

No. 300706

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WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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FDIC as Receiver for the Bank of Whitman,  
Respondent.

vs.

URIBE, INC., a Washington corporation, MICHAEL C. URIBE and  
HELEN R. URIBE, husband and wife, and the marital community  
composed thereof,

Appellants,

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RESPONDENT'S BRIEF

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## I. INTRODUCTION

The Appellants' ("the Uribes") breach of an oral contract claim for Bank of Whitman's alleged failure to timely provide an Irrevocable Letter of Credit ("ILOC") is fundamentally flawed; there was no such contract between the parties. The Bank of Whitman ("the Bank") never received any consideration in exchange for its purported oral promise. The alleged oral contract also fails for lack of definite terms, because the scope of either parties' performance is so nebulous that any alleged agreement is unenforceable. Furthermore, even if the Uribes could establish that there was an enforceable oral contract by which the Bank was to provide an ILOC for Uribe, Inc. (and they cannot), the Bank fully performed, discharging its obligation. Finally, the Uribes' oral contract claim is barred by the investigation clause in the Business Loan Agreement signed by the parties.

This Court should affirm the superior court's summary judgment granted in favor of FDIC as Receiver for the Bank of Whitman.<sup>1</sup>

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<sup>1</sup> On August 5, 2011, Bank of Whitman was closed by the Washington Department of Financial Institutions, and FDIC was appointed as Receiver. On October 31, 2011, FDIC was substituted as Respondent as the real party in interest. (Notation Ruling, October 31, 2011)

## II. ASSIGNMENTS OF ERROR

The Assignments of Error, as proposed by the Appellants, are as follows:

1. Does the record and the declarations submitted by the parties raise issues of fact about the existence of an oral agreement between the Bank of Whitman and the Uribes for the Bank to provide an irrevocable line of credit (ILOC) or other adequate security to enable Uribe, Inc. to obtain a performance bond?

**RESPONDENT ANSWERS “NO.”**

2. Did the trial court err by determining there were no genuine issues of fact as to whether the Bank of Whitman and the Uribes had an oral agreement for the Bank to provide an ILOC or other adequate security to enable Uribe, Inc. to obtain a performance bond?

**RESPONDENT ANSWERS “NO.”**

3. Did the trial court err in determining as a matter of law that an oral agreement did not exist?

**RESPONDENT ANSWERS “NO.”**

4. Did the trial court err in dismissing the Uribes' Counterclaim against the Bank of Whitman?

**RESPONDENT ANSWERS “NO.”**

### III. STATEMENT OF THE CASE

#### A. The Counterclaim.

The Bank filed a Complaint for Possession of Personal Property on July 21, 2010. On September 20, 2010, the Trial Court issued an Order Awarding Possession of Personal Property to the Bank. The only remaining claim was the Uribes' Counterclaim, filed along with their Answer.

The Counterclaim set out few factual allegations. According to the Counterclaim, Bank employee Craig Conklin verbally agreed to provide an ILOC to Uribe, Inc. so that it could do work for Intermountain Gas Company in Boise, Idaho ("Intermountain Project"). (CP 265) The Counterclaim also alleges that the Bank orally contracted with Uribe, Inc. to provide a performance bond for the Intermountain Project. (CP 266) However, the Counterclaim makes no reference to any written or verbal agreement by any employee to furnish such a bond. (CP 265-267) The only specific reference to any agreement in the Counterclaim is an allegation that Conklin verbally agreed to provide an ILOC. (CP 265)

Assuming, *arguendo*, that the Bank had verbally agreed to provide an ILOC, the Counterclaim concedes that the Bank did offer an ILOC to a bonding company. (CP 266) The Counterclaim also concedes that the Bank took steps to assist Uribe, Inc. in obtaining a performance bond from

a bonding company, and that these efforts were ultimately successful.  
(CP 266)

The Counterclaim does not allege any agreed time element as part of the oral alleged contract between the parties. (CP 265-267) The Counterclaim does not allege that the parties agreed that time was of the essence, or that the Bank would furnish an ILOC or obtain a performance bond from a bonding company on or before any specific date.

