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No. 70004-9-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff-Appellant,

v.

KENDALL D. GENTRY and NANCY GENTRY, individually and the marital community comprised of thereof,

Defendants-Respondents.

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ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(Hon. Dave Needy)

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I. INTRODUCTION

Respondents Kendall and Nancy Gentry ("the Gentrys") agreed to "absolutely and unconditionally" guarantee three multi-million dollar commercial loans made to companies they owned and/or managed. Those companies, and other Gentry-related companies, granted multiple deeds of trust on real estate to secure those loans. After the borrowers defaulted, and the Gentrys refused to make good on the guaranties, Appellant Washington Federal—who acquired the original lender's rights to the loans from the FDIC—non-judicially foreclosed on two of the deeds of trust. The value of the real estate collateral was inadequate, however, to satisfy the debt, so Washington Federal filed an action on the guaranties seeking a judgment against the Gentrys in the amount of the deficiency.

The trial court dismissed Washington Federal's claim on summary judgment. It concluded that the two deeds of trust did not just secure the borrowers' indebtedness on the loans, but also the Gentrys' separate obligations on the guaranties. The court further concluded that the Deed of Trust Act precludes a lender from obtaining a deficiency judgment against a guarantor of a commercial loan when the guaranty is secured by a borrower's or other grantor's foreclosed deed of trust. Finally, the court refused to enforce a clause in the guaranties in which the Gentrys agreed

to waive "defenses arising by reason of ... 'anti-deficiency' law ... which may prevent Lender from bringing ... a claim for deficiency[.]"

The trial court erred on all three fronts, any one of which requires reversal. First, the plain language and legislative history of the Deed of Trust Act—and, specifically, RCW 61.24.100(3)(c)—permit a lender to obtain a deficiency judgment against a guarantor of a commercial loan, even when the guaranty is deemed to be secured by a borrower's foreclosed deed of trust. Second, even if the Act did preclude a judgment in that situation, it would not bar a judgment here because the plain language and commercial context of the deeds of trust show that the parties did not intend the deeds to secure the Gentrys' guaranties. Third, and regardless of all else, the Gentrys knowingly waived any anti-deficiency defense they may have had under the Deed of Trust, and that waiver is enforceable as a matter of public policy.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

Washington Federal assigns error to the trial court's February 26, 2013 Order Granting Defendants' Motion for Summary Judgment and February 1, 2013 letter ruling. CP 765-771. The issues presented are:

1. After a lender non-judicially forecloses on property under a deed of trust granted by a borrower or other grantor to secure a commercial loan, does the Washington Deed of Trust Act, Chapter 61.24

RCW, permit the lender to bring an action for a deficiency judgment against a guarantor of that loan even if the guaranty is deemed to have been secured by the foreclosed deed of trust? **Yes.**

2. If the Deed of Trust Act does not permit a lender to bring an action for a deficiency judgment against a guarantor when the guaranty is secured by the borrower's foreclosed deed of trust, did the trial court err when it concluded that the parties intended the Gentrys' guaranties to be secured by the foreclosed deeds of trust in this case? **Yes.**

3. If the Deed of Trust Act does give the Gentrys a defense against an action for a deficiency judgment, did the trial court err when it concluded that the express waiver of anti-deficiency rights in the Gentrys' commercial guaranties were void as a matter of public policy? **Yes.**[1]

III. STATEMENT OF THE CASE

A. Factual Background

The facts are straightforward and undisputed. Stated most simply, Washington Federal non-judicially foreclosed on two deeds of trust that secured three commercial loans, and thereafter brought an action for a deficiency judgment against the Gentrys, who unconditionally guaranteed

[1] The issues presented in this appeal are substantially similar to the issues raised in *Washington Federal v. Harvey*, Case No. 69791-9-I, also currently pending before the Court. Washington Federal has not moved for consolidation, but would not oppose a linking of the two appeals for purposes of determination by the same panel of judges.

repayment of the loans. The first loan was made on December 14, 2005, when Blackburn Southeast, L.L.C., a company owned and/or managed by Kendall Gentry, borrowed over $2.5 million from Horizon Bank. CP 92-94 (note); 104-107 (loan agreement). In addition to other collateral, the loan to Blackburn Southeast was secured by a May 1, 2006 deed of trust, as modified, on property located on Little Mountain Road in Mount Vernon (the "Little Mountain Deed of Trust"). CP 178-197.

On April 27, 2009, Landed Gentry Development, Inc., another Gentry-related entity, borrowed over $3.5 million from Horizon Bank. CP 96-98 (note); 108-112 (loan agreement). The loan to Landed Gentry was secured by the Little Mountain Deed of Trust and a May 1, 2006 junior deed of trust on property located on East Blackburn Road in Mount Vernon (the "Blackburn Road Deed of Trust"). CP 137-157. Finally, on September 1, 2009, yet another Gentry-related entity, Gentry Family Investments, L.L.C., borrowed over $1.1 million from Horizon Bank. CP 100-102 (note); 113-116 (loan agreement). The loan to Gentry Family was also secured by the Little Mountain Deed of Trust. CP 178-197. In sum, the Little Mountain Deed of Trust secured all three loans, whereas the Blackburn Road Deed of Trust secured only the Landed Gentry loan.

In connection with all three loans, as an additional avenue for repayment, the Gentrys each executed an unlimited Commercial Guaranty

(the "Guaranties"). CP 118-123 (Blackburn Southeast); 124-129 (Landed Gentry); 130-135 (Gentry Family). In each one, the Gentrys "absolutely and unconditionally guarantee[d] and promise[d] to pay to Horizon Bank … the indebtedness" on the three loans. *Id.* The Guaranties also contained an express "Waiver" clause, by which the Gentrys agreed to:

> … waive[] any and all rights or defenses based on suretyship or impairment of collateral including, but not limited, any rights or defenses arising by reason of … '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 …

Id. The Gentrys were not the grantors of the Little Mountain or Blackburn Road Deeds of Trust, nor did they grant a deed of trust over their own property to secure the Guaranties. Similarly, there is no language in the Guaranties, or extrinsic evidence in the record, to suggest that the parties to the Little Mountain and Blackburn Road Deeds of Trust intended the Gentrys' obligation as guarantors to be secured by either deed of trust. *Id.* Indeed, as explained below, it would make no sense to do so.

