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SUPREME COURT  
OF THE STATE OF WASHINGTON

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No. 90085-0

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WASHINGTON FEDERAL, a federally chartered savings association,

Respondent,

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v.

KENDALL D. GENTRY and NANCY GENTRY,

Petitioners.

and

No. 90078-7

WASHINGTON FEDERAL, a federally chartered savings association,

Respondent,

v.

LANCE HARVEY, individually and the marital community comprised of  
LANCE HARVEY and "JANE DOE" HARVEY, husband and wife,

Petitioners.

**CONSOLIDATED SUPPLEMENTAL BRIEF OF  
PETITIONERS GENTRY AND HARVEY**

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**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ARGUMENT ..... 2

    A. In *First Citizens*, Division II Correctly Held That Deed of Trust Provisions Identical to Those in *Gentry* and *Harvey* Secured the Guarantors’ Obligations..... 3

        1. Express Definitions in the Deeds of Trust Must Control..... 3

        2. “Payment” and “Performance” ..... 10

        3. Other Loan Documents Cannot Change the Plain Language of the Deeds of Trust Themselves..... 14

        4. An Alleged Lack of “Commercial Purpose” Cannot Overcome the Express Language of the Deeds of Trust ..... 17

    B. *First Citizens* Correctly Held That the Deed of Trust Act Prohibits Deficiency Judgments Based Upon Guaranties Secured by Non-judicially Foreclosed Deeds of Trust ..... 20

        1. Division II’s Interpretation Is Supported by the Plain Language of RCW 61.24.100 ..... 20

        2. Division I Erroneously Declined to Apply the *Expressio Unius Est Exclusio Alterius* in *Gentry*..... 24

    C. Language in the Guaranties Purporting to Waive the Protections of the Deed of Trust Act Violates Public Policy ..... 26

III. CONCLUSION..... 30

**TABLE OF AUTHORITIES**

**CASES**

*Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008)..... 22

*Albice v. Premier Mort. Svcs. of Wash., Inc.*, 157 Wn.2d 560,  
276 P.3d 1277 (2012)..... 27

*Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83,  
285 P.3d 34 (2012)..... 26, 28

*Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) ..... 7, 14-15

*Bour v. Johnson*, 122 Wn.2d 829, 864 P.2d 380 (1993)..... 22

*Conran v. White & Bollard*, 24 Wn.2d 619, 167 P.2d 133 (1946) ..... 27

*Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898) ..... 27

*First Citizens Bank & Trust Co. v. Retkow*, 177 Wn. App. 787,  
313 P.3d 1208 (2013)..... 27-28

*First-Citizens Bank & Trust Co. v. Cornerstone Homes &  
Development LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013)..... passim

*Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d  
493, 115 P.3d 262 (1993)..... 7-10

*J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 147 P.2d 310  
(1944)..... 7

*Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812  
(1977)..... 26

*Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d  
1234 (1999)..... 22

*McKasson v. Johnson*, 178 Wn. App. 422, 315 P.3d 1138 (2013) ..... 7

*Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010) ..... 24

*Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 677 P.2d 125  
(1984)..... 7

*Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297  
P.3d 677 (2013)..... 27-28

*Seattle-First National Bank v. Westlake Park Assoc.*, 42 Wn.  
App. 269, 711 P.2d 361 (1985)..... 11

*State v. Holland*, 99 Wash. 645, 170 P. 332 (1918)..... 25

*State v. Ortega*, 177 Wn.2d 116, 297 P.3d 57 (2013)..... 23

*Washington Federal v. Gentry*, 179 Wn. App. 470, 319 P.3d 823  
(2014)..... passim

*Washington Federal v. Harvey*, 2014 WL 646746 (2014) ..... passim

*Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134  
Wn.2d 692, 952 P.2d 590 (1998)..... 20

**STATUTES**

RCW 61.24.100 ..... 20, 30  
RCW 61.24.100(5)..... 28  
RCW 61.24.100(9)..... 298  
RCW 61.24.100(10)..... passim  
RCW Chapter 6.124..... 28

**OTHER AUTHORITIES**

*Oxford Dictionary*, [www.oxforddictionaries.com](http://www.oxforddictionaries.com), August 1, 2014 ..... 10

**RULES**

RAP 13.7..... 1

## I. INTRODUCTION

This Consolidated Supplemental Brief is submitted pursuant to RAP 13.7 by Petitioners Kendall Gentry, Lance Harvey and their respective spouses, under permission granted by the Supreme Court Deputy Clerk on July 22, 2014. It addresses the current conflict in authority between Divisions I and II of the Court of Appeals, as well as certain arguments raised by Respondent Washington Federal in its Answers to the Gentry and Harvey Petitions for Review dated April 3, 2014 (each referenced herein as an “Answer” and collectively as the “Answers”).<sup>1</sup>

Petitioners Gentry and Harvey ask this Court to reverse the published decision of Division I of the Court of Appeals in *Washington Federal v. Gentry*, 179 Wn. App. 470, 319 P.3d 823 (2014) (“*Gentry*”), as well as its unpublished decision in *Washington Federal v. Harvey*, 2014 WL 646746 (2014) (“*Harvey*”). Instead, this Court should adopt the analysis of Division II of the Court of Appeals on the same issues, as set forth in *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013) (“*First Citizens*”). Petitioners ask this Court to reinstate the summary judgments of dismissal awarded to the Gentrys and Harveys by their respective trial courts.

In *First-Citizens*, Division II was asked to determine the deficiency liability of guarantor defendants following non-judicial foreclosures of

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<sup>1</sup> Aside from references to the somewhat different factual backgrounds in each case, the Petitions for Review in *Gentry* and *Harvey*, and the bank’s Answers thereto, are essentially identical.

deeds of trust containing essentially the same language as those in *Gentry* and *Harvey*. Based upon “plain language” in the deeds of trust, Division II found that they secured not only the obligations of the borrower/grantor entities, but also the obligations of the individual defendant guarantors. It construed RCW 61.24.100(10) to bar the bank from recovering deficiency judgments on those secured guaranty obligations, once the bank’s election to non-judicially foreclose was completed via trustee’s sales.

