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Washington State Supreme Court

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No. 90078-7

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL,

Respondent,

v.

LANCE HARVEY *et ux.*,

Petitioners.

WASHINGTON FEDERAL,

Respondent,

v.

KENDALL D. GENTRY and NANCY GENTRY,

Petitioners.

**COMBINED SUPPLEMENTAL BRIEF OF
RESPONDENT WASHINGTON FEDERAL**

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I. INTRODUCTION

In *Washington Federal v. Gentry*, 179 Wn. App. 470, 319 P.3d 823 (2014) (“Gentry”) and *Washington Federal v. Harvey*, 2014 WL 646746 (Feb. 18, 2014) (“Harvey”), the Court of Appeals, Division I, properly interpreted both the Deeds of Trust Act (“DTA”), RCW 61.24.100, and the parties’ commercial loan documents, and held that Washington Federal was entitled to bring deficiency judgment actions against Petitioners, who personally guaranteed multi-million dollar commercial loans, following the nonjudicial foreclosure of property secured by a deed of trust. This Court should affirm *Gentry* and *Harvey*, and reject Division II’s contrary decision in *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Dev. LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013) (“First-Citizens”).

The *Gentry* and *Harvey* decisions can also be affirmed on the additional or alternative grounds that Petitioners agreed to “waive[] any rights or defenses arising by reason of any anti-deficiency law.” This Court should hold that an express contractual waiver of anti-deficiency defenses executed by a sophisticated commercial guarantor is enforceable. Such a waiver does not modify the statutory prerequisites to a nonjudicial foreclosure sale, nor does it violate any public policy. On the contrary, and consistent with well-settled Washington suretyship law, the DTA reflects a strong legislative intent to ordinarily *allow* deficiency judgments

against commercial guarantors—who, unlike borrowers and grantors—lose no property rights in a nonjudicial foreclosure sale.

II. STATEMENT OF THE ISSUES

The petitions raise three issues, which are best stated as follows:

1. After a lender nonjudicially forecloses on property pursuant to a deed of trust securing a commercial loan, does the DTA permit a deficiency judgment against a guarantor of that loan regardless of whether the guaranty is also secured by the foreclosed deed of trust? **Yes.**

2. Was the form deed of trust at issue in these cases intended to secure only the borrower's and grantor's obligations with respect to the loan, and not a third-party guarantor's guaranty of the loan? **Yes.**

3. To the extent the DTA affords a guarantor of a commercial loan anti-deficiency rights, can the guarantor knowingly and voluntarily waive those rights as an inducement to the loan? **Yes.**

III. STATEMENT OF THE CASES

The basic facts in *Gentry* and *Harvey* are nearly identical, with the notable exception that, in *Gentry*, the parties executed a modification to the deed of trust that removed reference to the “Related Documents” term relied upon by Petitioners (and the *First-Citizens* court) to support their erroneous interpretation of the form deed of trust at issue in both cases.

A. Washington Federal v. Gentry

Factual Background. *Gentry* involves two deeds of trust that secured three commercial loans. In December 2005, Blackburn Southeast, L.L.C., a company owned by Kendall Gentry, borrowed over \$2.5 million from Horizon Bank. CP 92-94; 104-107.¹ This first loan was secured by a deed of trust granted on property located on Little Mountain Road in Mount Vernon (“Little Mountain Deed of Trust”). CP 178-197. In April 2009, Landed Gentry Development, Inc., also a Gentry-owned entity, borrowed over \$3.5 million from Horizon Bank. CP 96-98; 108-112. This second loan was secured by the Little Mountain Deed of Trust and a junior deed of trust on property located on East Blackburn Road in Mount Vernon (“Blackburn Road Deed of Trust”). CP 137-57.

Lastly, in September 2009, Gentry Family Investments, L.L.C. borrowed over \$1.1 million from Horizon Bank. CP 100-102; 113-116. This third loan was also secured by the Little Mountain Deed of Trust. CP 178-197. Thus, the Little Mountain Deed of Trust secured all three loans, and the Blackburn Road Deed of Trust secured only the Landed Gentry loan. The Gentrys were not the borrowers on the loans, nor the grantors of the deeds of trust, *i.e.*, they did not own any of the encumbered property.

¹ References to the Clerk’s Papers in Section III.A correspond to the CPs in *Gentry*, whereas Section III.B references the CPs in *Harvey*.

