, But Instead Expressly Preserves a Creditor's Right to a Deficiency at RCW 7.60.230(1)(a)

Like the DTA and the RECFA, the Receivership Act was proposed and drafted by the WSBA, after working on it over a ten-year period. Nothing in the statutory scheme or in the legislative history states or even suggests that a judicial sale by a court-appointed receiver protects the receivership debtor, or its guarantors, from a deficiency judgment by a creditor who had a security interest in the property sold by the receiver free and clear of liens. The legislative history states that "[t]he power of a general liquidating receiver to sell property free and clear of liens is clarified." FINAL BILL REPORT substitute S.B. 6189, at 1, 58th Leg., Reg. Sess. (Wash. 2004); SENATE BILL REPORT, substitute S.B. 6189, at 2, 58th Leg., Reg. Sess. (Wash. 2004). It says nothing about protecting the receivership debtor or its guarantor from a deficiency.

After the enactment of the receivership act, several articles were published by the chairperson of the WSBA's Receivership Working Group. They discussed the power of a receiver to sell property, but said nothing about nor inferred that a receivership sale would protect a debtor or its guarantor from a deficiency judgment. They said:

> Receiver's Disposition of Property; Sales Free and Clear. RCW 7.60.260 codifies the receiver's common law right to sell assets of the receivership free and clear of liens. The court may authorize a general receiver to sell estate property free and clear of liens and rights of redemption whether or not sale proceeds would be sufficient to satisfy all secured claims. Sale notices require 30 day notice under RCW 7.60.190(4). Absent consent of the owner, farm property and homestead property will not be sold by the receiver. Additionally, if the owner or a creditor secured by an interest in the property objects to the sale, the court must determine that "the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale."

Marc Barreca, *A Comprehensive Look at Washington's New Receivership Act,* 10-11 (National Business Institute 2004) (Washington State Law Library KF9016.B3) ("Barreca on the Receivership Act"); Marc Barreca, *Washington's New Receivership Act*, Martindale.com legal library (June 17, 2004) (www.martindale.com\bankruptcy-law\article_K-L-Gates-LLP_74776.htm).

A receivership is unlike a nonjudicial foreclosure or a real estate contract forfeiture.

> A receivership is governed by chapter 7.60 RCW. The purpose of chapter 7.60 RCW is "to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein." LAWS OF 2004, ch. 165, § 1.

> A "receiver" is "a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person." RCW 7.60.005(10). A "general receiver" is appointed "to take possession and control of all or substantially all of a person's property with authority to liquidate that property." RCW 7.60.015. A receiver may be appointed in a number of circumstances, including "to give effect to the judgment." RCW 7.60.025(1)(c).

Washington State Department of Revenue v. The Federal Deposit Insurance Corporation as the receiver for the Cowlitz Bank, ___ Wn. App. ___, No. 71524-1-I, slip op. at 8 (September 14, 2015).

The Receivership Act is distinct from and unlike the DTA and the RECFA at in at least the following respects:

- A sale of property under the Receivership Act is a judicial sale, whereas a sale under the DTA or the RECFA is a nonjudicial sale.

- A sale under the Receivership Act is permitted only after a notice and hearing, and entry of an order by the court. The DTA and the RECFA allow nonjudicial relief.

- A sale under the Receivership Act is made by the receiver, who is the court's agent and acts at the court's direction and upon the court's order. In contrast, the DTA permits a trustee, selected by the beneficiary of the deed of trust, to sell the property nonjudicially, while the RECFA allows the seller itself to forfeit the property nonjudicially without the involvement of any outside party.

- Unlike the DTA and the RECFA, which in their statutory language and legislative history provide for and discuss deficiency judgments, the Receivership Act does not

> discuss or contemplate that a sale by a receiver would protect a borrower from a deficiency judgment, let alone the borrower's guarantor. This is because there is no bargain, no "quid pro quo," between lender and borrower in the Receivership Act. To the contrary, it is a judicial proceeding with the receiver acting as the court's agent.

