

No. 70327-7-I

DIVISION 1, COURT OF APPEALS
OF THE STATE OF WASHINGTON

UNION BANK, N.A., a national banking association,

Plaintiff-Appellant,

vs.

KENNETH LYONS, MELANI A. LYONS, individually and the marital community thereof; ELIZABETH Y. VANDERVEEN, A. MARK VANDERVEEN, individually and the marital community thereof; TODD ARRAMBIDE, KIM M. ARRAMBIDE, individually and the marital community thereof; HARLEY O'NEIL, JR., MICHELE O'NEIL, individually and the marital community thereof; the TORI LYNN NORDSTROM TRUST, a Washington state trust; and HARLEY O'NEIL, JR., Trustee for the Tori Lynn Nordstrom Trust,

Defendants-Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jean Rietschel)

BRIEF OF RESPONDENTS VANDERVEEN

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I. INTRODUCTION

In this appeal, the Court is asked to decide whether a guarantor of a commercial loan has any further obligation to the lender, under the loan documents and the anti-deficiency provisions of the Washington Deed of Trust Act, RCW 61.24.100, after the lender non-judicially forecloses a deed of trust securing the guarantor's obligations.¹

The loan documents at issue in this case were drafted in their entirety by the lender, Frontier Bank. In preparing the loan documents, Frontier Bank chose to have its Deed of Trust secure not only the obligations of the co-borrowers under the Promissory Note, West Creek Village, LLC, d/b/a East Creek Village, LLC and Shoreline Business and Professional Center, LLC (collectively "East Creek" or the "Co-Borrowers"), but also the obligations of the guarantors of the loan, including Mark and Elizabeth Vanderveen, Harley and Michele O'Neil, and the Tori Lynn Nordstrom Trust, the respondents in this appeal (the

¹ Issues arising under the same "Laser Pro" deed of trust language involved in this appeal are presented in a number of other cases pending before Divisions I and II of the Court of Appeals. Those include *First-Citizens Bank & Trust Company v. Cornerstone Homes & Development, LLC*, No. 43619-1, fully briefed and argued before a Division II panel on September 12, 2013; and *Washington Federal vs. Lance Harvey*, No. 69791-9-I and *Washington Federal v. Kendall Gentry*, No. 70004-9-I, both fully briefed and awaiting assignment of an oral argument date before Division I. Several additional appeals are pending in Divisions I and II, for which the briefing has not yet been completed, including *Union Bank v. F.R. McAbee, Inc.*, No. 70497-4-I, an appeal from the memorandum orders of Judge Ken Schubert which reflect the most extensive written trial court analysis of the issues to date. Copies of those memorandum orders are attached to this brief as Appendix C for the Court's reference.

“Guarantors”).²

Frontier Bank was closed by state regulators on April 30, 2010, and the bank’s assets (including the East Creek Promissory Note, Deed of Trust and other loan documents) were taken over by the FDIC as receiver and sold to appellant Union Bank under a loss-sharing agreement.

East Creek did not repay the loan per the agreed terms. After that default, rather than choosing to sue the Co-Borrowers for a money judgment on the Promissory Note obligation, and/or suing the Guarantors on their Commercial Guaranties, and rather than choosing to foreclose its Deed of Trust judicially, Union Bank elected the expedient remedy of foreclosing the East Creek/Shoreline Deed of Trust non-judicially. The bank purchased the East Creek property through a credit bid at the trustee’s sale held on July 15, 2011, and then brought this action seeking to recover deficiency judgments against the Guarantors.

In granting summary judgment of dismissal to the Guarantors, the trial court properly determined that the East Creek Deed of Trust secured their obligations under their Commercial Guaranties, and that the anti-deficiency provisions of RCW 61.24.100 barred any further claims against the Guarantors on those secured guaranty obligations once the non-judicial

² Defendants Kenneth and Melani Lyons and Todd and Kim Arrambide, who also executed Commercial Guaranties of the East Creek loan, settled with plaintiff Union Bank shortly before the hearing on respondents’ successful motion for summary judgment of dismissal.

foreclosure sale had been completed. The trial court also found that any purported waivers of the protections of RCW 61.24.100 were void as contrary to the express language of the statute and public policy. The trial court awarded prevailing party attorney's fees to the Guarantors.

Those determinations were correct and should be affirmed by this Court, which should also award the Guarantors their reasonable attorney's fees and costs on this appeal.

II. COUNTER-STATEMENT OF ISSUES

Four central issues are presented to the Court in this appeal:

A. By its terms, did the non-judicially foreclosed deed of trust prepared by Frontier Bank secure the obligations of the Guarantors under their Commercial Guaranties, in addition to the obligations of the Co-Borrowers under the Promissory Note? **YES**

B. After electing to non-judicially foreclose the deed of trust securing the obligations of the Guarantors, was successor beneficiary Union Bank precluded by RCW 61.24.100 from pursuing post-trustee's sale deficiency claims against the Guarantors? **YES**

C. Are the anti-deficiency protections of RCW 61.24.100 subject to contractual waiver by a guarantor? **NO**

D. Were the Guarantors' motions for attorney's fees timely filed in the trial court under CR 54(d)(2)? **YES**

III. COUNTER-STATEMENT OF THE CASE

A. Key Provisions of Frontier Bank's Loan Documents

In December 2008, Frontier Bank made a \$5.1 million real estate loan to the Co-Borrowers, evidenced by a Promissory Note and secured by a Deed of Trust against property which the Co-Borrowers were acquiring from another Frontier Bank customer, for the purpose of developing it into a residential project to be known as East Creek Village.³ Decl. of Kenneth Lyons, CP 90. At the same time as the Promissory Note and Deed of Trust were executed by the Co-Borrowers, the Guarantors (who were the owners of the Co-Borrower limited liability companies) executed Commercial Guaranties to Frontier Bank with respect to the East Creek loan obligation.

Copies of the East Creek loan documents are attached to the Lyons Decl. as Exhibits A1 (Promissory Note), B1 (Deed of Trust), C1 (Lyons Commercial Guaranty), D (Notice of Final Agreement), E (LLC Company Resolution to Borrow) and F (Disbursement Request and Authorization). CP 95-117. The forms of Commercial Guaranty signed by respondents

³As alleged in Affirmative Defenses 35-38 in the Vanderveens' Answer to First Amended Complaint (CP 74-77), and similar affirmative defenses asserted by other defendants in the case below, this was not a simple new commercial loan, but rather a bizarre restructuring of existing loans done primarily to benefit Frontier Bank by converting non-performing loans into performing ones. The defendants below alleged that the new loan was induced through multiple material misrepresentations by the bank to the Co-Borrowers and Guarantors. However, it was not necessary for the trial court to consider the facts underlying those affirmative defenses in order to decide the Guarantors motion for summary judgment of dismissal, nor are they relevant to the issues on this appeal.

Vanderveen, O'Neil and the Nordstrom Trust are attached to their respective declarations and their terms are identical to those signed by Lyons. CP 129-31 and 137-42. Copies of those loan documents are also attached as Appendices 2-6 to Union Bank's appellate brief.

All of the East Creek Loan Documents bear the same effective date -- December 10, 2008. CP 95-117, 129-31 and 137-42. The fact that documents were executed by the parties as part of a single loan transaction is confirmed by the Notice of Final Agreement prepared by Frontier Bank, the "architect" of this loan transaction (CP 111-12). Its Notice identified each of the "Loan Documents" which the bank required to be executed in connection with the closing of the East Creek loan, including not only the Promissory Note and Deed of Trust, but also each of the Commercial Guaranties to be signed by the Guarantors. The bank's Notice confirmed that the listed documents collectively constituted the overall "Loan Agreement" between those parties and the bank (CP 111).

As noted in the fine print on their last pages, each of the Loan Documents was prepared by Frontier Bank using "Laser Pro Lending" document generation software. Lyons Declaration, paragraph 6 (CP 91). There were no negotiations between Frontier Bank and the Co-Borrowers or Guarantors regarding the language of any of the Loan Documents, including without limitation the Deed of Trust or Commercial Guaranties

(CP 91, 125-126, 133-34 and 144-45). As a result, there was no objectively manifested “intent” evidence before the trial court to aid in their interpretation, beyond the bank-prepared language of the loan documents themselves.

By its express terms, Frontier Bank’s Deed of Trust (CP 97-107) secured not only the obligations of the Co-Borrowers under their Promissory Note (CP 95-96), but also the obligations of the respondent Guarantors under their Commercial Guaranties (CP 108-110, 129-31, 137-42 and 148-150). In its fifth full paragraph on page 2 (CP 98), the Deed of Trust specifically stated:

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. (emphasis added)

Contrary to the assertions at pages 5-6 and 9-10 of Union Bank’s appellate brief, the secured obligations were in no way limited to the obligations of the Co-Borrower LLC’s under the Promissory Note. They

also included payment of “Indebtedness” and performance of obligations under all the “Related Documents.” Those terms used in the crucial “given to secure” clause above were specifically defined in Frontier Bank’s Deed of Trust at page 7 (CP 103):

The word “Indebtedness” means all principal, interest, and any 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 and any amounts expended or advanced by Lender to discharge Grantor’s obligations or expenses incurred by Trustee or Lender to enforce Grantor’s obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. (emphasis added)

The words “Related Documents” mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, 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. (emphasis added)

Clearly, the Deed of Trust was “given to secure” not only the Promissory Note but also the Commercial Guaranties signed by the Guarantors as “Related Documents” prepared by Frontier Bank for the East Creek loan.

The Deed of Trust referred to the Commercial Guaranties in other places as well. Lest there be any confusion about which “guaranties” were referenced as “Related Documents,” it included the following Definitions on page 7 (CP 103):

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

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

The only guaranties of the Note Indebtedness were those signed by the Guarantors (CP 111).

Near the end of the section identifying “Events of Default” entitling the bank to exercise its default remedies, page 5 of the Deed of Trust (CP 101) specifically included “Events Affecting Guarantor,” such as the death or disability of a guarantor. The Deed of Trust also contained an “entire agreement” clause at page 6 (CP 102), stating that “This Deed of Trust, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this deed of trust.” (Emphasis added.)

In short, the Guarantors’ obligations under their Commercial Guaranties were secured by the Deed of Trust under its clear language specifying what it was “given to secure.” The Commercial Guaranties were “Related Documents” and their obligations were part of the “Indebtedness,” as the bank defined those terms in its Deed of Trust form.⁴

⁴ At pages 4-6 of Appellant’s Brief, Union Bank argues that the East Creek Deed of Trust was intended to secure only the Co-Borrower’s obligations under the Note, notwithstanding the clear language of the “granted to secure” provision discussed above. The primary purpose of the Deed of Trust was to secure payment of the Note, and

This interpretation of the secured obligations need not be based solely on the language of Deed of Trust itself. Frontier Bank’s “belt and suspenders” approach, tying all loan-related obligations together and securing them with the Deed of Trust, was repeated in the other loan documents prepared by the bank in December 2008 for execution by the Guarantors, individually and as members (owners) of the Co-Borrowers.

The bank’s December 2008 Notice of Final Agreement (CP 111-12) defined the scope of the parties’ overall agreement very broadly, stating that the term “Loan Agreement” meant “one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions are documents, relating to the Loan, including without limitation the following LOAN DOCUMENTS.” (Emphasis added.)

The Notice then listed the “Loan Documents” making up the

naturally most of its provisions were devoted to the Co-Borrower/Grantors’ obligations to make payment and protect the property collateral, but that was not its only purpose. Through Frontier Bank’s choice, the Deed of Trust also secured the Guarantors’ obligations to pay the Note Indebtedness if the Co-Borrowers failed to do so. It is perfectly permissible for the grantor’s deed of trust to secure the obligations of a third party, in this case the Guarantors. *See Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 73, 573 P.2d 827 (1978); *Restatement (3rd) of Property: Mortgages* § 1.3 (“An obligation whose performance is secured by a mortgage may be that of the mortgagor *or of some other person.*”) As stated in RCW 61.24.020, “A deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary may be foreclosed by trustee’s sale.” (Emphasis added.) While the Co-Borrowers’ Note and Guarantors’ Commercial Guaranties were separate contractual undertakings to pay the same loan Indebtedness, Frontier Bank chose to expressly tie them together by securing both obligations with the Deed of Trust and confirming that they were all part of a single Loan Agreement.

“Loan Agreement” between the parties. That list included not only the Promissory Note and Deed of Trust, but also the “WA Commercial Guaranty: Elizabeth Y. Vanderveen,” as well as the Commercial Guaranties required to be signed by each of the other Guarantors as part of the loan closing (CP 111).

It cannot be seriously contended that the Continuing Guaranties were not “Related Documents” whose obligations were secured by the Deed of Trust, when they were specifically identified as “Loan Documents” which were part of the overall “Loan Agreement” among the Co-Borrowers, the Guarantors and Frontier Bank, as confirmed by the bank’s own Notice of Final Agreement form.

The Promissory Note also expressly referred to the Commercial Guaranties, by defining its “Events of Default” to include “Events Affecting Guarantor” such as death and incompetency (CP 95).

Each of the Commercial Guaranties contained essentially the same definitions of “Guarantor,” “Guaranty,” “Indebtedness” and “Related Documents” as were set forth in the Deed of Trust (*e.g.*, CP 108-10). By their terms, the Commercial Guaranties were general in nature, applying to all current and future indebtedness of the Co-Borrowers to the bank, rather than simply the East Creek loan. In their sections entitled “Guarantor’s Authorization to Lender,” each Commercial Guaranty authorized the bank

to “take and hold security for the payment of this Guaranty ... and direct the order or manner of sale thereof, including without limitation, any non-judicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine.” (Emphasis added.)⁵ Finally, each also contained language in the “Amendments” section at the middle of page 2 (*e.g.*, CP 109) declaring that “This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty” (emphasis added), and each defined the term “Related Documents” on page 3 to include “deeds of trust” (*e.g.*, CP 110).

In short, it is difficult to see how the Bank could have been any more clear in tying the Commercial Guaranties and Deeds of Trust together, and confirming that the former were secured by the latter.

B. Default and Union Bank’s Election of Remedies

Frontier Bank was closed by state banking regulators on April 30, 2010. Its assets were taken over by the FDIC and sold to appellant Union Bank (CP 92). The Co-Borrowers failed to repay the East Creek loan by

⁵ At pages 15-16 of its Appellate Brief, Union Bank notes that the East Creek Promissory Note specifically recites that it is secured by the East Creek Deed of Trust, while the Continuing Guaranties did not contain the same type of specific reference to the Deed of Trust. That is understandable, because the Continuing Guaranties by their terms were drafted to govern multiple loan transactions. Any omission of such a reference is also irrelevant, because it is the language of the Deed of Trust itself which defines what obligations it was “given to secure.” Finally, as noted above, the Commercial Guaranty forms specifically authorized the bank to obtain security for their obligations, including deeds of trust, and to foreclose such deeds of trust non-judicially.

the due date stated in the Promissory Note. At that point, a number of default remedy options were available to Union Bank. It could have sued the Co-Borrowers for a money judgment on the Promissory Note. It could have sued the Guarantors for money judgments on their Commercial Guaranties. Alternatively, as confirmed by the terms of the Deed of Trust itself, the bank had the right to choose between judicial and non-judicial foreclosure. At pages 5-6 (CP 101-02), the Deed of Trust recited:

Foreclosure. With respect to all or any part of the Real Property, the Trustee shall have the right to exercise its power of sale and to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

* * *

Trustee. . . . In addition to the rights and remedies set forth above, with respect to all or any part of the Property, the Trustee shall have the right to foreclose by notice and sale, and Lender shall have the right to foreclose by judicial foreclosure, in either case in accordance with and to the full extent provided by applicable law.

Rather than judicially foreclosing (or simply suing the Co-Borrowers and/or the Guarantors for money judgments), Union Bank voluntarily elected to pursue the remedy of non-judicial foreclosure under RCW Chapter 61.24. It initiated that process with the service of a Notice of Default early 2011, and completed it by acquiring the East Creek property via Trustee's Deed following its successful bid at the trustee's sale held on July 15, 2011. Lyons Decl., paragraph 8 and Exhibit G (CP

92 and 118-23). Those choices resulted in termination of the Guarantors' liability for any deficiency under RCW 61.24.100, as discussed in Section IV.C, below.

A different outcome could have readily been obtained, if Union Bank had selected a different remedy option, or if Frontier Bank had made a different choice at the outset in drafting the language defining which "Related Document" obligations would be secured by the Deed of Trust. Again, that definition in the Deed of Trust read in its entirety as follows:

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, **guaranties**, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, 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. (emphasis added)

Frontier Bank could have easily changed the coverage of its Deed of Trust by simply moving the word "guaranties" from the initial part of the definition to the exclusionary proviso at the end, as follows:

The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, **guaranties**, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the indebtedness; provided that the **environmental indemnity agreements and guaranties** are not "Related Documents" and are not secured by this Deed of Trust. (emphasis added)

However, Frontier Bank chose to include rather than exclude "guaranties"

from the definition of “Related Documents,” and it is the language actually used by the bank in its Deed of Trust which must control this case.

IV. ARGUMENT

A. Standard of Review

The Trial Court decided the issues presented on this appeal on summary judgment. The Vanderveens agree with appellant Union Bank that this Court reviews purely legal determinations *de novo*, including those relating to contract interpretation and statutory construction. See Appellant’s Brief at page 9 (“This appeal presents purely legal issues ...”)

Summary judgment is properly granted when the pleadings, affidavits, depositions and admissions presented with respect to the motion demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 437, 874 P.2d 861 (1994) (citing *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d 263 (1989))). A material fact is one upon which the outcome of the trial would depend, in whole or part. *Kendall v. Public Hospital District*, 118 Wn.2d 1, 820 P.2d 497 (1991). The purpose of a summary judgment is to avoid a useless trial when no genuine issue of material fact remains to be decided.

Nielson v. Spanaway General Medical Clinic, 135 Wn.2d 255, 956 P.2d 312 (1998); *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980).

No genuine issues of material fact were asserted by Union Bank in opposing summary judgment before the trial court, and none have been identified in its appeal, to support any contention that the trial court erred in dismissing the bank's deficiency claims.

B. The Trial Court Correctly Construed the Deed of Trust as Securing the Guarantors' Obligations

1. General Principles of Contract Interpretation.

Interpretation of an unambiguous contract is an issue of law. *Absher Constr. Co. v. Kent School District No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). "If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision." *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992).