In April 2010, the FDIC assigned Horizon Bank's interest in the three loans, the deeds of trust and the Guaranties to Washington Federal. CP 87 (Ford Decl., ¶¶ 11-13). By then, the borrowers had already defaulted on the loans. CP 85-86 (*Id.*, ¶¶ 2-4). On April 15, 2010,

Washington Federal sent the borrowers and the Gentrys notices of default, demanding that they cure the default, or else the property secured by the Little Mountain and Blackburn Road Deeds of Trust would be subject to foreclosure. CP 209-217; 241-246 (notices of default). The notices warned the Gentrys, as guarantors, that they "may be liable for a deficiency judgment to the extent the sale price obtained at the Trustee's Sale is less than the debt secured by the Deed[s] of Trust." CP 211; 244. Neither the borrowers nor the Gentrys cured the defaults on the three loans. CP 88-89 (Ford Decl., ¶¶ 18, 23); CP 782 (Answer, ¶¶ 3.1, 3.2).

Accordingly, on December 30, 2010, Washington Federal caused the trustee to send Notices of Trustee's Sale. CP 219-231; 248-256. The notices informed the borrowers, grantors and the Gentrys that a trustee's sale of the property secured by the Little Mountain and Blackburn Road Deeds of Trust was scheduled for April 1, 2011. *Id.* Pursuant to RCW 61.24.042, the notices informed the Gentrys that, as guarantors, they could be liable for a deficiency judgment. CP 223; 253. The Gentrys received the notices. CP 783 (Answer, ¶¶ 4.2 & 4.5). The sales went forward as scheduled and Washington Federal purchased both properties by credit bit. CP 233-239; 258-261 (trustee's deeds). After the sale proceeds were applied to the indebtedness remaining on the loans, plus interest,

foreclosure expenses, fees and costs, a total deficiency remained in the amount of approximately $7,615,624. CP 89 (Ford Decl., ¶¶ 24-26).

B. Procedural History

In March 2012, within one year of the trustee's sales, Washington Federal sued the Gentrys to enforce the Guaranties in the amount of the deficiency. CP 515-558. The Gentrys answered and counterclaimed, asserting a right to a set-off in the amount of the "fair value" of the property under RCW 61.24.100(5). CP 780-786. The Gentrys then moved for summary judgment.[2] They argued that the Little Mountain and Blackburn Road Deeds of Trust secured the Guaranties and that, after the property was foreclosed, the Deed of Trust Act—and, specifically, RCW 61.24.100(10)—prohibited Washington Federal from seeking a deficiency judgment against them. CP 792-798. Washington Federal opposed the motion on both contract interpretation and statutory construction grounds, and also argued that the Gentrys had knowingly and expressly waived any anti-deficiency rights they had under the Deed of Trust Act. CP 483-507.

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[2] Washington Federal also moved for summary judgment, arguing that Washington Federal purchased the properties at or above their statutorily defined "fair value." CP 67-84. The Gentrys' sought, and the trial court granted, a CR 56(f) continuance to allow the Gentrys more time to discover facts on the fair value issue. CP 762-763. Because the court subsequently granted the Gentrys' motion for summary judgment (and denied Washington Federal's motion on the same grounds), it never reached the fair value issue, which will have to be determined on remand.

By letter ruling dated February 1, 2013, the trial court granted the Gentrys' motion for summary judgment. CP 765-767. First, the court concluded, after construing ambiguities against Washington Federal as the "drafter," the Guaranties were secured by the Little Mountain and Blackburn Road Deeds of Trust. *Id.* Second, the court interpreted RCW 61.24.100(3)(c) to limit a lender's right to a deficiency judgment against a guarantor to waste or wrongful retention of rents where the guaranty is secured by the borrower's foreclosed deed of trust. *Id.* And, third, the court found that although the Gentrys knowingly waived any anti-deficiency rights they had under RCW 61.24.100, their waiver was void because it violated public policy. *Id.* The trial court thereafter entered judgment in the Gentrys' favor for the reasons stated in the letter ruling. CP 768-771. Washington Federal timely appealed. CP 772-779.

IV. ARGUMENT

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no

genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

A. The Deed Of Trust Act Allows Washington Federal To Bring An Action For A Deficiency Judgment Against The Gentrys.

This Court must reverse the judgment below because it is contrary to the plain meaning, context and legislative history of the Deed of Trust Act and, worse yet, it results in an absurd result that frustrates the very purpose of the Act. This Court reviews issues of statutory interpretation *de novo*. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). Where the plain meaning of a statute is clear, legislative intent is derived from that plain meaning. *Id.* The "plain meaning" of a statute is discerned from the ordinary meaning of the language used, as well as from the context of the statute, related provisions, and the statutory scheme as a whole. *Id.* at 876-77. A statute must be construed so that all language is given effect and no portion is rendered meaningless or superfluous. *Id.* The Court must also avoid constructions that yield absurd or strained consequences. *Id.* If the statute is susceptible to more than one reasonable interpretation, the Court may consider legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

The trial court concluded that Washington Federal was barred from seeking a deficiency judgment against the Gentrys after it non-judicially

foreclosed on the Little Mountain and Blackburn Deeds of Trust because—as the court also found—the deeds of trust secured not only the borrowers' indebtedness, but also the Gentrys' separate obligations under the Guaranties of that indebtedness. Although the court's interpretation of the deeds of trust was erroneous (*see* Section IV.B), the judgment below can and should be reversed on statutory grounds alone. The Deed of Trust Act gives a lender a broad right to obtain a deficiency judgment against a guarantor of a commercial loan. While the Act places some limit on that right when the guarantor is the owner of the foreclosed property, none of those limits apply when the guaranty is secured by a borrower's foreclosed deed of trust. It simply does not matter whether the Little Mountain and Blackburn Road Deeds of Trust secured the Guaranties; either way, Washington Federal can seek a deficiency judgment against the Gentrys.