The Counterclaim makes no mention of anything the alleged oral contract obligated Uribe, Inc. to provide or perform in exchange for the Bank's performance. (CP 265-267) The Counterclaim does allege that the "transactions between the parties were supported by adequate consideration," but it does not identify any bargained-for benefit that the Bank received from Uribe, Inc. in exchange for an ILOC, or for providing assistance in obtaining a performance bond from a bonding company.  
(CP 267)

**B. The Affidavits.**

Two former Bank employees submitted affidavits which supported the Trial Court's grant of summary judgment. Craig Conklin stated under oath that before Uribe, Inc. bid on the Intermountain Project, Michael Uribe, on behalf of Uribe, Inc., repeatedly affirmed that "Bank of Whitman did not have to worry about Uribe, Inc. obtaining a performance

bond." (CP 216) Jim Hui, the former Bank loan officer responsible for the loan at issue, states that "Michael Uribe repeatedly told me that Uribe, Inc. would have "no problem" obtaining a performance bond for the Intermountain Project." (CP 216; CP 220)

In reliance on these representations, the Bank approved funding for the Intermountain Project ("Intermountain Funding"), and advanced some of these funds to Uribe, Inc. (CP 216; CP 220) One of the loan documents signed by the parties (and the only one in the record) was a Business Loan Agreement (CP 89-95), which included an integration clause:

**Amendments.** This agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matter set forth in this Agreement. No alteration of or amendment to this Agreement 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. (CP 93)

Only after Uribe, Inc. bid on the Intermountain Project and spent approximately \$150,000-200,000 of the Intermountain Funding did Uribe, Inc. inform the Bank that it could not obtain a performance bond as promised. (CP 216; CP 220)

Faced with this new information, which Jim Hui described as a "complete surprise," the Bank had two choices: declare Uribe, Inc. to be in default and foreclose on the assets securing funds advanced to Uribe, Inc.;

or help it obtain a performance bond from a bonding company so Uribe, Inc. could complete the Intermountain Project and repay its obligation to the Bank. (CP 216; CP 220-221) The Bank decided to help in order to protect its investment.

The Bank never promised to provide Uribe, Inc. with a performance bond. (CP 216; CP 221) Banks do not provide performance bonds; that is the purview of bonding companies. (CP 221)

Without any reciprocal promise or undertaking from Uribe, Inc., the Bank decided to offer an ILOC to a bonding company in an effort to enable Uribe, Inc. obtain a performance bond. (CP 216; CP 221) The Bank did not receive any consideration, such as fees or additional security, in exchange. (CP 216; CP 220-221) Although the bonding company rejected the Bank's ILOC, the Bank was able to locate a second bank, which issued an ILOC acceptable to the bonding company. (CP 221)

The Trial Court granted the Bank's Motion for Summary Judgment on June 27, 2011. (CP 5-7)

#### **IV. ARGUMENT**

##### **A. Introduction.**

As set out in the Conklin and Hui affidavits, the Bank never contracted with Uribe, Inc. to provide either an ILOC or a performance bond. The Bank received no consideration that would support such a

contract. The Bank certainly never agreed to provide a performance bond, something banks do not do. Any alleged contract also failed for insufficiently definite material terms. Among other material terms, the Bank's obligation under the alleged contract was too nebulous to be enforceable, as was any performance required of Uribe, Inc. The Counterclaim implicitly concedes this point when it simultaneously alleged a contract to provide an ILOC and a contract to provide a performance bond. Even if there was a contract between the parties related to an ILOC or a performance bond—and there is not—the Bank fully performed its side of this bargain, fully discharging its obligation. Finally, the alleged oral contract is barred by the integration clause in the Business Loan Agreement signed by the parties.

These arguments apply regardless of whether Uribe, Inc. brought the Counterclaim by itself or with Michael and Helen Uribe in their individual capacities, although it appears that only Uribe, Inc. brought this claim. Even the Counterclaim admitted that only Uribe, Inc. sustained any alleged damage, and that any ILOC or performance bond was for Uribe, Inc. (CP 265-266) The Counterclaim contains no factual allegations suggesting that Michael and Helen Uribe were individually parties to the alleged agreement. When Michael Uribe, Helen Uribe, and Uribe, Inc.

filed for bankruptcy, only Uribe, Inc. listed a claim against the Bank among its assets.<sup>2</sup>

**B. Standard of Review.**

This Court reviews orders of summary judgment *de novo*, and engages in the same inquiry as the Trial Court:

After the moving party submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.