In construing a written contract, basic principles dictate that (1) the intent of the parties controls; (2) the Court ascertains the intent from reading the contract as a whole; and (3) the Court will not read an ambiguity into a contract that is otherwise clear and unambiguous. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965). Courts are to determine the parties' intent based on the "objective manifestations

of the agreement, rather than on unexpressed subjective intent of the parties.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.3d 493, 503, 115 P.3d 262 (1993).⁶ The Court “is not authorized to rewrite the contract; [its] task is to construe it.” *Rodenbough v. Grange Ins. Ass’n*, 33 Wn. App. 137, 140, 652 P.2d 22 (1982).

When several instruments are made as part of one transaction, they must be read together and construed with reference to each other. *Kenney v. Read*, 100 Wn. App. 467, 474, 997 P.2d 455 (2000). The rule applies “even though they do not refer to one another, or even though they are not executed by the same parties.” *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975). In the present case, however, the Deed of Trust, Commercial Guaranties and other loan documents do expressly refer to each other (*see* Section III.A, above), and they were described by the Bank in its Notice of Final Agreement collectively as the “Loan Agreement.”

⁶ As part of the “context evidence” discussed at pages 7-8 and 16-17 of Appellant’s Brief, Union Bank references the declaration testimony of its officer Wilma Snider (CP 303-04), to the effect that Frontier Bank would not have made the East Creek loan if it had not obtained the Commercial Guaranties as “an additional source of recovery.” Acceptance of that self-serving statement of unexpressed intent at face value would not change the result here. The Deed of Trust expressly stated that it secured the Guarantors’ obligations under the Continuing Guaranties, as “Related Documents.” Despite structuring the Deed of Trust in that manner, Union Bank could have preserved its “additional source of recovery” from the Guarantors by suing them on the Continuing Guaranties without foreclosing the Deed of Trust, or by foreclosing the Deed of Trust judicially and then seeking deficiency judgments under RCW Chapter 61.12. Instead, it elected the expedient remedy of non-judicial foreclosure, which under RCW 61.24.100 had the effect of terminating the Guarantors’ obligation upon completion of the trustee’s sale. It must now accept the legal consequences of that choice.

They must accordingly be construed together.

Words used in a contract should be given their ordinary meaning. *MacLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 831, 138 P.3d 155 (2006). A contract is only ambiguous if its terms are uncertain or they are subject to more than one reasonable meaning. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). If a contract can reasonably be interpreted in two ways, one of which is ambiguous and one of which is not, the latter interpretation should be adopted when each clause can be given effect. *Dice v. City of Montesano*, 131 Wn. App. 675, 685, 128 P.3d 1253, 1258 (2006) “[A]mbiguity will not be read into a contract where it can be reasonably avoided.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). A contract provision is not ambiguous merely because the parties suggest opposite meanings. *Underwriters at Lloyd’s v. Travelers Property Casualty Co. of America*, 161 Wn. App. 265, 286 n.21, 256 P.3d 368 (2011), citing *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 944, 974 P.2d 1261 (1999).⁷

⁷ Again, Union Bank has not identified any language of the East Creek Deed of Trust which it claims to be ambiguous. Even if the document did contain ambiguous language, such ambiguities must be construed against Frontier Bank as drafter. *Sprague v. Safeco Ins. Co. of America*, 174 Wn.2d 524, 528, 276 P.3d 1270 (2012). As assignee, Union Bank stepped into the shoes of Frontier Bank. *Puget Sound National Bank v. Dept. of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Morse Electro Products Corp. v. Beneficial Industrial Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978) (assignee of receiver’s claims stands in shoes of the receiver, who stands in the shoes of the insolvent

2. The Deed of Trust Unambiguously Secured the Commercial Guaranties.

There is no ambiguity in the Deed of Trust on the subject of whether it secured the Guarantors' obligations under their Commercial Guaranties. The Deed of Trust expressly stated that it secured payment of the "Indebtedness" and the performance of all obligations under the "Related Documents." It defined the "Indebtedness" to include amounts payable under the "Related Documents," and defined the latter to term to include all "guaranties ... executed in connection with the Indebtedness."⁸

Essentially the same definition of Related Documents was set forth on page 2 of the Commercial Guaranties themselves (*e.g.*, CP 109). The Notice of Final Agreement (CP 111-12) defined the "Loan Agreement" between the parties to include all of the "Loan Documents," specifically including the Vanderveen, O'Neil and Nordstrom Trust Commercial Guaranties as making up part of that "Loan Agreement." Finally, the

debtor in receivership). An assignee from a party who drafted a contract must have any ambiguities in the contract construed against that assignee, to the same extent as if it were the drafter. *Sunset Oil Co. v. Vertner*, 34 Wn.2d 268, 276, 208 P.2d 906 (1949) ("The contract was prepared by respondent's assignor and should therefore, generally speaking, be construed in appellant's favor.")

⁸ At footnote 3 on page 14 of its appellate brief, Union Bank attempts to argue that because the Deed of Trust defined the term "Guaranty" (with a capital "G"), it was somehow meant to exclude such "Guaranties" from the "guaranties" (with a small "g") referenced in the definition of Related Documents. That argument makes no sense. The Deed of Trust defined "Guarantor" "any guarantor ... of any or all of the Indebtedness," and "Guaranty" was defined to mean "the guaranty [small "g"] from Guarantor to Lender, including without limitation a guaranty [small "g"] of all or part of the Note." Bracketed material added. There were no "guaranties ... executed in connection with the Indebtedness," other than the Commercial Guaranties of the Note Indebtedness signed by the Guarantors and the settling defendants below (CP 111).

Commercial Guaranties specifically contemplated that their obligations would be secured by deeds of trust. *See* discussion and quoted language in Section III.A, above.

Washington courts will not construe contracts in a manner which would lead to absurd conclusions or would render contractual language nonsensical or ineffective. *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders Inc.*, 133 Wn. App. 828, 831, 138 P.3d 155, (2006); *Seattle–First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn.App. 269, 274, 711 P.2d 361 (1985). There is only one reasonable construction here: The Deed of Trust expressly secured “performance of any and all obligations under . . . the Related Documents”; the term Related Documents included “guaranties . . . executed in connection with the Indebtedness”; and the Commercial Guaranties listed in the Notice of Final Agreement were the only “guaranties” executed in connection with the December 2008 loan transaction (CP 111). As a matter of law, the obligations under those Commercial Guaranties were secured by the Deed of Trust.

3. Other Authority Construing the Same “Related Documents” Language.

Although counsel for the Vanderveens is not aware of any Washington appellate decision construing deeds of trust containing similar

“Related Documents” provisions,⁹ that same language has been construed elsewhere. *Greenville Lafayette, LLC v. Elgin State Bank*, 296 Mich. App. 284, 818 N.W.2d 460 (2012), involved a Deed of Trust form securing obligations which included all those arising under the “Related Documents.” That term was defined in the same manner as the Deed of Trust here, to include “all ... guaranties ... executed in connection with the Indebtedness.”

The Michigan appellate court concluded that obligations under a guaranty of the loan clearly fell within the definition of “Related Documents” and were accordingly secured by the Deed of Trust: “We agree with plaintiff that the plain language of the mortgage contract specifically includes guaranties of the indebtedness secured by the mortgage.” *Id.* at 290-291. The trial court below applied the same construction to the plain language of the East Creek Deed of Trust, and this Court should do so as well.

C. The Trial Court Correctly Construed RCW 61.24.100 to Preclude Union Bank’s Post-Trustee’s Sale Claims Against the Guarantors

1. History of the Washington Deed of Trust Act

The Washington Deed of Trust Act, RCW Chapter 61.24, was

⁹ Copies of memorandum orders by one Washington trial court judge discussing these provisions in detail are included as Appendix C to this brief. Those are the subject of an appeal to this Division of the Court of Appeals under Case No. 70497-4-I.

enacted for the public benefit. The Act was designed by the Legislature to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money for both the buyer and the lender. This feature of the Act has been applauded as meeting the needs of modern real estate financing. *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971) (citing Comment, *The Deed of Trust Act in Washington*, 41 Wash.L.Rev. 94 (1966)). One purpose of the Act was to keep non-judicial foreclosure process efficient and inexpensive. *Meyers Way Development Ltd. Partnership v. University Sav. Bank*, 80 Wn. App. 655, 910 P.2d 1308 (1996).

Reading RCW Chapter 61.24 in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that its enactment involved a “quid pro quo between lenders and borrowers.” *Thompson v. Smith*, 58 Wn. App. 361, 793 P.2d 449 (1990) (quoting *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988))). Debtors, for example, relinquished their right to redeem the property within one year after a foreclosure sale, as well as the right to a judicially-imposed upset price. *Thompson*, 58 Wn. App. at 365. Lenders, on the other hand, gave up any right to a deficiency judgment by electing to proceed with a non-judicial foreclosure under RCW 61.24. *Id.*

Prior to the substantial rewording of the statute in 1998, RCW

61.24.100 was relatively brief and direct in barring deficiency judgments on obligations secured by a deed of trust following a non-judicial foreclosure (except to the extent of realizing on other collateral held by the lender for those obligations):

Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation. Where foreclosure is not made under this chapter, the beneficiary shall not be precluded from enforcing the security as a mortgage nor from enforcing the obligation by any means provided by law. (emphasis added)

As stated by the Washington Supreme Court in *Washington Mutual v. United States*, 115 Wn.2d 52, 58, 763 P.2d 969 (1990), “Washington law provides that no deficiency judgment may be obtained when a trustee’s deed is foreclosed.”

No reported decisions under the former version of the Act expressly determined the post-sale liability of guarantors, but there is no reason to conclude that guarantors would have been subject to post-sale deficiency judgments where the deed of trust secured their guaranty obligations. On the contrary, as provided in the former language of the

statute, “foreclosure ... shall satisfy the obligation secured by the deed of trust foreclosed,” thereby barring any further judgment on such obligation. See *Udall v. T.D Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007) (“... the debt secured by the trustee’s deed is *per se* satisfied by the foreclosure sale due to the Act’s anti-deficiency provision.”). After a debt has been satisfied, a guaranty of payment of that debt could have no further application.

2. 1998 Deed of Trust Act Amendments.

RCW 61.24.100 was extensively rewritten in 1998, in part to address the subject of guarantor liability.¹⁰ However the new version of the statute retained the basic statement of public policy. A “no deficiency” rule for obligations secured by the deed of trust still prevails, unless the foreclosing lender can show that a specific exception applies:

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. (emphasis added)

RCW 61.24.100(1) (emphasis added). Subsection (3) of RCW 61.24.100 goes on to provide that as to commercial loans, the Act does not preclude certain actions, including “(c) subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given

¹⁰ For ease of reference, a full copy of RCW 61.24.100 is included as Appendix A to this Brief.

the notices under RCW 61.24.042” (emphasis added).

There are multiple limitations on deficiency claims against guarantors contained in Section 61.24.100, as referenced in the “subject to” language of subsection 3(c). The deficiency action must be commenced within one year after the trustee’s sale; the guarantor must be given proper notices; the guarantor is entitled to a judicial determination of “fair value”; if the deed of trust was granted by the guarantor, liability is limited to waste or wrongfully retained rents; if the beneficiary accepts a deed in lieu of foreclosure, the guarantor is exonerated; the beneficiary may waive by contract any right to a deficiency claim against a guarantor; and, as set forth in subsection (10):

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

This final limitation on deficiency actions against guarantors is the one at issue in this appeal.

3. Interpretation of Subsection (10) of RCW 61.24.100.

As a matter of general principle, the Washington Supreme Court has ruled that RCW Chapter 61.24 must be construed against lenders “because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial

foreclosure sales.” *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013), citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007). That principle must be applied in the construction of RCW 61.24.100 by this Court.

The opening sentence of Section 61.24.100 confirms that it applies solely to deficiency actions brought after the trustee’s sale with respect to obligations secured by a deed of trust. Subsection (10) only permits post-trustee’s sale claims against a guarantor if such claims are not based on the obligations, or the substantial equivalent of the obligations, secured by the foreclosed deed of trust. If the foreclosed deed of trust did secure the guarantors’ obligations, then the manifest intent of the Legislature is that any further action against the guarantors on those secured obligations is precluded by the statute.

Union Bank elected to take advantage of the expedited mechanism of a non-judicial foreclosure of the East Creek Deed of Trust. As previously discussed, the Guarantors’ obligations under their Commercial Guaranties” were secured by the Deed of Trust. Those obligations were also obviously the “substantial equivalent” of the Note and Indebtedness

obligations of the Co-Borrowers, also secured by the Deed of Trust.¹¹ Subsection (10) accordingly bars plaintiff's deficiency claims against the Guarantors.

This result does not represent a "windfall" to the Guarantors, any more than it was a "windfall" to the Co-Borrowers when their liability to the bank on the loan was limited by RCW 61.24.100 to the proceeds of the trustee's sale of the East Creek property. Rather, it is simply the outcome designated by the Legislature as one of the trade-offs for granting lenders the cheap and expedient remedy of non-judicial foreclosure. The releases of the Guarantors from further liability under their Commercial Guaranties resulted directly from the bank's voluntary choices to secure their obligations with the same Deed of Trust that secured the Co-Borrowers' obligations to repay the Note, and then to foreclose that Deed of Trust non-judicially rather than electing to pursue other available remedies.

Union Bank seeks to argue that subsection (10) is permissive only. Appellant's Brief at 18-21. Such a construction of subsection (10) would render it meaningless, by allowing lenders to bring deficiency actions against guarantors whose obligations were secured by the non-judicially

¹¹ The opening paragraph of each Commercial Guaranty states that the Guarantor "guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower, or any one or more of them, to Lender, and the performance and discharge of all Borrower's obligations under the Note ...," and also defines the term "Indebtedness" to mean "Borrower's Indebtedness to Lender ..."

foreclosed deed of trust, and also against guarantors whose obligations were not secured. It would be as if the Legislature had enacted a statute governing traffic lights, stating that it is permissible to drive through an intersection if the light is not red, and a defendant in traffic court then tried to argue that the Legislature did not intend to ban driving through intersections where the traffic light is red. Such an argument defies common sense.

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); *State ex rel. Port of Seattle v. Department of Pub. Serv.*, 1 Wn.2d 102, 112-13, 95 P.2d 1007 (1939) (the expression of one thing in a statute excludes all others).

Thus, in *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008), the Supreme Court was asked to rule that 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-hospitals. The Court rejected that contention:

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.

Similarly, in the present case if the Legislature had intended to allow post-trustee’s sale deficiency claims against guarantors, regardless of whether their obligations were secured by the foreclosed deed of trust, it would have stated in subsection (10) that “For deeds of trust securing commercial loans, a deficiency judgment may be obtained against any guarantor after a trustee’s sale under that deed of trust, ***regardless of whether*** the guarantor’s obligations were secured by the deed of trust.”

But the Legislature did not do that. It drew a clear distinction between guarantor obligations secured by the non-judicially foreclosed deed of trust, and guarantor obligations which were not so secured. Only with respect to unsecured obligations did the legislature determine that a post-sale deficiency claim could be pursued against a guarantor.

At page 21 of its appellate brief, Union Bank also argues that

construing subsection (10) as described above would conflict with the language of subsection (6), which makes a guarantor liable for a post-sale deficiency to the extent of waste or wrongful withholding of rents by the guarantor, when the guarantor's obligations were secured by the guarantor's own property.¹² Certainly the legislature could have been clearer in articulating how all of the parts of RCW 61.24.100 fit together. However, the duty of this Court is to construe the statute so as to effectuate the legislative intent. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). It does so by interpreting the statute as a whole, giving effect to all of its provisions, and not rendering some of them meaningless or superfluous. *Muckleshoot Indian Tribe v. Washington Dept. of Ecology*, 112 Wn. App. 712, 720 (2002). See also *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 314-15, 884 P.2d 920 (1994); *Whatcom v. City of Bellingham*, 128 Wn.2d at 546.

The only reasonable interpretation of RCW 61.24.100 (10) is that it

¹² At the summary judgment hearing, counsel for Union Bank sought to argue that subsection (10) applied only to guarantor obligations on loans totally unrelated to the loan secured by the foreclosed deed of trust. However, despite repeated questions from the trial court, bank counsel was unable to explain how the language of the subsection supported such a position, instead simply confirming the general principle of construction that all of the provisions of RCW 61.24.100 must be read together (RP 50-55). In fact, the entire purpose of that section is to address the issue of deficiency judgments on obligations secured by the non-judicially foreclosed deed of trust, and subsection (10) confirms that claims against guarantors may proceed only on obligations which were not so secured (RP 62-63).

states a general rule that post-trustee's sale deficiency claims against guarantors are precluded where, as here, the guarantors' obligations were secured by the non-judicially foreclosed deed of trust. RCW 61.24.100(6) should be read as presenting a limited exception to that general rule, allowing claims for waste and wrongful retention of rents committed by the guarantor, where the guarantors' obligations were secured by a deed of trust against the guarantors' own property.¹³

Such an interpretation of the anti-deficiency statute gives guarantors the same very limited liability which borrowers have with respect to obligations secured by the non-judicially foreclosed deed of trust. The general rule is that borrowers have no post-sale liability for a deficiency on such secured obligations, but the narrow exception under subsection 3(c)(1) allows them to be held liable to the extent of waste or wrongful retention of rents committed by them.

Counsel for the Vanderveens has been unable to locate any legislative history which would be of assistance to the Court in construing subsection (10).¹⁴ However, there is an extensive discussion of RCW

¹³ That limited exception has no application here, because the property subject to the deed of trust was owned by the Co-Borrowers rather than the Guarantors individually, and because Union Bank made no allegations of waste or wrongful retention of rents.