The WSBA knew how to draft a statute protecting a borrower (and sometimes guarantor) from a deficiency judgment, and the legislature knew how to enact such a statute. They did so with the DTA and the RECFA. But, they did not do so with the Receivership Act. If the Receivership Act were intended to protect a guarantor from a deficiency judgment following a receiver's sale, that is, to eliminate the creditor's right to a deficiency judgment against its absolute and unconditional guarantor, then the Receivership Act would need to have a specific provision expressly granting that protection. Unlike the DTA and the RECFA, it does not.

Instead, the WSBA and the legislature included a contrary provision in the Receivership Act that expressly preserves a deficiency for a secured creditor. RCW 7.60.230(1)(a) says:

> Creditors with liens on property of the estate, which liens are duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral. . . . *If and to the extent that the proceeds are less than the amount of a creditor's allowed claim or a creditor's lien is avoided on any basis, the creditor is an unsecured claim under (h) of*

> *this subsection.* Secured claims shall be paid from the proceeds in accordance with their respective priorities under otherwise applicable law. (Emphasis added.)

That is, to the extent that a secured claim is not paid off in full from the disposition of the collateral, the creditor retains an unsecured claim. This is made clear in Barreca on the Receivership Act at 10:

> RCW 7.60.230 provides that claims in a general receivership shall receive distributions in a set priority generally equivalent to that under the Bankruptcy Code. Secured creditors are to be paid from the proceeds of their collateral, after payment of the "reasonable necessary expenses of preserving, protecting or disposing of the property to the extent of any benefit to the creditors." This is a receiver's equivalent of a bankruptcy trustee's right to surcharge collateral under 11 U.S.C. § 506(c). *The unsecured portion of a creditor's claim is treated as an unsecured claim.* (Emphasis added.)

RCW 7.60.230(1)(a) is derived from section 506 of the Bankruptcy Code, and both sections provide for the bifurcation of an undersecured claim into "secured" and "unsecured portions."

> For example, suppose a creditor holds a claim in the amount of $1 million and the claim is secured only by a lien on the debtor's inventory, which has a value of $750,000. The creditor's claim is thus "undersecured" because the value of the collateral is less than the amount of the claim. By operation of section 506 (a) [and RCW 7.60.230(1)(a)], the claim is divided into two parts: (i) a secured claim in the amount of $750,000, and (ii) an unsecured claim in the amount of $250,000.

4 COLLIER ON BANKRUPTCY ¶506.03[4] (16th ed. 2009).

This is precisely Union Bank's situation. When the Property was sold by the Receiver for $360,000, Union Bank was owed $3,364,312.29. CP 5, 74, 92-93, 214-216. From the sale, Union Bank received the net amount of $332,252.84. CP 74. By operation of RCW 7.60.230(1)(a), Union Bank's claim was divided into two parts: (a) a secured claim in the amount of $332,252.84, and (b) an unsecured "deficiency" claim in the amount of $3,004,312.29. CP 74, 93. The Receivership Act expressly recognizes this deficiency claim and lets Union Bank retain it.

In short, the Receivership Act does not protect or discharge a borrower or a guarantor from a deficiency judgment. To the contrary, it expressly allows a creditor, like Union Bank, to retain its unsecured claim for a deficiency judgment. The trial court erred in ruling otherwise.

B. The Trial Court Should Have Denied the Cross Summary Judgment and Rejected Guarantors' Complaints About the Receivership Court's Sale Order and the Sales Price It Approved Because Guarantors Had Standing to Participate in the Receivership and to Object to the Sale, and Did So

Although Guarantors filed their written Objection to the Sale Motion and it was considered and overruled by the Receivership Court, Guarantors nonetheless argued to the trial court, to encourage the trial court to grant the Cross Summary Judgment and make its unprecedented

ruling, that "Defendants had no statutory standing to challenge the sale of the Property under Washington's Receivership Act." CP 283, 340, 610, 611, 618 619. They argued:

> Under the [receivership] statute, the only classes of parties who have the right to challenge the receiver's sale are the debtor...and a creditor. There is no statutory basis for guarantors to challenge the sales price under the Receivership Act.

