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No. 66301-1-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

FREESTONE CAPITAL PARTNERS L.P.; FREESTONE LOW
VOLATILITY PARTNERS LP; FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.; and FREESTONE LOW VOLATILITY QUALIFIED
PARTNERS LP,

Respondents,

v.

MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California
limited liability company; MKA CAPITAL GROUP ADVISORS, LLC, a
California limited liability company; MICHAEL A. ABRAHAM, an
individual; and JASON SUGARMAN, an individual,

Appellants.

REPLY BRIEF

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I. ARGUMENT IN REPLY

This Court should reverse on *de novo* review the \$30,477.70 in summary judgments against the guarantors. When balancing the interests of California and Washington, this Court should find that the defenses of Cal. Civ. Code §§ 2845 and 2849 are available to these California guarantors. This is the best accommodation possible between both states' interests and laws and follows from express provisions of the Restatement. Reversal is consistent with numerous Washington precedents.

This Court previously reversed the trial court, directing it to conduct a choice of law analysis pursuant to Rest. (2nd) Conflicts of Law §§ 6, 188, and, potentially, 194. On remand, the trial court did not balance the factors set forth in the Restatement, but reached a conclusion based upon incorrect emphasis of some facts and incomplete legal analysis. Respondents seek to bolster the trial court's erroneous summary judgment order by selectively ignoring explicit sections of the Restatement and all of the California connections and policy issues in this case, and through several misstatements of the law and the record.

On *de novo* review, this Court should find that the guarantors never waived the protections of California law, and conclude that California law applies. The Court should reverse the summary judgments.

The trial court orders are attached in the Appendix to this brief.

A. The Standard of Review Is *De Novo*, and No Deference Is Due to the Trial Court’s Summary Judgment Ruling Upon Written Declarations, as Freestone Concedes in a Footnote.

The proper standard of review of the choice of law determinations is *de novo*. *Opening Brief*, pp. 12-13; *Freestone Capital Partners*, 155 Wn. App. at 659. Freestone concedes that the legal questions are reviewed *de novo*. *Respondents’ Brief*, pp. 18-19. Freestone then asserts that the trial court’s “findings in support of it[s] choice of law ruling” are entitled to deference. *Id.*, pp. 18-19. Freestone concedes at the end of footnote 8 that decisions on written declarations are reviewed *de novo*. *Id.* at p. 19, note 8, citing *Truly v. Heuft*, 138 Wn. App. 913, 916, 158 P.3d 1276 (2007). The choice of law issue decided on written declarations without any hearing is reviewed *de novo*.

Freestone cites no Washington authority applying a clear error standard to a choice of law determination on summary judgment supported by declarations, like this decision was. *See* CP 210-36. Here, the trial court held no hearing. The trial court did not set forth findings. *See* CP 963-84. Moreover, Freestone moved for summary judgment, professing no dispute of fact. CP 210-36. Freestone’s footnoted concession provides the accurate and correct *de novo* standard for all aspects of the choice of law ruling. *See also Jenkins v. Snohomish County Public Utility District No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986) (no deference to trial court ruling if

it was based on documents and no credibility or live witnesses were involved), citing *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) (where record consists of written material and the trial court has not considered testimony, assessed credibility or competency, or weighed evidence, then review is *de novo*).

This Court should review the trial court order *de novo*, and reverse the judgments.

B. Freestone Identifies No *Expression of Waiver* in the Short Guarantees, Underscoring the Trial Court’s Error in Finding Waiver and Supporting the Conclusion That a Conflict of Laws Exists.

The trial court failed to follow or properly apply California law when it ruled as a matter of law that there was waiver. The guarantors demonstrated in their Opening Brief that a conflict of laws exists because the short guarantees contain no expression of waiver of California’s statutory protections. *Opening Brief*, pp. 13-22. Freestone does not dispute (nor could it) that § 2856 of the California Civil Code requires *express* waiver of the statutory protections as supported in the Opening Brief, p. 17. Freestone argues that no magic words are required for waiver. *See Resp. Brief*, p. 40. While the guarantors agree that the words need not be “magic,” they must express “waiver.” Nothing in these guarantees does. When the Court examines Freestone’s argument, it should conclude that

Freestone is urging this Court to find implied waiver as a matter of law.

Implied waiver is insufficient. Even implied waiver is not shown.

The guarantors demonstrated that under the California statutory scheme guarantees are simultaneously (1) unconditional and subject to immediate payment without demand, and (2) subject to a guarantors' right to invoke code protections including § 2845 that permit a guarantor to require a creditor to first pursue the principal or collateral. *Opening Brief*, pp. 15-16. This duality confounds Freestone and confused the trial court. This Court should accept the framework of the statutory scheme. The guarantors argued that the trial court incorrectly read the language in the guarantees describing the guarantees as unconditional and subject to immediate payment as incompatible with assertion of the statutory defenses. *Opening Brief*, pp. 20-22. The trial court has it wrong. It is precisely because guarantees are written this way that California enacted *statutory protections* not required to be in the guarantees themselves, but available to guarantors unless expressly waived. No express waiver exists. The affirmations of the immediate obligation to pay in the guarantees are not waivers. The trial court erred when it held that the guarantors waived their statutory rights in the guarantees.

Freestone in response offers no theory as to how language in the guarantees evidences a voluntary giving up of rights. *Resp. Brief*, pp. 38-

42. Freestone instead restates the language in the guarantees, arguing that this could mean nothing other than “unconditional and immediate payment.” *Id.*, p. 38. Freestone’s analysis is wrong because Freestone takes the approach that the guarantees should contain the right the guarantors seek to invoke. But the right exists independently in the statute. It does not require a provision in the guarantee. What the guarantees must contain, for Freestone to prevail, is waiver of that right. They do not. The Court must assume the existence of the protections, and then review the language of the guarantee to determine if the guarantors expressly waived those protections. Significantly, no expression of waiver exists.

Freestone curiously seeks to rely on *Brunswick Corp. v. Hays*, 16 Cal. App. 3d 134, 138-89 (Cal. Ct. App. 1971). *See Resp. Brief*, p. 41. In *Brunswick*, the court found waiver of the statutory protection based on a provision stating in full, “This Guaranty is absolute, unconditional and continuing, and payment of the sums for which Guarantor is liable hereunder shall be made . . . notwithstanding that Brunswick holds reserves, credits, collateral, security or other guarantees against which it may be entitled to resort for payment, . . .” (emphasis added, ellipses in original). 16 Cal. App. 3d at 138. The language beginning with “notwithstanding” has no equivalent in the guarantees at issue. Contrasting

the guarantees in *Brunswick* with the guarantees at issue here, *Brunswick* supports a conclusion that these guarantees do not express waiver.