¹⁴ At page 25 of Appellant's Brief, Union Bank refers to the House Bill Report for Engrossed Substitute Senate Bill 6191, 55th Leg. Reg. Sess. (Wash. 1998) and its summary of revised RCW 61.24.100's requirements for seeking a deficiency judgment against a guarantor. That summary did not purport to be exhaustive, and it instead

61.24.100's anti-deficiency provisions at page 4 of the Summer 1998 edition of the WSBA Real Property, Probate & Trust Section Newsletter, entitled "*An Overview of Washington's 1998 Deed of Trust Act Amendments*," published shortly after the amendments became effective.¹⁵ That discussion ended with the following paragraph addressing subsection (10), confirming the parallel obligations of borrowers and guarantors intended by the Legislature with respect to obligations which had been secured by the foreclosed deed of trust:

Finally, as long as the guarantor is not a borrower, the guarantee itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guarantee to the same extent a borrower's liabilities are terminated by a trustee's sale. However, if the foreclosed property is the guarantor's principal residence, the guarantor as the first right to the sales proceeds in an amount equal to the homestead exemption, which, under RCW 60.13.030, is the lesser of \$30,000 or the guarantor's equity in the property. [Emphasis added.]

Read as a whole, RCW 61.24.100 reflects the legislative intent to preclude deficiency judgments against secured commercial loan guaranty obligations through subsection (10), by applying the general no-deficiency rule of subsection (1) to such claims, excepting only those narrow situations (not applicable here) where the guarantors granted the deed of

prefaced the items it listed as conditions with the phrase "if certain conditions are met, including the following: ..." The restrictions in Subsection (10) were not the only ones omitted from the brief summary in the Bill Report.

¹⁵ A copy of the article is attached for reference as Appendix B to this Brief.

trust and then committed waste or similar wrongdoing as referenced in subsection (6).

While there are as yet no reported Washington cases construing subsection (10),¹⁶ a determination that it bars post-trustee sale deficiency claims on secured guarantor obligations would be entirely consistent with other decisions interpreting the Deed of Trust Act. Washington courts have created a clear line of demarcation prohibiting deficiency actions on obligations secured by a non-judicially foreclosed deed of trust. This line of demarcation was recently reiterated in *Beal Bank, SSB v Sarich*, 161 Wn.2d 544, 550, 552, 167 P.3d 555 (2007). *Beal Bank* held that while a non-judicially foreclosing deed of trust holder was barred from seeking a deficiency judgment on the foreclosed obligation, junior deed of trust holders were entitled to enforce the debt obligations owed to them because those obligations were not secured by the foreclosed deed of trust.

Similarly, in *Glenham v. Palzer*, 58 Wn. App. 294, 298, 792 P.2d 551 (1990), defendants who did not have an obligation secured by the foreclosed trust deed sought to avoid tort claims against them relating to the foreclosed loan transaction. Recognizing that the no-deficiency rule protects those who owed obligations secured by the non-judicially

¹⁶ As indicated in footnote 1 above, there are a number of cases involving the same issues now pending in Divisions I and II of the Washington Court of Appeals, three of which will likely be decided before the Court rules on those issues in this case.

foreclosed deed of trust, the *Glenham* court refused to bar further action against the defendants, because their tort obligations were not secured by the deed of trust. *Id.*; see also *Thompson v. Smith*, 58 Wn. App. 361, 366, 793 P.2d 449 (1990) (deed of trust beneficiary who accepted deed in lieu of foreclosure, then resold the property, was barred from seeking a deficiency judgment since the beneficiary had in effect non-judicially foreclosed the deed of trust securing the obligation).

In the present case, Frontier Bank could have taken the more normal approach and drafted its Deed of Trust to secure only the Co-Borrowers' obligations under the Promissory Note. Instead, it elected to have the Deed of Trust also secure the Guarantors' obligations to pay the Note Indebtedness if the Co-Borrowers failed to do so.

Notwithstanding that drafting decision by its predecessor in interest, Union Bank could have chosen to sue the Co-Borrowers on the Promissory Note and/or the Guarantors on their Commercial Guaranties, obtaining a money judgment without first foreclosing upon its East Creek property collateral. It could have chosen to foreclose the Deed of Trust judicially, preserving the right to deficiency judgments but taking the property subject to upset price limitations and a one year redemption period.

Instead, Union Bank chose the more expedient remedy of a non-

judicial foreclosure and trustee's sale. These choices have legal consequences. Because the obligations of the Guarantors were secured by the East Creek Deed of Trust, their liability to Union Bank ended with the trustee's sale. The Trial Court correctly dismissed the bank's deficiency lawsuit as having been brought in violation of RCW 61.24.100.

D. The Protections of RCW 61.24.100 Are Not Waivable.

At pages 27-32 of its appellate brief, Union Bank argues that the protections afforded guarantors through RCW 61.24.100 were waived by certain boilerplate language buried in the fine print on page 2 of the Commercial Guaranty forms (*e.g.*, CP 109), referencing "anti-deficiency law" but failing to explain or define that term. As an alternative argument below, the Guarantors contended that they did not understand the meaning of the term "anti-deficiency," that an ordinary person would not have understood that language as a waiver of the protections of RCW 61.24.100, and that a valid waiver of RCW 61.24.100 had not been proven. Defendants' Motion for Summary Judgment at pages 21-22 (CP 209-10).

It is long established law in Washington that "[a] 'waiver' is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish

the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them.” *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958).

However, it was not necessary for the trial court to consider that alternative argument, because it properly determined that the protections of the Deed of Trust Act are not waivable as a matter of law. Order Granting Defendants Summary Judgment, paragraph 5 (CP 586). First, the language of opening sentence of the statute is mandatory -- except as provided in RCW 61.24.100, a deficiency judgment “shall not be obtained” against a borrower or guarantor. Nothing in the statute even suggests, much less provides, that its protections are waivable. On the contrary, subsection (9) allows a deed of trust beneficiary to contractually waive the right to a deficiency following a trustee’s sale, but contains no corresponding provision authorizing waivers from borrowers or guarantors with respect to the statutory protections against deficiency judgments. Again, “*expressio unius est exclusio alterius.*” *Landmark Dev., Inc. v. City of Roy, supra.*

If the anti-deficiency protections set forth in RCW 61.24.100 were waivable, such waivers would be included in every Washington loan document, and lenders would have the best of both worlds: they would receive the speedy non-judicial foreclosure remedy afforded by the Deed

of Trust Act, without the burdens of redemption periods, upset price hearings or other aspects of the judicial foreclosure process, while still retaining the right to recover deficiency judgments against the borrowers and guarantors following the trustee's sale. Such an outcome would be totally at odds with the fundamental "quid pro quo between lenders and borrowers" underlying the Deed of Trust Act. *Thompson v. Smith*, 58 Wn. App. 361, 793 P.2d 449 (1990).

It would also be contrary to the Washington Supreme Court's recent decision under the Deed of Trust Act in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 107-108, 385 P.3d 34 (2012), involving the contention that MERS could non-judicially foreclose deeds of trust granted to it as "nominee," even though it could not prove that it was the holder of the promissory note secured by the deed of trust. The Supreme Court rejected an argument by MERS that a deed of trust grantor had contractually waived the statutory requirement that only a holder of the obligation secured by the deed of trust could exercise the rights of a "beneficiary" under the statute through non-judicial foreclosure. The Supreme Court stated:

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.
(emphasis added)

These principles were reiterated by the Washington Supreme Court in *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 108, 297 P.3d 677 (2013), which presented the issue of whether a deed of trust grantor could waive the statutory requirement that deeds of trust on agricultural land must be foreclosed judicially. Rejecting that waiver argument, the Court stated:

This is not the first time we have confronted the argument that statutory requirements of the deeds of trust act may be waived contractually. In *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012), we held the statutory requirement that the beneficiary hold the note or other instrument of indebtedness could not be waived. *Id.* at 108. In *Bain*, we followed the reasoning of other cases in which we have held other statutory requirements could not be contractually waived. *Id.* at 107-08 (citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); *Nat'l Union Ins. Co. of Pittsburgh v. Puget Sound Power & Light*, 94 Wn. App. 163, 177, 972 P.2d 481 (1999); *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943)).

The same fundamental principles should be applied to the anti-deficiency protections of RCW 61.24.100. Nothing in the *Bain* or *Schroeder* decisions suggests that they are limited to pre-foreclosure procedural requirements, as contended by Union Bank at page 31 of its opening brief, nor that the Supreme Court intended any different policy to apply to the statutory limits upon a beneficiary's right to obtain deficiency judgments after the trustee's sale is completed. On the contrary, the

language of RCW 61.24.100 is quite emphatic and unconditional, beginning with the words “Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained” Allowing waivers of those protections would gut the statute, permitting banks to obtain all of their side of the “quid pro quo,” while denying it to the parties intended to be protected, *i.e.*, borrowers, grantors and guarantors.

E. The Vanderveens’ Application for Award of Attorney’s Fees Below was Timely under CR 54(d)(2).

1. Right to Attorney’s Fees as Prevailing Parties.

As prevailing parties before the trial court, the Vanderveens, the O’Neils and the Nordstrom Trust were entitled to recover their attorney’s fees based upon the terms of the Promissory Note and Commercial Guaranties,¹⁷ combined with the provisions of RCW 4.84.330.¹⁸ Such

¹⁷ Near the bottom of page 1 under the heading “Attorneys’ Fees; Expenses,” the East Creek Promissory Note (CP 95) provided for the recovery of attorney’s fees incurred by the Lender in collecting the Note. The Vanderveen Commercial Guaranty, through its “Indebtedness” section on the first page (CP 129), also included the obligation to pay attorney’s fees incurred by the Lender.

¹⁸ While the Frontier Bank loan documents did not expressly for the recovery of attorney’s fees against the bank, the gap in those one-sided provisions has been filled by RCW 4.84.330, which states as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys’ fees in addition to costs and necessary disbursements. Attorneys’ fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21,

entitlement is not disputed by Union Bank, nor does it dispute the reasonableness of the attorney's fee awards rendered by the trial court. Rather, the bank simply argues that the process of requesting and receiving those fee awards did not comply with the time limitations of CR 54(d)(2). Those arguments should be rejected by this Court, just as they were rejected by the trial court below.

2. Establishment of Entitlement to Attorney's Fees and Quantification of Award.

In Section G of Defendants' February 22, 2013 Motion for Summary Judgment (CP 210-11), the Guarantors requested a ruling from the trial court that they were entitled to an award of attorney's fees if summary judgment of dismissal was granted, with the amount of the fee award to be determined after the summary judgment proceedings were completed. At no time during the summary judgment briefing or in oral argument did Union Bank ever object to that two-step process.

In issuing its April 10, 2013 Order Granting Defendants Summary Judgment, the trial court accordingly ruled that "Plaintiff's First Amended Complaint is hereby dismissed with prejudice, and defendants Vanderveen, O'Neil and the Tori Lynn Nordstrom Trust are entitled to recover their prevailing party attorney's fees and costs, in amounts to be

1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void. As used in this section "prevailing party" means the party in whose favor final judgment is rendered. (Emphasis added.)

determined by the court at a subsequent hearing” (CP 586, emphasis added).

Civil Rule 54(d)(2) provides that “claims for attorney’s fees ... shall be made by motion,” and that “the motion must be filed no later than 10 days after entry of judgment.” Here, the Guarantors filed their claim of entitlement to attorney’s fees as part of their summary judgment motion, and that entitlement was confirmed by the trial court in its summary judgment order. Nothing in the rule requires that the trial court must also complete the process of quantifying the dollar amount of attorney’s fees to be awarded within 10 days thereafter. In fact the plain language of CR 54(d)(2) expressly grants the trial court authority to grant extensions, which the court effectively did in this case as detailed below, by directing that the attorney fee applications would not be heard until at least May 6, 2013. Quantification of the fee awards within 10 days following summary judgment would not have been possible under the circumstances of this case, and Union Bank has suffered absolutely no prejudice as a result of the procedure employed.

To place the matter in proper context, a summary of the sequence of events following the summary judgment may be of assistance. The trial court’s summary judgment order was sent to the parties via email from the court’s bailiff on April 10, 2013 (CP 433). Counsel for the O’Neils and

Nordstrom Trust responded a few minutes later, expressing an intent to present an application for attorney's fee award for hearing without oral argument six days thereafter (CP 432). Less than an hour later, the bailiff responded, stating that the trial court would be in vacation recess for three weeks, from Monday, April 15 through Friday, May 3, and that the trial court would accordingly be unable to consider any fee applications until after returning on May 6, and that they should be noted accordingly (CP 432). This information was passed on to other counsel.

On April 22, 2013, Union Bank filed its Motion for Reconsideration of the trial court's summary judgment order.¹⁹ As a result of that motion, it was apparent that the Guarantors would be incurring additional attorney's fees in proceedings before the trial court, which fees would need to be included in their applications for prevailing party attorney's fee awards. That was particularly true as to the Vanderveens, whose counsel had carried the laboring oar throughout the summary judgment motion process (CP 453), and would be preparing the opposition to reconsideration. For that reason, as well as the Court's extended absence on vacation, the Vanderveens deferred the submission of their detailed application to the trial court to fix the amount of their prevailing

¹⁹ Although filed more than 10 days after the entry of the summary judgment order, the reconsideration motion was timely under CR 6(a) and CR 59(b) because April 20, 2013 was a Saturday, giving the bank until Monday, April 22 to file its motion.

party fee award, until after the motion for reconsideration had been briefed and the amount of fees incurred in doing so were known.

The opposition to the bank's motion for reconsideration was accordingly prepared and filed by counsel for the Vanderveens on May 2 on behalf of all the Guarantor defendants (CP 410-23). Union Bank filed its reply brief in support of reconsideration on May 6 (CP 488-98). The trial court entered its Order Denying Plaintiff's Motion for Reconsideration on May 7, 2013 (CP 512-13).

With the brief in opposition to Union Bank's motion for reconsideration completed on May 2, 2013, and with no further proceedings before the trial court anticipated, counsel for the Vanderveens finalized and filed their application for attorney's fee award on May 3, supported by a declaration and proposed findings and conclusions regarding the amount sought to be awarded (CP 434-66). (Because their work before the trial court had been completed earlier, counsel for the O'Neils and the Nordstrom Trust had submitted their fee application and supporting declaration on April 26, 2013 (CP 376-94).)

As previously indicated, the trial court denied Union Bank's motion for reconsideration on May 7, 2013. The bank filed its notice of appeal of later the same day (CP 504-11). On May 8, the trial court granted the O'Neil-Nordstrom Trust fee application and awarded

judgment for the amount sought (CP 499-503), rejecting the CR 54(d)(2) “untimeliness” arguments asserted by Union Bank. On May 9, Union Bank filed its opposition to the attorney’s fees requested by the Vanderveens (CP 515-24), relying on the same “untimeliness” arguments the trial court had rejected the previous day. After considering the Vanderveens’ May 10 reply brief and supplemental declaration (CP 525-38), the trial court approved their attorney’s fee request through Findings of Fact and Conclusions of Law entered on May 13 (CP 539-41). The trial court entered a minor amendment of the O’Neil-Nordstrom Trust fee judgment on May 22 (CP 544-47), and entered judgment for the Vanderveens’ fees on May 29 (CP 549-51).

Union Bank filed its Amended Notice of Appeal covering the fee awards on June 3, 2013 (CP 553-54). There is no issue regarding the effectiveness of that amendment, and no dispute by the Guarantors that, if the summary judgment in their favor is reversed by this Court, the attorney’s fee judgments must be reversed as well. But if the summary judgment is affirmed, the attorney’s fee judgments should be affirmed as well, and there is no basis for reversing them under CR 54(d)(2).

Union Bank seeks to rely upon the case of *Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010), but it is clearly distinguishable on its facts. In that case, Corey’s wrongful termination, defamation and

related claims were tried to a jury and resulted in a verdict in Corey's favor. Judgment was entered upon the jury verdict, and Corey did not file a motion seeking to establish her entitlement to attorney's fees until more than 10 days after the entry of judgment. In contrast, in the present case, the Guarantors asserted their claim for prevailing party attorney's fees as part of their summary judgment motion, Union Bank had the opportunity to brief the issue in its response, and the trial court ruled on their entitlement to recover such fees as part of its summary judgment order. Nothing in Civil Rule 54(d)(2) imposed a time limit upon the trial court's decision as to the dollar amount of fees to be awarded, once entitlement had been determined.²⁰

In footnote 8 to its appellate brief, Union Bank also cites the decision in *Schake v. Colt Industries Operating Corp. Severance Plan*, 960 F.2d 1187 (3rd Cir. 1992), involving an attorney's fee application under a federal local rule somewhat similar to CR 54(d)(2). That decision is distinguishable from the present facts for the same reasons as the *Corey* decision. In *Schake*, the District Court had entered a final judgment on October 11, 1990, and it was not until January 16, 1991 that the plaintiffs

²⁰ In its appellate brief at page 34, Union Bank attempts to gloss over this distinction, noting that Corey had a statutory "right" to fees under RCW 49.48.030. Yet, Corey did not ask the trial court to confirm that she met the requirements for exercising that "right" until more than 10 days after the entry of judgment. Here, the Guarantors not only had a "right" to attorney's fees by contract and under RCW 4.84.330, but they filed a motion and obtained a ruling confirming that right as part of the summary judgment itself.

applied for an award of attorney's fees. The Third Circuit ruled that the application was untimely under the local rule, because the plaintiffs had not even raised the issue of entitlement to attorney's fees until months after the final judgment had been entered.²¹

In so ruling, the Court commented as follows:

A fundamental principle of justice is that a case must come to an end; it should not be protracted interminably either because of the carelessness or ineptness of counsel or the indolence of a court.

960 F.2d at 1193. Aside from the obvious factual distinction, counsel for the Guarantors was not careless or inept in the present case, nor was the trial court indolent. The attorney's fee amounts were determined expeditiously, well before the deadline for Union Bank to perfect its appeal, and the proceedings below were protracted only by the bank's unsuccessful motion for reconsideration. The Guarantors were quite properly awarded the additional fees they were forced to incur after the entry of the summary judgment order, as a result of the need to oppose that reconsideration motion.

²¹ Union Bank's footnote 8 also cites *Quick v. Peoples Bank of Cullman County*, 993 F.2d 793 (11th Cir. 1993). There again, the issue of entitlement to attorney's fees was not raised until well after the entry of judgment and "The Quicks admit that their petition was untimely under L.R. 54.1(a)." 993 F.2d at 796. Also cited is *Sol Salins, Inc. v. W.M. Ercanbrack Co., Inc.*, 155 F.R.D. 4 (D.D.C. 1994). There, the opinion expressly noted that the plaintiff "did not seek attorney's fees and costs at the time it filed its motion for summary judgment," and waited 30 days after the entry of judgment before raising the issue of entitlement to attorney's fees, 16 days beyond the period allowed under the local rules. Again, these cases are clearly distinguishable from the present facts, and provide no basis for determining that the Guarantors' attorney's fee applications were untimely.

