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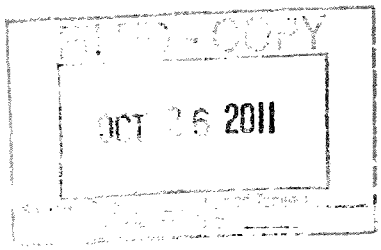
Washington Federal Savings v. Engelen Appellant's Reply Brief Dckt. 38484

IN THE SUPREME COURT OF THE STATE OF IDAHO

WASHINGTON FEDERAL SAVINGS Plaintiff/Respondent v. H. CRAIG VAN ENGELEN AND KRISTEN VAN ENGELEN Defendants/Appellants	Supreme Court Docket No. 38484-2011



APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Cheri C. Copsey, District Judge

Thomas A. Banducci (ISB No. 2453) Wade L. Woodard (ISB No. 6312) Dara L. Parker (ISB No. 7177) BANDUCCI WOODARD SCHWARTZMAN PLLC 802 West Bannock St., Suite 500 Boise, ID 83702 ***Attorneys for Defendants-Appellants***	David E. Wishney Chad E. Bernards WISHNEY LAW 988 S. Longmont, Ste. 100 P.O. Box 837 Boise, ID 83701 ***Attorneys for Plaintiff-Respondent***

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STATEMENT OF THE CASE

Appellants H. Craig and Kristen Van Engelen ("the Van Engelens") provided the Statement of the Case in their Appellants' Brief, filed June 21, 2011, incorporated herein by reference as if set forth in full. Briefly stated, the Van Engelens appeal the summary judgment entered in favor of Washington Federal Savings ("Washington Federal" or "the Bank"). The entry of summary judgment in favor of Washington Federal should be reversed because there are genuine issues of material fact concerning the Van Engelens' affirmative defense that the Bank's misrepresentations and nondisclosures (1) constituted a waiver of the Guarantee; (2) estopped the Bank from enforcing the Guarantee; (3) rendered the Guarantee voidable; (4) caused the Guarantee to be unenforceable; (5) discharged the Van Engelens; (6) constituted a breach of the covenant of good faith and fair dealing; or (7) fraudulently induced the Van Engelens to cause VED to enter the transaction(s). The Van Engelens also assert that there was a genuine issue of material fact as to whether the Guarantee was intended to extend to the loan at issue, and whether the Bank had failed to mitigate the claimed or alleged damage. They have met their burden of showing that genuine issues of material fact exist on the elements of their affirmative defenses. As such, the summary judgment granted in favor of Washington Federal should be reversed and this case remanded for further proceedings.

ISSUES PRESENTED ON APPEAL

The Van Engelens provided the statement of Issues Presented on Appeal in their Appellants' Brief, filed June 21, 2011, which is incorporated herein by reference as if set forth in full.

ARGUMENT

In their initial Appellants' Brief, the Van Engelens explained in detail why the district court erred in granting summary judgment in favor of Washington Federal. As those arguments are incorporated herein by reference, they will not repeat those arguments here, but simply make a reply to the arguments advanced by Washington Federal in is Respondent's Brief.

A. Washington Federal Had a Duty to Disclose the Existence of the Continuing Guarantee in Order to Correct is Misrepresentations and Omissions

1. Earlier Misrepresentations/Omissions Properly Provide the Basis for this Affirmative Defense

As discussed at length in the Van Engelens' opening brief, the district court improperly found that all of the misrepresentations alleged by the Van Engelens were irrelevant because they happened several years before the loans at issue in this case. To briefly recap, in December 2004, a representative of the Bank approached the Van Engelens about renewing their relationship. (R. Vol. I, p. 00097, at ¶ 7.) Later that month, the Van Engelens learned that a real estate development called Carriage Hill No. 3 and No. 4 was for sale. (R. Vol. I, p. 00097, at ¶ 8.) In February 2005, Bryan Churchill, a loan officer for the Bank, submitted a loan proposal for this project, when included a personal guarantee. (R. Vol. II, p. 00339, at p. 20 L. 6-9; R. Vol. I, p. 00087, at ¶ 10; R. Vol. I, p. 00097, at ¶ 10.) Mr. Van Engelen explained that they would accept a loan from the Bank only if it agreed to not require a personal guarantee. (R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19.) A few days later Mr. Churchill told Mr. Van Engelen that the loan had been approved with these requested terms, including not requiring a personal guarantee. (R. Vol. II, p. 00373, p. 36 L. 4-22.) During these discussions, Mr. Churchill never