Two months later, Division I of the Court of Appeals reached directly opposite determinations in *Gentry* and *Harvey*, holding that the Deeds of Trust did not secure the obligations of the Gentrys and Harveys as guarantors, and that RCW 61.24.100(10) did not bar post-trustee’s sale deficiency against them, regardless of whether their obligations were secured by the non-judicially foreclosed deeds of trust. In doing so, Division I ignored the “plain language” of the deeds of trust and failed to apply well-established rules of contract construction and statutory interpretation. Those errors must be corrected. This Court should also confirm that lender attempts to circumvent Deed of Trust Act protections through boilerplate waiver language are contrary to the provisions of the Act and public policy, and therefore void.

## II. ARGUMENT

The factual background to the *Gentry* and *Harvey* cases is set forth in detail in their respective responsive briefs filed in with Division I of the Court of Appeals, and in their Petitions for Review addressed to this Court, and accordingly will not be repeated here.

A. **In *First Citizens*, Division II Correctly Held That Deed of Trust Provisions Identical to Those in *Gentry* and *Harvey* Secured the Guarantors' Obligations.**

1. **Express Definitions in the Deeds of Trust Must Control.**

Each of the bank-drafted Deed of Trust forms at issue in *Gentry* and *Harvey* (as well as the form in *First-Citizens*), declares its purpose as follows -- in bold, all-caps language:

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 this Deed of Trust.<sup>2</sup>

The banks did not leave interpretation of the capitalized terms "Indebtedness" and "Related Documents" open to doubt. Rather each of their Deed of Trust forms contained "Definitions" sections, mandating that "The following capitalized words and terms shall have the following meanings when used in this Deed of Trust" (emphasis added). Those mandatory definitions included the following:

The word "Note" means the promissory note dated [specific date] in the original principal amount of [specific dollar amount] from Borrower to Lender ...

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

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security

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<sup>2</sup> *Harvey* CP 554-564; *Gentry* CP 9-21 and 23-32; *First-Citizens*, 178 Wn. App. at 423, ¶10.

agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.

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

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

(Emphasis added, bracketed material inserted for clarity).<sup>3</sup> Reading these definitions together, the Deeds of Trust in *Gentry* and *Harvey* were "given to secure ... any and all obligations under ... all ... guaranties executed in connection with the Indebtedness," among other obligations.

The only guaranties of the Note and Indebtedness in the *Harvey* and *Gentry* cases were those signed by Mr. Harvey and Mr. and Mrs. Gentry, respectively.<sup>4</sup> Those guaranties were not merely executed "in connection with" the Indebtedness. They specifically promised "payment and satisfaction of the Indebtedness of Borrower to Lender," and "performance and discharge of all Borrower's obligations under the Note," in the event that their Borrower LLC entities failed to do so. The lender could hardly have been clearer in stating that the obligations of the Harveys and Gentrys under their guaranties were secured by its Deed of Trust form.

In its decision in *First-Citizens*, Division II had no difficulty

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<sup>3</sup> The Definitions are set forth at *Harvey* CP 562 and *Gentry* CP 16-17 and 30-31.

<sup>4</sup> *Harvey* CP 650-51 and 669-70; *Gentry* CP 34-39, 46-51, 61-66.

confirming what the Deeds of Trust were granted to secure:

These deeds of trust defined (1) “Indebtedness” as “all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents”; and (2) “Related Documents” to include any “*guaranties ... whether now or hereafter existing, executed in connection with the indebtedness.*” A plain reading of this language includes the Allisons’ earlier guaranty among the “now ... existing” “Related Documents” that these deeds of trust secured.

178 Wn. App. at 213, ¶ 10 (emphasis in original, footnotes omitted).

Division II likewise found that the deeds of trust secured the Allisons’ later guaranties:

This plain language expressly incorporates future “Related Documents,” which unambiguously includes future “deeds of trust” as well as “promissory notes” “executed in connection with the Indebtedness,” “now or hereafter existing,” namely Cornerstone’s promissory notes and deeds of trust later executed to obtain this contemplated loan.

Nor is there any ambiguity in Venture Bank’s identical use of the term “the Indebtedness,” in both the deeds of trust and the Allisons’ guaranty, to refer to Cornerstone’s construction loans from Venture bank, secured by the deeds of trust. Thus, we agree with the Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons’ guaranty in addition to Cornerstone’s construction loan.

*Id.*, ¶¶ 11-12 (emphasis added, footnote omitted).

In its decision in *Gentry*, Division I acknowledged the definitions of “Indebtedness” and “Related Documents,” even conceding that the latter “plainly includes guaranties.” 179 Wn. App. at 492, ¶77. However, Division I proceeded to disregard that definition (*i.e.*, covering “all ... guaranties ... executed in connection with the Indebtedness”). Instead, it

seized upon other “payment” and “performance” language discussed in the next section of this brief, and inexplicably concluded that the definition of “Related Documents” could not be read to “include all guaranties, regardless of who the guarantor is,” and that the scope of the definition “does not include the guaranties of the Gentrys.” *Id.* at ¶79. The same “interpretation” was adopted by Division I in *Harvey*.

In its Answers, Washington Federal vainly attempts to argue that “this result makes sense,” dismissing the definition of “Related Documents” as a mere “boilerplate” listings of “all conceivable” documents executed in connection with a commercial loan, included for no apparent purpose. The bank asks this Court to follow Division I’s lead and simply disregard the definition of “Related Documents” in determining what obligations the Deeds of Trust were “given to secure.” This Court’s own well-established rules of contract construction do not permit it to do so. Far from irrelevant “boilerplate,” the definition of “Related Documents” was made mandatory. It confirmed specific choices made by the bank regarding the document obligations to be secured by the Deed of Trust, which included “all ... guaranties ... executed in connection with the Indebtedness,” but excluded others, *i.e.*, “environmental indemnity agreements are not ‘Related Documents’ and are not secured by this Deed of Trust.”