Nothing in the language of CR 54(d)(2) required a different procedure or compels a different result, especially given the direction the parties received from the Court and the impossibility of accurately quantifying the amount of attorney's fees to be awarded until after the briefing on Union Bank's motion for reconsideration had been completed.

F. The Vanderveens Seek an Award of Prevailing Party Attorney's Fees in This Appeal.

The Vanderveens are entitled to an award of prevailing party attorney's fees from this Court, on the same basis as the award made by the trial court, *i.e.*, pursuant to the terms of the Promissory Note and Continuing Guaranties between the parties and the provisions RCW 4.84.330. See Section IV.E.1 and footnotes 14 and 15, above.

V. CONCLUSION

For all of the reasons stated above, the trial court's dismissal of Union Bank's First Amended Complaint and its awards of attorney's fees against the bank should be upheld, and the Vanderveens should be awarded their attorney's fees and costs incurred on this appeal.

RESPECTFULLY SUBMITTED this 21st day of October, 2013.

LASHER HOLZAPFEL
SPERRY & EBBERSON P.L.L.C.

By 

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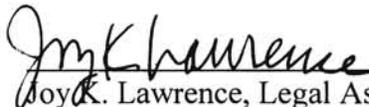
CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I caused to be served a copy of the foregoing **BRIEF OF RESPONDENTS VANDERVEEN and APPENDICES A-C thereto** on the following persons in the manner indicated below at the following address:

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- by **Overnight Delivery**



Joy K. Lawrence, Legal Assistant to
Dean A. Messmer

APPENDIX A

TEXT OF RCW 61.24.100

(1) 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.

(2)(a) Nothing in this chapter precludes an action against any person liable on the obligations secured by a deed of trust or any guarantor prior to a notice of trustee's sale being given pursuant to this chapter or after the discontinuance of the trustee's sale.

(b) No action under (a) of this subsection precludes the beneficiary from commencing a judicial foreclosure or trustee's sale under the deed of trust after the completion or dismissal of that action.

(3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(a)(i) To the extent the fair value of the property sold at the trustee's sale to the beneficiary or an affiliate of the beneficiary is less than the unpaid obligation secured by the deed of trust immediately prior to the trustee's sale, an action for a deficiency judgment against the borrower or grantor, if such person or persons was timely given the notices under RCW 61.24.040, for (A) any decrease in the fair value of the property caused by waste to the property committed by the borrower or grantor, respectively, after the deed of trust is granted, and (B) the wrongful retention of any rents, insurance proceeds, or condemnation awards by the borrower or grantor, respectively, that are otherwise owed to the beneficiary.

(ii) This subsection (3)(a) does not apply to any property that is occupied by the borrower as its principal residence as of the date of the trustee's sale;

(b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclosed;
or

(c) Subject to this section, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

(4) Any action referred to in subsection (3)(a) and (c) of this section shall be commenced within one year after the date of the trustee's sale, or a later date to which the liable party otherwise agrees in writing with the beneficiary after the notice of foreclosure is given, plus any period during which the action is prohibited by a bankruptcy, insolvency, moratorium, or other similar debtor protection statute. If there occurs more than one trustee's sale under a deed of trust securing a commercial loan or if trustee's sales are made pursuant to two or more deeds of trust securing the same commercial loan, the one-year limitation in this section begins on the date of the last of those trustee's sales.

(5) In any action against a guarantor following a trustee's sale under a deed of trust securing a commercial loan, the guarantor may request the court or other appropriate adjudicator to determine, or the court or other appropriate adjudicator may in its discretion determine, the fair value of the property sold at the sale and the deficiency judgment against the guarantor shall be for an amount equal to the sum of the total amount owed to the beneficiary by the guarantor as of the date of the trustee's sale, less the fair value of the property sold at the trustee's sale or the sale price paid at the trustee's sale, whichever is greater, plus interest on the amount of the deficiency from the date of the trustee's sale at the rate provided in the guaranty, the deed of trust, or in any other contracts evidencing the debt secured by the deed of trust, as applicable, and any costs, expenses, and fees that are provided for in any contract evidencing the guarantor's liability for such a judgment. If any other security is sold to satisfy the same debt prior to the entry of a deficiency judgment against the guarantor, the fair value of that security, as calculated in the manner applicable to the property sold at the trustee's sale, shall be added to the fair value of the property sold at the trustee's sale as of the date that additional security is foreclosed. This section is in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale.

(6) A guarantor granting a deed of trust to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i) of this section. If the deed of trust encumbers the guarantor's principal residence, the guarantor shall be entitled to receive an amount up to the homestead exemption set forth in RCW 6.13.030, without regard to the effect of RCW 6.13.080(2), from the bid at the foreclosure or trustee's sale accepted by the sheriff or trustee prior to the application of the bid to the guarantor's obligation.

(7) A beneficiary's acceptance of a deed in lieu of a trustee's sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction.

(8) This chapter does not preclude a beneficiary from foreclosing a deed of trust in the same manner as a real property mortgage and this section does not apply to such a foreclosure.

(9) Any contract, note, deed of trust, or guaranty may, by its express language, prohibit the recovery of any portion or all of a deficiency after the property encumbered by the deed of trust securing a commercial loan is sold at a trustee's sale.

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

(11) Unless the guarantor otherwise agrees, a trustee's sale shall not impair any right or agreement of a guarantor to be reimbursed by a borrower or grantor for a deficiency judgment against the guarantor.

(12) Notwithstanding anything in this section to the contrary, the rights and obligations of any borrower, grantor, and guarantor following a trustee's sale under a deed of trust securing a commercial loan or any guaranty of such a loan executed prior to June 11, 1998, shall be determined in accordance with the laws existing prior to June 11, 1998.

APPENDIX B

**WASHINGTON REAL PROPERTY & PROBATE SECTION
SUMMER 1998 NEWSLETTER ARTICLE**

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An Overview of Washington's 1998 Deed of Trust Act Amendments

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On June 11, 1998, a set of comprehensive amendments to Washington's Deed of Trust Act, chapter 61.24 RCW (the "Act"), took effect. The 1998 amendments revise 12 of the 14 sections of the prior Act, create 4 new sections, and modify RCW 7.28.300 (quieting title against a real property security lien) and RCW 7.60.020 (appointment of a receiver). This article provides only a thumbnail sketch of the most significant substantive changes and clarifications contained in the 1998 amendments, and the practitioner is advised to carefully review the amended Act in its entirety.

I. NEW DEFINITIONS

The starting point of any analysis of the 1998 amendments is the Act's new definitions section. Unlike the prior version of the Act, which did not define many of the key terms used throughout the statute, the 1998 amendments define eleven key terms: *grantor, beneficiary, affiliate of beneficiary, trustee, borrower, grantor, commercial loan, trustee's sale, fair value, record* and

continued on page 4

Sale of Residential Real Property From an Estate:

Practical Suggestions and Ways to Limit the Personal Representative's Liability

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The standard Northwest Multiple Listing Service ("NWMLS") forms for the sale of residential real property contemplate that the seller is the owner who is familiar with the property. Typically, this familiarity is because the property is either the seller's primary residence or rental property. However, when the owner has died and the seller becomes the personal representative who may be a son, daughter, friend or corporate fiduciary, this familiarity is lost. In this situation, using the standard NWMLS forms without modification can result in the personal representative incurring unnecessary liability by making broad representations and warranties based on little or inaccurate knowledge. The following points can help you limit the personal representative's liability and lay the groundwork for a smoother closing.

1. The Basics.

The following assumes that you have covered the basics: (1) the personal representative has the authority to sell the property, either under nonintervention powers or court order; (2) the sale is consistent with the terms of the Will and no beneficiary wants the property as all or part of his or her distributive share; and (3) the property is adequately insured against loss pending the sale.

However, there is one additional basic step that is often overlooked: Confirm that the decedent held title to the real property. From experience, individuals can creatively transfer real property, especially after they have received estate planning advice. For example, the decedent may have sold, gifted or transferred all or a fraction of the property to an individual, trust or limited liability company. The personal representative may not be aware of the transfer and, assuming that the decedent held title, will proceed to list the property for sale.

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An Overview of Washington's 1998 Deed of Trust Act Amendments

recorded, and person. The newly defined terms not only promote consistency and clarity in the statute, but they contain important substantive changes as well. For example, the amended Act specifically distinguishes among a "borrower," "grantor" and "guarantor." In short, a guarantor cannot also be a borrower. Since the amended Act treats borrowers and guarantors differently with respect to their potential liability for a deficiency judgment, this distinction prevents a lender from requiring the same person to act in both capacities in an attempt to circumvent the statutory limitations on post-sale liability. However, the Act does not prevent a guarantor from being a grantor under a deed of trust that is given to secure the borrower's note, provided the grantor is not also a borrower. The new definitions contain other substantive changes as well, some of which are highlighted below.

II. ANTI-DEFICIENCY PROVISIONS

Among the most notable of the 1998 amendments are the changes to RCW 61.24.100 regarding the Act's anti-deficiency rules. Under the prior version of that section, the borrower had no personal liability for a deficiency following a trustee's sale. Under the new Act, however, if the underlying obligation is a "commercial loan" (defined as a loan that is not made primarily for "personal, family or household purposes"), and the deed of trust does not encumber the borrower's principal residence on the date of the trustee's sale, a lender who purchases the property at such sale now has limited recourse against a borrower. Specifically, if and to the extent the "fair value" (another newly defined term) of the property as of the date of the trustee's sale is less than the amount of the debt, and regardless of the amount of the lender's bid, the lender may obtain a judgment against the borrower (a) for the wrongful retention of any rents, insurance proceeds or condemnation awards that are owed to the lender, and (b) to the extent such difference is caused by waste to the property committed by the borrower after the date the deed of trust is granted. Both of those provisions also apply to the deed of trust grantor (who may or may not be the borrower). In both cases, the liable party must have been given the statutory notices of the foreclosure, and the action must be brought within one year after the date of the trustee's sale, as opposed to the normal six-year statute of limitations. The one year period is extended to the extent that action is tolled by bankruptcy or any other debtor protection statute.

The amended Act also provides that 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, is not secured by the deed of trust. RCW 61.24.100(10). Thus, the parties may segregate liabilities into those that may be included in the lender's bid price, and therefore recovered from the sale if the lender is outbid, and those that will survive a trustee's sale. Because of the "substantially similar"

qualification, however, the lender cannot have it both ways: that is, both secure a specific obligation and require the borrower to execute an unsecured indemnification and cause that obligation to survive the sale.

The amended RCW 61.24.100 also clarifies the scope of a guarantor's liability for a post-sale deficiency, an issue which the Washington courts have declined to resolve. *E.g.*, *Glenham v. Palzer*, 58 Wn. App. 294, 298 n.4, 792 P.2d 551 (1990); *Thompson v. Smith*, 58 Wn. App. 361, 367 n.4, 793 P.2d 449 (1990). Under the new Act, the guarantor of a commercial loan is liable for a deficiency judgment, but only if the guarantor was given the same statutory notices that are required to be given to the borrower and the action is brought within the limitations period applicable to the borrower and grantor. In any such action, the guarantor may plead the "fair value" of the property as a defense to some portion or all of its liability. Under this defense, the guarantor's liability is equal to the debt as of the sale date, less the greater of the successful bid amount or the fair value of the property sold at the sale, plus interest on the amount of the deficiency from the sale date at the rate provided in the applicable loan documents, plus such costs, expenses and fees as are agreed to in the guaranty. If any other collateral for the same debt is sold prior to the entry of the deficiency judgment, the fair value of that property is added to the other fair values for the purpose of determining the extent of the guarantor's liability. This "fair value" defense avoids the inequities of a double recovery that would otherwise result from a successful bid that is significantly less than both the debt and the value of the property.

Finally, as long as the guarantor is not a borrower, the guaranty itself may be secured by a deed of trust. A trustee's sale under such a deed of trust extinguishes the liability of the guarantor under the guaranty to the same extent a borrower's liabilities are terminated by a trustee's sale. However, if the foreclosed property is the guarantor's principal residence, the guarantor has the first right to the sale proceeds in an amount equal to the homestead exemption, which, under RCW 6.13.030, is the lesser of \$30,000 or the guarantor's equity in the property.

III. OTHER REMEDIES

The 1998 amendments address other remedies as well. Washington prohibits a "concurrent action" on the same debt in the context of a judicial or nonjudicial foreclosure. RCW 61.12.120, 61.24.030(4). A 1990 amendment to the Deed of Trust Act clarified that with respect to a trustee's sale in commercial loan, a request for the appointment of a receiver is not such an "action." It also permitted concurrent and subsequent foreclosures of other security granted for a commercial loan. A new subsection (2) to RCW 61.24.100 addresses two additional points. First, by taking a deed of trust, a lender is not precluded from bringing another type of action prior to commencing a trustee's sale. In other words, Washington has no "security first" rule. Second, if

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An Overview of Washington's 1998 Deed of Trust Act Amendments

the other action has been concluded and any portion of the debt remains outstanding, the lender may thereafter judicially or nonjudicially foreclose a deed of trust. This should avoid concerns over whether a lender is precluded from obtaining a "pre-foreclosure deficiency" against the borrower because it may not seek a personal judgment after a trustee's sale is held. While these provisions were not previously codified, neither represents a departure from existing law.

IV. BANKRUPTCY CONCERNS

Another significant provision of the new Act attempts to circumvent a common bankruptcy problem by specifically defining the exact time when a trustee's sale is deemed "final." The problem arises when a bankruptcy is filed after the conclusion of a trustee's sale, but before the trustee's deed is recorded. In this situation, four sections of the Bankruptcy Code—Sections 362(a), 541, 544(a)(3), 549(a)—combine to bring the foreclosed property into the bankruptcy estate, stay the recordation of the trustee's deed, and permit the bankruptcy trustee to avoid the transfer of the debtor's interest in the property. *See, e.g., In re Williams*, 124 B.R. 311 (Bankr. C.D. Cal. 1991); *In re Walker*, 861 F.2d 597 (9th Cir. 1988).

The amended RCW 61.24.050 attempts to avoid this result by providing that a trustee's sale is "final" as of the time and date the trustee accepts a bid, provided the trustee's deed is recorded within fifteen days. This "relation back" approach follows a similar 1993 attempt by the California legislature to circumvent the same bankruptcy concern. California's relation back statute, Section 2924h(c) of the California Civil Code, has been tested and proven effective in at least two cases, *In re Engles*, 193 B.R. 23 (Bankr. S.D. Cal. 1996), and *In re Garner*, 208 B.R. 698 (Bankr. N.D. Cal. 1997). The California approach successfully

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Sale of Residential Real Property From an Estate

the property. Recognize, however, that the broker, real estate agent and buyer may not agree with all or any of your suggested revisions, and negotiation may be necessary.

The foregoing points cover the basic forms and highlight some suggested revisions. As always, carefully review all forms and addenda related to the sale and determine what, if any, additional revisions are required. By considering these issues when conducting your review, you can limit the personal representative's liability and lay the groundwork for a smoother closing.

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¹ The author gratefully acknowledges the significant contributions by Ellen Conedera Dial and Carol Kirby to this article

avoids the automatic bankruptcy stay because Section 362(b)(3) of the Code excepts from the stay certain acts to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under Section 546(b) of the Code; Section 546(b), in turn, gives effect to state law provisions permitting retroactive perfection.

V. EXCLUSION OF AGRICULTURAL LAND

In order to provide farmers and other owners of agricultural property facing foreclosure the opportunity to harvest seasonal crops from their land, Washington law provides that the foreclosure of agricultural property must be accomplished judicially, thus allowing the land owner a longer foreclosure process as well as a one year redemption period. To accomplish this result, the prior version of RCW 61.24.030 required that a deed of trust, as a prerequisite to being non-judicially foreclosed, contain a statement that the secured property "is not used principally for agricultural or farming purposes." Under an amended RCW 61.24.030, this requirement remains, although the term "farming" has been eliminated due to its ambiguous meaning. However, the new Act requires that, in addition to the statement that the encumbered property is not used for agricultural purposes, the property is not in fact so employed. To this end, the revised section requires that if the statement is false as of both the date the deed of trust was granted and the date of the trustee's sale, the property must be foreclosed judicially. Thus, a non-judicial foreclosure is allowed if the statement is true as of either of those two dates. This prohibits the grantor from changing non-agricultural property to an agricultural use in an attempt to circumvent the beneficiary's contractual right to foreclose nonjudicially. However, if the property was originally used for agricultural purposes but its use changes during the term of the deed of trust, the deed of trust may be amended to include the non-agricultural use statement, thus providing to the beneficiary the remedy of nonjudicial foreclosure.

The new Act also specifically defines the term "agricultural purposes" as "an operation that produces crops, livestock, or aquatic goods." RCW 61.24.030. This definition is consistent with an approach used in other security contexts, most notably in the proposed, new Article 9 of the Uniform Commercial Code. *See* Draft Revision of Uniform Commercial Code Article 9 — Secured Transactions; Sales of Accounts and Chattel Paper, Sections 9-102(3), (23), (29); and 9-105(c).

VI. TRUSTEES AND THE FORECLOSURE PROCESS

In 1981, the Act was amended to allow any "domestic corporation" to act as a trustee. Since that amendment, a number of out-of-state entities have been incorporating in Washington with no physical presence within the state for the sole purpose of acting as trustees in nonjudicial foreclosures. Unlike the other

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Notes from the Chair

preparing the Trust and Estate Dispute Resolution Act for re-submission to the legislature, and may have some additional proposals for changes to the durable power of attorney statutes. As bills reach proposal status they will be included on our Web page. This will allow you to see the actual terms of the specific proposals, and will give you opportunity to give us your feedback.

It has been my pleasure to serve as your Chair over this past year. Thank you for all of your assistance and support. With John Riley as your new Chair, and Mark Roberts as the new Chair Elect, I know that our Section will continue its tradition of excellence in leadership.

As always, questions, comments and suggestions are welcome and encouraged! Please provide us with your thoughts by contacting me or John Riley at:

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parties authorized to act as trustees under the Act, these out-of-state entities are essentially unregulated and may offer the grantor no in-state contact. To rectify this problem, the modified RCW 61.24.010 requires that at least one officer of a domestic corporation trustee be a Washington resident. The amended RCW 61.24.030 also requires trustees to maintain a street address in Washington prior to the date of the notice of trustee's sale through the trustee's sale for purposes of personal service of process.