mentioned that they had previously signed continuing personal guarantees on behalf of some of their entities, including both Northwest Development ("NWD") and Van Engelen Development ("VED"). (R. Vol. II, p. 00369, at p. 20 L. 20 – p. 21 L. 18; R. Vol. III, p. 00463, ¶ 6.) Instead, he falsely assured the Van Engelens that personal guarantees would not be required. (*Id.*)

On February 22, 2005, the Van Engelens therefore caused NWD to enter into two loan agreements with the Bank for the purchase of Carriage Hill No. 3 and No. 4 ("the Carriage Hill No. 3 and No. 4 Loans"). (R. Vol. I, p. 00097, at ¶ 8; R. Vol. III, p. 00423 and 00432.) At closing the Van Engelens again sought assurance that a personal guarantee would not be required for the Carriage Hill No. 3 and No. 4 Loans. (R. Vol. II, p. 00372-00373, at p. 32 L. 15 – p. 33 L. 9 and p. 34 L. 9-14.) A representative of the Bank responded that while the Bank usually required people to sign personal guarantees, the Van Engelens would not be required to do so because of their long term relationship with the Bank and the longevity of their company. (R. Vol. II, p. 00373, at 33 L. 3-9; R. Vol. II, p. 00390, at p. 25 L. 23 – p. 27:8.) These statements were false, as a continuing guarantee existed with respect to NWD. (R. Vol. II, p. 00369, at p. 20 L. 20 – p. 21 L. 18; R. Vol. III, p. 00463, ¶ 6.)

In order to develop the Carriage Hill project, between January 18, 2006, and March 28, 2007, the Van Engelens caused their other entity, VED, to enter the six real estate development and construction loans at issue ("the Six Loans"). (R. Vol. I, p. 00046, at ¶ 3; R. Vol. III, p. 00464-00465, ¶ 9). As with the prior loan to NWD, the Van Engelens were unaware of the existence of a continuing personal guarantee. (R. Vol. I, p. 00086, at ¶ 3; R. Vol. I, p. 00096, at ¶ 3.) Despite the fact that the Van Engelens had previously made it clear to the Bank that they

would not do business with the Bank if they were required to sign personal guarantees, and had received assurances in general and at the time of the Carriage Hill No. 3 and No. 4 loans that guarantees would not be required, the Bank never disclosed that these Six Loans were subject to this Guarantee. (R. Vol. III, p. 00465, ¶ 10). The loan documents did not include a personal guarantee, or mention or reference the earlier signed Guarantee. (R. Vol. II, p. 00342-00343, at p. 30 L. 12 – p. 34 L. 24 and p. 36 L. 4-22; R. Vol. II, p. 00361, at p. 20 L. 11-13.) Nor was the existence of the personal guarantee disclosed at closing. (R. Vol. II, p. 00340, at p. 22 L. 2-20; R. Vol. II, p. 00360, at p. 13 L. 18 – p. 14 L. 1.)

The district court held that the misrepresentations which had occurred in 2005 with respect to the Carriage Hill No. 3 and No. 4 loans taken out by NWD were irrelevant to the Six Loans taken out by the Van Engelens' other entity, VED, in 2006 and 2007. The district court apparently found, as the Bank argues, that the only misrepresentation was that "you don't have to personally guaranty the loans to NWD." (Respondent's Brief, p. 12). Construing the evidence in favor of the Van Engelens, as the district court should have done in a summary judgment motion, the circumstances show that the misrepresentation was much broader. The Van Engelens explicitly told the Bank that they would not do any business with the Bank if a guarantee was required. The Bank knew about the existence of the continuing guarantee with respect to the Carriage Hill No. 3 and No. 4 loans taken out by NWD in 2005, and lied to the Van Engelens by assuring them that there was no guarantee with respect to NWD. (R. Vol. II, p. 00343-00344, at p. 36 L. 23 – p. 37 L. 5.) This explicit misrepresentation, particularly in the context of the Van Engelens' insistence that they would not do business with the Bank if they

were required to sign a guarantee, put them under the misapprehension that the Bank would not require any guarantees when the Van Engelens did business with the Bank. The Bank allowed the Van Engelens' misapprehension to continue by failing to tell the Van Engelens that a continuing guarantee existed with respect to any loan given to VED. *See Batchelor v. Legg & Co.*, 52 F.R.D. 553, 558 (D. Md. 1971) (noting that misrepresentation can have a continuing effect influencing later as well as earlier transactions). For these reasons, and those discussed in the Van Engelens' opening brief, the Bank's actions in 2005 are clearly relevant to the loans taken out by VED in 2006 and 2007.