The Blackburn Road Deed of Trust and original Little Mountain Deed of Trust were nearly identical form documents. They provided:

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). In the next section, the deeds of trust also identified whose obligations to “pay” and “perform” were secured:

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). In other words, although the deeds’ boilerplate definition of “Related Documents” refers to various loan-related agreements including the generic term “guaranties,” *see* CP 144; 185, the deeds only secured the obligations of the “Borrower and Grantor”—not a “Guarantor”—to pay or perform any such agreement.

The parties subsequently agreed to modify the Little Mountain Deed of Trust to “cross-collateralize” all three loans. This modification amended the original deed of trust 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 terms, the modified Little Mountain Deed of Trust removed reference to “Related Documents” in the provision defining what debts and obligations are secured, and confirmed that the deeds of trust were intended to secure only the obligations of the “Borrower” or “Grantor”—not the obligations of a “Guarantor.”

For all three loans, as a separate avenue for repayment, the Gentrys each signed a Commercial Guaranty. *See* CP 118-123. The guaranties stated that the Gentrys “absolutely and unconditionally guarantee[d] and promise[d] to pay” the indebtedness” on the loans. *Id.* The guaranties also contained a “Waiver” clause, in which the Gentrys agreed to:

... waive[] 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 ... ‘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. There is no language in the guaranties stating or suggesting that the Gentrys’ obligation as guarantors was secured by the Little Mountain or Blackburn Road Deeds of Trust or other security. *Id.* In contrast, the

promissory notes for all three loans specifically referenced the fact that they were secured by one or both deeds of trust. *See* CP 93; 97; 101.

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 85-89. By then, the borrowers had defaulted on the loans and, despite notice, the Gentrys did not honor their guaranties. *Id.*; CP 209-217; 241-246. On December 30, 2010, Washington Federal initiated nonjudicial foreclosure proceedings. The notices of trustee's sale included the requisite statutory language informing the Gentrys that, as guarantors, they could be liable for a deficiency judgment. CP 219-231; 248-256; *see* RCW 61.24.042. Washington Federal purchased both properties at the trustee's sale by credit bid. CP 233-239; 258-261. 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.

Procedural History. In March 2012, Washington Federal sued the Gentrys for the deficiency judgment under RCW 61.24.100(3)(c), a provision in the DTA that permits deficiency actions against guarantors of commercial loans. CP 515-558. The Gentrys moved for summary judgment, arguing that the deeds of trust secured the guaranties and that, after the properties were nonjudicially foreclosed, another DTA provision

—RCW 61.24.100(10)—negated RCW 61.24.100(3)(c) and prohibited Washington Federal from obtaining a deficiency judgment. CP 792-798. The trial court agreed, granted the motion, rejected Washington Federal’s waiver defense, and entered judgment in the Gentrys’ favor. CP 765-771.

The Court of Appeals reversed on statutory and contractual grounds and, thus, did not reach the issue of whether the Gentrys’ waiver was enforceable. On the statutory issue, the court refused to rewrite the DTA to construe RCW 61.24.100(10) as an implied prohibition on a lender’s right to a deficiency judgment against a commercial guarantor under RCW 61.24.100(3)(c). 179 Wn. App. at 475-489. On the contract issue, the court interpreted the deed of trust’s scope of security clause with the “Payment and Performance” clause, and concluded that the deeds did not secure the Gentrys’ guaranties. *Id.* at 491-92. The court noted its disagreement with *First-Citizens* on both issues. *Id.* at 486-89; 492-95.

B. Washington Federal v. Harvey

Factual Background. In November 2008, Kaydee Gardens LLC, a company owned by Lance Harvey, borrowed over \$2.5 million from Horizon Bank to develop real property. CP 836-42; CP 844-46. In connection with the loan, Kaydee Gardens executed a “Resolution” authorizing the LLC “to mortgage, pledge ... or otherwise encumber” its own property “as security for the payment of any loans ... or any other or

further indebtedness of the Company to Lender[.]” CP 362-63 (emphasis added). The Resolution did not authorize Kaydee Gardens to encumber its property to secure the obligation of any other entity, including a guarantor. *Id.* Pursuant to the Resolution, Kaydee Gardens granted a lien in favor of Horizon Bank on property located in Everett, Washington pursuant to an existing construction deed of trust. CP 853-63. Like the Gentrys, Harvey was not the borrower on the loan, nor the grantor of the deed of trust.

The form deed of trust in *Harvey* is virtually identical to the pre-modified deeds of trust at issue in *Gentry*. It, too, contains a provision stating that it was granted to secure “Payment” and “Performance” of the indebtedness and other obligations. CP 855. And, also like *Gentry*, in the very next section, the *Harvey* deed of trust specifically identified whose obligations of “payment” and “performance” were secured:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of Grantor’s obligations under the Note, this Deed of Trust and the Related Documents.