Another change concerns successor trustees. Under the prior RCW 61.24.010, the beneficiary could appoint a successor trustee at its discretion. Under the amendments to that section, any such appointment is deemed an automatic resignation of the predecessor trustee. This eliminates the previous requirement that the predecessor trustee resign, which simply complicated the process and increased the costs, particularly when the original trustee was difficult to locate.

The amended Act also makes several other changes and clarifications to various aspects of the foreclosure process, including the following: codifying the existing practice of allowing the beneficiary to "credit bid" the amount of its debt at the trustee's sale (RCW 61.24.070); creating specific procedures for the handling of surplus sales proceeds (RCW 61.24.080); providing that certain anti-competitive efforts to interfere with the bidding process at trustees' sales are violations of the

Washington Consumer Protection Act (new section); clarifying that a beneficiary may "pick and choose" which junior interests in the property will remain after the trustee's sale by simply not serving those parties (RCW 61.24.040(1)(b), .060); and codifying in the Act an existing practice under RCW 62A.9-501(4), whereby a trustee can sell a grantor's interest in any personal property which is secured by a deed of trust with security agreement provisions (RCW 61.24.020, .050).

**Craig A. Fielden is an attorney with Stoel Rives LLP, where he practices primarily in the areas of real estate finance, development and leasing. Mr. Fielden would like to thank Gordon Tanner, Chair of the committee that drafted the 1998 Deed of Trust Act amendments, and David Rockwell, Chair of the subcommittee that addressed post-foreclosure liability, for their help in the preparation of this article, and David Levant for his assistance with the bankruptcy portions of this article. Messrs. Rockwell, Tanner and Levant are also with Stoel Rives LLP.*

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APPENDIX C

MEMORANDUM ORDERS OF JUDGE KEN SCHUBERT

IN UNION BANK V. F.R. MCABEE, INC.

(now pending before Division I as Case No. 70497-4-1)

The Honorable Ken Schubert

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

UNION BANK, N.A., successor-in-interest to the
Federal Deposit Insurance Corporation, as receiver
of Frontier Bank,

Plaintiff,

v.

F.R. MCABEE, INC., a Washington corporation,
et al,

Defendants.

NO. 12-2-12590-2 SEA

ORDER GRANTING DEFENDANT
F.R. MCABEE, INC.'S MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant F.R. McAbee Inc. ("FRM") moves for summary judgment, arguing that it is not liable to plaintiff Union Bank, successor-in-interest to the Federal Deposit Insurance Corporation as receiver of Frontier Bank (collectively "Union Bank") for the amounts left unpaid on loans that FRM guaranteed. FRM guaranteed several commercial loans that were issued to two limited liability companies both of which FRM was a member: Birch Bay Square I, LLC and

1 Birch Bay Square II, LLC ("BB I" and "BB II" respectively). When BB I and BB II defaulted,
2 Union Bank non-judicially foreclosed upon the property that secured the loan. The securing
3 property sold for less than the total debt, and, Union Bank sued to recover the difference from
4 FRM as the guarantor.

5 FRM's motion presents three issues. First, does RCW 61.24.100 of Washington's Deed
6 of Trust Act preclude deficiency actions against a guarantor when the lender non-judicially
7 foreclosed upon a deed of trust that secured the guaranty? This Court holds that it does. Second,
8 do the Deeds of Trust issued by BB I and BB II secure FRM's Guaranties of Union Bank's
9 commercial loans? This Court finds that they do. Third, is the waiver of the statutory
10 protections of RCW 61.24.100 contained in FRM's Guaranties enforceable. This Court finds
11 that it is not. Because Union Bank non-judicially foreclosed upon Deeds of Trust that secured
12 FRM's Guaranties, and because FRM's waiver is unenforceable, RCW 61.24.100 precludes
13 Union Bank from maintaining this action against FRM. As a result and as explained in more
14 detail below, the Court grants FRM's motion for summary judgment.

15 II. SUMMARY OF FACTS

16 During a three year period, BB I and BB II collectively borrowed nearly \$20 million
17 dollars to develop a shopping complex in Blaine, Washington. They borrowed the money in
18 three separate installments from Frontier Bank. FRM guaranteed 50% of each loan. The first
19 loan occurred on August 2, 2007 when BB I and co-defendant Far North Ventures, Inc. assumed
20 a loan from another company secured by a deed of trust.¹ On the same day that BB I and Far
21 North Ventures assumed the loan, FRM signed a Commercial Guaranty.²

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24 ¹ Declaration of Gary Schaeffer ("Schaeffer Decl."), Exhibit A.

² *Id.*, Exhibit B.

1 The second loan occurred on June 5, 2008 when BB II executed, through its member
2 FRM, a Promissory Note with Union Bank.³ On that date, BB II also signed, again through
3 FRM, a Deed of Trust and FRM signed another Commercial Guaranty.⁴ Then on December 5,
4 2009, BB I executed the third Promissory Note, secured its obligation by modifying the 2007
5 Deed of Trust to include the 2009 loan, and FRM guaranteed the loan on the same day.⁵ Union
6 Bank drafted all of the contracts involved in this case and the language in relation to each
7 document—regardless of the year it was executed—is identical.

8 The Promissory Notes state that BB I and BB II promise to pay Frontier Bank and that
9 promise is secured by the Deeds of Trust as collateral.⁶ The Notes also list instances of default
10 which include events “with respect to any Guarantor of any of the Indebtedness.”⁷

11 The Deeds of Trust state, in pertinent part, as follows:

12 THIS DEED OF TRUST...IS GIVEN TO SECURE (A) PAYMENT OF THE
13 INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL
14 OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS,
15 AND THIS DEED OF TRUST. THIS DEED OF TRUST...IS ALSO GIVEN
16 TO SECURE ANY AND ALL OF GRANTOR'S OBLIGATIONS UNDER
17 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.⁸

18 The Deeds contain a section titled “PAYMENT AND PERFORMANCE” which reads:

19 Except as otherwise provided in this Deed of Trust, Grantor shall pay to
20 Lender all amounts secured by this Deed of Trust as they become due, and
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22 ³ *Id.*, Exhibit C.

⁴ *Id.*, Exhibits D & E.

⁵ *Id.*, Exhibits F, G, & H.

⁶ Schaffer Decl., Exhibit C (UB_BB00073).

⁷ *Id.*

⁸ Declaration of Adam Ware (“Ware Decl.”), Exhibit B (UB_BB000784) (emphasis added).

1 shall strictly and in a timely manner perform all Grantor's obligations under
2 the Note, this Deed of Trust, and Related Documents.⁹

3 The Deeds of Trust define the key terms "Guarantor," "Guaranty," "Indebtedness," and "Related
4 Documents" as well:

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

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

9 The word "Indebtedness" means all principal, interest, and other amounts, costs
10 and expenses payable under the Note or Related Documents...

11 The words "Related Documents" mean all promissory notes, credit agreements,
12 loan agreements, guaranties, security agreements, *deeds of trust*, security deeds,
collateral mortgages, and all other instruments, agreements and documents,
whether now or hereafter existed, 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.¹⁰

13 The Deeds also list events that, at the lender's option, constitute an "Event of Default." These
14 events include: payment default, compliance default, false statements, death or insolvency, and
15 "any of the preceding events [that] occurs with respect to any Guarantor of any of the
16 Indebtedness."¹¹ FRM signed the Deeds of Trust as a member of BB I and BB II.¹²

17 At the same time, FRM signed Guaranties that obligated it to pay and perform
18 "Borrower's obligations under the Note and Related documents."¹³ The Guaranties authorize the
19 Lender to "take and hold security for the payment of [the Guaranties]... and direct the order or
20 manner of sale thereof, including without limitation, any non-judicial sale permitted by the terms
21

22 ⁹ *Id.*, Exhibit B (UB_BB000784).

23 ¹⁰ *Id.*, Exhibit B (UB_BB000789) (emphasis added).

24 ¹¹ *Id.*, Exhibit B (UB_BB000787).

¹² It did not sign the 2007 Deed, but it did sign 2007 assumption agreement when BBS assumed the loan and the
2009 Deed which modified the 2007 Deed to also secure the 2009 loan.

¹³ Schaeffer Decl., Exhibit B (UB_BB000709).

1 of the controlling security agreement or deed of trust, as Lender in its discretion may
2 determine.”¹⁴ The Guaranties define the “Borrower” as BB I or BB II and the “Lender” as
3 Frontier Bank, its successors or assigns.

4 The Guaranties also state that they “together with any Related Documents, [constitute]
5 the entire understanding and agreement of the parties as to the matters set forth in [the
6 Guaranties].”¹⁵ The Guaranties define “Related Documents” as “all promissory notes, credit
7 agreements, loan agreements, environmental agreements, guaranties, security agreements,
8 mortgages, *deeds of trust*...and all other instruments, agreements and documents, whether now
9 or hereafter existing, executed in connection with the Indebtedness.”¹⁶

10 The Guaranties also define Indebtedness to mean “Borrower’s indebtedness to Lender as
11 more particularly described in this Guaranty.”¹⁷ Elsewhere in the Guaranties, Indebtedness
12 includes that which “Borrower individually, collectively or interchangeably with others owes or
13 will owe Lender...including loans...primary or secondary in nature arising from a guaranty or
14 surety, secured or unsecured.”¹⁸

15 In addition, the Guaranties include a waiver provision. This section states that the
16 guarantor waives “any and all rights or defenses based on suretyship or impairment of collateral
17 including but not limited to, any rights or defenses arising by reason of...any...‘anti-deficiency
18 law.”¹⁹ The waiver provision says that it will be effective “only to the extent permitted by law
19 or public policy.”²⁰

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¹⁴ *Id.*

¹⁵ *Id.*, Exhibit B (UB_BB000710).

¹⁶ *Id.*, Exhibit B (UB_BB000711) (emphasis added).

¹⁷ *Id.*

¹⁸ *Id.*, Exhibit B (UB_BB000709).

¹⁹ *Id.*, Exhibit B (UB_BB000710).

²⁰ *Id.*

1 Finally, the Guaranties state that the bank may recover attorney's fees and costs "incurred
2 in connection with the enforcement of" the guaranties.²¹

3 In 2010, Union Bank acquired Frontier Bank and all the contracts it held with Birch Bay
4 and FRM. Shortly thereafter, BB I and BB II defaulted on the loans. Union Bank elected to
5 pursue a non-judicial foreclosure of the property that secured the loans. Union Bank recovered
6 \$7,951,500 from the non-judicial foreclosure. Now it has sued FRM as guarantor of the loan
7 seeking to recoup the difference between the sale and the \$20 million borrowed.

8 III. LEGAL ANALYSIS

9 A. The Pros and Cons of Non-Judicial Foreclosures: Speed Without Deficiencies.

10 Loans are often secured by deeds of trust, which grant a creditor an interest in real
11 property to secure the performance of some obligation.²² Upon default, the creditor may sue to
12 enforce the obligation or foreclose on the property to secure performance. Foreclosure may
13 occur in two ways—judicially or non-judicially. To foreclose judicially, a creditor must sue and
14 pursue the time-consuming process of litigation. In 1965, the Washington Legislature enacted
15 the Washington Deed of Trust Act, codified at RCW 61.24 *et seq.*, to provide parties the option
16 of non-judicial foreclosure.

17 The benefit of the Deed of Trust Act was that it removed judicial oversight and sped up the
18 vesting process for the sale of secured property. The non-judicial option comes with one major
19 drawback for lenders such as Union Bank. Normally, under a judicial foreclosure, a creditor
20 may sue for any deficiency when the sale of property secured under a deed of trust falls short of
21 the debt. But, as a general rule and as discussed below, those employing non-judicial
22

23 ²¹ Schaeffer Decl., Exhibits B (UB_BB000710) & E (UB_BB000746).

24 ²² *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 376, 588 P.2d 1153 (1979).

1 foreclosures may *not* sue for deficiency. This trade-off is a "*quid pro quo*" between borrowers
2 and lenders.²³

3 **B. 1998 Amendments to the Deed of Trust Act Allowed Some Suits for Deficiency.**

4 In 1998, the legislature amended The Deed of Trust Act to provide exceptions to the
5 general rule that deficiency actions are not allowed in non-judicial foreclosures. The act starts
6 with the basic rule that deficiency actions after non-judicial foreclosure are the exception:
7 "Except to the extent permitted in this section for deeds of trust securing commercial loans, a
8 deficiency judgment shall *not* be obtained on the obligations secured by a deed of trust against
9 any borrower, grantor, or guarantor after a trustee's sale under that deed of trust."²⁴

10 The statute then goes on to provide that for commercial loans, guarantors such as FRM
11 may, in limited instances be subject to deficiency judgments:

12 (3) This chapter does not preclude any one or more of the following after
13 a trustee's sale under a deed of trust securing a commercial loan executed
14 after June 11, 1998:

15 ***

14 (c) Subject to this section, an action for a deficiency judgment against a
15 guarantor if the guarantor is timely given the notices under RCW
61.24.042.

16 Further, a guarantor may grant its own deed of trust to secure its guarantee, but that a non-
17 judicial foreclosure will limit deficiency actions to any decrease in the fair value of the property
18 caused by waste or the wrongful retention of rents, insurance proceeds or condemnation
19 awards.²⁵ Finally, and most critically for purposes of FRM's motion before this Court, the

23 ²³ *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990).

24 ²⁴ RCW 61.24.100(1) (emphasis added).

25 ²⁵ RCW 61.24.100(6), which references RCW 61.24.100(3)(a)(i).

1 statute says a creditor may sue a guarantor for deficiency *if the guarantee was not secured by the*
2 *deed of trust that was the subject of the non-judicial foreclosure.*²⁶

3 **C. The 1998 Amendments Do Not Allow Union Bank to Sue FRM for Deficiency if the**
4 **Deeds of Trust Secured FRM's Guaranties.**

5 Union Bank argues that RCW 61.24.100(3)(c) allows a lender to sue a guarantor for any
6 deficiency after a non-judicial foreclosure of a deed of trust. In support of that argument, Union
7 Bank cites a Bill Report for the 1998 amendments.²⁷ The Bill Report states that deficiency
8 judgments against guarantors are allowed if commenced within one year and if the guarantor is
9 given notice. The Bill Report also reiterates that a guarantor may seek an appraisal of the
10 property when sued for deficiency.²⁸

11 Union Bank's argument is sound as far as it goes, but misses the real issue. The question
12 is not whether a guarantor may be sued for deficiency—it plainly can. Rather, the question is
13 *whether a guarantor may be sued for deficiency after the non-judicial foreclosure of a deed of*
14 *trust that secured its guarantee.* If a lender takes advantage of the efficiency provided by
15 Washington's Deed of Trust Act to non-judicially foreclosure upon a deed of trust that secures a
16 guaranty, RCW 61.24.100(10) precludes that lender from maintaining a deficiency action against
17 the guarantor.²⁹

20
21 ²⁶ RCW 61.24.100(10) ("(10) A trustee's sale under a deed of trust securing a commercial loan does not preclude an
action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial
equivalent of that obligation, was not secured by the deed of trust.").

22 ²⁷ When statutory language is unambiguous, Courts look only to that language to determine the legislative intent
without considering outside sources. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Here, the Court
23 does not believe that RCW 61.24.100 is ambiguous.

24 ²⁸ H.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg. Reg. Sess. (Wash 1998).

²⁹ Cf. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn. 2d 903, 916 n. 8, 154 P.3d 882 (2007) ("Washington law provides
that no deficiency judgment may be obtained when a trustee's deed is foreclosed.").

1 The Court reaches that conclusion because RCW 61.24.100(10) states that a lender may
2 bring a deficiency action against a guarantor if, meaning “on condition that,”³⁰ the guaranty is
3 not secured by a deed of trust. The doctrine of *expressio unius est exclusio alterius*, which
4 means “to express or include one thing implies the exclusion of the other,” supports this
5 interpretation of the statute.³¹ Because the Legislature conditioned a lender’s ability to bring a
6 deficiency action against a guarantor on the guaranty *not* being secured by the judicially
7 foreclosed-upon deed of trust, the Legislature intended to exclude a lender from being able to
8 bring a deficiency action against a guarantor after judicially foreclosing upon the deed of trust
9 that secured the guaranty.³²

10 In short, if the deed of trust does not secure the guaranty, then Union Bank may sue for
11 deficiency, but if it does, then Union Bank may not.³³ Thus, the question becomes whether the
12 Deeds of Trust secured FRM’s Guaranties. The answer to that question requires an examination
13 of the contracts themselves.

14 **D. Interpretation of the Deeds of Trust Confirms They Secured FRM’s Guaranties.**

15 **1. Standard of Review**

16 Interpretation of a contract is ordinarily a question of law.³⁴ Summary judgment is
17 appropriate if the written contract, viewed in light of the parties’ objective manifestations, has
18 only one reasonable meaning. To determine the objective manifestations of a contract, courts

19 _____
20 ³⁰ Courts will give the words in a statute their plain meaning. *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166
21 Wash. 2d 444, 451, 210 P.3d 297 (2009). To determine the plain meaning of a word, courts may look to the
22 dictionary. *Id.* Dictionaries define “if” to mean “on condition that.” *If Definition*, Dictionary.com,
23 <http://dictionary.reference.com/browse/if> (last visited May 3, 2013) (“I’ll go if you do.”).

24 ³¹ *State v. Ortega*, 297 P.3d 57, 61, 2013 WL 1163954 (2013) (quoting Black’s Law Dictionary 661 (9th ed. 2009))

³² In *Ortega*, a unanimous Supreme Court cited this doctrine as supporting its conclusion 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 nonfelony offenses. See *Staats v. Brown*, 139 Wn.2d 757, 768 n. 3, 991 P.2d 615
(2000) (finding that the exceptions to the presence requirement under RCW 10.31.100 are exclusive).”

³³ RCW 61.24.100(3)(c) and (10).

³⁴ *Tanner Elec. Coop v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301.