2. A Party Has a Duty to Correct Misrepresentations and Omissions

Contrary to the Bank's assertion otherwise, under the circumstances of this case, it clearly had a duty to disclose the existence of the Guarantee. Through the Bank's own statements and omissions, the Van Engelens were under the misapprehension that when they did business with the Bank, no guarantee would be required. As noted above, the Van Engelens had explicitly told the Bank that they would not do business with the Bank if a guarantee was required. The Bank affirmatively and actively lied to the Van Engelens in 2005 when it stated that no guarantee secured the Carriage Hill No. 3 and No. 4 loans taken out by NWD. In 2006 and 2007, the Bank allowed this misapprehension to continue by failing to tell the Van Engelens that a continuing guarantee existed with respect to any loan given to VED.

A number of legal principles obligated the Bank to correct this misapprehension by disclosing the existence of the guarantee. They are discussed at length in the Van Engelens' opening brief, and include obligations under the covenant of good faith and fair dealing to inform

continuing guarantors of new liability when the bank has reason to believe that the guarantor is unaware of this new liability, *Lacrosse State Bank v. Estate of McLoone,* 359 N.W.2d 179, 1984 WL 180170 (Wis. App. 1984) (unpublished); and the Restatement of Sureties (3d), under which misrepresentations can make guarantees voidable. Rest. 3d Sur, § 12(1) and cmt i.

The Van Engelens will not repeat those arguments again here, but do wish to highlight the principle, as stated in the Restatement of Torts (2d), § 551, that parties to a business transaction are under a duty to disclose information to one another to correct misunderstandings that they have fostered or which the other party would reasonably expect to be disclosed. This section provides that:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
>
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Rest. 2d Torts § 551(2). Notably, "[o]ne who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose." Rest. 2d Torts § 551(1). Idaho Courts have adopted this provision. *See Tusch Enterprises v. Coffin,* 113 Idaho 37, 42, 740 P.2d 1022, 1027 (1987) (approving Rest. 2d Torts § 551); *Saint Alphonsus Reg'l Med. Ctr., Inc. v. Krueger,* 124 Idaho 501, 508, 861 P.2d 71, 78 (Ct. App. 1992) (citing to the Rest. 2d Torts § 551(2);

The Bank argues that this provision does not apply because the parties are not in a fiduciary relationship. However, the duty of disclosure by a fiduciary is only one circumstance of the five listed circumstances under which information must be disclosed. The duty of disclosure does not require that all five circumstances listed in § 551 exist before the duty is triggered. As the comments to Section §551 note, the duty to disclose is triggered "if [the party] is under some one of the duties of disclosure stated in Subsection (2)." Rest. 2d Torts, § 551, comment "a" (emphasis added). As such, the Restatement of Torts (2d) clearly stands for the principle that a party has a duty to correct any misapprehension that has arisen by its own actions or omissions, or even more general misunderstandings if the circumstances are such that a party would ordinarily expect disclosure of those facts. *See Everman Nat'l Bank v. United States*, 5 Cl. Ct. 118 (U.S. Cl. Ct. 1984) (holding that bank could not enforce guarantee when it failed to inform guarantor of subsequently acquired information that made untrue or misleading a previous representation).