Id. (underlining added). In short, just as the unmodified *Gentry* deeds of trust secured only the obligations owed by the “Borrower or Grantor,” but not a “Guarantor,” the *Harvey* deed of trust only secured the obligation of the “Grantor”—not a “Guarantor” like Harvey.

Like the Gentrys, Lance Harvey also executed a Commercial Guaranty as an inducement to the loan, in which he “absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction” of Kaydee Garden’s indebtedness. CP 848-51. The *Harvey* guaranty contains an express waiver clause identical to the one contained in the *Gentry* guaranties. *Id.* Also like *Gentry*, whereas the promissory note in *Harvey* expressly states that “this Note is secured by ... a Construction Deed of Trust ... in favor of Lender,” CP 845, the guaranty contains no reference to the deed of trust or any other form of security. CP 848-51.

Washington Federal acquired Horizon Bank’s interest in the loan, deed of trust and guaranty from the FDIC. CP 846; CP 865-66. Just as in *Gentry*, the borrower defaulted in the loan and Harvey refused to make good on the guaranty. CP 815-16; CP 868-75. Here, too, Washington Federal purchased the property at the trustee’s sale, CP 892-97, resulting in a deficiency amount of \$1,238,358. CP 816; CP 327.

Procedural History. In January 2012, Washington Federal sued Harvey for a deficiency judgment pursuant to RCW 61.24.100(3)(c). The trial court granted Harvey’s motion for summary judgment based on its interpretation of RCW 61.24.100(10) and the deed of trust’s “Related Documents” term. CP 186-87; CP 273-76. The Court of Appeals, following its opinion in *Gentry* and again rejecting *First-Citizens*, reversed

on the same statutory and contractual grounds. *Harvey*, 2014 WL 646746.

The court likewise did not reach the issue of waiver. *Id.* at *6.

IV. SUPPLEMENTAL ARGUMENT

A. **The DTA Allows A Deficiency Judgment Action Against A Guarantor Of A Commercial Loan Regardless Of Whether The Guaranty Is Secured By The Foreclosed Deed Of Trust.**

This Court should affirm *Gentry* and *Harvey*, which properly held that the DTA, RCW 61.24.100(3)(c), allows a lender to obtain a deficiency judgment against a guarantor of a commercial loan following nonjudicial foreclosure of a deed of trust, even where the guaranty is secured by that deed of trust. *Gentry*, 179 Wn. App. at 480-89; *Harvey*, 2014 WL 646746, at *2. The Court must reject *First-Citizens'* erroneous holding that RCW 61.24.100(10) creates an implicit prohibition on any such action. This result is compelled by the plain meaning and underlying policy of the DTA, which prohibits a deficiency judgment against a guarantor only if, like a borrower or grantor, the guarantor owns the foreclosed property. Petitioners do not qualify for that exception.

Historically, a lender could obtain a deficiency judgment against a guarantor after judicial foreclosure. *See Nat'l Bank of Wash. v. Equity Investrs.*, 86 Wn.2d 545, 546 P.2d 440 (1976). The original DTA did not, however, address whether a lender could obtain a deficiency judgment from a guarantor after nonjudicial foreclosure. Laws of 1965, ch. 74,

§ 10; Laws of 1990, ch. 111 § 2. Although it was generally assumed that the DTA did not provide guarantors with anti-deficiency protection, Washington courts failed to address the issue. *See Glenham v. Palzer*, 58 Wn. App. 294, 298 n. 4, 792 P.2d 551 (1990). This uncertainty threatened to disrupt a key benefit of the DTA—with the right to obtain a deficiency judgment against guarantors unclear, lenders instead might opt for the longer, more expensive process of judicial foreclosure.

In 1998, the legislature significantly amended the DTA to clarify the availability of deficiency judgments. Laws of 1998, ch. 295, § 12. The act still generally prohibits deficiency judgments on loans secured by a deed of trust following a nonjudicial foreclosure. RCW 61.24.100(1). The DTA contains an express carve out, however, for commercial loans. *Id.* Section (3)(a) applies only to borrowers and grantors of commercial loans, and it continues to prohibit deficiency judgments except to the extent the lender can show waste or wrongful retention of rents; section (3)(c) applies only to guarantors of commercial loans, and it specifically permits deficiency judgments. RCW 61.24.100(3). Because Petitioners are guarantors, not borrowers or grantors, section (3)(c) applies here.