1 look to the reasonable meaning of the words used.³⁵ In addition to the reasonable meaning of the
2 words used, courts also look to the context within which the agreement was made.³⁶ The
3 contract is viewed as a whole including the circumstances surrounding its formation, the
4 reasonableness of parties' interpretations of its language, and the subsequent acts and conduct of
5 the parties.³⁷ Courts will not read ambiguity into a contract where it can be reasonably
6 avoided.³⁸ Where ambiguities exist, courts construe them against the drafter.³⁹

7 **2. A Textual Analysis of the Contracts at Issue**

8 A plain reading of the Deeds of Trust confirms they secure FRM's Guaranties. The
9 Deeds expressly secures "PAYMENT OF THE INDEBTEDNESS" and the "PERFORMANCE
10 OF ANY AND ALL OBLIGATIONS UNDER THE RELATED DOCUMENTS . . ."⁴⁰ The
11 Deeds define "Guarantor" as "any guarantor, surety, or accommodation party of any or all of the
12 indebtedness."⁴¹ The Deeds define "Guaranty" to mean "the guaranty from Guarantor to Lender,
13 including without limitation a guaranty of all or part of the Note."⁴² Under the Deeds,
14 "indebtedness" means "all principal, interest, and other amounts, costs and expenses payable
15 under the Note or Related Documents . . ."⁴³ And the Deeds expressly include "guaranties" in the
16 definition of "Related Documents" whose obligations are secured by the Deeds of trust.
17 Accordingly, the payment of Indebtedness and the performance of any and all obligations under
18 the Related Documents, which the Deeds secure, includes, by the very definitions contained in

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21 ³⁵ *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503-4, 115 P.3d 262 (2005).

³⁶ *Chatterton v. Business Valuation Research, Inc.*, 90 Wn. App. 150, 155, 951 P.2d 353 (1998).

³⁷ *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2011).

³⁸ *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

³⁹ *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

⁴⁰ Schaeffer Decl., Exhibit D (UB_BB000796).

⁴¹ *Id.* (UB_BB000801).

⁴² *Id.*

⁴³ *Id.*

1 those same Deeds, the Indebtedness guaranteed by the Guaranties of all or a part of the Note, and
2 the performance of the payment obligations of those Guaranties.⁴⁴

3 Union Bank argues that the “PAYMENT AND PERFORMANCE” section limits the
4 deeds to payment and performance of the Grantors’ obligations—the Grantors being the
5 borrowers, BB I and BB II. But reading that paragraph in relation to the rest of the Deeds, as the
6 Court must, shows that the Deeds covers more than just the Grantor’s obligations. The first
7 sentence of the paragraph identifying what the Deeds secure explicitly encompasses *more* than
8 only the secured obligations of the Grantor. As noted above, the Deeds explicitly extend that
9 security to the payment of the “Indebtedness” and the performance of any and all obligations
10 under the “Related Documents” including guaranties. Using the definitions of those terms
11 contained in the Deeds, which expressly include the guaranties and the guarantor’s obligations to
12 pay and perform, confirms that the Deeds were given to secure payment and performance of any
13 and all obligations under the guaranties, among others.

14 Further, the second sentence in the secured obligation paragraph immediately above the
15 “PAYMENT AND PERFORMANCE” section makes clear the security is not limited to that
16 given by the grantor.⁴⁵ That sentence states that the Deeds are “*also* given to secure any and all
17 of Grantor’s obligations under that certain Construction Loan Agreement Between Grantor and
18 Lender of even date herewith.”⁴⁶ Of course, there would be no reason to explicitly include the
19 word “also” *unless the Deeds provided security for obligations other than those for which the*
20 *Grantor was responsible*. The last sentence of that paragraph drives the point home by making

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22 ⁴⁴ Even if the Deed’s relevant provisions are ambiguous (and the Court does not believe them to be), they are
construed against Union Bank as the drafter of the contract. *Rouse*, 101 Wn.2d at 135.

23 ⁴⁵ Schaefer Decl., Exhibits B (UB_BB000796) and E (UB_BB000768) (“THIS DEED OF TRUST...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.”).

24 ⁴⁶ *Id.* (emphasis added).

1 clear that a default of the Construction Loan Agreement or any Related Documents, which
2 include the Guaranties by definition, is a default of the Deeds of Trust. If the Deeds of Trust
3 only secured the Grantor's obligations, there would be no reason to make the default of the
4 Grantor's obligations an event of default of the Deeds of Trust.

5 Union Bank next contends that the parties did not intend the Deeds to secure the
6 Guaranty because “[n]o utility arises by having the deeds of trust also secure the guaranties” and
7 that “[s]uch a structure offers no advantage to a bank, where the borrower’s full debt is already
8 secured by the deeds of trust.”⁴⁷ Union Bank cites no applicable authority to support its
9 apparent contention that whether a party ended up receiving a benefit from language in a deed or
10 contract it drafted is somehow determinative of the parties’ intent. Union Bank drafted the
11 contracts and could have excluded guaranties from the definition of Related Documents just as it
12 excluded “environmental indemnity agreements” from the definition and from being secured by
13 the Deeds of Trust. It did not.

14 That Union Bank specifically chose to include guaranties in its definition of “Related
15 Documents” secured by the Deeds prevents it from now complaining about the legal effect of the
16 provision it drafted. Regardless, Union Bank did receive an advantage by securing the
17 Guaranties to the Deeds of Trust. As mentioned above, the Deeds listed “Events Affecting
18 Guarantor,” including the guarantor’s default, as events that could trigger default on the loan. As
19 a result, Union Bank could foreclose on the *whole* amount secured by the Deeds, if FRM, which
20 only guaranteed *half* of the Notes, triggered a default. Union Bank gained this advantage by
21 securing *both* obligations under the Notes and the Guaranties to the Deeds of Trust.

22 Further, the fact that the Deeds secured the Guaranties did not, in of itself, preclude
23 Union Bank from recovering against FRM any deficiency from the sale of the development. In

24 ⁴⁷ Plf.’s Resp., p. 12.

1 reality, as FRM points out persuasively, Union Bank had a number of avenues that it could have
2 pursued against FRM in addition to pursuing its rights against BB I and BB II under the Deeds.
3 First, as each Commercial Guaranty makes clear, Union Bank could have simply demanded
4 payment from FRM of BB I and BB II's obligations under the Notes they executed and then sued
5 FRM if it failed to comply.⁴⁸ Second, Union Bank could have initiated in court foreclosure
6 proceedings of the Deeds of Trust, which have none of the deficiency prohibitions contained in
7 RCW 61.24.100. Third, Union Bank could have initiated a receivership proceeding to take
8 control of the development and sell it to satisfy in whole or in part the payment obligations of
9 Birch Bay I and II, and FRM.⁴⁹

10 Union Bank did none of these things. Instead, it chose to take the seemingly expeditious
11 route of non-judicial foreclosure of the Deeds as allowed by Washington's Deed of Trust Act.
12 But by doing so, Union Bank gave up the right to maintain a deficiency action against FRM
13 when those Deeds secured the Guaranties. Union Bank may well have had good reason to make
14 that choice at the time. For example, there may have been a pressing sale to someone or some
15 entity for an amount that Union Bank felt would make a deficiency action unnecessary or
16 unjustified. But Union Bank's reason(s) for choosing the non-judicial foreclosure option is
17 irrelevant—what matters is the legal effect as to the Guaranties once Union Bank made that
18 choice.

19 Next, Union Bank argues that when viewed in light of the parties' conduct, the Deeds are
20 not meant to secure the Guaranties. It argues that FRM made no demand that the Deeds also

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22 ⁴⁸ *Id.*, Exhibit E (UB_BB000745) ("This is a guaranty of payment and performance and not of collection, so Lender
23 can enforce this Guaranty against Guarantor **even when Lender has not exhausted Lender's remedies** against
24 anyone else obligated to pay the Indebtedness or **against any collateral securing the Indebtedness**, this Guaranty,
or any other guaranty of the Indebtedness.") (emphasis added).

⁴⁹ RCW 7.60 *et seq.*

1 secure the Guaranties.⁵⁰ And it points to a letter from FRM's attorney sent four years after
2 Union Bank demanded payment on the guarantee. The letter indicates that FRM requested an
3 extension to respond to Union Bank's demand of payment, and that it wished to examine the
4 appraisal before it responded.⁵¹

5 The Court agrees with FRM that such extrinsic sources of evidence does not and cannot
6 modify the written word of the contract.⁵² Further, FRM's actions in response to Union Bank's
7 demand for payment—four years after the contracts were drafted—do not show the
8 “circumstances under which the contract was written.”⁵³ Finally, FRM's letter cannot be seen as
9 a waiver, which must be unequivocal, and cannot be inferred from “doubtful or ambiguous
10 factors.”⁵⁴

11 **E. The Waivers of RCW 61.24.100 in the Guaranties are Unenforceable.**

12 Union Bank argues that FRM waived its right to assert a defense under RCW 61.24.100
13 when it signed the contract that contained a waiver provision. It argues that the Deed of Trust
14 Act has no anti-waiver provision, and that the Court should not read one into the law when other
15 laws contain express anti-waiver provisions.⁵⁵

16 FRM argues that the waivers are contrary to public policy and thus, are unenforceable.
17 FRM cites several cases in support of its position. First, in *Kennebec, Inc. v. Bank of the W.*,⁵⁶
18 the Washington Supreme Court—in discussing the history of non-judicial foreclosures—said that

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20 ⁵⁰ Pif's Resp. at 12.

21 ⁵¹ FRM objected to the belated submission of this letter based on its untimeliness and argued that it was
22 inadmissible under ER 408. While FRM is correct that Union Bank did not satisfy the excusable neglect standard
23 set forth in CR 6(b), the letter does not contain an offer and is not evidence of conduct or statements made in
24 compromise negotiations. Because the Court does not find that the letter helps Union Bank's cause, the Court's
consideration of that letter does not adversely impact FRM.

⁵² Def't's Reply at 4 (citing *Hearst*, 154 Wn.2d at 503).

⁵³ *Id.* (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669 (1990)).

⁵⁴ *Id.* (citing *224 Westlake, LLC v. Ergstrom Praps.*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012)).

⁵⁵ Pif's Resp. at 20 (listing RCWs that contain anti-waiver provisions).

⁵⁶ 88 Wn.2d 718, 565 P.2d 812 (1977).

1 the Deed of Trust Act represents the “public policy of the state.”⁵⁷ Second, FRM cites *Shoreline*
2 *Community College District v. Employment Security Department*,⁵⁸ which states that “[w]here a
3 statutorily created private right serves a public policy purpose, the persons protected by the
4 statute cannot waive the right either individually or through the collective bargaining process.”⁵⁹
5 That case dealt with waiver of unemployment benefits, but the court spoke in broad terms.

6 Next, FRM cites two recent cases dealing with The Deed of Trust Act, where the
7 Supreme Court refused to allow parties to waive their protections by contract—*Bain v. Metro*
8 *Mortgage Group, Inc.*⁶⁰ and *Schroeder v. Excelsior Management Group, LLC*.⁶¹ In *Bain*, parties
9 tried to contractually change the requirement that the beneficiary must be the actual holder of the
10 promissory note under RCW 61.24.030. The Washington Supreme Court did not allow the
11 parties to contractually circumvent the statute. It analogized to the arbitration process, where
12 parties are free to choose whether or not to arbitrate. But the Supreme Court said that once
13 parties submit to arbitration, the Washington Arbitration Act controls, as does the “policy
14 embodied therein, not just the parts that are useful to [the parties].”⁶² The Supreme Court went
15 on to say that “[t]he legislature has set forth in great detail how nonjudicial foreclosures may
16 proceed. We find no indication the legislature intended to allow the parties to vary these
17 procedures by contract. *We will not allow waiver of statutory protections lightly.*”⁶³

18 Similarly, the parties in *Schroeder* attempted to contract around a limitation in the statute
19 that agricultural land may not be foreclosed on non-judicially.⁶⁴ The Washington Supreme Court
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21 ⁵⁷ *Id.* at 725.

⁵⁸ 120 Wn.2d 394, 842 P.2d 938 (1992)

22 ⁵⁹ *Id.* at 410.

⁶⁰ 175 Wn.2d 83, 285 P.3d 34 (2012)

⁶¹ 6772013 WL 791863, 297 P.3d 677 (2013).

23 ⁶² *Bain*, 175 Wn.2d at 108, 285 P.3d 34.

⁶³ *Id.* (emphasis added).

24 ⁶⁴ *Schroeder*, 297 P.3d at 683

1 would not allow a contractual waiver under the Deed of Trust Act: "These are not, properly
2 speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose
3 without judicial supervision."⁶⁵ In a footnote, the Supreme Court allowed that "[t]here may be
4 *technical procedural details* that the parties may, by agreement, modify or waive but strict
5 compliance with mandated requisites is required."⁶⁶

6 This case is analogous to *Schroeder*. RCW 64.21.100(10) limits the power of parties to
7 foreclose non-judicially when a guarantee is secured by a deed of trust. Parties cannot contract
8 around this mandated limitation. The analogy to the arbitration process by the court in *Bain*
9 supports this Court's finding. Non-judicial disclosure is an elective process, just like arbitration.
10 In exchange for an expedient foreclosure process, parties forgo the right to sue for deficiency.
11 Again, this trade-off is a "*quid pro quo*" between borrowers and lenders encapsulated by the
12 policy of the statute.⁶⁷ Parties choosing this process, choose to be governed by the procedures,
13 protections and limitations of the applicable statute.

14 Union Bank cannot both use the Deed of Trust Act's speedy and less expensive non-
15 judicial foreclosure procedure and eliminate by way of a waiver the Deed of Trust Act's limit on
16 a lender's power to seek a deficiency judgment after such non-judicial foreclosure. The waiver
17 of any anti-deficiency laws contained in the Guaranties is not a "technical procedural detail."
18 The deficiency provision in the Deed of Trust Act is a limit on the trustee's power to foreclose
19 without judicial supervision. Accordingly, the waiver of that provision in the Guaranties violates
20 public policy and is unenforceable.

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22
23 ⁶⁵ *Id.*

⁶⁶ *Id.* at 683 n.7 (emphasis added).

24 ⁶⁷ *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990).

1 **F. The Attorney's Fees Provision in the Guaranties Provides FRM with a Right to**
2 **Recover its Fees as the Prevailing Party.**

3 FRM seeks attorney's fees in this case in accordance with the Guaranties' attorney's fee
4 provision and RCW 4.84.330. That statute provides that in "any action on a contract...where
5 such contract or lease specifically provides that attorney's fees and costs...shall be awarded to
6 one of the parties...the prevailing party shall be entitled to reasonable attorney's fees in addition
7 to costs and necessary disbursements."⁶⁸ In essence, when a contract contains a one-sided
8 attorney's fees provision, the statute makes that provision two-sided.

9 Here, the 2007 and 2008 Guaranties provide that the bank is entitled to attorney's fees
10 and costs "incurred in connection with the enforcement of" the guaranties. Union Bank sought
11 to enforce the Guaranties against FRM. FRM prevailed. This court finds that RCW 4.84.330
12 applies, and Union Bank does not argue to the contrary. In granting FRM's motion for summary
13 judgment the court also awards reasonable attorney's fees and costs incurred in connection with
14 the enforcement of the Guaranties. FRM should note a reasonableness hearing should the parties
15 be unable to agree upon an award amount.

16 **IV. CONCLUSION**

17 The Deed of Trust Act precludes Union Bank's deficiency action against FRM because
18 Union Bank non-judicially foreclosed upon Deeds of Trust that secured FRM's Guaranties. The
19 waiver of the statutory protections of RCW 61.24.100 contained in FRM's Guaranties
20 contravenes public policy and is unenforceable. Because Union Bank non-judicially foreclosed
21 upon Deeds of Trust that secured FRM's Guaranties, and because FRM's waiver is
22 unenforceable, RCW 61.24.100 precludes Union Bank from maintaining this action against
23

24 ⁶⁸ RCW 4.84.330.

1 FRM. As a result, the Court grants FRM's motion for summary judgment and awards FRM its
2 attorney's fees and court costs incurred in defending this action.

3 Signed this 3rd of May 2013.

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7 Honorable Ken Schubert
8 King County Superior Court Judge
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

UNION BANK, N.A., successor-in-interest to the
Federal Deposit Insurance Corporation, as receiver
of Frontier Bank,

Plaintiff,

v.

F.R. MCABEE, INC., a Washington corporation,
et al,

Defendants.

NO. 12-2-12590-2 SEA

ORDER GRANTING DEFENDANTS
WARES' AND FAR NORTH'S
MOTION FOR SUMMARY
JUDGMENT

I. INTRODUCTION

Defendants Far North Ventures, LLC ("Far North"), A. Suzanne Ware, G. Paul Ware,
Jared Ware, Noelle Ware, Levi Ware, Stephanie Ware, Adam Ware and Katherine Ware (the
"Wares" or collectively "Remaining Defendants") move for summary judgment dismissal on the
same grounds that the Court found persuasive in granting defendant F.R. McAbee, Inc.'s
("FRM") Motion for Summary Judgment. Union Bank, as successor-in-interest to the Federal

1 Deposit Insurance Corporation, as receiver of Frontier Bank (collectively "Union Bank")
2 opposes the Remaining Defendants' Motion for Summary Judgment ("Motion") on essentially
3 the same grounds raised in its unsuccessful effort to survive FRM's motion.

4 Union Bank does, however, raise a new variation of its contract interpretation argument,
5 and in support of that argument, Union Bank timely presents a letter that it believes shows the
6 parties' intention not to have the Deeds of Trust secure the guarantees executed by defendants as
7 part of the transactions at issue. Union Bank also re-argues its statutory interpretation and
8 waiver arguments. As discussed below, the Court does not find these arguments persuasive. As
9 a result, the Court grants the Remaining Defendants' Motion and enters the accompanying Final
10 Judgments in favor of FRM and the Remaining Defendants.¹

11 II. SUMMARY OF FACTS

12 The Court, like the parties, incorporates herein its prior summary of facts set forth in its
13 Order Granting F.R. McAbee, Inc.'s Motion for Summary Judgment. The Remaining
14 Defendants filed copies of the Guarantees they executed as part of the transactions at issue.
15 Those Guaranties, when combined with FRM's Guaranty, the Deeds of Trust, and the
16 Promissory Notes at issue in the prior motion make a complete set of the documents that relate to
17 the nearly \$20 million dollars loaned from Union Bank to develop a shopping complex in Blaine,
18 Washington. Along with a summary of the documents it reviewed in considering defendants'
19 motions for summary judgment, the Court attaches to this Order a summary of the relevant

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21 ¹ FRM objects to Union Bank's response in opposition to the Remaining Defendants' Motion, arguing that it is, in
22 reality, an untimely and unsupported motion for reconsideration. Union Bank is well within its right to file an
23 opposition to their Motion and the Court is not aware of any authority that would require Union Bank to limit itself
24 to the same arguments the Court already found unpersuasive. If the Court found Union Bank's new arguments
persuasive, there would be one order granting summary judgment and another order denying summary judgment
even though the motions have been brought by similarly situated defendants. In that scenario, the Court would be
well within its power to modify its prior order to deny FRM's motion for summary judgment. While perhaps a
request for that result did not need to be included in Union Bank's opposition to the Remaining Defendants'
motion, there was no harm in making it seeing as the Court is leaving in place its order granting FRM's motion.