Heath v. Uruga, 106 Wn. App. 506, 512-513, 24 P.3d 413 (2001) (internal citation omitted).

**C. The alleged oral contract fails for lack of consideration.**

The alleged oral contract at issue fails for lack of consideration. The party asserting the existence of a contract bears the burden of proving

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<sup>2</sup> See CP 113-131: Docket for *In Re: Uribe, Inc.*, No. 09-03171-FLK11 (Eastern District of Washington Bankr., June 4, 2009); CP 132-135: *Summary of Schedules for In re Uribe, Inc.* (Docket Entry 11 in *In Re: Uribe, Inc.*); CP 136-145: *Second Amended Schedule B — Personal Property* (Docket Entry 132 in *In Re: Uribe, Inc.*); CP 167-194: Docket for *In Re: Uribe*, No. 09-03173-FLK11 (Eastern District of Washington Bankr., June 4, 2009); CP 195-214: *Summary of Schedules for Michael and Helen Uribe* (Docket Entry 15 in *In Re: Uribe*).

Pursuant to Evid.R. 201(b) the Bank asks the Court to take judicial notice of the materials identified above which were filed in Uribe, Inc.'s and Helen and Michael Uribe's bankruptcy proceeding.

each essential element of a contract, including consideration. Trotzer v. Vig, 149 Wn. App. 594, 605, 203 P.3d 1056 (2009). Failure to prove any essential element renders a contract claim ripe for summary judgment. See, Blinka v. Washington State Bar Ass'n, 109 Wn. App. 575, 590, 36 P.3d 1094 (2001) (failure to prove existence of consideration supported summary judgment against plaintiff on contract claim). Washington courts define consideration as follows:

Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. In order to constitute consideration, an act or promise must be bargained for and given in exchange for the promise.

Trotzer, 149 Wn. App. at 606, internal citations omitted. A preexisting contractual relationship between parties does not excuse the consideration requirement; subsequent agreements require additional consideration. Blinka, 109 Wn. App. at 590.

In this case, there is no evidence that any alleged oral agreement by the Bank to offer an ILOC or provide a performance bond was supported by consideration. The Uribes allege that "the transactions" between the Bank and Uribe, Inc. "were supported by adequate consideration," but they do not offer any evidence supporting this conclusory allegation. (CP 267) The Counterclaim makes no mention of any bargained-for promise from the Uribes that they exchanged with the

Bank.<sup>3</sup> Affidavits by former Bank employees affirmatively demonstrate that Uribe, Inc. failed to provide consideration to support the purported contract. (CP 216; CP 221-222)

Because the Uribes have provided no evidence that would rebut these affidavits, or any other evidence demonstrating that they offered consideration to the Bank, there is no genuine issue of fact as to the lack of consideration for the alleged oral agreement. Therefore, the Uribes failed to meet their burden of proving the existence of an oral contract, and the Trial Court correctly entered summary judgment in the Bank's favor.

**D. The alleged oral contract lacks definite material terms, so it is not binding.**

The alleged oral agreement is so vague that it fails to establish a valid contract. Unless there is a meeting of the minds on all material terms, an agreement is too vague to be enforceable. 16th Street Investors, LLC v. Morrison, 153 Wn. App. 44, 54-55, 223 P.3d 513 (2009). As a matter of basic contract interpretation, the "terms of a contract must be sufficiently definite." Id. at 55. "If an offer is so indefinite that a court cannot decide just what it means and fix **exactly** the legal liability of the

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<sup>3</sup> The Counterclaim does mention that Uribe, Inc. paid for the performance bond, but it does not allege that the Bank received these funds. (CP 266)

parties, its acceptance cannot result in an enforceable agreement." Id., emphasis added.

The exact scope and nature of each party's promised performance must be exactly fixed, or there is no contract. For example, where parties to litigation entered settlement negotiations and agreed on the amount of the settlement but did not agree on the exact scope of the settlement, they failed to form a binding contract. Evans & Son, Inc. v. City of Yakima, 136 Wn. App. 471, 477-78, 149 P.3d 691 (2007). Similarly, where the purchaser of a new car and a dealership had a "nebulous understanding" about the value of the purchaser's trade-in, "there was not a meeting of the minds of the parties on a material part of the contract," no "common understanding of the essential terms of a contract and, therefore, no contract existed between them." Shuck v. Everett Sports Cars, Inc., 12 Wn. App. 28, 31, 527 P.2d 1321 (1974).