Section (3)(c) is not absolute; it is “[s]ubject to” three express limitations. *Id.* First, the lender must bring the deficiency action within one year of the trustee’s sale. RCW 61.24.100(4). Second, the guarantor

may request a determination of the property's "fair value" for purposes of calculating the deficiency amount. RCW 61.24.100(5). And, third, in cases where a guarantor grants a deed of trust on his or her own property, the guarantor is properly treated as a grantor, and the lender's right to a deficiency judgment is prohibited to the same extent as it is under section (3)(a). RCW 61.24.100(6). This exception does not apply here because Petitioners did not grant the deeds of trust, nor was it their property that was foreclosed. Because no exception applied, Washington Federal was entitled to a deficiency judgment against Petitioners under section (3)(c), subject only to their right to a "fair value" determination.

Critically, the DTA contains no exception that bars a deficiency judgment where the guaranty of the commercial loan is secured by the foreclosed deed of trust. Indeed, such an exception would be contrary to the basic "quid pro quo" of the DTA: borrowers and grantors lose the right to redemption and a judicially imposed upset price and, in return, lenders lose the right to a deficiency judgment. *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988). Guarantors are not part of the *quid pro quo*; unlike borrowers and grantors, they lose no rights in a nonjudicial foreclosure they would otherwise have in a judicial foreclosure. That is why the DTA generally prohibits a deficiency judgment against borrowers and grantors, but not guarantors. That is also

why the DTA has an express exception for those guarantors who, unlike Petitioners, grant a deed of trust on their own land—giving them the same anti-deficiency protection as grantors generally.

This Court must reject Petitioners’ argument (adopted in *First-Citizens*) that RCW 61.24.100(10) should be interpreted as yet another exception to section (3)(c). As *Gentry* and *Harvey* recognized, section (10) “is not a prohibition.” *Gentry*, 179 Wn. App. at 482. A borrower or guarantor can owe multiple debts or obligations to a single lender. Section (10) confirms that foreclosure of a deed of trust securing a commercial loan does not affect a lender’s right to enforce obligations separate from an obligation to satisfy a deficiency on that loan. *See Rombauer, 27 Wash. Practice: Creditors’ Remedies—Debtors’ Relief* § 3.37 (2d ed. Supp. 2012) (section (10) allows parties to “carve out” obligations unrelated to payment of the debt, such as environmental liabilities).

To interpret section (10) as a prohibition on what section (3)(c) allows, “an action for a deficiency judgment against a guarantor,” would improperly ignore and re-write the words of the statute. “Only by striking the word ‘not’ from ... two places ... can the otherwise permissive statement of [section (10)] be read as a prohibition.” *Gentry*, 179 Wn. App. at 483 (citing *Glasebrook v. Mut. of Omaha Ins. Co.*, 100 Wn. App. 538, 545, 997 P.2d 981 (2000) (“Generally, we do not infer a prohibition

absent specific language to that effect, unless the statute as a whole directs that conclusion.”)). Moreover, such an interpretation results in an impermissible “fallacy” that the “inverse of what is stated in the statute is necessarily true.” *Id.* at 483-86.² This Court should not engage in textual and logical gymnastics to imply a prohibition that RCW 61.24.100 does not contain and that is inconsistent with the DTA’s policy to allow deficiency judgments against commercial guarantors.

Beyond its permissive nature, section (10)’s language confirms it was not intended to prohibit deficiency judgments. “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 meant an action for a “deficiency judgment” on a commercial loan, as against both borrowers and guarantors, it used that specific term. *See* RCW 61.24.100(1), (3), (5), (6) & (11). But in section (10), it used a different term: “an action to collect or enforce any obligation.” Thus, the term “obligation” used in section (10) must mean something different than

² This fallacy is known as “denying the antecedent,” in which one mistakenly reasons from a statement phrased as “because not-P, not-Q,” that once P happens Q will necessarily follow. *Agri Processor Co., Inc. v. N.L.R.B.*, 514 F.3d 1, 6 (D.C. Cir. 2008) (citing Patrick J. Hurley, *A Concise Introduction to Logic* 323 (9th ed. 2005)). For example: “Because it’s not cold outside, it’s not snowing. It is now cold outside, therefore it must be snowing.” *Id.*

an obligation to pay a “deficiency judgment.” Indeed, if section (10) were construed to impliedly prohibit a “deficiency judgment” on the underlying commercial loan, as *First-Citizens* held, then it would be both duplicative of and inconsistent with the express terms of sections (3) and (6).³