1 provisions of each of those documents.

2 **III. LEGAL ANALYSIS**

3 **A. The Deeds of Trust by Their Own Terms Secure the Guaranties.**

4 As Union Bank argued unsuccessfully in opposition to FRM's Motion for Summary
5 Judgment, Union Bank again argues that the Deeds of Trust do not secure the Guaranties at
6 issue. Union Bank argues, without actually discussing the controlling language in the Deeds,
7 that the "proper construction that the deeds of trust do not secure the guarantors' obligations does
8 not require a re-writing of the deeds of trust. To reach this proper construction does not require
9 this Court to read anything "out" of the deeds of the trust."² The only way that this Court could
10 conclude that the Deeds of Trust did not secure the Guaranties is if it modified the Deeds of
11 Trust to change and/or delete the Deeds of Trust's definitions of "Indebtedness," "Related
12 Documents," "Guarantor," "Guaranty," and "Note" that determine what the Deeds of Trust
13 secure. That, this Court cannot do. As discussed in the Court's prior order and below, the
14 definitions of those terms makes clear that the Deeds of Trust did indeed secure the Guaranties at
15 issue.

16 Washington follows the objective manifestation theory of contract interpretation, under
17 which courts try to ascertain the parties' intent "by focusing on the objective manifestations of
18 the agreement, rather than on the unexpressed subjective intent of the parties."³ Under this rule,
19 courts can consider extrinsic evidence relating to the context in which the parties made the
20 contract "to determine the meaning of specific words and terms."⁴ Extrinsic evidence includes
21 the contract's subject matter and objective, all the circumstances in making the contract, the
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23 ² Plaintiff Union Bank's Response Opposing Remaining Defendants' Motion for Judgment ("Response"), p. 5.

³ *Hearst Comm'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

24 ⁴ *Id.*, (emphasis omitted) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)).

1 parties' subsequent acts and conduct, and the reasonableness of parties' interpretations.⁵ But
2 such extrinsic evidence can only be used to interpret what is in the instrument, not to show
3 intention independent of the instrument.⁶

4 Here, the objective manifestations of the Deeds themselves confirm that the parties
5 intended the Deeds to secure the Guarantees at issue. By their plain terms, the Deeds of Trust
6 secure two things: (1) payment of the "Indebtedness," and (2) performance of the "Note" and the
7 "Related Documents":

8 THIS DEED OF TRUST . . . IS GIVEN TO SECURE (A) PAYMENT OF THE
9 INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL
10 OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND
11 THIS DEED OF TRUST. . . . 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."

12 The Deeds of Trust provide a definition of the "Indebtedness" and the "Related Documents" that
13 the Deeds of Trust secure. The definition of "Indebtedness" includes "all principal, interest, and
14 other amounts, costs and expenses payable under the Note or Related Documents . . ." The
15 definition of the "Related Documents" includes "all promissory notes, credit agreements, loan
16 agreements, guaranties . . . executed in connection with the Indebtedness; provided that the
17 environmental indemnity agreements are not 'Related Documents' and are not secured by this
18 Deed of Trust."

19 The Deeds of Trust go further and remove any possible confusion as to which
20 "Guaranties" fall within the definition of the "Indebtedness" and "Related Documents" in order
21 to be secured by the Deeds of Trust. The Deeds of Trust define a "Guaranty" as "the guaranty
22 from Guarantor to Lender, including without limitation a guaranty of all or part of the Note."

23 _____
⁵ *Id.* at 502.

24 ⁶ *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

1 The Deeds of Trust define “Guarantor” as “any guarantor, surety, or accommodation party of any
2 or all of the Indebtedness.” Finally, the August 2, 2007, June 5, 2008 and December 5, 2009
3 Deeds of Trust respectively define “Note” to be the promissory notes dated August 2, 2007, June
4 5, 2008, and December 5, 2009.

5 Union Bank does not and cannot present any evidence creating an issue of material fact
6 as to whether the term “Guaranty” as defined by the Deeds of Trust does not cover the
7 Guaranties at issue – it does. There is no dispute that the Guaranties executed by FRM and the
8 Remaining Defendants covered one or more of the Notes dated August 2, 2007, June 5, 2008,
9 and December 5, 2009. As a result, those Guaranties squarely fit the definition of a “Guaranty”
10 contained in the Deeds of Trust. Likewise, FRM and the Remaining Defendants squarely fit the
11 definition of a “Guarantor” contained in the Deeds of Trust.

12 In short, the Guaranties executed by FRM and the Remaining Defendants fall within the
13 definition of the “Indebtedness” and the “Related Documents.” The Deeds of Trust by their own
14 terms secure the payment of the former and the performance of the latter. There can simply be
15 no dispute, then, that by the very definitions set forth in the Deeds of Trust that the Deeds of
16 Trust secure the Guaranties at issue.⁷

17 _____
18 ⁷ Without addressing those definitions, Union Bank argues that consideration of the “Payment and Performance”
19 provision and what Union Bank calls the “Full Conveyance” provision allow for Union Bank’s construction. The
20 “Payment and Performance” provision requires “Grantor to pay Lender all amounts secured by this Deed of Trust
21 as they become due, and shall strictly and in a timely manner perform all of Grantor’s obligations under the Note,
22 this Deed of Trust, and the Related Documents.” The Court has been unable to find a provision titled “Full
23 Conveyance” in the Deeds of Trust. There is, however, a “Full Performance” provision, which provides for a full
24 reconveyance in the event Grantor pays all of the Indebtedness when due.

21 Neither provision addresses what the Deeds of Trust secure; the paragraph in all-caps quoted on the preceding
22 page provides that the Deeds of Trust secure payment of the “Indebtedness” and performance of the “Related
23 Documents;” both include the Guaranties. Further, as this Court observed in its prior order, the second sentence
24 in the secured obligation paragraph—prefaced with the word “also”—is limited to the grantor. There would be no
reason to explicitly state that the Deeds of Trust are “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” unless the
Deeds of Trust provided security for obligations other than those for which the Grantor was responsible. Union
Bank did not address that observation in its opposition.

1 **1. Consideration of “Extrinsic Evidence” Does Not and Cannot Change this**
2 **Court’s Interpretation of the Deeds of Trust.**

3 Instead of addressing the controlling definitions set forth in the Deeds of Trust, Union
4 Bank argues that “context evidence” supports its contention that the Deeds of Trust do not secure
5 the Guaranties. But Washington’s rules of construction limit the evidence Union Bank can rely
6 on to show that “context” because any such evidence, in order to be admissible, cannot
7 contradict or modify the definitions contained in the Deeds of Trust.⁸ Indeed, the Court need not
8 consider extrinsic evidence when the Deeds of Trust provide the relevant definition because
9 doing so would either not provide any additional context for the meaning of those terms or would
10 contradict the definition contained in the document at issue.⁹

11 Here, the extrinsic evidence offered by Union Bank fails to show that the parties did not
12 intend for the Deeds of Trust to secure the Guaranties. Indeed, it is hard to imagine how any
13 evidence could make such a showing without improperly contradicting, modifying or altering the
14 terms of the Deeds of Trust quoted and discussed above. First, Union Bank submits that the
15 “guaranties do not contain [a] provision like in [the] notes that they are secured by the DoT”.¹⁰

16
17 ⁸ See *In re Marriage of Schweitzer*, 132 Wn.2d 318, 322, 326-27, 937 P.2d 1062, 1064 (1997) (holding trial court
18 could not consider statements about parties’ intent in signing standard-form community property agreement,
19 when statements contradicted terms of agreement); *Washington Fed. Sav. & Loan Ass’n v. Alsager*, 165 Wn. App.
20 10, 18-19, 266 P.3d 905 (2011) *rev. denied*, 173 Wn.2d 1025, 272 P.3d 851 (2012) (excluding statements about the
21 nature of loan contact made at time of signing, when statements directly modified terms of loan).

22 ⁹ See *Seattle Times Co.*, 120 Wn. App. at 798 (holding that extrinsic evidence about parties’ intent regarding
23 elements of contract was irrelevant when contract “defined [those] specific elements... once, in great detail, for
24 the entire agreement, and embedded these terms without qualification”) *aff’d*, 154 Wn.2d 493, 115 P.3d 262
(2005); *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 570-71, 919 P.2d 594 (1996) (excluding extrinsic
evidence that disability insurance policy covered both husband and wife, when policy stated that it covered only
the “insured obligator,” and listed only husband as the “insured obligator”); see also *Kitsap Cnty. v. Allstate Ins.
Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) (“If terms are defined in a[n insurance] policy, then the term should
be interpreted in accordance with that policy definition.”); *S & K Motors, Inc. v. Harco Nat. Ins. Co.*, 151 Wash. App.
633, 639, 213 P.3d 630, 633 (2009) (“Terms that are defined within a policy should be interpreted in accordance
with the policy definition.”); *Black v. Nat’l Merit Ins. Co.*, 154 Wash. App. 674, 679, 226 P.3d 175 (2010) (“If a term
is defined in a policy, then the term will be interpreted in accordance with that policy definition.”).

¹⁰ Response, p. 6.

1 True enough, but Union Bank does not cite any authority to support its apparent argument that in
2 order for a specific Deed of Trust to secure a guaranty that guaranty must identify that specific
3 Deed of Trust. Not only would such a requirement be at odds with the nature of a continuing
4 guaranty, but given that Deeds of Trust must be recorded to put others on notice as to what they
5 secure, the operative language for determining what a Deed of Trust secures resides in that deed.

6 More importantly, the Guaranties do actually expressly authorize the Lender to secure the
7 Grantors' obligations by a Deed of Trust.¹¹ The fact that the Guaranties did not identify a
8 specific Deed of Trust as collateral is entirely consistent with the continuing nature of the
9 Guaranties. Unlike the Notes, which memorialized a promise to repay a specific debt and
10 provided specific security for that repayment, the Guaranties guaranty the "payment,
11 performance and satisfaction of the Grantor's share of the Indebtedness of Borrower to Lender
12 now existing or hereafter arising or acquired on a continuing basis." The fact that the Guaranties
13 cover future Indebtedness is precisely why the Guaranties allow the Lender to hold security,
14 including security to be provided later, and the security for the payment of the Guaranty or the
15 Indebtedness allowed by the Guaranties explicitly includes deeds of trust.

16 Next, Union Bank submits that the "undisputed purpose of [the] guaranty discussed at
17 contracting was to provide 'additional' security".¹² The Guaranties did provide additional
18 security for Union Bank. The plain language of the Guaranties allowed Union Bank to demand
19 payment directly from any or all of the Guarantors without exhausting its remedies against the
20

21 ¹¹ As stated on the first page of each Guaranty in the paragraph titled "Guarantor's Authorization to Lender":
22 "Guarantor authorizes Lender . . . to take and hold security for the payment of this Guaranty or the Indebtedness,
23 and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or
24 without substitution of new collateral . . . to apply such security and direct the order or manner of sale thereof,
including without limitation any nonjudicial sale permitted by the terms of the controlling security agreement or
deed of trust . . ."

¹² Response, pp. 6-7.

1 Borrower or any security of the Indebtedness or the Guaranty.¹³ Further, Union Bank could have
2 brought an action against the Guarantors to make up any deficiency following a judicial
3 foreclosure action.¹⁴ Union Bank, however, chose door number three: a non-judicial foreclosure
4 of property secured by the Deeds of Trust. Considering the expedient nature of a non-judicial
5 foreclosure, Union Bank presumably had its own business reasons for choosing that option. As
6 it turned out, that was the only option which, as an operation of law, precluded Union Bank from
7 maintaining a deficiency action against the Guarantors due to the fact that the Deeds of Trust
8 secured the Guaranties.

9 Union Bank offers two related arguments next: “3) no express bargaining for a structure
10 other than the ordinary structure (whereas McAbee did negotiate other material term of 50%
11 limit) 4) lack of request by guarantors or anyone that DoT secure guaranty”.¹⁵ That no one
12 expressly bargained for or requested that the Deeds of Trust secure the Guaranties is presumably
13 due in part to the fact that the Deeds of Trust, Notes, and Guaranties were all bank boilerplate
14 forms.¹⁶ While the record is silent as to the parties’ intent, to the extent any party requested that
15 the Deeds of Trust secure the Guaranties, that request would come from Union Bank, the drafter
16 of those documents.¹⁷

17
18 ¹³ The first paragraph of each Guaranty includes the following sentence: “This is a guaranty of payment and
19 performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has
20 not exhausted Lender’s remedies against anyone else obligated to pay the Indebtedness or against any collateral
21 securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness.”

22 ¹⁴ This Union Bank apparently did not do. See e.g., Declaration of Gary Schaeffer in Support of Defendant F.R.
23 McAbee’s Motion for Summary Judgment, ¶ 11 (“At no time prior to the trustee’s sale did Union Bank seek
24 payment from FRM under the 2007 Guaranty or the 2008 Guaranty.”).

¹⁵ Response, p. 7.

¹⁶ Union Bank attached to its opposition to FRM’s Motion for Summary Judgment “exemplars” of deeds of trust,
notes and guaranties from an unrelated transaction with Frontier Bank. Those documents contain the same
boilerplate terms as at issue here.

¹⁷ Union Bank claims, without explanation or a citation to the record, that it (Frontier Bank) “is not the drafter” of
the Deeds of Trust. Response, p. 8. Notably, Mary Job, Frontier Bank’s Senior Vice President and Loan Officer with
personal knowledge of and responsibility for the loans at issue, did *not* deny that Frontier Bank drafted these
documents. Cf. Declaration of Mary K. Jobe in Support of Union Bank’s Response to Defendant F.R. McAbee’s

1 Finally, Union Bank claims “post-drafting conduct never revealed different construction
2 but confirmed [the] availability of [a] deficiency after trustee’s sale”.¹⁸ Although Union Bank
3 does not identify what in the record evidences this post-drafting conduct, the Court presumes
4 Union Bank intends to refer to the January 3, 2012 letter from Maren Gaylor to Bruce Borrus.¹⁹
5 The letter indicates that the Ms. Gaylor’s client, FRM, planned on retaining “an appraiser in
6 connection with the foreclosure actions undertaken by the Bank, to prepare a fair market value
7 appraisal of the property that was foreclosed.”²⁰ She went on to state that the appraisal was
8 essential to have “prior to the meeting to enable the Guarantors to make a reasoned response,
9 with the goal of reaching an agreement with Union Bank regarding the amount demanded.”²¹

10 FRM previously objected to Union Bank’s introduction of that letter as evidence based
11 on ER 401, 402, and 408. FRM makes the valid argument that the letter relates to settlement
12 negotiations, which ER 408 makes inadmissible.²² FRM also contends that the letter is
13 inadmissible because it is simply not relevant to whether the Deeds of Trust secured the
14 Guaranties; in fact, the letter mentions neither.

15
16
17 Motion for Summary Judgment, ¶¶ 2 and 3. Union Bank attached to its opposition to FRM’s motion nearly
18 identical documents, which contained the same definitions including Guaranties as part of the Indebtedness and
19 Related Documents secured by the Deed of Trust, from an unrelated transaction involving it and completely
20 different parties as “exemplars” of its work product. Finally, that Frontier Bank (Union Bank) drafted them is
21 consistent with Union Bank’s vice president’s description of these documents as Frontier Bank’s business records.
22 Herrera Decl., ¶ 2; cf. RCW 5.45.020. Accordingly, any inference that a party other than Frontier Bank drafted the
23 documents at issue here would not be reasonable. Regardless, this Court is not inferring that Frontier Bank
24 drafted them in order to apply the construction rule *contra proferentum*. See Response, pp. 8-9. There is no
ambiguity in the documents in order for that rule to come into play.

¹⁸ Response, p. 7.

¹⁹ Supplemental Declaration of Guillermo Herrera re: Defendant F.R. McAbee’s Motion for Summary Judgment,
Exhibit A. Mr. Guillermo states that Ms. Gaylor represented FRM at that time while Mr. Borrus represented Union
Bank at that time. Neither Ms. Gaylor nor Mr. Borrus have appeared as counsel of record for any of the parties in
this action.

²⁰ *Id.*

²¹ *Id.*

²² Union Bank does not contend this letter falls within any of the narrow exceptions to ER 408’s standard
inadmissibility, such as bias, or prejudice.

1 The letter is relevant, according to Union Bank, because FRM's engagement of an
2 appraiser and willingness to discuss settlement suggests that FRM did not believe that the non-
3 judicial foreclosure precluded Union Bank from maintaining a deficiency action against the
4 Guarantors. But the simple fact that FRM wanted to obtain an appraiser, presumably to test
5 Union Bank's assessment as to the amount of any deficiency sought, and that it was willing to
6 meet to negotiate has no bearing on the parties' intention two to four years prior when they
7 signed the documents at issue. Further, FRM's counsel's letter is precisely the kind of
8 communication ER 408 intends to foster by precluding it from being admitted against FRM
9 under these circumstances. In short, the Court agrees that Ms. Gaylor's letter is not relevant to
10 whether the Deeds of Trust secure the Guaranties. Even if relevant, her letter plainly relates to
11 settlement negotiations protected from admission by ER 408. Accordingly, the Court does not
12 consider it in deciding this motion.