Multiple Washington case authorities also demonstrate that the guarantees should not be construed to waive California's statutory protections. *Opening Brief*, pp. 19-20.¹ Freestone distinguished none of these cases. *Resp. Brief*, pp. 41-42. Freestone unconvincingly cites *Century 21 Products, Inc. v. Glacier Sales*, 129 Wn.2d 406, 918 P.2d 168 (1996), a case that does not address waiver. Freestone and the trial court conflate the inquiry for waiver with how Washington would construe an "unconditional" guaranty.

Freestone ignores this determinative statement by the trial court: "The guarantee does not contain any language indicating a waiver of rights." CP 981, lines 24-3. How the trial court went from that determinative statement to a finding of waiver is perplexing. This Court should reverse the finding of waiver and perform the conflict of laws analysis.

¹ Citing *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007); *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005); *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 918, 506 P.2d 20 (1973); *Security State Bank v. Burk*, 100 Wn. App. 94, 100, 995 P.2d 1272 (2000), citing *United States v. Willis*, 593 F.2d 247, 254 (6th Cir. 1979); and *Fruehauf Trailer Co. of Canada, Ltd. v. Chandler*, 67 Wn.2d 704, 709, 409 P.2d 651 (1996).

C. California Law Should Apply Based on the Relevant Restatement Sections and California's Most Significant Relationship to the Particular Issue of What Protections Are Due the California Guarantors.

To resolve the conflict of laws issue, this Court should focus on the critical issue whether California has the most significant relationship to the particular issue of whether the California guarantors can assert the California statutory defenses of §§ 2845 and 2849. The Opening Brief analyzes this material inquiry, concluding that California law should apply. *Opening Brief*, pp. 24-38. Under both § 188 and § 194 of the Rest. (2nd) of Conflicts of Law, this Court should conclude that the California statutory defenses are available.

Freestone urges that this Court utilize § 194, despite the fact that Washington courts have specifically applied § 188 to guarantee contracts. *Resp. Brief*, pp. 23-26. *See also Opening Brief*, pp. 23-24, citing *Potlatch, Freestone Capital Partners*, and *Granite Equip. Leasing Corp.* Freestone then argues that § 195 might control. *Id.* at p. 26. If this Court were to apply either of these sections, the guarantors still should prevail. Under both of these sections, this Court should conclude that California law controls the particular issue of the guarantors' available defenses. Both of

these sections support reversal based on California's more significant relationship to the transaction and the particular issue.²

1. Freestone formulates a false standard

This Court must consider simply this: whether California has the most significant relationship to the parties and the transaction with respect to the guarantors' available defenses. It does.

Freestone pretends that the applicable Restatements provide for application of the lenders' home state law "in the absence of extraordinary circumstances." *See Resp. Brief*, p. 24. This formulation of the inquiry is incorrect. Freestone does not accurately paraphrase the Restatement sections on which it wishes to rely.

Freestone also uses the word "presumption" repeatedly in its brief, as if Freestone enjoyed a presumption under the Restatement tests that Washington law applies. *See, e.g., id.* at pp. 24, 27. The Restatement does

² Section 194 provides that the law governing the principal obligation applies except that "on occasion, a state which is not the state whose local law governs the principal obligation will nevertheless, with respect to a particular issue, be the state of most significant relationship to the suretyship contract and the parties and hence the state of the applicable law." *Opening Brief*, p. 24, citing *Freestone Capital Partners*, at 666-67, citing comments to § 194. Section 195 provides that the laws of the place of repayment apply "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." § 195.

not articulate a “presumption.”³ Rather, §§ 194 and 195 state a general proposition that is subject to an explicit exception. While Freestone generally avoids talking about the explicit exception, choosing to reiterate frequently that the Notes select Washington law, the exceptions are the key to this Court’s decision if the Court applies §§ 194 and 195. Like when § 188 is analyzed, when §§ 194 and 195 are analyzed, this Court should apply California law because, with respect to the particular issue of the guarantors’ defenses, California has the most significant relationship to the parties and the transaction.

Freestone argues that if upon application of these provisions the Court concluded that California law applies to the issue it hand, this Court would be “ignoring” the Restatement rules, “defeat[ing] the purpose of the rules,” and “rendering the ALI’s careful work a nullity.” *Resp. Brief*, p. 30. Freestone’s argument depends on ignoring the plainly stated exceptions in § 194 and § 195, and the test of § 188. Contrary to Freestone’s argument, failure to apply these exceptions would do an injustice to the Restatement and its principles. An accurate analysis under § 188, § 194 or § 195 leads

³ Freestone’s lengthy footnote 13 citing extra-jurisdictional authorities does not support an assertion that a “presumption” exists under the Restatement. These cases either do not discuss the Restatement sections, or do not discuss a presumption.

to the application of California law to the issue of the guarantors' available defenses.

2. By applying California law, this Court can best accommodate California's most significant relationship and important policy interests *and* Washington's interests.

California has the most significant relationship to the parties and the transaction with respect to the particular issue of the guarantors' defenses. Its policy interests are strong and clearly defined. Selection of California law will best accommodate both states' policies, a main objective of the Restatement. Selection of Washington law, in contrast, will sacrifice California's interests.

This Court is aware from the Opening Brief of the long and extensive history of the codification by the California legislature of the protections a guarantor can assert. *See Opening Brief*, pp. 15-18. California has a legislative policy to offer guarantors additional protections from enforcement. *Id.* The California judiciary has long enforced these protections. *Id.* These protections are based in equity. *Id.* Sections 2845 and 2849 do not deny the lender ultimate relief, but can

result in delay where lenders must first pursue the principal and collateral before resort to a guarantor.⁴

These strong policy interests on California's behalf do not clash with Washington's interests. While Washington does not have these same protections, Washington's interests are more generally that contracts be enforced and that lenders can pursue debts. Application of California law delays payment to Freestone from the guarantors by prescribing the order in which Freestone must proceed. This is compatible with Washington's interests that its lenders get repaid.

Enforcement of the guarantees against Abraham and Sugarman further concerns California because the guarantors and their assets are located there. The enforcement of the judgments must necessarily occur in California. The collateral securing the debt also is located there. Additionally, Freestone does not dispute that the business into which the lenders invested their money was centered on California real estate transactions. California has a strong interest in the debtors' available defenses.

⁴ Freestone argues that application of California law will "*deprive* the lender of payment." *Resp. Brief*, p. 32 (emphasis original). The result is not so draconian. It will delay payment from the guarantors in these circumstances where Freestone first must pursue the principal and collateral.

Freestone states that application of Washington law “furthers relevant Washington policies,” *see Resp. Brief*, p. 32, without identifying what these policies are. Freestone later argues that “Washington has a compelling interest in seeing its law on the meaning of absolute and unconditional guarantees applied.” *Resp. Brief*, p. 33. It is not at all clear that Washington has a strong interest in foiling California’s statutory protections grounded in equity where Freestone lent to a business concern in California and chose to accept guarantees from individuals residing in California.