A party seeking to prove the existence and terms of a contract must look to objective manifestations of such intent. Hadaller v. Port of Chehalis, 97 Wn. App. 750, 755, 986 P.2d 836 (1999).

Here, all of the essential terms of the alleged oral contract are indefinite. Under the alleged oral agreement, it is unclear exactly what the Bank was supposed to do. Even the Counterclaim itself alternates between characterizing this performance as providing either an ILOC or a bond.

(CP 265-266) This is a significant distinction. Banks offer ILOCs, but do not offer performance bonds, which are the domain of bonding companies. (CP 216-217; CP 221)

The scope of Uribe, Inc.'s performance under the alleged oral contract is also unknown. The Counterclaim does not allege what, if anything, the Uribes gave up, paid, or exchanged as part of their performance under this contract. This vagueness exceeds that found to have invalidated contracts in Shuck and City of Yakima, where at least the parties established the nature of their performance, if not the exact details.

The Counterclaim also presumes that timeliness was a material term, but provides no factual support for that presumption. While the damages referenced in the Counterclaim supposedly arise out of delay in obtaining a performance bond, which banks do not issue, the Counterclaim does not allege facts suggesting that the parties agreed on—or even discussed—any sort of deadline for providing the bond. Nor is there any reference to time being of the essence.<sup>4</sup>

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<sup>4</sup> One would also assume that the Uribes would find out whether or not they could obtain a bond prior to bidding on the Intermountain Project and applying for and spending Intermountain Funding, but apparently they did not do so. (CP 220-221)

The alleged oral agreement is so indefinite that it does not allow the Court to determine just what it means and to exactly fix the parties' liability, so the contract fails. Therefore, the Trial Court correctly entered summary judgment against the Uribes.

**E. Even if there was an oral contract to provide either an ILOC or a performance bond, the Bank fully performed, discharging any obligation.**

To the extent there was a valid oral contract between the parties as alleged in the Counterclaim—and there is not—the Bank fully performed, so it cannot be held liable for breach of contract. Full performance discharges a party's contractual obligations. Turner v. Wexler, 14 Wn. App. 143, 148, 538 P.2d 877 (1975).

Assuming that the Bank had a contractual obligation to assist the Uribes in obtaining a performance bond from a bonding company, even the Counterclaim concedes that the Bank did so. (CP 266) The Uribes allege that this performance was somehow defective because obtaining the performance bond took too long, but they have failed to allege any facts suggesting the Bank lacked diligence in assisting the Uribes. (CP 221)

In any event, the Bank never agreed to provide a performance bond, something that banks simply do not do. (CP 216; CP 221) Therefore, even accepting the Uribes' claim at face value, the Bank could only have agreed to provide an ILOC. The Uribes concede that the Bank

did offer an ILOC. (CP 266) The Counterclaim does not even allege that the Bank's offer was untimely. Consequently, the Bank's timely offer of an ILOC discharged any liability it may have had under any alleged verbal contract with the Uribes. And even though the bonding company rejected the Bank's ILOC, the Bank was successful in getting a second bank to provide its own ILOC, that was accepted by the bonding company. (CP 221; CP 266)

The Bank's voluntary efforts in offering an ILOC and assisting the Uribes in obtaining a performance bond from a bonding company are nothing more than gratuitous efforts to protect the Bank's investment. Contract law imposes no liability on the Bank for such conduct.

For these reasons as well, the Trial Court properly granted summary judgment in the Bank's favor.