13 **2. Applying Commercially Reasonable Construction, Even if Warranted in the**
14 **Absence of any Ambiguity, Supports this Court's Ruling.**

15 Union Bank contends that there was "no commercial purpose for securing the guaranty
16 where the DoT already secures the borrower's debt".²³ In support of its contention that this
17 Court must construe the Deeds of Trust in a "commercially reasonable manner," Union Bank
18 cites *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, which is readily distinguished from the
19 situation before this Court.²⁴ Tony Maroni's, Inc. ("Tony Maroni's") leased a retail space from
20 Wilson Court Limited Partnership ("Wilson"). As a condition of the lease, Wilson executed a
21 guarantee agreement with Anthony Riviera, president of Tony Maroni's. When Riviera signed
22 the guarantee, he added "president" after his name in an apparent attempt to avoid personal

23 _____
²³ Response, p. 7.

24 ²⁴ 134 Wn.2d 692, 952 P.2d 590 (1998).

1 liability as guarantor. When Wilson attempted to enforce the guarantee against Riviera, Riviera
2 argued that he was not personally liable because he had signed the guarantee only in his capacity
3 as president of Tony Maroni's.

4 The Washington Supreme Court rejected Riviera's arguments. The Court agreed that the
5 guaranty became ambiguous by Riviera's insertion of the word "president" under his signature.
6 The Court noted that the guarantee referenced three parties, the landlord, the tenant, and the
7 guarantor. If Riviera signed as president of Tony Maroni's, then the tenant and the guarantor
8 would be the same party, rendering some of the guarantee's language meaningless or impossible.
9 Furthermore, under Washington law, Tony Maroni's could not guarantee its own obligations. In
10 terms of applying a "commercially reasonable interpretation," which is the basis for which Union
11 Bank relies on the opinion, the Washington Supreme Court concluded as follows:

12 Although the descriptive language in Riviera's signature on the Guaranty created an
13 ambiguity and *our commercially reasonable construction of the Guaranty*
14 *resolved the ambiguity* by imposing personal liability on Riviera, we note the issue
15 in this case could have been easily avoided by careful attention to the language of
16 the Guaranty and communication between the parties. If Riviera did not intend
17 personal liability, he should have said so. Wilson could have pressed Riviera to
18 sign only in his individual capacity or modified its Guaranty to clearly specify
19 Riviera as the Guarantor. As between commercial entities, we decline to write
20 agreements for such entities they did not negotiate, but *where they create*
21 *ambiguities by their imprecise drafting, we will construe their agreements in a*
22 *commercially reasonable manner to resolve any ambiguities.*²⁵

18 Here, in contrast to the situation in *Tony Maroni's*, there is no ambiguity as to the terms
19 of the Deeds of Trust. The Deeds of Trust plainly state they provide security for the payment of
20 the "Indebtedness" and the performance of the "Related documents," both of which expressly
21 included the Guaranties. Accordingly, because there is no ambiguity to resolve, there is no need
22 to apply a "commercially reasonable construction" to the Deeds of Trust.

23
24 ²⁵ *Id.* at 710 (emphasis added).

1 Further, *Tony Maroni's* does not stand for the proposition that the Court can modify or
2 alter the terms of an agreement to manufacture a commercially reasonable construction. Indeed,
3 the Supreme Court expressly stated "we decline to write agreements for such entities they did not
4 negotiate . . ." ²⁶ Yet that is precisely what Union Bank would have this Court do; adopting Union
5 Bank's construction would require removing from the Deeds of Trust the term "Guaranties"
6 from the definition of "Indebtedness" and "Related Documents," along with the actual
7 definitions of "Guarantor" and "Guaranty" because Union Bank's interpretation would make
8 them irrelevant.

9 Even in the absence of any ambiguity and even looking at the facts in the light most
10 favorable to Union Bank, consideration of a "commercially reasonable construction" does not
11 change this Court's ruling. Union Bank contends that the Court's interpretation is not
12 commercially reasonable for a number of reasons. First, Union Bank claims, without citation to
13 authority, that "uncontested Washington law [provides] that guaranty transactions are separate
14 from the loan transaction". ²⁷ Assuming the law is as Union Bank claims, it does not follow that
15 the same Deed of Trust cannot secure both the loan and the guaranty. After all, so long as Union
16 Bank did not use a non-judicial foreclosure, the Deeds of Trust, Notes, and Guaranties allowed
17 Union Bank to simultaneously sue on the Notes and Guaranties and bring a judicial foreclosure
18 action, or choose which of those actions to pursue in whatever order it wanted.

19 Union Bank next claims that the structure of the overarching transaction makes the
20 Court's interpretation commercially unreasonable, and that the "uncontested purpose of the
21 guaranty transactions [was] to provide additional security for the loans in the event of default" ²⁸.
22 Again, Union Bank had a number of options to choose upon default. The guaranty provided

23 ²⁶ *Id.*

24 ²⁷ Response, p. 6.

²⁸ *Id.*

1 additional security under at least two of those options, suing directly on the guaranty or pursuing
2 a judicial foreclosure with a deficiency action. That Union Bank chose the one option that
3 precluded it from maintaining a deficiency option does not mean the structure of the overarching
4 transaction was commercially unreasonable.

5 Next, Union Bank claims that the tripartite nature of the deeds of trust involves
6 borrowers, lenders and trustee, but not guarantors. Yet the Deeds of Trust explicitly refer to and
7 even define "Guarantors," and make clear that their guaranties are part of the Indebtedness and
8 Related Documents, the payment and performance of which the Deeds of Trust secures.

9 Finally, Union Bank argues that the parties contemplated and desired that the non-judicial
10 foreclosure process would be permitted in the event of a default. Union Bank is correct that
11 nothing in the documents prevented Union Bank from seeking a non-judicial foreclosure.
12 Likewise, this Court's order also does not impinge on Union Bank's ability to bring a non-
13 judicial foreclosure. As discussed below, the only restriction that arises from Union Bank
14 bringing a non-judicial foreclosure is statutory, not contractual.

15 **B. The Deed of Trust Act Precludes Seeking a Deficiency Judgment from the**
16 **Guarantor when the Non-judicially Foreclosed Deeds of Trust Secure the**
17 **Guaranties.**

18 Similar to the argument it made previously, Union Bank relies upon RCW
19 61.24.100(3)(c) to argue that it may both non-judicially foreclose the Deeds of Trust and
20 maintain a deficiency action on Guaranties secured by those Deeds of Trust. The section relied
21 upon by Union Bank provides:

22 (3) This chapter does not preclude any one or more of the following after a
23 trustee's sale under a deed of trust securing a commercial loan executed after June
24 11, 1998:

1 (c) ***Subject to this section***, an action for a deficiency judgment against a guarantor
2 if the guarantor is timely given the notices under RCW 61.24.042.²⁹

3 Union Bank's response does not address the language emphasized in bold and italics above.
4 That language makes clear that its ability to maintain an action for a deficiency judgment against
5 a guarantor is subject to the remainder of RCW 61.24.100. The very first sentence in RCW
6 61.24.100 makes equally clear, with emphasis added, that "***[e]xcept to the extent permitted in***
7 ***this section for deeds of trust securing commercial loans***, a deficiency judgment shall not be
8 obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor
9 after a trustee's sale under that deed of trust."

10 Both the bolded, italicized portions of RCW 61.24.100 quoted above limit Union Bank's
11 ability to seek a deficiency judgment "subject to" and "except to the extent permitted in" that
12 section. The part of RCW 61.24.100 that permits Union Bank to obtain a deficiency judgment
13 for a deed of trust securing commercial loans after a trustee's sale only applies "if that
14 obligation, or the substantial equivalent of that obligation, was not secured by the deed of
15 trust."³⁰ As a result, Union Bank's ability to seek a deficiency judgment against the Guarantors
16 depends on whether the Deeds of Trusts non-judicially foreclosed upon secured the Guaranties.
17 To hold otherwise and adopt Union Bank's reasoning that all it need do in order to seek that
18 deficiency judgment is provide notice as required by RCW 61.24.100(3)(c) would read out of the
19 statute the provision in that same subsection that limits RCW 61.24.100(3)(c)'s applicability
20 "subject to this section . . ." The statute, as a whole, directs the conclusion that Union Bank
21 cannot seek a deficiency judgment against the Guarantors when it non-judicially foreclosed upon
22

23 _____
²⁹ Emphasis added.

24 ³⁰ RCW 61.24.100(10).

1 the Deeds of Trust that secure the Guaranties.³¹

2 **5. Union Bank Cannot Enforce the Waivers in the Guarantees as a Matter of Law.**

3 In its section titled "Statement of the Issues," Union Bank argues that FRM waived its
4 right to assert a defense under RCW 61.24.100. The Court was unable to find anything in
5 support of that argument in the section of Union Bank's response titled "Argument and
6 Analysis." Regardless, the Court believes that the Washington Supreme Court has made clear
7 that waivers of The Deed of Trust Act are not enforceable.³² Accordingly, this Court holds that
8 the anti-deficiency waivers contained in the Remaining Defendants' Guaranties are
9 unenforceable.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court grants the Remaining Defendants' motion for
12 summary judgment. The Guaranty's attorney fee provision, which Washington law makes
13 reciprocal, entitles the Remaining Defendants to an award of their attorney's fees and court costs
14 incurred in defending this action. Accordingly, the Court also awards the Remaining Defendants
15 their reasonable attorneys' fees and costs incurred in this matter.³³

16 Signed this 16 of July, 2013.

17
18 
19 Honorable Ken Schubert
King County Superior Court Judge

20 ³¹ See *Glasebrook v. Mutual of Omaha Ins. Co.*, 100 Wn. App. 538, 545, 997 P.2d 981 (2009) ("Generally, we do not
21 infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion.")
(citations omitted).

22 ³² *Bain v. Metro Mortgage Group, Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012) ("The legislature has set forth in
23 great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the
24 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, 106-7, 297 P.3d 677 (2013) (refusing to uphold waiver of Act's limits on
the trustee's power to foreclose without judicial supervision).

³³ Union Bank has received notice of the fees and costs sought by the Remaining Defendants and has not objected
to the amount.

ATTACHMENT A

Union Bank, N.A. et al., v. F.R. McAbee, INC. et al.,

12-2-12590-2 SEA

1. Defendant F.R. McAbee's Motion For Summary Judgment
2. Declaration of Gary Schaeffer In Support of Defendant F.R. McAbee's Motion For Summary Judgment (with Ex)
3. Declaration of Adam Ware in Support of Defendant F.R. McAbee's Motion For Summary Judgment (with Ex)
4. Proposed Order Granting Defendant F.R. McAbee's Motion For Summary Judgment
5. Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment (with Ex)
6. Declaration of Guillermo Herrera In Support of Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment (with Ex)
7. Declaration of Mary K. Jobe in Support of Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment
8. PRAECIPE to Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment (with Ex)
9. Proposed Order Denying Defendant F.R. McAbee's Motion For Summary Judgment
10. Defendant F.R. McAbee's Reply to Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment
11. Declaration of Gary Schaeffer In Support of Defendant F.R. McAbee's Reply to Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment
12. Notice of Errata Re: F.R. McAbee's Reply to Union Bank's Response Opposing Defendant F.R. McAbee's Motion For Summary Judgment
Motion without Oral Argument (Note for 4/26)
13. Union Bank's Motion to Supplement Guillermo Herrera's Declaration
14. Ex. 1 – Supplemental Declaration of Guillermo Herrera Re: Defendant F.R. McAbee's Motion For Summary Judgment (with Ex A)
15. Proposed Order Granting Union Bank's Motion to Supplement Guillermo Herrera's Declaration
16. Defendant F.R. McAbee's Response to Union Bank's Motion to Supplement Guillermo Herrera's Declaration (Oral Argument Requested)
17. Declaration of Jessica Tsao In Support of F.R. McAbee's Response to Union Bank's Motion to Supplement Guillermo Herrera's Declaration
Motion without Oral Argument (Note for 7/05)
18. Defendant Wares' and Far North's Motion for (1) Application of Summary Judgment Order to remaining Defendants; (2) Entry of Final Judgment for all Defendants; and (3) Attorney's Fees and costs without oral argument

19. Declaration of Peter R. Dworkin in Support of Motion for Application of Summary Judgment Order to Remaining Defendants (with Ex)
20. Declaration of Peter R. Dworkin in Support of Motion for Attorney's Fees and Costs
21. Proposed Order
22. Plaintiff Union Bank 's Response Opposing Remaining Defendants' Motion for Judgment
23. Supplemental Declaration of Guillermo Herrera Re: Defendant F.R. McAbee's Motion for Summary Judgment
24. F.R. McAbee's Reply to Plaintiff Union Bank 's Response Opposing F.R. McAbee's Motion for Entry of Judgment and Additional Attorney Fees and Costs

ATTACHMENT B

Date	Document	Signed by	Relevant Provisions
4/20/2007	Promissory Note	Far North	<ul style="list-style-type: none"> * Provides that any event of default, such as the failure to comply with the term of any of the related documents, that occurs with respect to any Guarantor of any of the Indebtedness is an Event of Default under the Note. * States that this Note is secured by a Construction Deed of Trust dated April 20, 2007 and an assignment of all rents to Lender on real property located in Whatcom County.
4/20/2007	Deed of Trust	Far North	<ul style="list-style-type: none"> * Provides that the 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. . . 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." * Requires Far North to pay Frontier Bank "all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of [Far North's] obligations under the Note, this Deed of Trust, and the Related Documents." * Provides that any event of default as to Far North that occurs with respect to any Guarantor of any of the Indebtedness is an event of default of this Deed of Trust. * Defines "Guarantor" as "any guarantor, surety, or accommodation party of any or all of the Indebtedness." * Defines "Guaranty" as "the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note." * Defines "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents . . ." * Defines "Related Documents" as "all promissory notes . . . guaranties . . . deeds of trust . . . 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."
8/2/2007	Assumption Agreement	Far North and BB I (Borrowers), Frontier Bank (Lender), and Levi Ware, G. Paul Ware, Adam P. Ware, Jared Ware, Suzanne Ware and FRM (Guarantors)	<ul style="list-style-type: none"> * Provides that Far North, BB I and Guarantors are authorized and empowered to sign, acknowledge and deliver this Agreement, and are authorized to fulfill all of their obligations under the Note, Deed of Trust and any other Loan Documents without any qualification whatsoever. * Provides that Far North, BB I, Guarantors and FRM shall promptly sign all such additional deeds and other documents as the Lender may reasonably require under the Deed of Trust or perfecting the Deed of Trust or the security interests granted by the Deed of Trust; Defines "Loan Documents" as "the Note, Deed of Trust, . . . Guaranties and all related documents executed in

			connection with the Note . . .”
8/2/2007	Commercial Guarantees	FRM, Jared Ware and Noelle Ware, A. Suzanne Ware, G. Paul Ware, and Far North	<ul style="list-style-type: none"> * Guarantor guarantees full and punctual payment of the Indebtedness of BB I to Frontier Bank. * Obligates the signers to perform BB I’s obligations under the Note and Related Documents. * Defines Indebtedness as BB I’s indebtedness to Frontier Bank * Defines Related Document as meaning “all promissory notes . . . deeds of trust, security deeds, . . . and all other instruments, agreements and documents whether nor or hereafter existing executed in connection with the Indebtedness.”
6/5/2008	Promissory Note	Far North as manager for BB II and FRM as member of BB II	<ul style="list-style-type: none"> * Provides that any event of default, such as the failure to comply with the term of any of the related documents, that occurs with respect to any Guarantor of any of the Indebtedness is an Event of Default under the Note. * States that this Note is secured by a Construction Deed of Trust dated June 5, 2008.
6/5/2008	Commercial Guarantees	FRM, Jared Ware and Noelle Ware, Adam Ware, G. Paul Ware, A. Suzanne Ware, Levi Ware, and Far North	<ul style="list-style-type: none"> * Guarantor guarantees full and punctual payment of the Indebtedness of BB II to Frontier Bank. * Obligates the signers to perform BB II’s obligations under the Note and Related Documents. * Defines Indebtedness as BB II’s indebtedness to Frontier Bank. Defines Related Document as meaning “all promissory notes . . . deeds of trust, security deeds, . . . and all other instruments, agreements and documents whether nor or hereafter existing executed in connection with the Indebtedness.”
6/5/2008	Deed of Trust	Far North as manager of BB II and FRM as member of BB II	<ul style="list-style-type: none"> * Provides that the 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. . . 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.” * Requires BB II to pay Frontier Bank “all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of [BB II’s] obligations under the Note, this Deed of Trust, and the Related Documents.” * Provides that any event of default as to BB II that occurs with respect to any Guarantor of any of the Indebtedness is an event of default of this Deed of Trust. * Defines “Guarantor” as “any guarantor, surety, or accommodation party of any or all of the Indebtedness.” * Defines “Guaranty” as “the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.” * Defines “Indebtedness” as “all principal, interest, and other amounts, costs and expenses payable under the Note or Related

			<p>Documents . . .”</p> <p>* Defines “Related Documents” as “all promissory notes . . . guaranties . . . deeds of trust . . . 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.”</p>
12/5/2009	Modification of Deed of Trust	Far North as manager of BB I and FRM as member of BB I	<p>* Modifies April 20, 2007 Deed of Trust.</p> <p>* Adds a paragraph regarding cross-collateralization, stating “In addition to the Note, this Deed of Trust secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them . . . whether obligated as guarantor, surety, accommodation party or otherwise.</p>
12/5/2009	Promissory Note	Far North as manager for BB I and FRM as member of BB I	<p>* Provides that any event of default, such as the failure to comply with the term of any of the related documents, that occurs with respect to any Guarantor of any of the Indebtedness is an Event of Default under the Note.</p> <p>* States that this Note is secured by a Construction Deed of Trust dated December 5, 2009.</p>
12/5/2009	Deed of Trust	Far North as manager of BB I and FRM as member of BB I	<p>* Provides that the 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. . . 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.”</p> <p>* Requires BB II to pay Frontier Bank “all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of [BB II’s] obligations under the Note, this Deed of Trust, and the Related Documents.”</p> <p>* Provides that any event of default as to BB II that occurs with respect to any Guarantor of any of the Indebtedness is an event of default of this Deed of Trust.</p> <p>* Defines “Guarantor” as “any guarantor, surety, or accommodation party of any or all of the Indebtedness.”</p> <p>* Defines “Guaranty” as “the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.”</p> <p>* Defines “Indebtedness” as “all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents . . .”</p> <p>* Defines “Related Documents” as “all promissory notes . . . guaranties . . . deeds of trust . . . 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.”</p>