1. RCW 61.24.100(3)(c) Does Not Limit The Scope Of A Deficiency Judgment Against A Guarantor To Waste Or Wrongful Retention Of Rents If The Guaranty Is Secured By The Borrower's Foreclosed Deed Of Trust.

The plain meaning of the Deed of Trust Act unambiguously allows Washington Federal to obtain an unlimited deficiency judgment against the Gentrys, subject only to the Gentrys' right to a "fair value" set-off. In 1965, the legislature enacted the Deed of Trust Act to supplement the traditional judicial foreclosure process with an "efficient and inexpensive"

alternative of non-judicial foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). It was intended "to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender. This feature of the act has been applauded as meeting the need of modern real estate financing." *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971). The Act contemplated a "quid pro quo between lenders and borrowers" in which the lender gave up a right to a deficiency judgment against the borrower, while the borrower gave up the right of redemption. *Donovick v. Seattle–First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988).

Historically, creditors could seek a deficiency judgment against a guarantor after a judicial foreclosure. *See Nat'l Bank of Wash. v. Equity Investors*, 86 Wn.2d 545, 546 P.2d 440 (1976); *George v. Jenks*, 197 Wn. 551, 85 P.2d 1083 (1938). The original Deed of Trust Act, and a 1990 amendment, did not, however, address whether a lender could still seek a deficiency judgment from a guarantor after non-judicial foreclosure. *See* Laws of 1965, ch. 74, § 10; Laws of 1990, ch. 111 § 2. Although it was generally assumed that the Act did not provide anti-deficiency protection to guarantors, Washington courts refused to clarify the issue. *Glenham v. Palzer*, 58 Wn. App. 294, 298 n. 4, 792 P.2d 551 (1990); *Thompson v. Smith*, 58 Wn. App. 361, 367 n. 4, 793 P.2d 449 (1990). This silence

threatened to disrupt a key benefit of the Act; that is, with the right to pursue a guarantor after non-judicial foreclosure uncertain, creditors might opt for the longer, more expensive process of judicial foreclosure.

In 1998, the legislature significantly amended the Deed of Trust Act to clarify the availability and scope of deficiency judgments against borrowers, grantors and guarantors. Laws of 1998, ch. 295, § 12. The Act precludes deficiency judgments where the foreclosed deed of trust secured a residential loan, but permits deficiency judgments against borrowers, grantors and guarantors "to the extent permitted in this section for deeds of trust securing commercial loans[.]" RCW 61.24.100(1). As it relates to a lender's deficiency action against a "borrower or grantor" where the deed of trust secured a commercial loan, the Act provides in relevant part:

> (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> (a)(i) ... an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

RCW 61.24.100(3)(a)(i). Under this section, the only deficiency judgment available against a borrower or grantor is one for waste or wrongful

retention of rents. Because neither condition existed here, Washington Federal did not seek a deficiency judgment against the borrowers and/or grantors of the Little Mountain and Blackburn Road Deeds of Trust.

Rather, Washington Federal sought a deficiency judgment against the Gentrys in their capacity as guarantors of the loans. The Deed of Trust Act contains a separate exception that applies exclusively to an action for a deficiency judgment against a "guarantor" of a commercial loan. Unlike section (3)(a), this section imposes no limits. Section (3)(c) provides:

> (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> * * *
>
> (c) Subject to this Section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

RCW 61.24.100(3)(c). Section (3)(c) plainly applies here. There is no dispute that the Guaranties secured only "commercial loans," and the Gentrys admit that Washington Federal gave them timely notice under RCW 61.24.042. CP 783 (Answer, ¶¶ 4.2 & 4.5); 223; 253. The only issue, then, is whether some other part of RCW 61.24.100—incorporated through section (3)(c)'s "[s]ubject to this Section" language—somehow limited the availability or scope of Washington Federal's right to a deficiency judgment in this case. No such limitation exists.

There are only three sections in RCW 61.24.100 that expressly limit a lender's right under section (3)(c) to obtain a deficiency judgment against a guarantor. First, section (4) requires a lender to bring an action within one year of the trustee's sale. RCW 61.24.100(4). Washington Federal did so. Second, section (5) gives a guarantor the right to challenge "fair value" for purposes of determining the deficiency amount. RCW 61.24.100(5). Washington Federal does not dispute that the Gentrys have that right, and the trial court must decide "fair value" on remand. Third, section (6) limits a deficiency judgment against a guarantor to waste and wrongful retention of rents when a lender forecloses on a deed of trust granted by the guarantor to secure the guaranty. RCW 61.24.100(6). Here, the Gentrys did not grant a deed of trust on their own property to secure the Guaranties, nor were they the grantors of the Little Mountain or Blackburn Road Deeds of Trust. CP 137-157; 178-197 (deeds of trust).

Because none of these limitations bar Washington Federal's right to a deficiency judgment, the trial court should have rejected the Gentrys' motion on the basis of section (3)(c) alone. Instead, it interpreted RCW 61.24.100 to impose another, implicit, limitation on section (3)(c):

> I interpret section (3)(c) as meaning that a deficiency judgment, against a guarantor whose guaranty was secured by the nonjudicially foreclosed deed of trust, can only be obtained for the decrease in fair value [for waste] or wrongful retention [of rents], ...