Genuine issues of material fact exist under either one of these circumstances. As discussed in detail above and in the Van Engelens' opening brief, the Banks' ambiguous statements regarding guarantees caused the Van Engelens to have a misunderstanding about whether loans would be personally guaranteed. As such, the Bank had an affirmative obligation to disclose the existence of the Guarantee to correct this misapprehension. Further, under the customs of the industry, the Van Engelens would expect to be told about the existence of a continuing guarantee. The Van Engelens testified that in their experience in the industry, which spanned over decades, they would have expected the existence of a continuing personal guarantee to be referenced in the loan documents, and disclosed during the loan negotiations and at closing. (R. Vol I., p. 00088 at § 20; R. Vol. I, p. 00098 at § 21.) Indeed, Mr. Churchill testified that it would have been his custom to remind borrowers that their loan was covered by a continuing general guarantee, but he did not give this reminder to the Van Engelens. (R. Vol. II, p. 00340, at p. 22 L. 2-20.) As genuine issues of fact exist on the elements of this affirmative defense, the district court erred in granting summary judgment in favor of the Bank.

3. The Guarantee Does not Waive the Duty to Correct Misrepresentations and Omissions

The Bank contends that the Van Engelens waived their right to be notified when the Bank extended credit to VED. The Van Engelens do not contest this. However, in this case, the Bank did not merely rest on this waiver, but made affirmative misrepresentations concerning the Van Engelens' guarantee, as well as omissions that, under the circumstances, are the same as

affirmative misrepresentations. *See* Rest. 2d Torts § 551(1). The Guarantee does not contain a waiver of the Van Engelens' right to be free of fraudulent behavior or bad faith.

B. The District Court Rulings Regarding the "Modification" of the Guarantee are in Error

The district court applied two legal principles, the statute of frauds and the doctrine of consideration, to find that the so-called "oral modification" of the Guarantee could not stand. A modification is a change or alteration. Black's Law Dictionary (9th ed. 2009). However, as outlined at length in their opening brief, the Van Engelens' affirmative defenses do not seek a "modification" of a particular provision of the Guarantee. Rather, the Van Engelens contend that the guarantee has been waived or is otherwise unenforceable in its entirety.

1. Statute of Frauds

The case cited by the Bank, and relied upon by the district court, itself demonstrates this distinction. In *USA Fertilizer, Inc. v. Idaho First Nat. Bank*, 120 Idaho 271, 815 P.2d 469 (Ct. App. 1991), a farmer applied for an operating loan from a Bank. The farmer subsequently approached USA Fertilizer to obtain fertilizer for his farm. However, when USA Fertilizer contacted the Bank to confirm the farmer's financing, it learned that the loan had not yet been approved. Anticipating that the loan would be approved with the next month, the Bank orally committed to guarantee to lend up to $15,000 for the initial delivery of fertilizer to the farm. The Bank also executed a number of letters of commitment. USA Fertilizer was unsatisfied by the terms of the bank's commitment as stated in these letters, and attempted to introduce evidence of oral modifications of the guarantee to lend considerably more than $15,000. The Court held that

such an oral modification would be barred under the Statute of Frauds. *Id.* at 275, 815 P.2d at 473.

Notably, *USA Fertilizer* is about an oral modification to the terms contained within an agreement, particularly how much money the bank had promised would be lent. Unlike the present case, *USA Fertilizer* has nothing to do with whether the agreement to lend was enforceable, but rather its terms. There is no discussion of the affirmative defenses raised by the Van Engelens, including waiver, equitable estoppel, quasi estoppel, fraud/misrepresentation, violation of the covenant of good faith and fair dealing, intent, and fraudulent inducement. The argument that a contract is unenforceable for any of these reasons is not an argument that the parties "orally modified" the Guarantee so as not to apply to certain loans. Rather, it is an argument that the terms contained in the Guarantee cannot be enforced. Furthermore, as outlined in extensive detail in the Van Engelens' opening brief, Idaho courts have clearly and explicitly held that the statute of frauds is inapplicable to these defenses. As such, the district court's holding otherwise was in error.