**F. The Trial Court properly granted summary judgment, even though the alleged contract was oral and not written.**

In their briefing to the Trial Court, the Uribes made no effort to respond to the Bank's arguments regarding lack of consideration, indefinite terms, and performance. Instead, the Uribes only argued (as they do here) that the Counterclaim could not be decided on summary judgment because it involved an oral contract. (CP 71-74) This is an incorrect statement of the law; Washington appellate courts have

repeatedly affirmed entry of summary judgment against a party alleging the existence of an oral contract. See e.g., Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 851-855, 22 P.3d 804 (2001) (alleged oral contract failed because no evidence of mutual assent); Blinka v. Wn. State Bar Ass'n, 109 Wn. App. 575, 580, 589, 36 P.3d 1094 (2001) (assurances of no retaliation not a binding contract because no consideration); Hadaller v. Port of Chehalis, 97 Wn. App. 750, 755-58, 986 P.2d 836 (1999) (no oral contract between city and contractor where contractor failed to meet city's conditions).

Even when a claim relies on an alleged oral contract, when all inferences are drawn in favor of the non-movant (the Uribes), a court can and should still draw legal conclusions based on the facts of the case and grant summary judgment if it is appropriate. See, Hadaller, 97 Wn. App. at 755. That is what the Trial Court necessarily did in granting summary judgment for the Bank, and it is what this Court should do as well.

**G. The Uribes' claim is also barred by the integration clause in the Business Loan Agreement.<sup>5</sup>**

In order to procure the loan from the Bank, the Uribes entered into a Business Loan Agreement. (CP 89-95) That agreement included the following provision:

**Amendments.** This agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matter set forth in this Agreement. No alteration of or amendment to this Agreement 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.

(CP 93)

Given the opportunity, the Trial Court could reasonably have concluded that the agreement of the parties was fully integrated in the Business Loan Agreement. "The presence of an integration clause strongly supports a conclusion that the parties' agreement was fully integrated." M.A. Mortenson Co. v. Timberline Software Corp., 140 Wn.2d 568, 579-580, 998 P.2d 205 (2000). If a contract is fully integrated, it may be modified only by a writing signed by both parties.

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<sup>5</sup> Although this argument was not presented to the Trial Court, the record has been sufficiently developed to fairly consider it as an additional basis to affirm the Trial Court. RAP 2.5(a); Bainbridge Citizens United v. Wash. State Dep't of Natural Resources, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008) (appellate court may sustain trial court's ruling on any correct ground, even if the trial court did not consider it).

Jarvis v. K2, Inc., 486 F.3d 526, 536 (CA9, 2007) (citing Washington law).

Although it is true that the terms of a written contract, providing that any modification must be in writing, may be waived by a subsequent oral agreement, that is not the claim here. Consolidated Electrical Distributors, Inc. v. Gier, 24 Wn.App. 671, 679, 602 P.2d 1206 (1979). The Counterclaim alleges that the oral agreement to provide the ILOC was contemporaneous with the Bank's agreement to provide a construction loan. (CP 265)

The integration clause provides yet another reason why the Trial Court correctly granted summary judgment to the Bank.

#### **IV. CONCLUSION**

The Uribes' claim was appropriate for summary judgment. Even if this Court accepts the Uribes' allegation that the Bank verbally agreed to provide an ILOC, the absence of any consideration makes this alleged promise unenforceable. Even if this Court construes all questions of fact in the Uribes' favor, the alleged oral contract is too indefinite to be enforceable. Even if this Court assumes the existence of a legally valid contract to provide an ILOC, the Bank discharged any contractual obligations with its full performance. This Court need not make any credibility determinations or resolve any questions of fact to rule in the

Bank's favor on any one of these three dispositive issues. The Uribes' failure to refute even one of these arguments is fatal to their claim. Finally, the integration clause in the Business Loan Agreement signed by the Uribes bars their claim.

The Trial Court properly granted the Bank's summary judgment pursuant to CR 56 and should be affirmed by this Court.

DATED this 14<sup>TH</sup> day of March, 2012.



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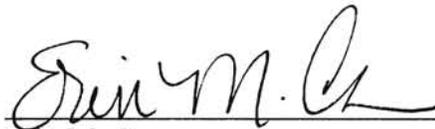
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of March 2012, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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PO Box 313  
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VIA REGULAR MAIL	<input checked="" type="checkbox"/>
VIA CERTIFIED MAIL	<input type="checkbox"/>
HAND DELIVERED	<input type="checkbox"/>
BY EMAIL	<input checked="" type="checkbox"/>
VIA FEDERAL EXPRESS	<input type="checkbox"/>

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\_\_\_\_\_  
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