CP 766. In effect, the trial court grafted section (3)(a)'s and section (6)'s limited right to a deficiency judgment for waste and wrongful retention of rents onto section (3)(c)'s unlimited right to a deficiency judgment against a non-grantor guarantor when—as the court erroneously found here—a guaranty is deemed to have been secured by the borrower's foreclosed deed of trust. This Court must reject this reading of section (3)(c) because it violates the most basic rules of statutory interpretation.

Neither section (3)(c), nor any other provision in RCW 61.24.100, limits the scope of a deficiency judgment against a guarantor to waste and wrongful retention of rents when the lender forecloses on the borrower's (or grantor's) deed of trust. That limitation appears in section (3)(a), but the legislature limited that section to "actions against the borrower or grantor." RCW 61.24.100(3)(a)(i). Had the legislature intended to impose a similar limitation on actions against a "guarantor," it would have included that term in section (3)(a). The legislature's decision to carve out deficiency judgments against guarantors from section (3)(a), and to omit the limitation for waste or wrongful retention of rents from section (3)(c), was intentional. *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 843, 64 P.3d 15 (2003) ("The inclusion of one term as opposed to another in a statute implies that the legislature intended to exclude the other."). It

was also consistent with long-standing Washington common law favoring the enforcement of commercial guaranties. *See* Section IV.C, *below*.

Similarly, while section (6) imposes section (3)(a)'s limitation to deficiency judgments against a "guarantor," section (6) only applies where a "guarantor grant[s] a deed of trust to secure its guaranty" and the lender forecloses on the guarantor's deed of trust. RCW 61.24.100(6). Here too, if the legislature intended the limitation to apply where a "borrower" or "grantor" grants a deed of trust to secure a guaranty, it could have said so. But it didn't, and courts "cannot rewrite or modify the language of the statute under the guise of statutory interpretation or construction." *Graham Thrift Group, Inc. v. Pierce County*, 75 Wn. App. 263, 267, 877 P.2d 228 (1994). In sum, the legislature intended to provide protection to the owner of the foreclosed property, not a third-party commercial guarantor. The plain language of section (3)(c) gives Washington Federal a right to an <u>unlimited</u> deficiency judgment against the non-grantor Gentrys, subject only to a "fair value" defense. No other section of RCW 61.24.100 curtails that right, even if the Guaranties were secured by the Little Mountain and Blackburn Road Deeds of Trust.

2. RCW 61.24.100(10) Does Not Apply To Or Preclude An Action For A Deficiency Judgment Against A Guarantor

The Gentrys will undoubtedly argue, as they did below, that RCW 61.24.100(10) also imposes a limitation on a lender's right to obtain a deficiency judgment against a guarantor, and that it bars Washington Federal's action against them here. Although the trial court apparently disagreed—the court did not cite or rely on section (10) to support its flawed reading of section (3)(a)—this Court should reject the Gentrys' equally untenable interpretation. Section (10) provides:

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

RCW 61.24.100(10). Even though section (10) is phrased permissively to allow lenders to bring actions against borrowers and guarantors, the Gentrys argued that it should be construed negatively to preclude lenders from bringing an action for a deficiency judgment against a guarantor if the guaranty was secured by the borrower's foreclosed deed of trust. That interpretation must be rejected because it is contrary to the language of the section itself, conflicts with other parts of the statute and, as discussed in the next section, would undermine a key purpose of the Deed of Trust Act.

Section (10) simply has nothing to do with a lender's right to obtain a "deficiency judgment" against a guarantor. "When the legislature

uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). When the legislature intended the Deed of Trust Act to refer to actions for a "deficiency judgment," it used that precise term. *See* RCW 61.24.100(3)(a) ("action for a deficiency judgment against a borrower or grantor"); RCW 61.24.100(3)(c) ("action for a deficiency judgment against a guarantor"); RCW 61.24.100(5) ("the deficiency judgment against the guarantor"); RCW 61.24.100(6) ("guarantor ... shall be subject to a deficiency judgment"). In section (10), however, the legislature used an entirely different term—"an action to collect or enforce any obligation"—which appears nowhere else in RCW 61.24.100. This difference was intentional.

The legislature's reference in section (10) to "an action to collect or enforce any obligation ... not secured by the deed of trust" is directed to the situation where a borrower or guarantor has an obligation to a lender that is separate from the commercial loan that is subject to the foreclosed deed of trust. A borrower or guarantor can owe multiple debts to a single lender or multiple obligations in a single transaction. As respected commentators have recognized, section (10) makes it clear that foreclosure on property securing a commercial loan will not extinguish a lender's rights to enforce debts and obligations separate from that loan. *See* 27

Marjorie Dick Rombauer, *Wash. Practice: Creditors' Remedies—Debtors' Relief* § 3.37 (2d ed. Supp. 2012) (section (10) allows parties to "carve out" obligations, such as liability for environmental contamination, from a transaction where a commercial loan is secured by the deed of trust). In short, section (10) addresses a lender's right to pursue a separate debt; it does not address a lender's right to pursue a deficiency judgment on the same debt. As discussed above, that right is addressed in section (3) only.

Not only does this interpretation comport with section (10)'s plain meaning, it avoids internal conflict between different parts of the statute. *See Am. Legion Post # 149 v. Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (courts must construe statutes to avoid conflict between different provisions). If the phrase "an action to collect or enforce any obligation" is construed to mean the same thing as "an action for a deficiency judgment," then section (10) would <u>preclude</u> a lender from bringing <u>any</u> action for a deficiency judgment against a borrower or guarantor if the commercial loan or guaranty were secured by a foreclosed deed of trust. But, as explained above, sections (3)(a) and (6) expressly <u>permit</u> a lender to bring an action for a limited deficiency judgment against a borrower or grantor-guarantor in just that situation. RCW 61.24.100(3)(a)(i) & (6). The Gentrys' interpretation, therefore, places sections (3)(a) and (6) in direct conflict with section (10).