2. Consideration

The Court held that the "oral modification" required consideration, and that there was no consideration to support such modification. As discussed in more detail below, consideration is unnecessary for the Van Engelens' contract defenses. Regardless, however, consideration was present. To the extent that there was an "oral modification," it was a modification of the 2002 continuing guarantee that, notwithstanding the provisions of this continuing guarantee, no personal guarantee would be required when the Van Engelens' entities did business with the

Bank. Van Engelens said that they would not do business with the Bank if a guarantee was required, the Bank said that no guarantee was required, and the Van Engelens have testified that they chose to do business with the Bank as a result. (R. Vol. III, p. 00463-00464, at ¶¶ 6-11; R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19; R. Vol. III, p. 00463, at ¶ 6; R. Vol. II, p. 00371, at p. 27 L. 22 – p. 28 L. 16; R. Vol. III, p. 00465, at ¶¶ 10-11.) Thus, in consideration of this supposed "modification," the Van Engelens caused NWD to enter into two loans in 2005, and VED to enter into six additional loans in 2006 and 2007. (R. Vol. III, p. 00463-00464, at ¶¶ 6-11; R. Vol. I, p. 00097-00098, at ¶¶ 11-20; R. Vol. II, p. 00369, at p. 18 L. 23 – p. 19 L. 3; R. Vol. II, p. 00369-00370, at p. 20 L. 20 – p. 21 L. 10; R. Vol. II, p. 00370, at p. 21 L. 20 – p. 22 L. 19; R. Vol. II, p. 00375, at p. 42 L. 4-14.) In consideration for this promise, the Van Engelens entered into eight new loan agreements with the Bank worth millions of dollars that they were not any way obligated to enter. *Eddins Const., Inc. v. Bernard,* 119 Idaho 340, 806 P.2d 433 (1991) (additional agreements provided the necessary consideration for modifications to a contract). As such, the district court's finding that there was no consideration for the so-called "oral modification" of the guarantee was in error.

Although consideration was present, it is not a necessary element of any of the Van Engelens' affirmative defenses. As noted above, the Van Engelens do not contend that a modification occurred. Rather, they assert that the Guarantee, even as written, cannot be enforced. As such, the district court's decision that "consideration" was in any way necessary for the maintenance such an affirmative defense, is utterly misplaced. Idaho courts have explicitly held that consideration is not necessary when a party alleged that a contract is not

enforceable because of waiver, estoppel, and the like. *See Idaho Bank of Commerce v. Chastain*, 86 Idaho 146, 154, 383 P.2d 849, 854 (1963) (waiver of bank's lien did not require consideration, because the waiver arose out of the bank's conduct); *Seaport Citizens Bank v. Dippel,* 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987) ("Where a waiver arises out of conduct and partakes of the nature of an estoppel, no consideration is necessary."); *Andrus v. Irick*, 87 Idaho 471, 394 P.2d 304 (1964) (where party plead theories for rescission on the grounds of misrepresentation or lack of consideration, it was not necessary for the court to making findings upon the question of consideration when it had already made findings on the question of misrepresentation).

The Bank cites the case *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981), for the proposition that consideration is somehow necessary to these defenses. In fact, however, this case explicitly holds that consideration is not an element of waiver or estoppel. In *Brand S*, the plaintiff and defendant entered a contract whereby plaintiff would advance defendant $140,000, and defendant would provide logs to the plaintiff. The agreement provided that if the logs were not accepted, defendant would sell the logs elsewhere, and use that money to pay back the advance. After the contract was signed at the advance made, the plaintiff decided that it did not want the logs, and the lumber market collapsed. The defendant claimed that plaintiff told it to just sell the logs elsewhere, and forget about the $140,000. Plaintiff later sued defendant for this $140,000. The defendant said that the plaintiff's statement to "just forget" about the $140,000 was either a modification, waiver, impossibility of performance, or estoppel. The court first addressed the defense of modification and found that the defense failed because there was no

consideration. The Court then engaged in an entirely difference analysis with respect to waiver and estoppel. It made no inquiry about the existence of consideration, but in fact noted that "waiver does not necessarily depend on any new or additional consideration," *Brand S Corp.*, 102 Idaho at 734, 639 P.2d at 432. Although the Court found that the defenses of waiver and estoppel failed, it was not for a lack of consideration, which is not an element of those defenses, but lack of evidence of reliance. In short, this case holds, as do those cited above and in the Van Engelens' appellate brief, that consideration is not an element of the defenses of waiver and estoppel. As such, the district court's ruling otherwise must be overturned.

C. The Van Engelens have shown that Genuine Issues of Material Fact Exist on the Elements of their Affirmative Defenses

In their opening brief, the Van Engelens discussed their affirmative defenses in exhaustive detail, and demonstrated why genuine issues of material fact existed on each element of their defenses. The Van Engelens will not repeat those arguments here, which are incorporated by reference, but will simply address those issues raised by the Bank in its briefing.