The Deeds of Trust were drafted entirely by the lender,<sup>5</sup> and if the lender had intended to exclude rather than include “all guaranties” in the

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<sup>5</sup> *Harvey* CP 396; *Gentry* CP 17, 31.

definition of Related Documents, that intent could have easily been implemented. In fact, that is exactly what Washington Federal later did in its own updated version of the deed of trust form, changing the definition so that environmental agreements were expressly included, but “guaranties” were expressly excluded.<sup>6</sup> Its revised definition reads as follows:

The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, environmental agreements, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided, that guaranties are not “Related Documents” and are not secured by this Deed of Trust. [Emphasis added.]<sup>7</sup>

The *Gentry* and *Harvey* cases must be decided based upon the express terms of the Deeds of Trust. “It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.” *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990), quoting from *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 349, 147 P.2d 310 (1944). As explained by this Court in *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (1993):

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<sup>6</sup> *Harvey* CP 631 and 671-92. Washington Federal’s revised deed of trust form was put into use at least by October 27, 2011, several weeks before it completed its non-judicial foreclosure of the Harvey Deed of Trust.

<sup>7</sup> In *Gentry*, Division I criticized Division II’s construction of the Deeds of Trust against the drafting bank, concluding that such construction could apply only if the Deeds of Trust were ambiguous. 179 Wn. App. at 494-95 (citing *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984)). But Washington law is not so limited; courts will also construe written contracts against their drafters so that the drafters cannot later benefit from “mistakes.” *McKasson v. Johnson*, 178 Wn. App. 422, 429, 315 P.3d 1138, 1142 (2013) (“we construe written contracts against their drafters such that they cannot later benefit from ‘mistakes’ that they were in a position to prevent.”). Nor should Washington Federal be allowed to escape here from the unambiguous definition of “Related Documents” mandated by its predecessor Horizon Bank.

We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written. [Emphasis added.]

The *Hearst Communications* case involved the interpretation of contract terms which were specifically defined. Hearst attempted to argue that internal memos written by Seattle Times personnel must be considered in interpreting a particular definition used in calculating losses. The Court of Appeals rejected the argument, holding:

If this evidence were relevant, it would raise questions of fact; it would not support summary judgment for Hearst. But it is not relevant. Extrinsic evidence may not be used to demonstrate an intent independent of the contract; it may only illuminate the words of the agreement. Hearst is unable to tie its argument to language in the JOA. If the parties intended to require that agency remainder be calculated differently when strike losses affect agency expenses, they did not say so. Instead, they defined the specific elements of the calculation (agency remainder, consisting of agency revenues less agency expenses, and news and editorial expenses) once, in great detail, for the entire agreement, and embedded these terms without qualification in the escape clause.

In essence, Hearst asks us to rewrite the JOA by revising the escape clause, so that a loss notice may be issued "if at any time hereafter there are any three consecutive years that are not affected by a force majeure event in which either of the parties does not receive a distribution of Agency Remainder adequate to pay its

expenses.” Likely this would have been a reasonable limitation. Whatever we may now wish, however, this is not what the parties agreed. The JOA cannot be read to disqualify strike losses from calculations pertaining to the escape clause without varying, contradicting, or modifying the language in the agreement. We are not at liberty to revise the parties’ contract.

*Hearst Communications, Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 798 (2004) (emphasis added). The Court of Appeals’ decision was affirmed by this Court, which stated as follows:

We agree with the Court of Appeals that the JOA is subject to only one reasonable interpretation. Even if the parties intended to require that agency remainder be calculated differently when strike losses affect agency expenses, they failed to reduce such an intention to writing. Instead, they defined the specific elements of calculating gains and losses once, in lengthy detail, and embedded these terms without qualification in the loss operations clause. Hearst essentially asks us to rewrite the JOA by revising the loss operations clause, something we are not at liberty to do.

154 Wn.2d at 510 (emphasis added). That holding applies with equal force here, and requires this Court to give effect to the unambiguous definitions included by Horizon Bank in the Harvey and Gentry Deeds of Trust, establishing the meanings which those defined terms “shall have when used in this Deed of Trust.”<sup>8</sup>

This Court is not simply being asked to interpret deeds of trust securing “payment of indebtedness and obligations under related documents,” with those terms un-capitalized and left open to interpretation.

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<sup>8</sup> *Hearst Communications* was actually cited in the *Gentry* opinion, 179 Wn. App. at 490, ¶70, but was disregarded when Division I decided that the definition of Related Documents did not control, and that the Deeds of Trust were not “given to secure” the Gentry guaranties.

A definition is “a statement of the exact meaning of a word, such as in a dictionary,” and “an exact statement or description of the nature, scope, or meaning of something.” *Oxford Dictionary*, online edition at [www.oxforddictionaries.com](http://www.oxforddictionaries.com) as of August 1, 2014. When included in a contract, such definitions must control its interpretation. The lender-drafted Deed of Trust forms here secured “any and all obligations under ... the Related Documents,” and they specifically defined the term “Related Documents” to include “all ... guaranties ... executed in connection with the Indebtedness.”

There is no room to “interpret” the words “all guaranties” to exclude the only guaranties executed in connection with the loans to the Gentrys’ and Harveys’ LLC entities, and it was plain error for Division I to do so.<sup>9</sup>

## 2. “Payment” and “Performance”.

Rather than apply the mandatory definitions in interpreting the “granted to secure” provisions of the Deeds of Trust in *Gentry* and *Harvey*, as required by *Hearst Communications*, Division I simply skipped over them and focused on the last sentence of that paragraph, stating that “This Deed of Trust is given and accepted on the following terms.” It decided that the “following terms” referred only to a one subsequent paragraph entitled “Payment and Performance.”<sup>10</sup> In *Gentry*, that paragraph stated:

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<sup>9</sup> As noted above, it would have been a simple matter for Horizon Bank to impose a different outcome, by making a minor wording change in the Deed of Trust definition of “Related Documents” so that it excluded rather than included guaranties. But the bank chose not to do so.