It also creates absurd distinctions the legislature would not have intended. *Bellevue Fire Fighters Local 1604, Int'l Ass'n of Fire Fighters, AFL-CIO, CLC*, 100 Wn.2d 748, 754, 675 P.2d 592 (1984) (statutes must be given a reasonable construction to avoid meaningless distinctions). The legislature carefully drafted RCW 61.24.100 to afford guarantors far less anti-deficiency protection than borrowers and grantors, except in the one situation where they should be treated the same. Under section (3)(c), a lender may obtain an unlimited deficiency judgment against a guarantor (subject to "fair value" set off), unless the guarantor grants a deed of trust on his own property to secure the guaranty; in that case, the guarantor is a "grantor" and, as such, section (6) gives him the same anti-deficiency protection section (3)(a) gives any grantor, *i.e.*, if the lender forecloses on the guarantor's deed of trust, the lender can only seek a deficiency judgment for waste or wrongful retention of rents. RCW 61.24.100(6). In this way, RCW 61.24.100 provides symmetrical anti-deficiency protection to borrowers and grantors, on the one hand, and guarantors, on the other hand, who agree to encumber <u>their own property</u> to secure the debt.

That protection is part of the basic "quid pro quo," *Donovick*, 111 Wn.2d at 416, inherent to non-judicial foreclosure. But if section (10) is construed as an exception to section (3)(c), that careful symmetry falls apart, and some guarantors will receive absolute anti-deficiency protection

despite having given up nothing toward the "quid pro quo." Under the Gentrys' view, a guarantor who puts up no property of his own, but whose guaranty is deemed secured by a borrower's foreclosed deed of trust, will be immune from a deficiency judgment—even though the borrower himself will remain liable for a limited deficiency judgment under section (3)(a), as will a guarantor who encumbers his own property under section (6). There simply is no rational reason why the legislature would give guarantors who do not risk their own property greater anti-deficiency protection than grantors and guarantors who do. This Court should give RCW 61.24.100(3)(c) its intended effect, and avoid these absurd results.

3. The Legislative History And Purpose Of The Deed Of Trust Act Confirms Washington Federal's Right To A Deficiency Judgment Against The Gentrys.

The trial court must be reversed based on the plain meaning of the Deed of Trust Act alone. The Act's legislative history, if considered, only confirms that meaning. Useful legislative history may include bill reports. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 237 n. 18, 254 P.3d 895 (2011). The 1998 amendments to RCW 61.24.100 were enacted by the legislature through Engrossed Substitute Senate Bill ("ESSB") 6191. The House Bill Report for ESSB 6191 summarized three conditions a lender had to meet in order to seek a deficiency judgment against a guarantor of a commercial loan:

> The beneficiary may seek a deficiency judgment against a guarantor of the commercial loan if certain conditions are met, including the following: (1) the action must be commenced within one year; (2) the guarantor must have been given notice of the trustee's sale that contains the guarantor's rights and defenses, and an opportunity to cure the default; and (3) the guarantor may ask the court to determine the fair value of the property, and the amount of the deficiency is the amount owed by the guarantor to the beneficiary less the greater of either the fair value of the property or the price paid at the sale.

H.B. Rep. on ESSB 6191, 55th Leg., Reg. Sess. (Wash. 1998). These three conditions are now reflected in RCW 61.24.100(3)(c), (4) and (5). Absent from this legislative analysis is any support for the trial court's conclusion that a deficiency judgment against a guarantor under section (3)(c) is limited to waste or wrongful retention of rents, or the Gentrys' argument that a deficiency judgment is barred by section (10), where a borrower's foreclosed deed of trust is deemed to secure the guaranty.

On the contrary, both the trial court's and the Gentrys' interpretation would frustrate the central purpose of the Deed of Trust Act—which is "to avoid time consuming and expensive judicial foreclosure proceedings and to save time and money for both the borrower and the lender." F.B. Rep. on ESSB 6191, 55th Leg., Reg. Sess. (Wash. 1998).[3] As it stands, lenders are willing to non-judicially foreclose on

[3] The bill reports are available through the legislature's website at http://dlr.leg.wa.gov/billsummary/default.aspx?year=1997&bill=6191.

deeds of trust securing commercial loans confident that they can obtain a deficiency judgment against most guarantors. If that right is limited where a borrower's deed of trust is deemed to secure the guaranty, lenders will be forced to file a pre-foreclosure lawsuit on the guaranty, or to initiate judicial foreclosure, whenever there is a chance that the value of the foreclosed property will be insufficient to cover the debt; otherwise, their ostensibly "absolute" guaranties will be worthless. For this reason too, this Court should conclude that Washington Federal may seek a deficiency judgment against the Gentrys, regardless of whether the Guaranties were secured by the Little Mountain and Blackburn Road Deeds of Trust.

B. The Gentrys' Guaranties Were Not Secured By The Little Mountain And Blackburn Road Deeds Of Trust.

Because the Deed of Trust Act allows a deficiency judgment against a guarantor even when the guaranty is secured by a borrower's or other grantor's foreclosed deed of trust, this Court does not need to decide whether, in this case, the Little Mountain and Blackburn Road Deeds of Trust secured the Guaranties. If the Court does reach that issue, then it must conclude that the deeds of trust secured only the borrowers' indebtedness on the three loans—not the Guaranties. As shown below, (1) the plain language and context of the deeds of trust refute the trial court's conclusion that the parties intended the definition of "Related Documents"

to encompass the Guaranties and, in any event, (2) the parties modified the Little Mountain Deed of Trust to omit any reference to "Related Documents" as part of the indebtedness secured by the modified deed, and to clarify their intent to secure only the borrowers' loans.