RP 18, 20, 21, 29. They said to the trial court that:

> [T]he amendments to the Washington Receivership Act granted standing to object to the sale only to *owner* or a *creditor* with an interest in the property sold by the Receiver.

CP 283, 294, 610; RP 18. They told the trial court that if Guarantors' attorney had appeared at the hearing on the Sale Motion, he could have been sanctioned under Civil Rule 11 by the Receivership Court for lack of standing. RP 30, 44.

The trial court heard "the very vigorous argument that these guarantors had no voice in the receivership process. And that's really the key to their argument, is lack of due process." RP 32. The trial court said that the Guarantors "didn't get the right statutorily to challenge the amount of the sale, and so they are being asked to pay a judgment without the right to challenge that amount." RP 41. The trial court said that the Guarantors

"didn't have a right to file as guarantor" any objection to the Sale Motion. RP 43. The trial court said "I ...understand [Guarantors'] arguments that in the receivership process, they didn't have a voice in the receivership process, and they had no means of challenging effectively [the Sale Order]." RP 49. This is all wrong.

First, the Receivership Act expressly gives a right to participate and be heard to every person affected by the receivership, not just owners and secured creditors. RCW 70.60.190(2) provides:

> *Any person having* a claim against or *interest* in any estate property or *in the receivership proceedings may appear* in the receivership, either in person or by an attorney. . . . A creditor or other *party in interest has a right to be heard with respect to all matters affecting the person, whether or not the person is joined as a party to the action.* (Emphasis added.)

Guarantors had the statutory right to be heard "with respect to all matters affecting" them, including the Sale Motion and its proposed sale price for the Property because that affected them. In fact, they filed the Objection, which was heard and overruled by the Receivership Court at the Sale Hearing. The Receivership Act did not prohibit Guarantors from having a "voice in the receivership process;" instead, it specifically gave them a voice, they used their voice by filing the Objection, their voice was heard,

and it was answered when the Receivership Court overruled their objection.

Second, the Receivership Act does not limit objections to a sale to only the owner of the property or a creditor with interest in the property. RCW 7.60.260 provides:

> (2) the court *may* order that a general receiver's sale of estate property either (a) under subsection (1) of this section, or (b) consisting of real property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, *unless* either:
>
> (i) The property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver; or
>
> (ii) The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale, and the court determines that the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale.
>
> Upon any sale free and clear of liens authorized by this section, all security interests and other liens encumbering the property conveyed transfer and attach to the proceeds of the sale, net of reasonable expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to

> the property immediately before the conveyance. The court may authorize the receiver at the time of sale to satisfy, in whole or in party, any allowed claim secured by the property out of the proceeds of its sale if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired. (Emphasis added.)

The Receivership Act provides that the court "may" order a sale, but the court is under no obligation to do so. The court's power to order a sale is permissive but not mandatory. Thus, the Receivership Act permits, but does not require, a court to order a general receiver's sale of property free and clear.

But, there are three circumstances where the Receivership Act affirmatively prohibits a court from ordering a general receiver's sale of property free and clear of liens, and this is where Guarantors misinformed the trial court about the effect of the Receivership Act's reference to an owner or a secured creditor.

The first two circumstances are at RCW 7.60.260(2)(i). A court cannot order a general receiver's sale of property free and clear of liens if the real property is (a) principally agricultural, or (b) homesteaded residential property, unless the owner consents.

The third circumstance involves the owner or a secured creditor. Under RCW 7.60.260(ii), a court cannot order a general receiver's sale of

property free and clear of liens if the owner of the property or a creditor secured by the property demonstrates, and the court determines, that such a person would get less from the sale than the person would get "within a reasonable time in the absence of the receiver's sale." This third circumstance does not limit or prohibit persons other than an owner or a secured creditor from objecting to a sale. It does not mean that the owner and the creditor are the only ones who can object to the sale. It simply tells that court that, if the third circumstance is present, then the court cannot order the sale of the property, just as the court cannot order the sale of the property if either of the first two circumstances is present. It does not limit standing to just an owner or secured creditor, and it is not a bar to others objecting to the sale or participating in the receivership.

