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Washington Federal Savings v. Engelen Appellant's 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

APPELLANT'S 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

A. Nature of the Case

Appellants H. Craig and Kristen Van Engelen ("the Van Engelens") appeal the summary judgment improperly 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. In the underlying action, Washington Federal sought to enforce a continuing Guarantee, which allegedly made the Van Engelens' personally liable for loans entered into by their real estate development company, Van Engelen Development, Inc. ("VED"). (R. Vol. I, p. 00008-00012.) The Bank brought a motion for summary judgment on its claims. (R. Vol. I, p. 00019-00020.) The Van Engelens opposed this motion by asserting that the Bank made multiple misrepresentations in which it stated that the loans were not secured by a personal guarantee, and concealed the existence of the continuing Guarantee. (R. Vol. I, p. 00398-00416.)

In particular, the Van Engelens argued that genuine issues of material fact existed concerning whether the Bank's affirmative 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). (*Id.*) The Van Engelens also argued 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. (*Id.*) The district court improperly rejected these arguments and entered summary judgment in favor of Washington Federal. (Tr. p. 45 L. 9 – p. 78 L. 2; R. Vol. III, p. 00519-00520.) The Van Engelens appeal, asserting that the entry of summary judgment was in error because genuine issues of material fact exist on their defenses.

B. Statement of the Case, Factual Background, and Course of the Proceedings

1. Factual Background

In 2002, VED borrowed $126,000 from Washington Federal ("the 2002 Loans"). (R. Vol. I, p. 00327-00328, at p. 64 L. 14 – p. 65 L. 16; R. Vol. I, p. 00096, at ¶ 3; R. Vol. I, p. 00086, at ¶ 3.) In the course of that transaction, the Van Engelens signed a personal continuing guarantee (the "Guarantee"). (R. Vol. I, p. 00056-00057.) While the Van Engelens have no memory of signing this Guarantee, they do not dispute that they signed it. (R. Vol. II, p. 00369, at p. 19 L. 15-25; R. Vol. II, p. 00386, at p. 9 L. 16-23.) The Guarantee was "continuing" guarantee by which the Van Engelens allegedly guaranteed any present or future obligation of VED to Washington Federal. It states:

> Guarantor guarantees payment to Lender of all Obligations that Borrower owes to Lender now or in the future . . . Guarantor's Promise extends to all Obligations which Borrower owes Lender now or in the future . . . . Guarantor's Promise shall be a continuing guarantee as to any present or future Obligations Borrower owes Lender and shall remain effective until Lender actually receives written notice from Guarantor that Guarantor withdraws Guarantor's Promise."

(R. Vol. I, p. 00056.) As the Van Engelens were unaware of this Guarantee, they never gave written notice to the Bank revoking it. (R. Vol. II, p. 00369, at p. 20 L. 6-15.) Within one year, VED fully paid the $126,000 from the 2002 Loans. (R. Vol. I, p. 00086-00087, at ¶ 5; R. Vol. I, p. 00096, at ¶ 5.) For several years following the 2002 Loans, the Van Engelens and their real

estate development entities (including VED and another entity called Northwest Development, LLC ("NWD") (R. Vol. II, p. 00366, at p. 6 L. 14-16; R. Vol. III, p. 00451, at ¶3)), declined to do business with Washington Federal. (R. Vol. II, p. 00370-00371, at p. 24 L. 19 – p. 25 L. 24.; R. Vol. II, p. 00388, at p. 18 L. 24 – p. 19 L. 15 and p. 20 L. 13-16.) This decision was based on the Van Engelens' feeling that, in the previous transaction, the Bank had breached their trust and confidence. (R. Vol. II, p. 00370-00371, at p. 24 L. 19 – p. 25 L. 24.)