1. Waiver

The Bank asserts that waiver cannot be shown because the statements upon which Washington Federal premises this defense were made with respect to the Carriage Hill No. 3 and No. 4 loan given to NWD, rather than the loans at issue subsequently given to VED in 2006 and 2007. The error of this assertion has already been discussed in detail both above and in the Van Engelens' opening brief. Suffice it to say that when the Bank and the Van Engelens first began having discussions about a loan, the Van Engelens made it clear to the Bank that they would not do any future business with the Bank, on behalf of any of their entities, if doing so required

personal guarantees. (R. Vol. III, p. 00463-00464, at ¶¶ 6-7; R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19), and Mr. Churchill responded by assuring the Van Engelens that personal guarantees would not be required for future loans from the Bank. (R. Vol. III, p. 00463, at ¶ 6; R. Vol. II, p. 00373, at p. 34 L. 4 – p. 36 L. 11.) At the very least, there is a genuine issue of material fact about whether the Bank's conduct amounts to waiver.

2. Equitable Estoppel

The Bank asserts that equitable cannot be shown because the statements upon which Washington Federal premises this defense were made with respect to the Carriage Hill No. 3 and No. 4 loan given to NWD, rather than the loans at issue subsequently given to VED in 2006 and 2007. Again, the Van Engelens have addressed the error of this argument on multiple occasions above and in earlier briefing, and therefore refer the Court to those arguments.

The Bank also argues that the Van Engelens had the ability to discover the truth about the continuing Guarantee, as they had signed it in 2002. The Van Engelens discussed the error of this argument at length in their opening brief. Suffice it to say that the Van Engelens assert that they never received a copy of this Guarantee from the Bank, and the Idaho Supreme Court has held that when a document is not made available by the party who has sole possession of it, the other party had no ability to discover the truth. *Lewis v. Continental Life and Accident Co.,* 93 Idaho 348, 461 P.2d 243 (1969). At the least, there is a genuine issue of material fact on this element.

Finally, the Bank argues that in order to prove that they relied on the Bank's misrepresentation that no guarantee would be required, the Van Engelens must produce the loan

terms offered by other banks. This is absurd, as such evidence is not required in order to establish reliance. There is no requirement that, in order to rely on the misrepresentation of one party in entering a transaction, some third party must have offered the same or better option. The Van Engelens said that they would not do business with the Bank if a guarantee was required, the Bank said that no guarantee was required, and the Van Engelens have testified in affidavits that they chose the Bank's loan because of this misrepresentation. (R. Vol. III, p. 00463-00464, at ¶¶ 6-11; R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19; R. Vol. III, p. 00463, at ¶ 6; R. Vol. II, p. 00371, at p. 27 L. 22 – p. 28 L. 16; R. Vol. III, p. 00465, at ¶¶ 10-11.) This evidence is more than sufficient. *See Fowler v. Uezzell,* 94 Idaho 951, 500 P.2d 852 (1972) (when misrepresentations about the availability of water were made at the place, time, and manner for the purpose of inducing plaintiffs to enter lease, reliance was clearly shown by the evidence). The error of the Bank's argument can be shown by considering the fact that, if the Van Engelens had not solicited offers from any other bank, they could clearly establish reliance with the evidence they have submitted.

The precise terms which may or may not have been offered by other banks, and whether the Van Engelens could have in fact received financing from another bank without a personal guarantee, is irrelevant to the question of whether the Van Engelens relied upon a statement made by the Bank that it would not require a personal guarantee. It is not necessary to demonstrate what other loan proposals would have shown. Whether any other bank had offered a loan without a personal guarantee, every other bank had offered a loan only with a personal guarantee, or some banks had offered a loan without a personal guarantee, does not affect the

fact that when they choose to do business with Washington Federal, the Van Engelens relied on the Bank's statement that it would not require personal guarantees. For these reasons, and those stated in the Van Engelens' opening brief, they raised a genuine issue of material fact on each element of this defense.

3. Quasi Estoppel

The Bank asserts that quasi estoppel cannot be shown because the NWD loans and the VED loans were distinct transactions, and thus not a "change in position." The Van Engelens have addressed the error of this argument on multiple occasions above and in earlier briefing, and therefore refer the court to those arguments. The Bank also argues that reliance must be show by evidence the Van Engelens could have obtained loans from other banks without a personal guarantee. The Van Engelens have addressed the error of this argument in the section immediately above.