As the Restatement urges, this Court looks for the most effective accommodation of both states’ policies. *Opening Brief*, p. 22, note 7 and p. 38, citing Rest. § 6 and comments. That choice is California law. By permitting the guarantors to require that the lenders first pursue the principal and collateral under Cal. Civ. Code § 2845 and § 2849, this Court will not be vitiating the guarantors’ obligations. None of Washington’s policy interests will be undone by enforcing the California law. Washington’s general interest in enforcement of contracts to protect its lenders is served even where collection from the guarantors is delayed based on the California statute. On the other hand, if this Court applied Washington law the policies of California would be completely sacrificed. The “best possible accommodation” is the application of California law.

Freestone itself points out that Washington law does accommodate statutory defenses even where guarantees are involved. *Resp. Brief*, p. 44, note 27. In *Security State Bank v. Burk*, the Court of Appeals applied an unwaivable section of the UCC to an unconditional guaranty. 100 Wn. App. at 97-99. Freestone also cites *Century 21 Products, Inc. v. Glacier Sales*, a case that recognizes the “equitable considerations” that apply to guarantors. 129 Wn.2d at 412. This court’s recognition of California’s statutory defenses is not incompatible with Washington law and policy.

The trial court and Freestone espouse an inflexible approach that fails to balance and accommodate both states’ interests. Freestone even argues the Restatement “militates” in favor of Washington law. *Resp. Brief*, p. 32. This Court should reject this approach. Allowing the guarantors to assert the protections of Cal. Civ. Code § 2845 and § 2849 best serves the Restatement objectives.

3. Washington courts do not hesitate to apply the law of the state where guarantors are domiciled based on the interest of the domicile state in an enforcement issue

This Court should follow the rationale of *Pacific Gamble Robinson, G.W. Equipment Leasing*, and *Potlatch* to apply California law to the issue at hand. *See Opening Brief*, pp. 29-32. These decisions demonstrate that Washington courts will apply the law of a state where the

obligors reside over the law of the state where the lender is located based on the interests of the guarantors' state. *Id.* In these cases, the courts applied the law of the guarantors' states to issues concerning available defenses based on the community property laws of the obligors' states. *Id.* In their Opening Brief, the guarantors analogized a state's interest in enforcement of its community property laws with California's interest in enforcement of its guarantor protections. *Id.* The guarantors urged this Court to apply the California laws like the courts in *Pacific Gamble Robinson, G.W. Equipment Leasing*, and *Potlatch* applied the law of the obligors' home states to particular issues in those lender disputes. *Id.*

Freestone attempts to dismiss these cases because the particular issue involved concerned community property laws. Freestone argues that the cases are irrelevant here because community property laws are not at issue. *Resp. Brief*, p. 34. Freestone overlooks the significance of the cases in establishing that Washington will apply the exception of the Restatements and recognize a defense based on the law where the obligor is domiciled. This is so even when other factors would point to the application of the lenders' states' laws. As noted in the Restatement, the contacts are not merely counted. *Opening Brief*, pp. 26-27. Nor is the situs of repayment determinative, as these cases show.

This Court need do nothing more than follow the example of *Pacific Gamble Robinson, G.W. Equipment Leasing*, and *Potlatch* to recognize California's interest in protecting its guarantors and apply California law.

4. Cal. Civ. Code § 1646 is not relevant, because an issue of “interpretation” is not presented in this conflict of laws analysis

Cal. Civ. Code § 1646 is irrelevant to the issue whether the guarantors can assert the protections of California's statutory code. That issue is decided by Washington's conflict of laws analysis, as this Court directed in the first appeal. Freestone argues that under § 1646 “the guarantees are interpreted according to the ‘law and usage’ of Washington, concluding that the statutory protections are unavailable because they do not exist in Washington.” *See Resp. Brief*, p. 36. That conclusion does not follow. To the extent that § 1646 would point the Court to Washington's conflict of laws analysis, it is redundant. Moreover, the rights that the guarantors assert under California law are statutory protections that do not arise from the language of the guarantees. Interpretation of the guarantees is not necessary to the conflict of laws analysis. Section 1646 speaks to interpretation of the guarantees. The

conflict of laws analysis does not turn on interpretation of a provision in the guaranty.⁵ Section 1646 is irrelevant.

Freestone failed to rebut the guarantors' precedent and authority that § 1646 is a rule of contract construction, not a choice of law rule. *Opening Brief*, p. 38, note 13. Because construction of the contract is not determinative of the choice of law analysis, § 1646 is irrelevant.

5. The Notes' selection of Washington law so that Freestone could avoid paying California tax on its profits is irrelevant

Freestone emphasizes the Notes' selection of Washington law as if this justifies application of Washington law to the guarantees. The Court should be unmoved. First, this Court has already ruled that the selection of Washington law for the Notes does not control. *Freestone Capital Partners, supra*. Second, the record is clear that the Notes initially selected California law. CP 420, lines 2-7 ("initially it was California"). Freestone sought to change that selection to Washington for the exclusive purpose of avoiding California taxes as admitted by Freestone's representative Justin

⁵ As noted in the Opening Brief, the statute possibly is relevant to whether the guarantees express waiver of California's statutory protections, because that is an issue of interpretation. *Opening Brief*, pp. 37-38. Both states' laws require an expression of voluntarily or knowingly giving up rights to find waiver. The guarantees do not express this. It makes more sense, however, that California law should control whether the California statute allows waiver and under what terms.

Young. *Id.* at lines 14-22.⁶ It is mere fortuity that Washington law will better serve Freestone's interests in the present dispute.

Freestone takes liberties with its language, arguing in its Statement of the Case that "[A]ll of the relevant contract documents between Freestone, MKA and the Guarantors selected Washington law as the law governing the parties' relations" *Resp. Brief*, p. 9. The present dispute shows this assertion is incorrect. The *guarantees* do not select Washington law, and they are *the* relevant contract document. Freestone had every opportunity to add a choice of law selection to the guarantors' obligations. Not only did Freestone fail to do so in the original guarantees, it failed to do so in the note extension agreements. *See, e.g.,* CP 945-54. Freestone are all sophisticated lenders who failed to protect their own interests regarding these issues. Freestone also failed to include the guarantors in its Subordination Agreement with Gottex and MKA.

Freestone suggests that the guarantors had counsel during their negotiations with Freestone. *See, e.g., Resp. Brief*, p. 4 citing CP 870-71

⁶ Mr. Young testified:

Q: And why did you make that switch [in the notes from a selection of California to Washington law]?

A: Primarily for tax reasons. We were concerned about having income, having the loan interest income off the loans being taxed by the California level, and at the advice of our accountants, if we switched the choice of law to Washington, that would further strengthen our tax, our relief of taxability from the state of California.