1. The Deeds Of Trusts Did Not Secure The Guaranties By Virtue Of The "Related Documents" Definition.

The goal of contract interpretation is to determine the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). That intent may be discovered from the language of the contract, as well as by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties." *Id.* at 667. This Court should avoid interpreting contracts in ways that lead to absurd results. *Forest Mktg. Enter.'s, Inc. v. Dep't of Natural Resources*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005). "Where two commercial entities sign a commercial agreement, [courts] will give such an agreement a commercially reasonable construction." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998).

Because there was no extrinsic evidence, the trial court's conclusion that the Little Mountain and Blackburn Road Deeds of Trust

secured the Guaranties was based entirely on its interpretation of the term "Related Documents." Specifically, the deeds of trust provided that they were granted to secure "Payment" and "Performance" as follows:

> THIS DEED OF TRUST ... IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THE DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS: ...

CP 138; 179 (emphasis added). The term "Related Documents" is defined to include, among other things, "guaranties." CP 144; 185. The trial court concluded that because the Little Mountain and Blackburn Road Deeds of Trust secured "Performance of ... the Related Documents," and "Related Documents" include "guaranties," then they must be interpreted to secure not only the borrowers' indebtedness, but also the Gentrys' Guaranties. CP 765-766. Even putting aside the fact that the modified Little Mountain Deed of Trust supersedes the "Related Documents" term, the trial court's superficial interpretation fails on multiple levels and must be rejected.

To begin with, the trial court ignored other terms in the deeds of trust that unambiguously show the parties' intent to secure only the borrowers' and grantors' obligations to repay the three loans, not the Gentrys' separate obligations under the Guaranties. The above section states that the deeds of trust were "given and accepted" only "on the

following terms." Those "terms" appear in a following section, and they identify whose "Payment" and "Performance" is secured. It states:

> **PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of Trust, Borrower and Grantor shall pay to Lender all Indebtedness secured by this Deed of Trust as it becomes due, and Borrower and Grantor shall strictly perform all their respective obligations under the Note, this Deed of Trust and the Related Documents.

CP 138; 179 (emphasis added). The deeds of trust define "Borrower" as Landed Gentry Development, Inc. and "Grantor" as the various Gentry-related limited liability companies that owned the property encumbered by the deeds. CP 143; 184. As discussed below, the terms "Guarantor," *i.e.*, the Gentrys, and "Guaranty" are separately defined. Read together, as they must, these two "Payment" and "Performance" provisions show that the Little Mountain and Blackburn Road Deeds of Trust secured only the obligations of the "Borrower" and "Grantor" with respect to "Related Documents," not the obligations of a "Guarantor" under a "Guaranty."

That the deeds of trust were intended to secure only the borrowers' and grantors' obligations, and not the Gentrys' under the Guaranties, is further shown by the "FULL PERFORMANCE" section, which states:

> **FULL PERFORMANCE.** If Borrower and Grantor pay all the Indebtedness when due, and Grantor otherwise performs all the obligations imposed upon Grantor under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance

> and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and Personal Property. ...

CP 141; 182 (emphasis added). In other words, the deeds of trust would be discharged only if the "Borrower and Grantor"—not a "Guarantor"—"pays" or otherwise "performs" their obligations. Similarly, the deeds' warranty provision states that "[a]ll representations, warranties, and agreements made by Grantor in this Deed of Trust ... shall remain in full force and effect until such time as Borrower's Indebtedness shall be paid in full." CP 140; 181 (emphasis added). Here too, the plain language of the deeds of trust contradicts the trial court's erroneous conclusion that the parties intended the Little Mountain and Blackburn Road Deeds of Trust to secure the separate obligations of a "Guarantor" like the Gentrys.

A careful reading of the "Related Documents" term confirms the grantors' intent to secure only the borrowers' and grantors' obligations on the loans. "Related Documents" are defined as "all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents ... executed in connection with the indebtedness." CP 144; 185. While this list includes the generic term "guaranties," it does not include the specific term "Guaranty," which

is separately defined. *Id.* The use of the general term "guaranties" and not the specifically defined term "Guaranty," should be construed as an intended exclusion of the latter. *Diamond "B" Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) (parties use of specific contract terms control over general terms).

That the parties did not intend the specific term "Guaranty" to fall within the scope of the generic term "guaranties" is further shown by the deeds of trust's reference to the analogous terms "Note" and "promissory notes." Like "Guaranty" and "guaranties," the term "Note" is specifically defined, whereas "promissory notes" is included in the laundry-list of "Related Documents." *See, e.g.*, CP 184-185. Notably, the deeds of trust's "Payment" and "Performance" provisions state that the deed secures obligations under the "Note" and "Related Documents," meaning that the generic term "promissory notes" does not include the specifically defined term "Note"; otherwise, the term Note would be superfluous—contrary to another well-accepted rule of contract interpretation. *Wilson Court*, 134 Wn.2d at 706-07. So it is with "Guaranty" and "guaranties."[4]

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[4] The Guaranties define the terms "Guaranty" and "Related Documents" the same as the deeds of trust. *See, e.g.*, CP 120. And, like the deeds of trust, the Guaranties' use of those terms shows that the generic term "guaranties" in the "Related Documents" provision cannot include the specifically defined term Guaranty, *i.e.*, "This Guaranty, *along with* any Related Documents …." CP 119 (Amendments).