RCW 7.60.260(ii) is one of the three statutory prohibitions on a sale, but they are not the only grounds on which a court can refuse to approve a sale. In fact, the Receivership Act puts no limit on the grounds for objecting to a sale nor does it require the court to ever approve a sale. The sale of a property in a receivership is permissive, not mandatory, and any person affected by the sale may object. RCW 7.60.190(2). And, of course, Guarantors did object to the sale and their Objection was heard and overruled.

C. The Trial Court Should Have Denied the Cross Summary Judgment and Rejected Guarantors' Complaints About the Receivership Court's Sale Order and the Sales Price It Approved Because Guarantors Are Bound By the Orders of the Receivership Court and the Acts of the Receiver

Because they received actual and constructive notice, filed the Objection to the Sale Motion and participated in the Receivership, Guarantors are bound by the orders of the Receivership Court and by the acts of the Receiver, who is the agent of the Receivership Court, in managing and disposing of the Property, whether or not they were formally joined as parties. That means that Guarantors are bound by the Sale Order, including the findings made by the Receivership Court (CP 257-261), and the acts of the Receiver in managing the Property during the Receivership.

RCW 7.60.190 is entitled, "**Participation of creditors and parties in interest in receivership proceeding—Effect of court orders on nonparties.**" As explained in Barreca on the Receivership Act at 10, the purpose of this section is to make clear that interested persons may participate in the receivership and that they are bound by the actions of the receiver and the rulings of the receivership court:

> RCW 7.60.190 clarifies that a creditor or certain other parties in interest may participate in the receivership proceeding without formally joining as a party. Orders regarding sale free and clear of liens or other matters

affecting real property are effective as to persons having actual knowledge of receivership whether or not they appear and participate in the receivership.

This is apparent from Subsections (1), (4) and (7) of RCW 7.60.190, which say:

> (1) *Creditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210*, and creditors or other persons submitting written claims in the receivership or *otherwise* appearing and *participating in the receivership, are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as parties.*
>
> ***
>
> (4) *Orders of the court with respect to* the treatment of claims and *disposition of estate property, including but not limited to orders providing for sales of property free and clear of liens, are effective as to any person having* a claim against or *interest in the receivership estate and who has actual knowledge of the receivership, whether or not* the person receives written notice from the receiver and whether or not *the person appears or participates in the receivership.*
>
> ***
>
> (7) *All persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.* (Emphasis added.)

Guarantors fall squarely within these subsections. Each received notice, had actual knowledge of and participated in the Receivership. The order appointing the general receiver was an "Agreed Order" and, when it was amended, the two orders of amendment were signed by Guarantors themselves in their own handwriting. CP 561-566. They were given written notice of the pendency of the receivership in accordance with RCW 70.60.210. CP 485, 487, 490, 491-521, 523-556. After the Receivership was commenced, Defendants communicated with the receiver and met with the Receiver while actually standing on the Property. CP 370. Notice of the Sale Motion was served on Guarantors, and they filed a written Objection to the motion. CP 199-212, 372.

As subsections (1) and (7) provide, Guarantors "are bound by the acts of the receiver with regard to management and disposition of estate property" and "are bound by any order of the court with respect to the action" of the receiver, "whether or not they are formally joined as parties." And, as subsection (4) provides, the orders of the Receivership Court with respect to disposition of Property of the Receivership Estate, including the Sale Order (CP 257-261), "are effective" against the Guarantors because they had "actual knowledge of the receivership."

So, Guarantors cannot complain about or re-litigate the sale of the Property or the price obtained by the Receiver. The sale made pursuant to the Sale Order of the Receivership Court and the price obtained are binding on Guarantors pursuant to RCW 7.60.190.

D. The Trial Court Should Have Granted Summary Judgment in Union Bank's Favor Because There Is No Dispute That the Guaranties Are Absolute and Unconditional, with Extensive Authorizations, Representations, Warranties and Waivers by Each Guarantor

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

The amount of each Guaranty is "unlimited."

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

Each Guaranty provides that it "will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been finally paid and satisfied and all of

Guarantor's other obligations under this Guaranty shall have been performed in full."