<sup>10</sup> In *Harvey*, the “Payment and Performance” paragraph immediately followed the “granted to secure” paragraph. *Harvey* CP 556. In *Gentry*, the two provisions were separated by several other paragraphs. *Gentry* CP 11 and 25.

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.<sup>11</sup>

Reading the reference to “following terms” and the “Payment and Performance” paragraph together, Division I concluded that the Deed of Trust was given to secure only the obligations of the Borrower and Grantor. 179 Wn. App. at 495, ¶ 82. Washington Federal goes even further, arguing that the above quoted “Payment and Performance” paragraph exclusively controls the determination of what the Deeds of Trust were given to secure, “by expressly and specifically limiting the scope of what it secured to only those obligations owed by the ‘Grantor.’”<sup>12</sup>

Division I’s ruling and Washington Federal’s argument are fatally flawed. First, the words “following terms” in the final sentence of the “given to secure” paragraph are obviously a reference to all of the terms in the remaining six pages of the Deed of Trust form, including the mandatory definitions. There is simply no basis for reading the sentence to narrowly refer to only one “following” paragraph out of dozens. Doing so would violate the fundamental rule that the intent of contracting parties must be determined “by viewing the contract as a whole.” *Seattle-First National Bank v. Westlake Park Assoc.*, 42 Wn. App. 269, 273, 711 P.2d 361 (1985).

Second, although the “Payment and Performance” paragraph

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<sup>11</sup> In *Harvey*, the paragraph referred only to the “Grantor” rather than to the “Borrower and Grantor.” *Id.* However, in each case the Grantor and Borrower were one and the same LLC entity, of which the guarantor defendants were the sole member/owners.

<sup>12</sup> *Harvey* Answer at 10, *Gentry* Answer at 11.

addresses “Grantor/Borrower” or “Grantor” obligations, nothing in it states that the entire Deed of Trust is limited to those obligations, as the bank now contends. Rather, the Deed of Trust applies to “any and all obligations” under not only the Note and the Deed of Trust, but also under the Related Documents such as the Harvey and Gentry guaranties. The fact that some obligations are addressed in one paragraph does not negate the fact that other obligations are covered in other provisions of the Deed of Trust, all of which must be read together.<sup>13</sup>

Thirdly, the “interpretation” adopted by Division I, supported here by Washington Federal in its Answers, contravenes the plain language of the “granted to secure” paragraphs, which specifically provided that the Deeds of Trust were given to secure “payment of the Indebtedness,” without limiting that to the payment obligations of a particular party. They also stated that they were given to secure “performance of any and all obligations under the Note, the Related Documents and this Deed of Trust” (emphasis added), not just the obligations of the LLC Borrower under the Notes.

As previously discussed, the bank’s Deed of Trust form defined the Related Documents to include the obligations of the Gentrys and Harveys

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<sup>13</sup> The *Gentry* opinion also pointed to a “Full Performance” paragraph in the Deeds of Trust, stating that “if Borrower and Grantor pay all the Indebtedness when due,” then the lender will reconvey the Deed of Trust. 179 Wn. App. at 492, ¶73. Division I commented that the provision “reinforces our conclusion” that the Deed of Trust secured only Borrower/Guarantor obligations. *Id.* However, the language of that paragraph cannot override by inference the express provisions of the “granted to secure” paragraph, whose meaning was confirmed by mandatory and unambiguous definitions. Certainly Division I would not contend that a lender could refuse to reconvey a Deed of Trust of this form, if the Indebtedness were paid in full by the guarantors individually, as opposed to their LLC entities.

under their guaranties. Those guaranties covered “payment and satisfaction of the Indebtedness of Borrower to Lender,” as well as “performance and discharge of all Borrower’s obligations under the Note” (emphasis added). The fact that the Deed of Trust contained a paragraph addressing payment and performance obligations of the Grantor/Borrower LLC entities in no way negated the fact that, by their express terms, the Deeds of Trust were also “given to secure” a broader range of obligations, including those of the guarantors to pay and perform if their LLC entities failed to do so.

Finally, Division I’s opinions and Washington Federal’s arguments ignore other relevant language in the “given to secure” paragraph of the *Harvey* Deed of Trust. That paragraph in its entirety reads 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 this Deed of Trust. This Deed of Trust, including the Assignment of Rents and the security interest in the rents and personal property, is also given to secure any and all of Grantor’s obligations under that certain Construction Loan Agreement between Grantor and Lender of even date herewith. Any Event of Default under the Construction Loan Agreement, or any of the Related Documents referred to therein, shall also be an Event of Default under this Deed of Trust. This Deed of Trust is given and accepted on the following terms. [Emphasis added.]

Clearly, when the bank wanted a provision to refer only to obligations of the Grantor LLC’s, such as their obligations under a loan agreement, it knew how to do so. There were no such limitations in the first sentence of the “given to secure” clause, which instead referred to “any and all obligations,”

expressly including obligations under the Related Documents, which by mandatory definition included the Gentrys' and Harveys' guaranties.

**3. Other Loan Documents Cannot Change the Plain Language of the Deeds of Trust Themselves.**

In an effort to support Division I's erroneous interpretation of what obligations the Deeds of Trust were given to secure, Washington Federal points in its Answers to the Petitions for Review to several other loan documents as allegedly demonstrating that the Deeds of Trust were not intended to secure obligations under the Gentry and Harvey guaranties, i.e. an LLC Borrowing Resolution,<sup>14</sup> the Notes<sup>15</sup> and the guaranties<sup>16</sup> themselves. However, other loan documents cannot modify or contradict unambiguous language in the recorded Deeds of Trust themselves, and the language of those documents does not support its arguments in any event.