Finally, this Court can and should consider the terms of the parties' other loan documents when ascertaining the parties' intent regarding the scope of the Little Mountain and Blackburn Road Deeds of Trust. *See Spokane Helicopter Serv., Inc. v. Malone*, 28 Wn. App. 377, 382, 623 P.2d 727 (1981) (where more than one document relate to the same transaction and are not inconsistent with each other, they may be considered together to determine the parties' intent). The promissory notes to each of the three loans all specifically reference the fact that they were secured by one or both deeds of trust. CP 93; 97; 101. In stark contrast, the Guaranties contain no reference to either deed of trust, nor do they state that the Gentrys' obligations thereunder were secured in any way. CP 118-123; 124-129; 130-135. As noted, the Gentrys presented no extrinsic evidence to suggest that the parties had any contrary intent. They didn't. This Court should reject the trial court's myopic focus on a generic word used in the boilerplate "Related Documents" section. Read as a whole and in its entirety, it is clear the deeds of trust do not secure the Guaranties.

Indeed, there is no other "commercially reasonable construction" possible given the parties' objectives. *Id.* at 705. Securing the Guaranties with the same deeds of trust that secured the borrowers' indebtedness would serve no purpose. From the bank's perspective, the whole point of a guaranty is to obtain an <u>additional</u> source of payment in the event the

borrower's collateral lacks sufficient value to satisfy the debt. From the guarantor's perspective, his or her liability will be reduced by the value of the borrower's collateral whether or not the guaranty is secured. In sum, there simply was no benefit to Horizon Bank or the Gentrys in having the deeds of trust secure both borrowers' primary obligation on the loans and the Gentrys' secondary obligation on the Guaranties, and the parties' agreements recognized that commercial reality. So should this Court.

2. The Modified Little Mountain Deed of Trust Confirms The Parties' Intent And, At A Minimum, Entitles Washington Federal To A Deficiency Judgment On The Guaranties Of The Blackburn Southeast And Gentry Family Loans.

Although the plain meaning and context of the original deeds of trust are dispositive, a modification of the Little Mountain Deed of Trust confirms that the parties did not intend the deeds to secure the Gentrys' Guaranties. The Little Mountain Deed of Trust originally secured only the Blackburn Southeast loan, but it was modified to "cross-collateralize"—that is, to secure—all three loans. This modification amended the original deed of trust's term regarding "Performance of any and all obligations under … the Related Documents," with the following language:

> In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of either Grantor or Borrower to Lender …, as well as all claims by Lender against Borrower or Grantor …, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note …

CP 192 (emphasis added). By its express and unambiguous terms, the modified Little Mountain Deed of Trust secured only the "obligations" of the "Grantor" or "Borrower"—not the obligations of a "Guarantor" nor the performance of "Related Documents." This modification is relevant to the parties' original intent (*Spokane Helicopter*, 28 Wn. App. at 382) and, here, that intent is clear: the Little Mountain and Blackburn Road Deeds of Trust secured the obligations of the borrowers and grantors to repay the loans, not the Gentrys' obligations on the Guaranties.

At a very minimum, the modification of the Little Mountain Deed of Trust entitles Washington Federal to enforce the Guaranties for the Blackburn Southeast and Gentry Family loans. The modified Little Mountain Deed of Trust was the only deed of trust securing those two loans (the Blackburn Road Deed of Trust additionally secured the Landed Gentry loan). Because the parties amended the Little Mountain Deed of Trust to remove reference to "Related Documents" from the description of the secured indebtedness, even if that term did include the Guaranties, the modified Little Mountain Deed of Trust no longer secured the Guaranties for the Blackburn Southeast and Gentry Family loans. Thus, even if this Court accepted the trial court's (or the Gentrys') erroneous interpretation of RCW 61.24.100, foreclosure of the Little Mountain Deed of Trust

would not preclude Washington Federal's right to a deficiency judgment against the Gentrys on those two Guaranties.

C. The Gentrys' Waiver Of Anti-Deficiency Defenses Does Not Violate Public Policy And Is Enforceable As A Matter Of Law.

Even if the Gentrys were entitled to an anti-deficiency defense based on their interpretation of RCW 61.24.100 and the boilerplate "Related Documents" term in the unmodified deeds of trust, this Court must still reverse the trial court because the Gentrys expressly waived the right to assert that defense. In all of the Guaranties, the Gentrys agreed to:

> … waive[] … any rights or defenses arising by reason of … 'anti-deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor …

See, e.g., CP 118. The trial court correctly recognized that "[t]he language of the waiver was unambiguous," and by its terms, the Gentrys "knowingly waived any rights or defenses arising by reason of any anti-deficiency law …." CP 766. Indeed, the Gentrys did not dispute that they read, understood and voluntarily agreed to waive their rights under RCW 61.24.100—nor could they. *See Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) ("It is a general rule that a party to a

contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.").[5]

Rather, the Gentrys argued, and the trial court agreed, that their waiver was "void because it violates public policy." CP 766. This too was error. Under the common law, it is well-settled that a commercial guarantor's suretyship and statutory defenses "may be explicitly waived in a guaranty agreement and such waiver provisions are enforceable." 38A C.J.S., *Guaranty* § 125 (2008); *also* 38 Am.Jur.2d, *Guaranty*, § 67 ("the guaranty may provide, by its terms, that the guarantor remains liable despite the release of the principal debtor"). Washington courts have long recognized and applied this common law rule. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 709, 409 P.2d 651 (1966) (upholding guarantor's waiver of defense of discharge); *Seattle First Nat'l Bank v. West Coast Rubber Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985) (upholding guarantor's waiver of surety defenses); *United States v. Everett Monte Cristo Hotel, Inc.*, 524 F.2d 127, 136 (9th Cir. 1975) (under Washington law, guarantor defenses may be "lost by consent or waiver").

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[5] The Guaranties also contain a separate warranty in which Harvey represented that he agreed to the waiver with "full knowledge" of its consequences, as well as bold acknowledgement language, which appears immediately above the signature line. *See, e.g.*, CP 119, 120.