(citation refers instead to MKA's lawyers Skadden Arps). This is unsupported by the record. The record is clear that the guarantors had no counsel. *See Opening Brief*, pp. 6, 26. The guarantors were not unsophisticated, but they were without counsel and it is undisputed that their personal experience with California law informed their expectations of how the guarantees would work.

6. The Guarantors' expectations are a legitimate consideration for this Court

This Court should consider as further support for the application of California law the guarantors' expectation that upon default they only could be pursued *after* MKA and the collateral. *See Opening Brief*, pp. 25-26.

Freestone attempts to criticize arguments in the Opening Brief regarding the guarantors' expectations. *Resp. Brief*, pp. 9-10. Freestone misinterprets these arguments and appears to literally interpret § 6 of the Restatement (which directs consideration of the parties' expectations) as requiring testimony that a party considered the conflict of law question and had an understanding of which state's laws would apply. *Id.* The guarantors urge that the meaning of "the parties' expectations" under § 6 of the Restatement is not limited to a formal opinion on which state's laws apply. That is too legalistic, when the Restatement is meant to include

considerations of real world transactions. If a party had an understanding of what the substantive law is or would be, that is the party's expectation. Here, when they signed the guarantees in California to facilitate investment into their California business based on California real estate developments, the guarantors had an expectation that the guarantees would work like the ones with which the guarantors had personal experience. It was a justified expectation that this Court should take into account. *See Opening Brief*, p. 26.

The Opening Brief did not argue that the guarantors personally had a technical, lawyer's understanding when they executed the guarantees of which state's laws would apply. *Id. See Resp. Brief*, p. 9 ("The representation to this Court that the Guarantors 'expected' California law would apply to the guarantees is false."). The record establishes that the parties, including Freestone, overlooked this issue when the guarantees were executed. The guarantors testified that they were not aware when they executed the guarantees of a choice of law in the guarantees. CP 1140 and CP 1165 (Freestone also cites this testimony at *Resp. Brief*, pp. 9-10). This Court affirmed their understanding in the first appeal when it held that there was no choice of law in those contracts. The guarantors also testified that they understood how guarantees worked based on their business in California, and they expected these guarantees to work the

same way. *Opening Brief*, pp. 6, 26, citing CP 386 75:12-78:13; CP 398 42:4-5. This is all the guarantors assert, and it is supported by the record.

Freestone's argumentative Statement of the Case concerning these facts, *Resp. Brief*, pp. 9-10, suggests that this Court could reverse and remand for fact-finding regarding the guarantors' expectations. The guarantors believe, however, that taking all inferences in the guarantors' favor as the parties who lost on summary judgment, the record more than supports their justified expectation that California law would apply, i.e. that Freestone must first pursue the collateral and MKA. Freestone weakens its defense of the trial court orders on summary judgment by disputing and arguing numerous facts in its Respondents' Brief.

Freestone did not argue any alternative grounds for affirmance. *See Resp. Brief*, p. 48, § F. This Court should reverse the judgments because California law applies and the judgments are contrary to California law.

D. This Court Should Remand the Exoneration Defense Because California Law Applies, the Trial Court Performed No Conflict of Laws Analysis, and Material Questions of Fact Exist.

The guarantors' defense of exoneration supports reversal. *See Opening Brief*, pp. 39-46. The trial court denied the guarantors' motion to amend to clarify their exoneration defense under California law based on

its conclusion that Washington law applied. *Opening Brief*, pp. 44-45. But California has the most important relationship with respect to this issue as well. Because California law should apply, the denial of the motion to amend should be reversed.

Additionally, Freestone does not deny that the trial court failed to perform a conflict analysis to determine if California's law regarding exoneration conflicted with Washington's. *See Resp. Brief*, pp. 43-48. This supports reversal and remand.

Reversal and remand is also justified by the factual disputes. Freestone disputes the facts related to the exoneration defense, such as when the guarantors had notice of the subordination agreement and whether they consented to it. *Resp. Brief*, p. 47. Freestone fails to address how the integrated note extension agreements could be construed to establish consent when they are silent as to the Subordination Agreement. *See Resp. Brief*, pp. 45-46; *Opening Brief*, p. 41. The integration clause prohibits this Court from finding an additional agreement in the note extensions, such as consent to the Subordination Agreement. *Id.* At the least, this Court should remand for fact finding regarding exoneration and a conflict of laws analysis.

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II. CONCLUSION

This Court should reverse on *de novo* review and hold that California law controls the particular issue whether the Guarantors can assert the California statutory defenses of Sections 2845 and 2849. This results in the best accommodation possible of both California's and Washington's interests. Because the Guarantors can require the lenders first to pursue the collateral and principal, and undisputedly did so demand, CP 508, ¶¶ 2-3, this Court should reverse the judgments.

Additionally, this Court should reverse the judgments and denial of the motion to amend and should remand the exoneration defense because (1) California law should apply and supports litigation of the defense, (2) the trial court did not perform a conflict of laws analysis of the exoneration defense, and (3) questions of fact exist regarding the exoneration defense.

This Court should reverse the money judgments for further proceedings, and instruct that California law applies to the issues on review.

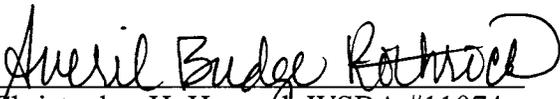
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Respectfully submitted this 11th day of May, 2011.

By: 
~~Christopher H. Howard, WSBA #11074~~
Averil Budge Rothrock, WSBA #24248
Virginia Nicholson, WSBA #39601
Attorneys for Appellants,
Michael Abraham and Jason Sugarman

APPENDIX - A

FILED
KING COUNTY WASHINGTON

The Honorable Jim Rogers

OCT 26 2010

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FREESTONE CAPITAL PARTNERS L.P.;
FREESTONE LOW VOLATILITY PARTNERS
LP; FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.; and FREESTONE LOW
VOLATILITY QUALIFIED PARTNERS LP,

Plaintiffs,

v.

MKA REAL ESTATE OPPORTUNITY FUND I,
LLC, a California limited liability company; MKA
CAPITAL GROUP ADVISORS, LLC, a
California limited liability company, MICHAEL
A. ABRAHAM, an individual; and JASON
SUGARMAN, an individual;

Defendants.