Deeds of Trust are required to be recorded in order to give notice to the world of the obligations they secure. It would be anomalous to allow their "given to secure" language to be controlled by other documents which are not matters of public record. Even if such other loan documents were considered as "context" evidence, they could not support Division I's rulings in *Gentry* and *Harvey*. The so-called "context evidence rule" was established in *Berg v. Hudesman, supra*, which held that evidence may be considered by a court when interpreting a contract, even in the absence of an ambiguity. The *Berg* Court cautioned that context evidence has limited

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<sup>14</sup> *Harvey* CP 571-72. No similar Resolutions are included in the *Gentry* Clerk's Papers.

<sup>15</sup> *Harvey* CP 582-83, *Gentry* CP 4-7, 41-44, 53-59.

<sup>16</sup> *Harvey* CP 585-88, *Gentry* CP 34-39, 46-51, 61-66.

application, and must be “admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.” 115 Wn.2d at 669. Additionally, context evidence cannot be used to “add to, subtract from, vary or contradict” the express terms of a contract which are unambiguous. *Id.* at 670. Here, the clear terms of the Deeds of Trust defined what they were given to secure. Such terms cannot be changed in the guise of “interpreting” them through “context” evidence.

Moreover, neither the provisions of the *Harvey* LLC Resolution nor the guaranty agreements support Washington Federal’s “interpretation” of the Deed of Trust. The bank asserts that “the Resolution did not authorize Kaydee Gardens [the Harveys’ LLC entity] to encumber its property to secure the obligations of any other entity, including a guarantor” (bracketed material added for clarity).<sup>17</sup> That assertion totally mischaracterizes the “Actions Authorized” section of the Resolution, which began by stating:

Any one (1) of the authorized persons listed above may enter into any agreements of any nature with lender, and those agreements will bind the Company. Specifically, but without limitation, any one (1) of such authorized persons are authorized, empowered, and directed to do the following for and on behalf of the Corporation:

Those authorized actions included a section entitled “Grant Security,” confirming the LLC’s right to mortgage its property “as security for the payment of any loans and credit accommodations” from the bank, as well as “any promissory notes” signed by the LLC, and “any other or further

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<sup>17</sup> Answer in *Harvey* at 3.

Indebtedness of the Company to Lender”<sup>18</sup> (emphasis added). The Harveys, who were the sole owners of their LLC, were also liable for such payment under the express language of their guaranties,<sup>19</sup> and nothing in the Resolution prevented the LLC from granting collateral to secure the Harveys’ obligations to repay the loan, in addition to its own.

In other words, there were multiple parties obligated to make payment of a single loan, and the bank structured its Deed of Trust so that it secured all of the parties’ obligations to repay that loan Indebtedness. The bank-drafted Resolution authorized the grant of the Deed of Trust to secure repayment of the Note and Indebtedness, without distinguishing between the LLC’s and guarantors’ obligations to make that payment. The bank-drafted Deed of Trust forms reinforced that authority, confirming that “Grantor has the full right, power, and authority to execute and deliver this Deed of Trust to Lender.”<sup>20</sup> Even if it were proper under the guise of “context” evidence to consider the terms of the Harvey Resolution, nothing in that document, prepared solely by the bank for the bank’s benefit, could form a basis for undercutting the plain language of the bank-drafted, recorded Deed of Trust defining what it was “given to secure.”

Washington Federal also draws attention to the fact that the Notes executed by the borrower LLC’s contained specific recitations that they were secured by the corresponding Deeds of Trust, while the guaranty

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<sup>18</sup> Harvey CP 571-72. No similar Resolutions are included in the *Gentry* Clerk’s Papers.

<sup>19</sup> They guaranteed “payment and satisfaction of the Indebtedness” owed to the Lender, and “performance and discharge of all Borrower’s obligations under the Note.”

<sup>20</sup> *Harvey* CP 558, middle of page 5. *Gentry* CP 13 and 27, page 4 of each.

agreements signed by the Gentry and Harveys did not, from which the bank proposes an inference that the guaranties were not intended to be secured.<sup>21</sup>

If such an inference were plausible, the limitations of the “context” rule would preclude it from overcoming the plain and unambiguous language of the Deeds of Trust themselves, and there is no inference to be drawn in any event. Each Note evidenced a specific loan from the bank to the borrower LLC’s, secured by a designated Deed of Trust. In contrast, the guarantees were general in nature, defining the term “Note” to mean not just the promissory note signed by the LLC for that particular loan, but also “all of Borrower’s promissory notes and/or credit agreements evidencing Borrower’s loan obligations in favor of lender.” Similarly, the guaranty agreements defined the guaranteed “Indebtedness” to include “any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired,” owed by the LLC to the bank. Given their all-inclusive nature, there would have been no reason for the general guaranties to refer to an individual deed of trust.<sup>22</sup>

**4. An Alleged Lack of “Commercial Purpose” Cannot Overcome the Express Language of the Deeds of Trust.**

In a further attempt to avoid the express written terms of the Deeds of Trust, Washington Federal argues that “it would serve no commercial purpose for the deed of trust to secure the borrower’s loan and a guaranty

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<sup>21</sup> Answers at 5.

<sup>22</sup> However, the Gentry and Harvey guarantees did provide under “Amendments” that “This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties,” and defined the “Related Documents” to include “all deeds of trust” executed in connection with the broadly-defined “Indebtedness.”

of that loan,” contending that this “reality” was “conceded” but improperly “ignored” by Division II in its opinion in *First-Citizens*. Answer in *Harvey* at 10 and in *Gentry* at 11. This clearly mischaracterizes the *First-Citizens* decision, and there is no authority for the proposition that a contract term must serve a “commercial purpose” in order to be enforceable.

Despite what Washington Federal now contends (with the wisdom of hindsight), its predecessor Horizon Bank saw benefits to be gained by tying all of the loan documents together as a global “Loan Agreement.”<sup>23</sup> The “entire agreement” clauses and “Related Documents” definitions found in each of the loan documents further tied them all together, and confirmed that they were all secured by a single Deed of Trust. It is not this Court’s responsibility to second-guess such business decisions, even those of a bank which later failed and was taken over by the FDIC.