Finally, interpreting section (10) as a prohibition would frustrate a central goal of the DTA—to facilitate real estate financing through an “efficient and inexpensive” alternative to judicial foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Under *Gentry* and *Harvey*, a lender can nonjudicially foreclose on a deed of trust securing a commercial loan confident that, if there is a deficiency, it can enforce an “absolute” and “unconditional” guaranty to obtain a deficiency judgment. Under *First-Citizens*, if there is even a chance that the sale price will not cover the debt, the lender will be forced to file a pre-foreclosure lawsuit on the guaranty or a judicial foreclosure action—otherwise, the guaranty will be worthless. Either result would unnecessarily subject the guarantor to a personal judgment before the lender has an opportunity to apply the value

³ Indeed, the conflict would go beyond section (3)(c). For example, sections (3)(a) and (6) *permit* a lender to obtain a limited deficiency judgment for waste and wrongful retention of rents against a borrower and grantor-guarantor, respectively. RCW 61.24.100(3)(a)(i) & (6). If section (10)’s reference to an action to enforce “any obligation of a borrower” is construed to mean the same thing as an action for “a deficiency judgment,” and it impliedly prohibits such actions as *First-Citizens* held, then section (10) would unequivocally *prohibit* even the limited deficiency judgments expressly permitted in sections (3)(a) & (6).

of the property to reduce the guarantors' liability. This Court should give RCW 61.24.100(3)(c) its intended effect, and avoid that absurd result.

B. The Form Deeds Of Trust Did Not Secure The Guaranties.

Because the DTA permits deficiency actions against guarantors even if the foreclosed deed of trust is deemed to secure the commercial guaranty, this Court does not need to reach the contract interpretation issue. But if it does, it should affirm *Gentry's* and *Harvey's* alternative holding that the form deed of trust at issue secured only the obligations of the borrowers and/or grantors, not the guarantors. *Gentry*, 179 Wn. App. at 490; *Harvey*, 2014 WL 646746, at *3. The *First-Citizens* court reached a contrary interpretation because it focused solely on the deed of trust's "Related Documents" definition, while erroneously ignoring the deed's key "PAYMENT AND PERFORMANCE" clause.

The deed of trust specifically states that the deed is intended to secure only "payment" and "performance" of certain indebtedness and obligations. This "Scope of Security" clause provides as follows:

THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THE DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

CP 138; 179 (Gentry); CP 855 (Harvey) (emphasis added). On its face, the Scope of Security provision is conditioned upon other “terms.” Those terms include a separate clause that specifically identifies whose obligation to “pay” and “perform” is secured. The *Gentry* deed provides:

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 *Harvey* deed is identical, but applies only to the “Grantor.” CP 855. The deeds in both cases separately define the terms “Borrower,” “Grantor” and “Guarantor.” CP 143; 184 (Gentry); CP 861 (Harvey). Thus, whereas both deeds unambiguously specify that they secure the “payment” and “performance” obligations of a “Borrower” or “Grantor,” they do not secure the obligations of a “Guarantor.”

Gentry and *Harvey* correctly recognized that the deeds of trust must be interpreted as whole, and the Scope of Security clause read together with the Payment and Performance clause that modifies it. *See Gentry*, 179 Wn. App. at 491-92. “There is simply no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the *Borrower and Grantor*.” *Id.*; *Harvey*, 2014 WL 646746, at *4 (same as to “Grantor”). As the Court of Appeals

also noted, the “Full Performance” clause, which likewise omits any reference to a “Guarantor,” also shows that the deeds’ “exclusive focus is on the payment and performance obligations” of the Borrower or Grantor (as the case may be)—not third-party guarantors like Petitioners. *Gentry*, 179 Wn. App. at 492; *Harvey*, 2014 WL 646746, at *4.⁴

This interpretation is reinforced by the terms of the parties’ related loan documents. *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995) (when several documents are part of same transaction, they should be construed together). In both cases, the promissory notes specifically state that they were secured by the deeds of trust. CP 93; 97; 101 (*Gentry*); CP 845 (*Harvey*). Conspicuously, the guaranties contain no similar reference to the deeds or any other form of security. CP 118-35 (*Gentry*); CP 848-51 (*Harvey*). Further, in *Harvey*, the LLC resolution shows an intent to grant the deed of trust “as security for the payment of any loans ... of the Company,” not the payment of third-party guaranty, CP 362-63, whereas, in *Gentry*, as discussed below, the modified deed of

⁴ Similarly, in *Gentry*, 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). The *Harvey* warranty is identical, except it applies only until “the Grantor’s Indebtedness shall be paid in full.” CP 857 (emphasis added).

trust confirms the parties' intent to secure only "obligations, debts and liabilities ... of either Grantor or Borrower," not a "Guarantor." CP 192.