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

Each Guaranty contains extensive waivers. Each Guarantor waives all defenses given to guarantors at law or in equity other than actual payment of the Indebtedness, and "any and all rights or defenses based on suretyship or impairment of collateral," including but not limited to the right to require Lender to proceed first against the Borrower or against any other person, or to exhaust collateral of the Borrower or pursue any other remedy before pursuing Guarantor.

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

> Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter-demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.
>
> Each Guarantor knowingly makes the waivers and
>
> ...warrants and agrees that each of the waivers set forth above is made with the Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law.

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

Each Guarantor agrees that "Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty."

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

E. The Trial Court Should Have Granted Summary Judgment in Union Bank's Favor Because Each Guaranty Is Absolute and Unconditional

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

Washington courts mandate that "[an] absolute and unconditional guaranty should be and is enforceable to its terms. The courts are to enforce it as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is

completely silent." *National Bank v. Equity Invs.*, 81 Wn.2d 886, 919, 506 P.2d 20 (1973); *Franco v. Peoples Nat'l Bank,* 39 Wn. App. 381, 387-88, 693 P.2d 200 (1984) (citing *National Bank v. Equity Invs.*, 81 Wn.2d at 919).

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

In *Croney*, the borrower, Cowboy Campsite, was an LLC. Croney was a member of the LLC and a guarantor. The court began its analysis by quoting directly from the LaserPro Guaranty, and highlighting terms identical to those in the LaserPro Guaranties here: "Guarantor absolutely and unconditionally guarantees," "Guarantor's liability is unlimited and Guarantor's obligations are continuing," and a recitation of the same Guarantor's waivers. 2011 WL 1656371 at *1 (CP 342).

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

> Under Washington law, a guarantee of payment of an obligation without words of limitation or condition is construed as an absolute or unconditional guarantee. In contrast, a conditional guarantee contemplates the happening of a contingent event other than default of the principal debtor as a condition of liability on the part of the guarantor. Unlike a conditional guarantee, and [*sic*] absolute guarantee imposes no duty upon the creditor to attempt collection from the principal debtor before looking to the guarantor.
>
> With an absolute guaranty, the guarantor is liable for the full amount of his guaranty upon default by the primary obligor. The guaranty in this case specifically states that it is unconditional, and goes on to specifically waive any requirement that Business Bank proceed against Cowboy, the collateral, or any of the other guarantors. The guaranty does not contain any provisions making debtor's [Mr. Croney's] liability contingent on an event other than default by Cowboy. The guaranty is clearly an unconditional or absolute guaranty under Washington law. Therefore, under Washington law, debtor is liable for the full amount of the debt guaranteed. The amount of the debt can be readily determined by reference to the Cowboy note.

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

Likewise, each Guaranty here is absolute and unconditional and the trial court should have enforced them by granting summary judgment in Union Bank's favor.

F. The Trial Court Should Have Granted Summary Judgment in Union Bank's Favor Because Each Guarantor Expressly and in Writing Waived All Defenses and Rights of Setoff and Counterclaim

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

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

the guaranty is dispositive" and guarantors could not complain about extension granted after they withdrew consent to future loans as they were bound by extension clause applying to original loans).[2]

Courts throughout the country, on summary judgment, have uniformly upheld these waivers of defenses and counterclaims when imposing liability on guarantors.[3] Indeed, the *Croney* court, in holding the