No. 08-2-29787-0 SEA

ORDER GRANTING PLAINTIFFS'
RENEWED MOTION FOR
SUMMARY JUDGMENT

THIS MATTER having come on regularly before the undersigned Judge of the
above-entitled court upon Plaintiffs' Renewed Motion for Summary Judgment (the
"Motion") following the remand of the case for further consideration of the law applicable
to the guarantees executed by Michael Abraham and Jason Sugarman, and the Court
having considered the papers submitted by the parties in support of and in opposition to the
Motion, including:

ORDER GRANTING SUMMARY JUDGMENT - 1
DWT 15459719v5 0085965-000001

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 • 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 • Fax: (206) 757-7700

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1. Plaintiffs' Renewed Motion for Summary Judgment;
2. The Declaration of Justin Young in Support of Renewed Motion for Summary Judgment and Exhibits 1-17 thereto [hereinafter the "YOUNG SUMMARY JUDGMENT DECLARATION"];
3. The Declaration of Brad Fisher in Support of Plaintiff's Motion for Preliminary Injunction Compelling Contractual Disclosures (dated September 25, 2008) [filed sub nom. 6];
4. The Declaration of Justin Young in Support of Plaintiffs' Motion for Preliminary Injunction Compelling Contractual Disclosures (dated September 25, 2008) [filed sub nom. 8];
5. The Declaration of Ken Miyoshi (dated October 1, 2008) [filed sub nom. 16];
6. The Declaration of Brad Fisher in Opposition to Defendants' Motion for Stay and Guarantors' Motion to Dismiss for Want of Jurisdiction (dated January 20, 2009) [filed sub nom. 30];
7. The Declaration of Justin Young in Opposition to Defendants' Motion for Stay and Guarantors' Motion to Dismiss for Want of Jurisdiction (dated January 20, 2009) [filed sub nom. 34];
8. The Declaration of Brad Fisher in Support of Reply on Order to Show Cause (dated January 23, 2009) [filed sub nom. 36];
9. The Declaration of Justin Young Re Reply in Support of Continuing Reporting Obligations (dated January 26, 2009) [filed sub nom. 37];

- 1 10. The Declaration of Justin Young in Opposition to Motion to Strike (dated
- 2 January 28, 2009) [filed sub nom. 47];
- 3 11. The Declaration of Justin Young in Support of Plaintiffs' Motion for
- 4 Summary Judgment (dated February 13, 2009) [filed sub nom. 54];
- 5 12. The Declaration of Justin Young Re Supplemental Submissions on Original
- 6 Promissory Notes (dated March 18, 2009) [filed sub nom. 69];
- 7 13. The Declaration of Justin Young Regarding Judgment Amounts (dated
- 8 March 26, 2009) [filed sub nom. 76];
- 9 14. The Declaration of Brad Fisher Re Fees and Expenses (dated March 26,
- 10 2009) [filed sub nom. 75];
- 11 15. The Declaration of Justin Young Regarding Payment of Fees and Costs
- 12 (dated April 2, 2009) [filed sub nom. 81];
- 13 16. Defendants Abraham's and Sugarman's Response in Opposition to
- 14 Plaintiffs' "Renewed" Motion for Summary Judgment;
- 15 17. Declaration of George Baker in Support of Defendants Abraham's and
- 16 Sugarman's Response in Opposition to Plaintiffs' "Renewed" Motion for
- 17 Summary Judgment;
- 18 18. Declaration of Brian Wagoner in Support of Defendants Abraham's and
- 19 Sugarman's Response in Opposition to Plaintiffs' "Renewed" Motion for
- 20 Summary Judgment;
- 21 19. Declaration of Daniel D. White in Support of Defendants Abraham's and
- 22 Sugarman's Response in Opposition to Plaintiffs' "Renewed" Motion for
- 23 Summary Judgment;

- 1 20. Declaration of John S. Hekman in Support of the Guarantor's Response in
- 2 Opposition;
- 3 21. Declaration of Averil Rothrock in Support of Defendants Abraham's and
- 4 Sugarman's Response in Opposition to Plaintiffs' "Renewed" Motion for
- 5 Summary Judgment;
- 6 22. Plaintiffs' Reply in Support of Renewed Motion for Summary Judgment;
- 7 23. Second Declaration of Justin Young in Support of Plaintiffs' Renewed
- 8 Motion for Summary Judgment Against Guarantors and in Opposition to
- 9 Guarantors' Motion to Amend; and
- 10 24. Declaration of Ragan Powers in Support of Plaintiffs' Renewed Motion for
- 11 Summary Judgment Against Guarantors and in Opposition to Guarantors'
- 12 Motion to Amend;

13 and the Court having heard argument of counsel on October 15, 2010, and in all things
14 being fully advised, now, therefore,

15 The Court rules as follows:

16 The Motion is **GRANTED**.

- 17 A. As previously determined, MKA Real Estate Opportunity Fund I, LLC
- 18 [hereinafter "MKA Opportunity"] is in default of its payment obligations to
- 19 the plaintiffs under the promissory notes appended to the YOUNG
- 20 RENEWED SUMMARY JUDGMENT DECLARATION as Exhibits 1-9
- 21 [hereinafter the "Notes"].
- 22 B. Guarantors Michael Abraham and Jason Sugarman [hereinafter
- 23 "Guarantors"] are in default of their obligation to make immediate and

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unconditional payment of the amounts owed to the various plaintiffs under the Notes.

C. For the reasons set forth in the Court's oral ruling of October 18, 2010, a transcript of which is appended hereto as Exhibit A and which is incorporated by reference, the Court rules and finds that Washington, rather than California, law applies to the interpretation and performance of guarantees.

D. For the reasons set forth in the Court's oral ruling of October 18, 2010, a transcript of which is appended hereto as Exhibit A and which is incorporated by reference, the Court rules and finds that even if California law were applied, the language in the guarantees promising unconditional and immediate payment upon default constitutes a waiver of the statutory defenses asserted by guarantors.

E. As of October 15, 2010, Michael Abraham is liable to the Freestone Plaintiffs in the total amount of \$30,477,700.00 (exclusive of fees, expenses and costs), comprised of the following:

- (1) \$9,835,985.00 to plaintiff Freestone Capital Partners L.P.;
- (2) \$9,558,915.00 to plaintiff Freestone Capital Qualified Partners L.P.;
- (3) \$4,156,050.00 to plaintiff Freestone Low Volatility Partners LP;
- and
- (4) \$6,926,750.00 to plaintiff Freestone Low Volatility Qualified Partners LP.

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F. As of October 15, 2010, Jason Sugarman is liable to the Freestone Plaintiffs in the total amount of \$6,926,750.00 (exclusive of fees, expenses and costs), comprised of the following:

(5) \$1,385,350.00 to Freestone Capital Qualified Partners L.P;

(6) \$1,385,350.00 to Freestone Low Volatility Partners LP; and

(7) \$4,156,050.00 to Freestone Low Volatility Qualified Partners LP.

G. The Freestone Plaintiffs are entitled to money judgments consistent with the foregoing, and such Judgments shall be entered forthwith.

H. To the extent Michael Abraham and Jason Sugarman owe the same amounts to the same Freestone entities under the same notes, their liability for said amounts shall be a joint and several liability of both as provided in the individual judgments.