This Court must reject *First-Citizens'* erroneous interpretation of an identical form deed of trust. The *First-Citizens* court focused entirely on the deed's boilerplate definition of "Related Documents." Far from revealing any specific intent, the definition simply contains a laundry-list of documents that might exist in a commercial loan transaction. CP 144; 185 (Gentry); CP 861 (Harvey). Notably, the definition does not refer to the parties' specific agreements, including the guaranties at issue (which the deeds expressly define with a capital "G"). *Id.* Nevertheless, because the definition includes the generic term "guaranties" (with a little "g"), the *First-Citizens* court held that the deeds were intended to secure not just the obligations of the Borrower or Grantor, but also any guaranty executed by anyone in connection with the transaction. 178 Wn. App. at 213-14.

First-Citizens' analysis is flawed because it ignores the "payment" and "performance" language in the Scope of Security clause and, worse yet, does not even mention the operative "Payment and Performance" clause. *Id.* Simply put, the deeds do not say they were given to secure the "Related Documents"; they secure "payment" or "performance" of the Related Documents. The issue is whose payment or performance? As *Gentry* and *Harvey* recognize, the deeds specifically and unambiguously

answer that question in the incorporated “Payment And Performance” clause, and *First-Citizens* erred in failing to construe the two clauses together. *Gentry*, 179 Wn. App. at 494. This Court should likewise reject *First-Citizens*’ conclusion that a single and generic word buried in the deeds of trust’s definitions manifests the parties’ intent to secure the guaranties in the absence of any express language to that effect. Read as a whole and in its entirety, the form deed of trust shows a contrary intent.⁵

This result makes sense. The “Related Documents” definition lists all conceivable “instruments, agreements and documents ... executed in connection with” a commercial loan. CP 144. If the deeds of trust truly secured all such agreements without regard to who owes the obligation, then they would conceivably secure not only a third-party guaranty of a development loan, as here, but also the completely separate loans the lender makes to the borrower’s contractor, or any number of tangentially related obligations common to complex land development projects. The “Payment and Performance” clause avoids that unintended result (and the mischief it would create for the grantor of the deed of trust) by

⁵ *Gentry* also correctly rejected *First-Citizens*’ suggestion that the deeds of trust should be construed against Washington Federal. As *Gentry* noted, that fall-back rule does not apply here because “the deeds of trust in this case are not ambiguous when read as a whole.” 179 Wn. App. at 494-95. In any event, Washington Federal was not the “drafter” of the deeds (Horizon Bank was), nor were the Petitioners a party to them, and, thus, they cannot invoke this rule of construction in their favor.

intentionally and expressly limiting the scope of what is secured to only those obligations owed by the “Borrower” and/or “Grantor.”

Further, it would serve no commercial purpose for the deeds of trust to secure the borrower’s loan and a guaranty of the loan. *See Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998) (where commercial parties “sign a commercial agreement, we will give [it] a commercially reasonable construction.”). For a lender, a guaranty provides an additional source of payment if the borrower’s collateral is insufficient to satisfy the debt after the deed is foreclosed. And, for the guarantor, his or her liability is reduced by the value of the collateral following foreclosure whether or not the guaranty is secured by the deed of trust. There simply is no benefit to any party in having the deed secure both a borrower’s primary obligation and a guarantor’s secondary obligation.⁶ *First-Citizens* conceded this commercial reality, but ignored it. 178 Wn. App. at 214 n. 10. This Court should not.

⁶ At oral argument, Petitioners suggested that a lender would want the deed of trust to secure a guaranty so that it could foreclose in the event the guarantor breaches its obligations. But a lender would not and does not need to secure the guaranty with the deed of trust to achieve that result: the deed of trust already gives the lender that right in its cross-default provision, “EVENTS AFFECTING GUARANTOR,” which specifically allows the lender to nonjudicially foreclose if the Guarantor (with a capital “G”) defaults, dies, goes insolvent, etc. The deeds of trust at issue contained this provision. CP 182 (Gentry); CP 858-59 (Harvey).

C. The Modified Deed Of Trust in *Gentry* Confirms The Parties' Intent And Provides An Alternative Grounds For Affirmance.

In *Gentry*, the parties modified the Little Mountain Deed of Trust to “cross-collateralize”—*i.e.*, to secure—all three loans. This modification amended the original deed of trust and effectively substituted the original deed’s Scope of Security clause 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). This modification is relevant for two reasons. First, it confirms and is further evidence of the parties’ intent regarding the original deed of trust. Like the original deed, by its unambiguous terms, the modified deed of trust manifests the parties’ continued intent that the deeds of trust secure only the obligations and debts of the “Grantor” or “Borrower”—not the obligations of a “Guarantor.”