While not addressed by Division I in *Gentry* or *Harvey*, the “no commercial purpose” argument was raised in an amicus brief in *First-Citizens*. Contrary to Washington Federal’s Answers,<sup>24</sup> that argument was specifically considered and rejected by Division II:

Amici banks make a compelling argument that accepting the Allisons’ argument here would (1) call into question many similar documents securing and guaranteeing commercial loans; and (2) run contrary to the general purpose that personal guaranties serve in the banking industry, namely to assure an additional source of payment to lenders when borrowers default and their securities are insufficient to satisfy the debt. Here, however, we confront specific

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<sup>23</sup> The Notice of Final Agreement in *Harvey* defined the term “Loan Agreement” to include all of the documents signed by the Harveys and their LLC in connection with the loan, specifically including the “WA Commercial Guaranty - Lance Harvey.” *Harvey* CP 568.

<sup>24</sup> Answers in *Harvey* at 10, and in *Gentry* at 11.

language that Venture Bank selected for inclusion in these documents and which we must construe against the drafting bank, even if the bank's specific language subverts this general guaranty purpose.

*First-Citizens, supra*, n.10 (emphasis added). Division II elaborated upon that rejection in footnote 13:

Amici WBA argue that it would “accomplish nothing” to have a deed of trust securing a guaranty. Br. of Amici Curiae WBA at 9. We note that First-Citizens triggered the ultimate protections afforded by the anti-deficiency statute when it voluntarily elected to avail itself of the relatively “inexpensive and efficient” nonjudicial foreclosure option. *Thompson*, 58 Wash. App. at 365, 793 P.2d 449. Moreover, RCW 61.24.100(9) specifically contemplates a party's ability to forego its contractual right to recover any portion or all of a deficiency, which First-Citizens did when its predecessor, Venture Bank, drafted the deeds of trust in such a manner as to secure the Allisons' guaranty. As the Allisons correctly note [in their response to the Amici brief],

First-Citizens had a variety of remedies available to it to collect on the Cornerstone debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Cornerstone and the guarantor. It could have sued on the Guaranty first, leaving the foreclosure option available as a later remedy. Or it could (and did) choose the efficient remedy of a Trustee's sale pursuant to the Deed of Trust Act without judicial oversight.

*Id.*, n.13 (bracketed material added for clarity).

This Court cannot disregard the plain language of Horizon Bank's Deed of Trust form, merely because Washington Federal now finds it disadvantageous. And Washington Federal should not be heard to complain about its lack of further recourse against the guarantors, where it resulted from the bank's own voluntary choice to foreclose the Harvey and Gentry Deeds of Trust non-judicially, rather than initiating judicial foreclosures or

simply suing the Harveys and Gentrys on their guaranties.<sup>25</sup>

**B. *First Citizens* Correctly Held That the Deed of Trust Act Prohibits Deficiency Judgments Based Upon Guaranties Secured by Non-judicially Foreclosed Deeds of Trust.**

**1. Division II's Interpretation Is Supported by the Plain Language of RCW 61.24.100.**

The circumstances where a deed of trust beneficiary's may obtain a deficiency judgment following non-judicial foreclosure of the deed of trust are set forth in RCW 61.24.100. The general rule established by that statute is that "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor or guarantor after a trustee's sale under that deed of trust." Although subsection 3(c) of the statute permits actions for deficiency judgments against guarantors of commercial loans, that exception remains "subject to this section," *i.e.*, to all the other provisions of RCW 61.24.100. The key

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<sup>25</sup> *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998), cited at pages 10 and 11 of the Answers for the proposition that construction of commercial guaranties must be "commercially reasonable," does not support a different result here. In *Wilson Court*, an individual guarantying his corporation's lease put the word "President" after his signature on the guaranty. That created an ambiguity as to whether the guaranty was intended to be signed personally, or only as an officer of the corporation. The Court resolved the ambiguity by deciding that he had signed personally because a corporation can't guaranty its own obligations, noting that any other interpretation of the guaranty would render it meaningless and therefore commercially unreasonable. The case did not involve a contention that unambiguous contract language drafted by a party should be ignored if it arguably provided no benefit to the drafting party. Here, there is no ambiguity to resolve in the bank-drafted language of the Deed of Trust, which confirmed that it secured "any and all obligations" under "all guaranties" executed in connection with the Indebtedness. Unlike *Wilson Court*, the intent is set forth in the plain, unambiguous language of the Deed of Trust, including its mandatory, specific definitions. No interpretation is needed and it would not be "reasonable" to diametrically change those terms in the guise of "interpreting" them.

provision of the statute is subsection (10), which states as follows:

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

Having determined that guarantors' obligations were secured by the deeds of trust in *First Citizens*, Division II turned to the question of whether the bank could pursue a deficiency judgment against the guarantors after a trustee's sale under those deeds of trust. In construing RCW 61.24.100(10), Division II applied the well-established statutory interpretation principle of *expressio unius est exclusio alterius*, i.e., "Expression of one thing in a statute implies the exclusion of others, and this exclusion is presumed to be deliberate." 178 Wn. App. at 216-17, n.15. Division II noted that:

Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure by allowing the lender to sue a commercial loan guarantor if the guaranty was not secured by the foreclosed deed of trust. [Emphasis in original.]

Applying that principle, Division II found that subsection (10) "further implies that where a guaranty was secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank cannot sue the guarantor for any deficiency remaining after the trustee's sale of the secured property." *Id.* (emphasis in original). Here, the Harvey and Gentry guaranty obligations were secured by the Deeds of Trust. They were also the "substantial equivalent" of their LLC's obligations to pay the Note and

Indebtedness to the bank.<sup>26</sup> As a result, Washington Federal is barred from pursuing deficiency claims against them by its election to non-judicially foreclose the Deeds of Trust securing those obligations.

Division II's statutory interpretation in *First-Citizens* is consistent with other modern Washington decisions. Legislative inclusion of certain items within a category necessarily implies that other items in that category were intended to be excluded. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* ...." *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999).