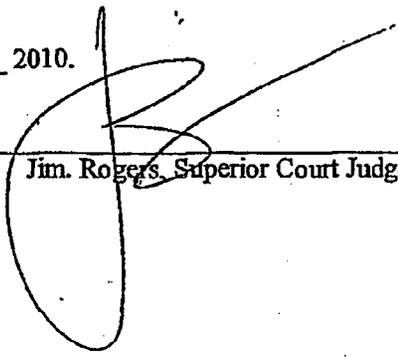
I. In conjunction with the previously unappealed issues and/or judgments, such Judgments shall fully and finally resolve all remaining issues in this matter.

IT IS SO ORDERED.

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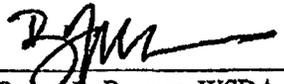
DATED this 26 day of Oct 2010.



Jim. Rogers, Superior Court Judge

Presented by:

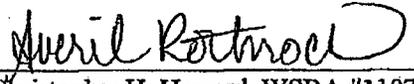
Davis Wright Tremaine LLP
Attorneys for Plaintiffs

By 

Ragan L. Powers, WSBA #11935
Brad Fisher, WSBA #19895

Approved as to form: .
Notice of Presentation waived:

Schwabe, Williamson & Wyatt, PC
Attorneys for Defendants

By 

Christopher H. Howard, WSBA #11074
Averil Rothrock, WSBA #24248

EXHIBIT A

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THE COURT: Thank you for your patience. I have worked further on this problem. It should be in a law school exam somewhere.

This is my decision in the case of Freestone Capital Partners and MKA Real Estate on remand from the Court of Appeals. The issue is whether Washington or California law applies in the interpretation and the enforcement of guarantees signed by Sugarman and Abraham, the two men that I will refer to as guarantors in this decision.

I have read all of the briefs and the factual materials, obviously the Restatements. In this case, we are talking about four sets of promissory notes signed by MKA as maker to the Freestone entities and Sugarman or Abraham or both as guarantors. These two men signed in representative capacities for MKA for each of the notes and also as guarantors. The record, I think, is clear on who signed which. I am not going to repeat that. It is also in the Court of Appeals decision.

I will say parenthetically that the Court of Appeals decision in this case has been quite helpful in setting out the analysis to be applied in this case. The law governing the analysis is the Restatement of Conflicts of

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Laws, especially sections 6, 188, 194 and 195.

The first question in the analysis is whether an actual conflict exists between Washington and California law for the guarantees. The question is whether the conflict exists in the facts of the case under these factors, not whether there is simply a general conflict, for it is clear California law generally gives guarantors

Page 2

8 greater protection than does Washington law.

9 California requires creditors to go after collateral
10 first, and creditors can forfeit their rights under
11 certain circumstances if this is not done. These rights
12 can be waived by statute. They are found at California
13 Civil Code 2845, 2849.

14 Certainly under the Restatement 6, under general
15 principles, this is a significant factor, but not the
16 only one.

17 So let's go in order here. I think it does make
18 sense, as was suggested by Freestone, to start from the
19 specific to the general, since in this case the specific,
20 194, refers back to the general, 188.

21 Under the Restatements of Conflicts of Laws, 194, the
22 validity of a suretyship in the absence of a choice of
23 law provision in the contract, the choice of law for the
24 principal obligation governs unless a state has a more
25 significant relationship under the principles articulated

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1 in 6 and involving the parties as well.

2 In our case, the guarantees are promissory notes that
3 contain under the signature, that is, below the signature
4 for the maker, a guarantee. The notes have the choice of
5 law for Washington. The guarantees have no choice of
6 law. Under this first step, Washington law could govern.

7 So what is the relationship that the state of
8 Washington or California may have? I think there are two
9 primary policies with regard to the Restatement No. 6.
10 That is the relevant policies of the forum, that's
11 6(2)(b); and the protection of justified expectations,

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that's 6(2)(d).

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There is also a relevant California Civil Code provision that I will discuss a little bit later, that's 1646, which provides that a contract is to be interpreted where it is performed.

So looking under the more general provision, the Restatement 188, I am going to talk about these two statements I just talked about in Restatement 6 and examine them within the context of 188.

As the parties well know, 188 talks about the place of contracting, the place of performance, negotiation, location of the subject matter, domicile/residence, and principal place of business.

In these series of loans, for that is what they are,

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from Freestone to MKA, the place of contracting was in California, because the guarantors signed the guarantees at the same time they signed the notes while they were in the state of California.

The place of performance is Washington state. While Freestone has several entities, some of which are incorporated in Delaware, it is really an undisputed fact that the entities are governed by the Freestone Seattle, Washington, entity. Payments were due in Seattle, were sent to Seattle, and the primary negotiations were done in Seattle.

I think under Restatement 194, it makes clear that this is an important, though not determinative, factor in the case of a suretyship.

The place of negotiation. The contracts were largely negotiated by phone and e-mail. Little was, frankly,

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17 done in terms of the parties meeting together in
18 Washington or California. They both stayed in their
19 respective locations.

20 In that sense, the factor is negligible, except that
21 Freestone was approached by an independent agent who put
22 them in contact with MKA, and in that sense, Freestone
23 was contacted in the state of Washington, and then MKA
24 entered into negotiations to borrow money from Freestone.

25 The location of the subject matter. These are loans

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1 that are guaranteed for entities in Seattle, Washington.
2 The properties were in California that were the subject
3 of the loans, but the loans themselves are in the state
4 of Washington.

5 The domicile residence and principal place of
6 business. The principal place of business of Freestone
7 is in Seattle. The principal place of Mr. Sugarman and
8 Mr. Abraham as well as MKA are in California.

9 Let's look at justified expectations of the parties.
10 The guarantors, Mr. Sugarman and Mr. Abraham, testified
11 that they were justified -- or it is argued that they
12 were justified in expecting that their rights under
13 California be protected. They didn't actually say it
14 that way. What they said, for example, in Mr. Abraham's
15 case is that he expected the lenders to go after the
16 collateral first.

17 But it is notable that their company wrote the
18 guarantees. They are the CEO and the president of the
19 companies respectively. Their staff are writing the
20 guarantees. They're not their personal counsel, but they

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own the company.

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There is no question in this case that these guarantors are highly sophisticated in real estate and finance. In fact, all of the parties in this case are highly sophisticated. We are not talking about an

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individual investor with very little experience being involved in the transaction on either side.

Abraham and Sugarman run a fund for investors of contracting. Abraham has decades of experience in real estate investment. Sugarman has extensive financial experience. They, of course, so held themselves out to Freestone, just as Freestone held themselves out as a sophisticated lender.

This guarantee drafted by MKA allows the lenders to go after guarantors immediately on the default of the principal. That term "immediately," to be given any meaning, must mean that if MKA defaults, Freestone may go after directly either Sugarman or Abraham or both, depending on the guarantee.