Second, the modified Little Mountain Deed of Trust was the only deed securing the Blackburn Southeast and Gentry Family loans. CP 178-97. At the very minimum, even if Petitioners’ interpretation of the DTA were correct (it’s not) and the original deed of trust secured the guaranties by virtue of the “Related Documents” term (it didn’t), Washington Federal is still entitled to a deficiency judgment on those two loans. In clear

terms, the modified deed of trust omits reference to “Related Documents” in its description of what is secured and clarified the parties’ intent that the deed secured only the debts of the “Borrower” or “Grantor.” Regardless of how the Court resolves any other issue, the Court of Appeals’ decision in *Gentry* can be partially affirmed for this reason as well.

D. A Sophisticated Commercial Guarantor’s Express Contractual Waiver Of The DTA’s Anti-Deficiency Defense Is Enforceable.

Even if Petitioners did have an anti-deficiency defense, this Court should affirm *Gentry* and *Harvey* on the alternative basis that Petitioners’ contractual waiver of that defense is enforceable as a matter of law. The guaranties contain identical waiver language, under a bold and capitalized heading “**GUARANTOR’S WAIVERS,**” in which Petitioners 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 ...

CP 118-23 (*Gentry*); CP 848-51 (*Harvey*). The guaranties also contain a warranty in which Petitioners confirmed they agreed to the waiver with “full knowledge” of its consequences, as well as a bold acknowledgement, which appears immediately above the signature line. *Id.* Petitioners

conceded that the waiver was unambiguous and, if enforceable, that it would preclude the anti-deficiency defenses they asserted under the DTA.⁷

Rather, Petitioners argued, and the trial courts agreed, that the waivers were void. CP 766 (Gentry); CP 275 (Harvey). The Court does not need to reach this issue, but if it does, it should hold that a guarantor of a commercial loan can waive the DTA's post-sale anti-deficiency rights. The scope of such a holding would be narrow. It would not apply to waivers executed by borrowers or grantors; it would not apply to waivers executed by guarantors of non-commercial loans; it would not apply to waivers of the prerequisites to a nonjudicial foreclosure sale.⁸ The policy considerations in those cases are different. There is, however, no public policy that prevents a court from enforcing a waiver of anti-deficiency rights, knowingly and voluntarily agreed to by a sophisticated guarantor of a commercial loan as part of the consideration for the loan.

⁷ Harvey filed a self-serving declaration claiming he did not read the waiver language. CP 396 (Harvey). Even if that were true, it would not affect the guaranty's enforceability. "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." *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (citation omitted).

⁸ Similarly, a holding that a commercial guarantor's waiver is not void as against public policy would not prevent a guarantor from asserting other contractual or common law defenses to the validity of the waiver, such a procedural or substantive unconscionability, duress, fraud, etc. Petitioners raised no such defenses in either *Gentry* or *Harvey*.

It is settled that a 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); *Seattle First Nat'l Bank v. West Coast Rubber Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985); also *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").

The DTA did not change this familiar rule. Nothing in the text of RCW 61.24.100 suggests a legislative intent to forbid waivers. When the legislature wants to deny parties the freedom to waive statutory rights, it knows how to do so.⁹ In the analogous context of UCC, Article 9, the legislature prohibited debtors from agreeing to waive their rights as a matter of public policy, but preserved the common law rule permitting guarantors to waive theirs. RCW 62A.9A-602 & cmt. ("Washington

⁹ See, e.g., RCW 19.118.130 (waiver void under lemon law); RCW 19.100.220(2) (same under franchise act); RCW 21.20.430(5) (state securities act); RCW 50.40.010 (unemployment compensation); RCW 51.04.060 (industrial insurance act).

variations of this section ... preserve the ability of a guarantor to waive suretyship defenses”). RCW 61.24.100 contains no similar anti-waiver provision. Indeed, RCW 61.24.100(9) permits agreements to forego a deficiency judgment where it would be available, but nothing in the statute prohibits agreements to allow a deficiency judgment where it would not.