In *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008), this Court was asked to decide whether a provision of the Washington Uniform Anatomical Gift Act, stating that gifts of human body parts "may be accepted by any hospital," also permitted gifts of such items to non-

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<sup>26</sup> Washington Federal has conceded this, stating that the Harveys' guaranty "is not unrelated to the [commercial loan] debt; it is part of the same obligation." Answer in *Harvey* at 12. The same statement is made in its Answer in *Gentry* at 13. However, the bank in the same sentence illogically concludes that subsection (10) "does not apply to a payment guaranty." If the Harvey and Gentry guaranties were part of the same obligation secured by the non-judicially foreclosed deed of trust, how could the trustee's sale not preclude further claims against them with respect to the loan, in the same way that the statute bars further claims against their borrower LLC's (except in circumstances of waste or misappropriation of rents, inapplicable here)? Nor is there any inconsistency between subsection 3(c)'s reference to "deficiency judgments" against guarantors, and subsection (10)'s reference to enforcement of "any obligation" against them, as contended in the subsequent page of the Answers. The latter general term clearly includes the former more specific one.

hospitals. It rejected that contention, stating:

The canons of statutory construction do not permit such an interpretation. This court recognizes that “[o]missions are deemed to be exclusions.” *In re Det. of Williams*, 147 Wash.2d 476, 491, 55 P.3d 597 (2002) (“Under *expressio unius est exclusio alterius*, ... to express one thing in a statute implies the exclusion of the other.”); *State v. Delgado*, 148 Wash.2d 723, 729, 63 P.3d 792 (2003). Hospitals are one of several qualifying donees under subsection (1), but hospitals are the only donee listed in subsection (2) as authorized to accept an undesignated gift. If the legislature did not intend to limit undesignated gifts to hospitals, then we assume that subsection (2) would have stated that any qualifying donee could accept such gifts. [Emphasis added.]

This Court applied the same principle of statutory interpretation in *State v. Ortega*, 177 Wn.2d 116, 123-25, 297 P.3d 57 (2013):

Neither the general presence requirement nor the other exceptions to that rule expressly allow an officer to rely on the request of a witnessing officer in arresting a misdemeanor or gross misdemeanor suspect. The doctrine of *expressio unius est exclusio alterius* (“to express or include one thing implies the exclusion of the other”), Black’s Law Dictionary 661 (9<sup>th</sup> Ed. 2009) supports our finding that the express authority to rely on the request of another officer in making an arrest for a traffic infraction indicates that such authority does not extend to other non-felony offenses.”

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Moreover, the exception under RCW 10.31.110(6), which expressly allows an officer to rely on another officer’s request to arrest a driver for a traffic infraction, would be unnecessary if an officer were permitted to arrest a suspect of any nonfelony offense at the request of an officer who witnessed the misconduct.

Similarly, it would have been unnecessary for the Legislature to include subsection (10) in RCW 61.24.100, if lenders were entitled to pursue deficiency judgments against guarantors of commercial loans, regardless of whether their guaranty obligations were or were not secured by the non-

judicially foreclosed deed of trust. There is no reason to interpret the subsection in such a manner. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (“We look first to the plain meaning of the statutory language, and we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.”).

**2. Division I Erroneously Declined to Apply the *Expressio Unius Est Exclusio Alterius* in *Gentry*.**

In its *Gentry* opinion, Division I disagreed with the straightforward reasoning of Division II in *First-Citizens*. It explained its interpretation of RCW 61.24.100(10) as follows:

The problem with the Gentrys’ interpretation is that it requires striking from the statute the word “not,” as indicated by the following revision:

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.

But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is not secured by the deed of trust that was foreclosed by a trustee’s sale. In that situation, the trustee’s sale does not preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word “not” from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.

179 Wn. App. at 483 (bold/strikethrough in original). Of course, Division II’s purely “permissive” interpretation would require striking not two words but the entire last portion of subsection (10), as follows:

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.~~

Indeed, under Division I's interpretation, the exception would swallow the rule. Rather than having to satisfy the "if" condition, lenders would be able to pursue deficiency judgments against guarantors in any scenario.

Division I's opinion in *Gentry* failed to even discuss the application of the principle of *expressio unius est exclusio alterius* to RCW 61.24.100(10). Instead, it opined that the Gentrys' interpretation (and that of Division II in *First-Citizens*) was "grounded in a logical fallacy," concluding that "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. 179 Wn. App. at 484-85.

The only authority cited by Division I in *Gentry* for this proposition was a nearly century-old criminal case, *State v. Holland*, 99 Wash. 645, 170 P. 332 (1918). *Holland* involved the interpretation of a statute permitting pharmacists to sell "alcohol for mechanical or chemical purposes only." It required sellers to maintain a book recording each sale made and the true purpose for which the purchase was made. The question on appeal was whether a pharmacist could take at face value the purpose identified by his customer. The court held that he could not, and that defending such a charge required a good faith belief in the customer's stated purpose.

The relevance of the *Holland* decision here is a mystery, yet Division I adopted it as controlling authority:

Putting aside terminology differences, like *Holland*, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

*Gentry*, 179 Wn. App. at 485. *Holland* makes no reference to “inverse,” “converse” or other logical terms. Division II’s opinion fails to explain how that decision applies to the question presented in *Gentry* and *Harvey*, i.e. whether the word “if” in RCW 61.24.100(10) should be read as “only if,” as the principle of *expressio unius est exclusio alterius* clearly requires. Division II’s interpretation must accordingly be reversed.

**C. Language in the Guaranties Purporting to Waive the Protections of the Deed of Trust Act Violates Public Policy.**

Mortgage foreclosure statutes, both judicial and non-judicial, express the public policy of Washington – a public policy in place since 1869. See *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812 (1977) (finding that foreclosure statute is “expressive of the public policy of the state”). This Court has previously declined to enforce contractual provisions purporting to waive other requirements of RCW Chapter 61.24. In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 108-09, 285 P.3d 34 (2012), it rejected the argument that a deed of trust grantor had contractually waived the requirement that a foreclosing “beneficiary” be the holder of the obligations secured by the deed of trust:

This is not the first time that a party has argued that we should give effect to its contractual modification of a statute.