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So Abraham and Sugarman's testimony contradicts what the guarantees themselves say. And if I were interpreting it under the law of this state, their parol evidence would not be admissible. Their expectations are not justified, therefore.

California has another policy, an older policy under California Civil Code 1646. In more recent cases such as Costco v. Liberty Mutual, which is a Federal District Court case out of California, 472 F. Supp. 1183, that case noted that 1646 and the Restatement were separate analyses. And that case adopted and examined both

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1 analyses, because there was a tension between the two.

2 To be perfectly frank, California courts seem
3 undecided whether 1646 still has force and effect in
4 analysis. I acknowledge that the Hoeckle case exists
5 cited by Freestone, and 1646 was considered determinative
6 there, but other courts do not necessarily see it that
7 way.

8 But I will talk about 1646, having looked at it under
9 the Restatement. California Civil Code 1646 is
10 considered in California to be both a rule of contract
11 interpretation and a rule of conflict of laws. It
12 provides that a contract is to be interpreted according
13 to the law where it is to be performed.

14 In the case cited by Freestone, *Developers Small*
15 *Business Investment Corp. v. Hoeckle*, which I just talked
16 about, 395 F.2d 80, the court held that suretyship
17 contracts differ from regular contracts in determining
18 the place of their making and resuming, that the place
19 where the creditor accepts the surety's guarantee is the
20 place where it is to be performed.

21 So this is not determinative of the case, but
22 certainly evidence of the policies of the State of
23 California.

24 In weighing all these factors, looking under the
25 principles under the Restatement 6, 188 and 194, while it

1 is certainly important under the State of California that
2 guarantors be protected, I conclude in weighing all of

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the factors, looking at the fact that these are

sophisticated investors who wrote the guarantees, looking at where the contract is to be performed, and the fact that these Freestone entities were contacted in the state of Washington, I conclude that the location of the contract, the choice of law should be Washington law.

I am going to examine the other issues in this case as well.

I look to the next issue of waiver. The question was posed by Freestone or argued by Freestone, do the guarantees at issue waive any rights that the guarantors had under California law? If they did waive, then any conflict between Washington and California law no longer exists, and Washington law is presumptively the law governing these guarantees.

MKA disagreed, calling these guarantees pithy, which means actually both brief and meaningful. I do agree that they're brief. Let's look at them and see whether I concluded they're actually meaningful.

California Civil Code 2856 allows for the waiver of the rights of guarantors. This code provision overturned the Cathay case.

I have read all of those cases, looked under WestLaw,

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and I read the cases that discuss waiver under this code provision. The question in my mind was whether the code provision required an explicit waiver and language that references rights even in the most general sense.

The Cathay case, of course, famously held that a waiver was only valid if a specific right was being referenced, but the legislature specifically held or

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8 stated at 2856 that allows a waiver to be general. And
9 to be quite frank, this is a close case.

10 A case I found most helpful in this analysis was a
11 case called River Bank America v. Diller. That's at 38
12 Cal. App. 4th 1400, starting at page 1415.

13 That case examined both the contracts themselves and
14 the sophistication and circumstances of the formation of
15 the contracts. First, the River Bank America Corp.
16 looked at the sophistication of the guarantors, whether
17 they were represented by counsel, whether they were aware
18 of the terms of the contracts.

19 In this case, there is no question, as I have already
20 said, that the guarantors are highly sophisticated real
21 estate financial professionals. And to repeat myself for
22 the purpose of keeping some line of thought through this,
23 they run a fund for investors of contractors. Abraham
24 has decades of experience in real estate investment, and
25 Sugarman has extensive financial experience as well.

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1 MKA, of course, is Mr. Abraham's own initials.

2 The guarantee contracts were negotiated with counsel
3 for MKA. Mr. Abraham and Mr. Sugarman are the CEO and
4 president respectively of MKA. Mr. Abraham and Mr.
5 Sugarman did not have personal counsel at the time of the
6 execution of these guarantees.

7 Justin Young for Freestone testified that the
8 guarantees were submitted by MKA and negotiated with
9 counsel through MKA. So again to the extent that they
10 were negotiated at all, they were not negotiated by the
11 guarantors personally or through personal counsel.

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12 MKA submitted the original form of the documents. For
13 example, at page 32 of his January 13th, 2009 deposition,
14 Mr. Abraham testified that Exhibit 2, a May 8th, 2006
15 promissory note and guarantee, was created by Steve
16 Dunning, his company's transactional attorney.

17 Mr. Abraham testified that his understanding, based
18 upon his practice, was that the guarantee had the lender
19 go after the assets first and the guarantor second. He
20 also testified as a matter of routine practice, he read
21 agreements before he signed them, though he could not
22 recall these immediately. He also testified that he
23 signed guarantees routinely, as they were always required
24 by banks.

25 He was asked if he read the guarantees, and his answer

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1 was, "Obviously not that thoroughly." He stated he was
2 unaware of the choice of law issue.

3 It is also undisputed that Freestone, through
4 negotiations, inserted the choice of law of Washington on
5 the notes that are the same pages as guarantee contracts,
6 although not any choice of law in the guarantee contracts
7 themselves.

8 The River Bank America court also looked to the
9 language of the guarantees themselves. First, in the
10 guarantee in the River Bank America case, the guarantee
11 stated that the guarantor would get no credit for the
12 application of foreclosure proceeds. In that case, the
13 guarantee also stated that it was independent of the
14 obligations of the maker. And in that case, it also
15 stated that the promisor lender could go after the
16 guarantor and maker independently or together.

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17 This guarantee contains two of these three factors.
18 The guarantee expresses that if the maker defaults, the
19 lender can immediately demand, and the guarantor must
20 immediately pay the debt. This is a plain English
21 statement that the lender does not have to wait for
22 anything or take any other action before demanding full
23 payment from the guarantor.

24 The guarantee does not contain any language indicating
25 a waiver of rights. It does not say the word "waiver"

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1 generally or specifically. It certainly does not contain
2 the safe harbor language by statute, which is not
3 required but is suggested.

4 2856(3)(b) reads, "A contractual provision that
5 expresses an intent to waive any or all of the rights and
6 defenses described in subdivision (a) shall be effective
7 to waive these rights and defenses without regard to the
8 inclusion of any particular language or phrases in the
9 contract to waive any rights and defenses."

10 Well, I agree this is a close case. I conclude that a
11 guarantee that allows a lender to immediately demand
12 payment from a guarantor must have some meaning. And it
13 can only mean in this case that a lender is free to go
14 look to the guarantor first, and as such, the guarantor
15 cannot demand his rights that a lender must first collect
16 collateral.

17 So I conclude that the guarantors in this case waived
18 their rights under the California Civil Codes providing
19 protections to guarantors.