Moreover, enforcing a commercial guarantor’s express waiver of anti-deficiency defenses would not offend any public policy reflected in the DTA. As explained above, the legislature recognized that guarantors do not have the same anti-deficiency rights as borrowers or grantors and, thus, the DTA reflects a clear policy to *allow* “an action for a deficiency judgment against a guarantor[.]” RCW 61.24.100(3)(c). This is true even if, as Petitioners argue, RCW 61.24.100(10) provides guarantors with a limited anti-deficiency defense in cases like this one. What possible public policy is violated when a sophisticated guarantor, to induce a multi-million dollar commercial loan, knowingly and voluntarily agrees to give the lender the same right to a deficiency judgment it otherwise would have against an unsecured guarantor under section (3)(c)? None, of course.

Indeed, the policy concerns that might preclude a borrower’s waiver of anti-deficiency rights do not apply to a commercial guarantor’s waiver. For example, if a borrower can waive the DTA’s anti-deficiency defenses, the lender may have less incentive to seek the highest value for

the property at the trustee's sale, and the borrower would have no right to ask a court to set an "upset price" to protect against an inequitable bid. RCW 61.12.060 (court may set upset price in a *judicial* foreclosure). The same is not true if a guarantor waives anti-deficiency defenses because, as noted above, the court must use the property's "fair value," not its sale price, when calculating the deficiency amount; the lender therefore has no incentive to make a low-ball bid. RCW 61.24.100(5); *see generally Wash. Federal v. McNaughton*, --- Wn. App. ---, 325 P.3d 383 (2014). In short, a borrower's waiver of anti-deficiency rights would nullify a fundamental *quid pro quo* of nonjudicial foreclosure; a guarantor's waiver would not.¹⁰

Similarly, *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013) and *Bain v. Mortg. Elec. Registration Sys.*, 175 Wn.2d 83, 285 P.3d 34 (2012), do not reflect a contrary public policy.

¹⁰ Petitioners' reliance on *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 313 P.3d 1208 (2013), is misplaced for this reason. Citing principles of contract interpretation and waiver law, not public policy considerations, the *Reikow* court noted in dicta that a "broad, boilerplate waiver in the guaranties' fine print" was inadequate to "defeat the explicit and specific provisions of RCW 61.24.100(5)" *Id.* at 794 n. 4. Unlike the DTA's provision on a guarantor's right to a "fair value" determination, there is no "explicit and specific" provision in the DTA giving guarantors anti-deficiency protection. On the contrary, RCW 61.24.100(3)(c) reflects an opposite intent and public policy. To the extent *Reikow*'s dicta suggests that the DTA would prohibit any waiver by a commercial guarantor, it must be rejected for the reasons stated herein.

Neither case involved deficiency judgments, commercial loans, guarantors or the validity of waivers executed by sophisticated parties like Petitioners. Rather, both held that parties cannot contractually modify the “statutory requirements” that must be followed prior to a valid nonjudicial foreclosure sale. *Schroeder*, 177 Wn.2d at 106-07; *Bain*, 175 Wn.2d at 108. The rule that one ordinarily can waive most statutory “rights or privileges” does not apply to these prerequisites because they “are not ... rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Schroeder*, 177 Wn.2d at 107.

That makes sense. The statutory requirements to a trustee’s sale must be followed because—in the absence of court oversight—they are necessary to ensure that property rights (including the rights of third-party lienholders) are not impaired without adequate notice and procedural fairness. These concerns are not implicated where these prerequisites are followed, a valid trustee’s sale is held, and the only interest that remains is a guarantor’s contractual obligation to the lender. If the DTA does confer guarantors with an anti-deficiency defense, it arises only after the trustee’s sale and is precisely the kind of “rights-or-privileges-creating statute” that can be waived. *Id.* Any public policy preventing homeowners and other borrowers from waiving the DTA’s core procedural protections should not apply in commercial transactions where, as here, a sophisticated guarantor

agrees to pay a deficiency judgment in order to induce, and as part of the consideration for, millions of dollars of commercial loans.

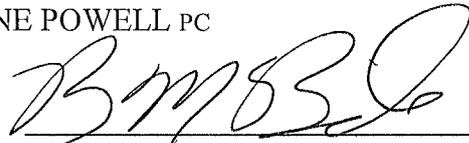
V. CONCLUSION

Both the legislature in enacting the DTA and the parties in drafting the deeds of trust intended Petitioners to remain liable for deficiency judgment following the nonjudicial foreclosure of the commercial loans at issue. *Gentry* and *Harvey* properly recognize that intent. *First-Citizens* does not. At a minimum, no public policy prevents the enforceability of Petitioners' express contractual waiver of anti-deficiency rights, if any.

RESPECTFULLY SUBMITTED this 8th day of August, 2014.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria hereby certify under penalty of perjury of the laws of the State of Washington that on August 8, 2014, 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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