The Deed of Trust Act did not change this familiar rule. To be sure, nothing in the text of RCW 61.24.100 suggests a legislative intent to forbid waivers. When the legislature wants to deny contracting parties the freedom to bargain away statutory rights, it knows how to say so. *See* RCW 19.118.130 (waiver void under lemon law); RCW 19.100.220(2) (same under franchise act); RCW 21.20.430(5) (securities act); RCW 50.40.010 (unemployment compensation); RCW 51.04.060 (workers compensation). Indeed, in the analogous context of UCC Article 9, the legislature prohibited waiver of debtors' rights upon default, but preserved the common law rule permitting waiver of guarantors' rights. RCW 62A.9A-602 & cmt. ("Washington variations of this section ... preserve the ability of a guarantor to waive suretyship defenses"). RCW 61.24.100 contains no express anti-waiver provision and, as noted above, its text and history show that the legislature intended to confirm a lender's right to a deficiency judgment against a commercial guarantor; there is no reason to believe it wanted to change the common law rule with respect to waivers.

Nor would any public policy reflected in the Deed of Trust Act be offended by a commercial guarantor's knowing waiver of anti-deficiency rights. "An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (quotation marks

omitted). The Act's goals are: (1) to promote the efficiency and cost-effectiveness of non-judicial foreclosure; (2) to provide interested parties with an adequate opportunity to prevent wrongful foreclosure; and (3) to promote the stability of land titles. *Cox*, 103 Wn.2d at 387. Neither the trial court nor the Gentrys explained how a sophisticated commercial guarantor's knowing waiver of anti-deficiency rights—made to induce loans for the benefit of companies he owns and controls—would frustrate these goals. It wouldn't. Indeed, in enacting the 1998 amendments, and section (3)(c) specifically, the legislature declared a public policy in favor of allowing deficiency judgments against commercial guarantors.

There were good reasons for this. As the trial court itself found, guarantors agree to waivers of this kind because it facilitates commercial lending that may not otherwise be available. CP 766 (the Gentrys were "motivated to convince the [lender] to disburse funds to the borrowers"). If the validity of such waivers (and, thus, the value of the guaranties) is uncertain, lenders may be reluctant to make commercial loans. And, when they do, the prospect of invalidity will defeat—rather than promote—the Deed of Trust Act's goal of creating an efficient and inexpensive non-judicial foreclosure process: as discussed above, if there is a possibility that the borrower's property will be insufficient to satisfy the debt, lenders will have no choice but to file lawsuits against guarantors or initiate

judicial foreclosure actions—the very kind of inefficient and expensive judicial proceedings the Act was intended to curtail.

Finally, the Supreme Court's recent decisions in *Bain v. Mortg. Elec. Registration Sys.*, 175 Wn.2d 83, 285 P.3d 34 (2012), and *Schroeder v. Excelsior Mgmt. Group LLC*, No. 86433-1 (Wash. Feb. 28, 2013), do not affect this analysis. Neither case addressed deficiency judgments, commercial loans, guaranties or the enforceability of express waivers by sophisticated guarantors like the Gentrys. Rather, in both cases the Court held, without significant analysis, that parties cannot contractually waive "statutory requirements" that the trustee must follow prior to a non-judicial foreclosure sale. *Schroeder*, slip. op. at 11-12. As the Court noted in *Schroeder*, the common law rule that a person can ordinarily waive "rights or privileges" does not apply to these procedural requisites because they "are not … rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Id.*

That makes sense. As a matter of due process and public policy, the procedural requirements antecedent to foreclosure must be followed because they protect other interested parties (like junior lienholders) and prevent future title disputes—two key purposes of the Deed of Trust Act. *Cox*, 103 Wn.2d at 387. These concerns are simply not implicated where, as here, the statutory requisites are followed, a valid trustee's sale is held,

and the only interests that remain are those of the original contracting parties. Indeed, if RCW 61.24.100 did confer the Gentrys with an anti-deficiency defense, contrary to the common law, then it is precisely the kind of "rights-or-privileges-creating statute" that the Court recognized was subject to waiver doctrine. *Schroeder*, slip. op. at 12. To be sure, the Court's concern for protecting homeowners and other unsophisticated borrowers from overreaching lenders and/or trustees has no applicability in a commercial transaction between sophisticated parties.

V. CONCLUSION

The Gentrys agreed unconditionally and absolutely to guaranty repayment of three commercial loans made to companies they owned and controlled. There is no dispute that those companies defaulted on the loans and the Gentrys defaulted on the Guaranties. The plain meaning of RCW 61.24.100(3)(c) permits Washington Federal to obtain a deficiency judgment against the Gentrys on their Guaranties and, even if the Gentrys had an anti-deficiency defense based on the Deed of Trust Act and/or the "Related Documents" term, they knowingly and permissibly waived that defense. The trial court's judgment in the Gentrys' favor must be

reversed, and the case remanded for a determination of Washington Federal's damages and the Gentrys' "fair value" defense.[6]

RESPECTFULLY SUBMITTED this 26th day of April, 2013.

LANE POWELL PC

By _____

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[6] The Guaranties contain an attorneys' fee provision. *See, e.g.*, CP 119. If this Court reverses, Washington Federal reserves its right to seek an award of appellate fees in the trial court after the trial court determines that Washington Federal is the prevailing party in this action. *See Stieneke v. Russi*, 145 Wn. App. 544, 572, 190 P.3d 60 (2008) (appellate court cannot award fees under RAP 18.1 where issues must be determined on remand; trial court can award appellate fees to prevailing party).

CERTIFICATE OF SERVICE

I, Valerie M. Allen-Powell, hereby certify under penalty of perjury of the laws of the State of Washington that on April 26th, 2013, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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