20 Finally, if we get to other issues, I think that there

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are disputed facts as to whether MKA has enough

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22 collateral to pursue or whether they are financially, to
23 be colloquial here, under water. I could not resolve
24 certain other issues on summary judgment, so I had gotten
25 to that point. Since you are going to the Court of

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1 Appeals, that issue I could not decide as a matter of
2 undisputed fact.

3 Do you have any questions? And if you don't, I'll
4 also give you the opportunity to -- you can do a
5 conference call after you look at the transcript, but if
6 you have any questions, I'd like to sign a written order
7 and attach a transcript of this decision.

8 MR. HOWARD: I was going to say, since you want to
9 send it as attached, I would suggest that counsel and I
10 get together to double-check the math of what he wants to
11 present and perhaps pick a date for that so we can check
12 double-check the math to a date certain. I don't know if
13 that fits in -- that's not a matter of delay. That's a
14 matter of a date certain.

15 MR. FISHER: Your Honor, we did have several prepared.
16 I think that we're keyed off Friday, which would need to
17 be changed beyond that. Do you want us to prepare an
18 order that was consistent with what you told us today, or
19 were you saying you had already -- you have an order, or
20 do you want us to prepare one and attach the --

21 THE COURT: I don't have an order. I didn't write an
22 order for this, and I don't need to sign a complicated
23 order for the purpose of ruling on this. We usually use
24 a reference where I can incorporate my oral decision, and
25 you can use that to go up on appeal, I think.

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1 What say you to, though, the question about -- that he
2 raised?

3 MR. FISHER: Only that I am very concerned about a
4 delay. So if we set it for a time certain for the
5 presentation of the judgment and short form of the order,
6 anticipating that the transcript's going to be attached,
7 I would just like to have that set on a date certain so
8 it doesn't drift out into space.

9 So I do get the point, and I can send those over to
10 Mr. Howard again to look at them. I would just like an
11 exact date so we would know when we'd be getting things
12 signed by the court.

13 THE COURT: We can set it for next Monday.

14 MR. HOWARD: I'm happy to do it without oral argument.

15 THE COURT: That's fine, too.

16 MR. HOWARD: If the court reporter thinks it can be
17 ready by Friday, and I guess I'll have to ask the court
18 reporter for a moment -- if we can go off the record,
19 with the Court's permission.

20 I would suggest that that oral argument and that
21 counsel and I -- I will be out of town Wednesday,
22 Thursday, Friday, so we'll have to do this by e-mail, but
23 Ms. Nicholson can back me up, and we'll be ready by
24 Friday to work with you.

25 MR. FISHER: Can we do this, then? Can we set it on

1 Monday, and assuming there is nothing to be discussed,
2 you know, strike it and lodge the papers without

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3 argument? Hold that date just in case something comes up
4 between now and then. I think that would be the
5 preferred course.

6 THE COURT: That's fine.

7 MR. HOWARD: I get the impression this court's going
8 to be in trial.

9 THE COURT: Actually, we have Monday off for trial.
10 That's why I picked that day.

11 MR. HOWARD: That sounds great. If we have to come
12 and argue, just pick a time, and I'll make sure I can get
13 here.

14 MR. FISHER: Can we get it right now?

15 THE BAILIFF: Nine a.m.

16 MR. HOWARD: It shouldn't be a problem.

17 THE COURT: I want to thank the parties again for the
18 outstanding briefing that you all did, and so I'll maybe
19 see you on Monday, maybe not. If not, if I get agreed
20 orders -- agreed as to form, then I'll sign them on
21 Friday.

22 MR. FISHER: Thank you, your Honor.

23 MR. HOWARD: Or Monday.

24 THE COURT: Or Monday, right.

25 MR. HOWARD: Thank you, your Honor.

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1 (Proceedings adjourned at 1:29 p.m.)
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APPENDIX - B

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The Honorable Jim Rogers

FILED
KING COUNTY WASHINGTON

OCT 26 2010

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FREESTONE CAPITAL PARTNERS L.P.;
FREESTONE LOW VOLATILITY PARTNERS
LP; FREESTONE CAPITAL QUALIFIED
PARTNERS L.P.; and FREESTONE LOW
VOLATILITY QUALIFIED PARTNERS LP,

Plaintiffs,

v.

MKA REAL ESTATE OPPORTUNITY FUND I,
LLC, a California limited liability company; MKA
CAPITAL GROUP ADVISORS, LLC, a
California limited liability company, MICHAEL
A. ABRAHAM, an individual; and JASON
SUGARMAN, an individual;

Defendants.

No. 08-2-29787-0 SEA

ORDER DENYING GUARANTORS'
MOTION TO AMEND

THIS MATTER having come on regularly before the undersigned Judge of the
above-entitled court upon Defendants' First Motion for Leave of Court to Amend Answer
(the "Motion"), and the Court having considered the papers submitted by the parties in
support of and in opposition to the Motion,

The Court rules as follows:

The Motion is **DENIED**. For the reasons set forth in the Court's Order Granting

ORDER DENYING MOTION TO AMEND - 1
DWT 15730294v2 0085965-000001

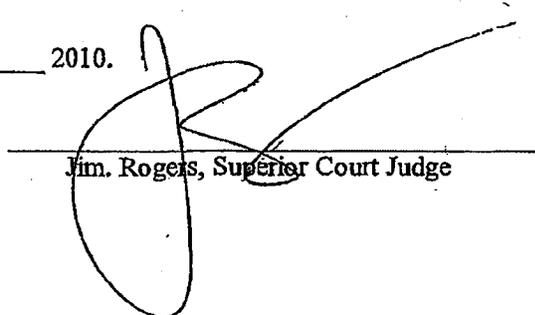
Davis Wright Tremaine LLP
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Plaintiffs' Renewed Motion for Summary Judgment, the Defendants' Motion to Amend to
assert a defense under Section 2819 of the California Civil Code is denied as futile and
moot.

IT IS SO ORDERED.

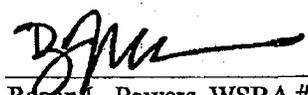
DATED this 26 day of Dec 2010.



Jim. Rogers, Superior Court Judge

Presented by:

Davis Wright Tremaine LLP
Attorneys for Plaintiffs

By 

Ragan L. Powers, WSBA #11935
Brad Fisher, WSBA #19895

Approved as to form:
Notice of Presentation waived:

Schwabe, Williamson & Wyatt, PC
Attorneys for Defendants

By 

Christopher H. Howard, WSBA #11074
Averil Rothrock, WSBA #24248

CERTIFICATE OF SERVICE

I certify and declare that on the 11th day of May, 2011, I caused to be served by first class U.S. Mail the foregoing *Reply Brief* on the following parties at the following address:

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Brad Fisher
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Averil Budge Rothrock, WSBA #24248