... The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly.

*Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), reiterated the holdings in *Bain*, determining that grantors could not waive the requirement that deeds of trust against agricultural land must be foreclosed judicially. The Court noted that the Deed of Trust Act “is not a rights-or privileges-creating statute,” and that its provisions “are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” 177 Wn. App. at 106. In *Albice v. Premier Mort. Svcs. of Wash., Inc.*, 157 Wn.2d 560, 567, 276 P.3d 1277 (2012), it held that a non-judicial foreclosure sale was void because it occurred outside the statutory time frame, regardless of fact that extensions were agreed upon by the parties.<sup>27</sup>

The enforceability of waivers of the protections of RCW 61.24.100(10) was not decided in either *Gentry*, *Harvey* or *First-Citizens*. However, Division II in *First-Citizens* made it clear in dicta that such waivers would have been rejected if the issue were squarely presented. 178 Wn. App. at 212, n.5.

Division II addressed the issue of waiver more directly in *First*

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<sup>27</sup> See also *Dennis v. Moses*, 18 Wash. 537, 577-79, 52 P. 333 (1898) (holding that a borrower cannot prospectively waive his right of redemption under the foreclosure statute because of public policy considerations); *Conran v. White & Bollard*, 24 Wn.2d 619, 629, 167 P.2d 133 (1946) (finding that agreements that chill or suppress one’s right to bid at a foreclosure sale “have long been held invalid against public policy.”). It should be noted that none of the guarantor waiver cases cited by Washington Federal in its Answers involved the waiver of statutory (as opposed to contractual) rights.

*Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 795, 313 P.3d 1208 (2013). In *Reikow*, as in *Harvey* and *Gentry*, the plaintiff sought a post-foreclosure deficiency against guarantors. The foreclosing party invoked boilerplate “anti-deficiency law waivers” to avoid application of RCW 61.24.100(5), which limits any deficiency judgment to the amount by which the debt exceeds the fair value of the property foreclosed (as opposed to the amount the debt exceeds the sale bid). 177 Wn. App. at 790-91. Division II recognized that post-foreclosure remedies are exclusively governed by the Deed of Trust Act, and held that a foreclosing party may not obtain a larger deficiency than the statute allows. *Id.* at 794-96. *Reikow* specifically cited, and is in accord with, this Court’s decisions in *Bain*, *supra*, and *Schroeder*, *supra*.

Because Division II held in *Reikow* that the foreclosing party cannot contractually expand a limited, legislatively created remedy, it did not base its ruling on the enforceability of the provision as a “waiver.” It nonetheless noted that waivers require intentional abandonment of known rights, stating that: “were we to find the issue relevant to this dispute, the broad boilerplate waiver in the guaranties’ fine print could hardly defeat the explicit and specific provisions of RCW 61.24.100(5). 177 Wn. App. at 795, n. 4.

There was nothing “knowing or intentional” about the waivers buried in the *Harvey* and *Gentry* guaranties.<sup>28</sup> Beyond those obstacles to

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<sup>28</sup> *Harvey* CP 518-20 and 696. Mr. *Harvey* did not notice those provisions, which made no reference to RCW Chapter 6.124, and he had no idea what was meant by the phrases “one action law” or “anti-deficiency law.”

enforcing waivers generally, it must be emphasized that RCW 61.24.100 is mandatory, defining the only circumstances under which a guarantor may be held liable for a deficiency judgment. Again, it begins by stating that “Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained ...” Although RCW 61.24.100(9) allows lenders to waive the right to recover a deficiency judgment which the statute would otherwise permit, nothing in the statute allows a lender to contractually impose a deficiency judgment which the statute prohibits. Indeed, by securing the guarantors’ obligations with the Deeds of Trust, the bank effectively waived its deficiency rights by contract, as expressly permitted by subsection (9). *First-Citizens*, 178 Wn. App. at 216 n.13 (“Moreover, RCW 61.24.100(9) specifically contemplates a party’s ability to forego its contractual right to recover any portion or all of a deficiency, which First-Citizens did when its predecessor, Venture Bank, drafted the deeds of trust in such a manner as to secure the Allisons’ guaranty.”)

If Washington Federal were entitled to enforce a waiver of the anti-deficiency protections, it could subvert the underlying rationale for the Deed of Trust Act by obtaining the speedy and inexpensive remedy of non-judicial foreclosure, meanwhile denying guarantors the quid pro quo of protections provided by the Act. The Legislature did not intend such a result, the statute prohibits it, and it should not be adopted by this Court.

### III. CONCLUSION

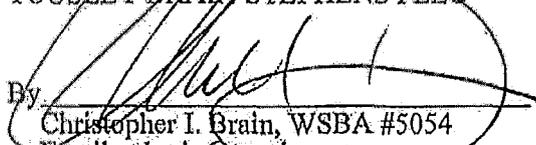
For the reasons stated above and in their briefing to Division I and their Petitions for Review by this Court, the Gentrys and Harveys respectfully request that the Court of Appeals decisions in *Gentry* and *Harvey* be reversed, that the Superior Court's summary judgments in their favor be affirmed, and that contractual waivers of the protections provided by RCW 61.24.100 should be declared void and unenforceable.

DATED this 8<sup>th</sup> day of August, 2014.

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**CERTIFICATE OF SERVICE**

I, Dean A. Messmer, hereby certify that on the 8th day of August, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 8<sup>th</sup> day of August, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Dean A. Messmer

## OFFICE RECEPTIONIST, CLERK

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**Subject:** Nos. 90085-0 (Washington Federal v. Gentry) and 90078-7 (Washington Federal v. Harvey)

Dear Clerk,

Attached for filing in the above appeals is the Consolidated Supplemental Brief of Petitioners Gentry and Harvey. It is being filed pursuant to the Court's letter dated July 22, 2014, granting motions authorizing the parties in those two appeals to file consolidated briefs.

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