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

[3] *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*, 740 F.3d 1146 (7th Cir. 2014), *aff'g summary judgment* 901 F. Supp. 1066, 1071 (E.D. Ill. 2012) (waiver of impairment of collateral; per the 7th Circuit, "[t]he guaranty couldn't be clearer;" per the District Court, guarantors "made their deal, and they must live with it. [Lender] is entitled to the benefit of its bargain, and Guarantors must bear what turned out to be the detriment of one of the terms of their bargain"); *HSH Nordbank Ag New York Branch v. Street*, 421 Fed. Appx. 70 (2d Cir. 2011) (CP 357-362), *aff'g summary judgment* 672 F. Supp. 2d 409, 418 (S.D.N.Y. 2009) (CP 363-373) ("Where a guaranty states that it is 'absolute and unconditional,' guarantors are generally precluded from raising any affirmative defense . . . . Furthermore, a guarantor cannot assert defenses that it expressly waived in the guaranty agreement"); *United States v. Mallet*, 782 F.2d 302, 303 (1st Cir. 1986), *aff'g summary judgment* 1985 WL 5696 (D.N.H. 1985) ("The case law is replete with examples of guarantors attempting to traverse this standard-form guaranty language. The courts, however, have uniformly upheld the "waiver-of-defenses" language;" citing cases from 3rd Circuit, 4th Circuit, 5th Circuit, and 8th Circuit); *First National Park Bank v. Johnson*, 553 F.2d 599,601-602 (9th Cir. 1977) (affirming summary judgment by D. Mont.; "[t]he guaranty in this case...is absolute and unconditional. . . . The district court correctly found that guarantors had waived their right to rely on lack of notice as

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

Guarantors have waived all defenses, counterclaims and setoffs, and the trial court committed an error by not enforcing the waivers and entering the Summary Judgment in Union Bank's favor.[4]

VII. REQUEST FOR ATTORNEYS' FEES

Union Bank requests its attorneys' fees in connection with this appeal. The Note and each Guaranty include an attorneys' fee clause permitting Union Bank to recover all costs and fees of the enforcement of the Note and each Guaranty, and this includes costs and fees on appeal. CP 95, 99, 101, 103, 105, 106, 125, 129, 133, 137, 141. *Marine Enters. v.*

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a defense. The guaranty agreement unambiguously contains such a waiver"); *Sovereign Bank v. O'Brien*, 2013 WL 959301, at **1, 3-4 (D.R.I. 2013) (CP 380-384) (granting summary judgment and upholding waiver of defenses provisions in guaranty); *HSBC Realty Credit Corp. (USA) v. O'Neill*, 2013 WL 362823, at **2-4, 5 n.7 (D. Mass. 2013) (CP 351-356) (granting Rule 12(c) motion for judgment on the pleadings and dismissing guarantor's 18 affirmative defenses and 8 counterclaims as "eviscerated" by the waiver language of the guaranty); *Elmhurst Dairy, Inc. v. Van Peenen's Dairy, Inc.*, 2012 WL 1116978, at *2 (S.D.N.Y. 2012) (CP 348-350) (granting summary judgment against guarantors jointly and severally while upholding waiver of defenses provisions in guaranty).

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

Sec. Pac. Trading Corp., 50 Wn. App. 768, 750 P.2d 1290, *review denied*, 111 Wn.2d 1013 (1988).

VIII. CONCLUSION

Union Bank respectfully asks this Court to reverse the trial court, remand this case to the trial court with instructions to grant summary judgment in Union Bank's favor, and award attorneys' fees and costs to Union Bank in connection with this appeal.

RESPECTFULLY SUBMITTED this 18th day of September, 2015.

RIDDELL WILLIAMS P.S.

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

APPENDIX 1

Text Providing for Absolute and Unconditional Guaranty

Each Guaranty states:

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

***

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

CP 124, 128, 132, 136, 140.

APPENDIX 2
Text Providing for Authorizations and Waivers

Each Guaranty states:

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

* * *

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

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

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

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

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

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

CP 124-125, 128-129, 132-133, 136-137, 140-141.

Appendix 3
Text Providing for the Definition of
"Indebtedness"

Each Guaranty defines "Indebtedness" to mean:

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

CP 124, 128, 132, 136, 140.

CERTIFICATE OF SERVICE

I, Cynthia Concannon, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent MUFG Union Bank, N.A., in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On September 18, 2015, I served a true and correct copy of the foregoing document on the following persons for Appellant, via email and hand-delivery as follows:

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

SIGNED at Seattle, Washington, this 18th day of September, 2015.

Cynthia Concannon

4850-4463-9783.07
62724.00158

RIDDELL WILLIAMS PS

September 18, 2015 - 10:10 AM

Transmittal Letter

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