4. Good Faith and Fair Dealing

The Van Engelens contend that the Bank acted in bad faith by not disclosing the existence of the guarantees when it made the at-issue loans to Van Engelen Development in 2006 and 2007. The Bank argues that there can be no violation of the covenant of good faith and fair dealing because the Bank was merely exercising its express rights under the Guarantee. The Van Engelens rebutted this argument at length in their opening memorandum. Briefly stated, requiring that Bank to disclose the existence of the Guarantee, under circumstances where it knew that the Van Engelens were under a misapprehension about its existence, does not override any express term contained in the Guarantee, as the agreement contains no express waiver of

disclosure of the existence of the Guarantee. As genuine issues of material fact exist with respect to this affirmative defense, the district court erred in granting summary judgment in favor of the Bank.

5. Fraud/Misrepresentation/Discharge/Fraudulent Inducement

With respect to these affirmative defenses, Washington Federal repeats many of its same arguments as those above, including that argument that the 2005 NWD loan was irrelevant to the loans to VED, the supposed ability of the Van Engelens to ascertain the existence of the continuing Guarantee, and waiver of the right to be told about the Guarantee. The Van Engelens have rebutted each of these arguments above and in their opening brief. They therefore reference the court to those arguments.

Washington Federal also argues that these affirmative defenses fail because the Van Engelens have not shown any "injury" or "damages." Notably, however, this is not an affirmative claim asserted by the Van Engelens such that they have to prove "damages" as a plaintiff, but rather is an affirmative defense. In fact, the Idaho Pattern Civil Jury Instructions contain an instruction of the affirmative defense of fraud, which instruction is presumptively correct. *See McKay v. State,* 148 Idaho 567, 571, n. 2 225 P.3d 700, 704 n. 2 (2010). Notably, this instruction does not contain the requirement that a defendant who has raised this defense prove the element of "damages" or "injury." As such, the Court may simply disregard the inapposite argument. Regardless, however, the Van Engelens have in fact presented evidence of a resultant injury: if not for the fraud or misrepresentation, the Van Engelens allegedly would not be liable for more than $4 million under a personal guarantee. As such, to the extent that a

party pleading the affirmative defense of fraud must establish a resultant injury, the Van Engelens have done so. As genuine issues of material fact exist with respect to this affirmative defense, the district court erred in granting summary judgment in favor of the Bank.

6. Whether the Guarantee was Intended to Apply

The Bank asserts that, although the guarantee was not referenced in any loan documents, the Guarantee was nevertheless intended to apply to the loans at issue, by virtue of the fact that it was a "continuing" guarantee. In their opening brief, the Van Engelens presented case law directly to the contrary. *Cadle Co. v. Newhouse*, 300 A.D.2d 756 (N.Y.A.D. 2002). The Court should adopt the reasoning contained in the *Cadle* case, which is discussed in detail in the Van Engelens' initial briefing.

7. No Damages, Unjust Enrichment, Failure to Mitigate, and Double Recovery

The Bank does not contest that it has a duty to mitigate, but asserts that this doctrine is inapplicable to guarantors. This clearly results in an inappropriate windfall. A party always has an obligation to take such steps as would reasonably tend to minimize damages occasioned by breach of contract. *Casey v. Nampa and Meridian Irr. Dist.*, 85 Idaho 299, 305, 379 P.2d 409, 412 (1963). As outline at length in the Van Engelens' opening brief, there are therefore genuine issues of material fact as to whether the bank has properly undertaken to mitigate its damages.

D. Attorney Fees on Appeal

As genuine issues of material fact exist which require the remand of this case back to the district court, the Van Engelens, not Washington Federal, are the prevailing parties for purposes of appeal, and are entitled to costs and attorneys fees, at outlined in their opening brief.

CONCLUSION

For the reasons stated above and in the Van Engelens' opening brief, genuine issues of material fact exist on the Van Engelens' affirmative defenses. Van Engelens therefore request that this Court to reverse the order of summary judgment and judgment entered by the district court, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2011, I caused to be served **two** true and correct copies of the foregoing document as follows:

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