In December 2004, a representative of the Bank approached the Van Engelens about renewing their relationship. (R. Vol. I, p. 00097, at ¶ 7.) They were told that the Bank was willing to finance new projects.[1] (*Id.*) The Bank did not solicit business from any particular entity owned by the Van Engelens, but wanted a relationship with the Van Engelens so that it might have access to loaning money to all the entities that the Van Engelens controlled. (R. Vol. III, p. 00463, at ¶ 4.) 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.) The Van Engelens had conversations with the Bank about financing this project. (R. Vol. III, p. 00463, at ¶ 5.) At that time, they had not determined which of their entities would purchase the project. (*Id.*) They solicited loan proposals from the Bank and two other lending institutions. (R. Vol. II, p. 00371, at p. 26 L. 21 – p. 27 L. 1.)

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[1] There is disagreement about the content of this meeting, but Bank representatives agree that this meeting occurred. (R. Vol. II, p. 66 L. 13 – p. 68 L. 25.)

In February 2005, Bryan Churchill, a loan officer for the Bank, submitted a loan proposal.[2] (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.) The Bank said that it would require a down payment of 20 percent, and a personal guarantee signed by the Van Engelens. (R. Vol. I, p. 00087, at ¶ 10; R. Vol. I, p. 00097, at ¶ 10.) Around that time, the Van Engelens had a discussion with another developer about personal guarantees and decided that, where possible, they would not sign personal guarantees. (R. Vol. III, p. 00463, ¶ 6.) Mr. Van Engelen therefore told Mr. Churchill that other lenders had submitted stronger proposals, (R. Vol. II, p. 00371, at p. 27 L. 22 – p. 28 L. 13,) and 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.) Because of the Van Engelens' previous bad experience with the Bank, they were very demanding about the conditions under which they would do future business with the Bank. (R. Vol. III, p. 00463, ¶ 6.) The Van Engelens made it very clear to Mr. Churchill that they would not cause any of their entities to do business with the Bank if doing so required them to personally guaranty any loans. (*Id*; R. Vol. II, p. 00373, at p. 35 L. 16-19.) Mr. Churchill said that he would have to take this and other requested terms to the loan committee. (R. Vol. II, p. 00374, at p. 40 L. 2-3.) 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

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[2] As Mr. Churchill testified, the Bank chose not to put the loan proposal in writing. (R. Vol. II, p. 20 L. 10-14.)

mentioned that they had previously signed continuing personal guarantees on behalf of some of their entities, including both NWD and 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.)

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 six real estate development and construction loans with the Bank in the amount approximately $6 million ("the Six Loans"). (R. Vol. I, p. 00046, at ¶ 3; R. Vol. III, p. 00464-00465, ¶ 9). Each loan was evidenced by a promissory note (R. Vol I, p. 00050-55,) and secured by a deed of trust on various parcels of real property. (R. Vol. I, p. 00046, at ¶ 5.) At the time that the Six Loans were made, the Bank knew of the existence of the continuing personal Guarantee that the Van Engelens had signed with respect to VED in 2002. (R. Vol. II, p. 00343-00344, at p. 36 L. 23 – p. 37 L. 5). The Van

Engelens were unaware of the existence of the 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.) Although it would have been Mr. Churchill's custom to remind borrowers that their loan was covered by a continuing general guarantee, Mr. Churchill did not give this reminder to the Van Engelens. (R. Vol. II, p. 00340, at p. 22 L. 2-20.) Neither did Gloria Henson, who may have been present at the closings. (R. Vol. II, p. 00360, at p. 13 L. 18 – p. 14 L. 1.)

Because the Van Engelens had been previously told that the loans they caused their businesses to borrow would not be guaranteed, they believed that the Six Loans were not guaranteed. (R. Vol. III, p. 00465, at ¶ 10.) Indeed, they caused VED to borrow the money from the Bank in reliance on the Bank's previous representations that it would not require personal guarantees (*Id.*) The Van Engelens had no reason to think the Six Loans were subject to a personal guarantee because (1) they had previously communicated to the Bank that one of the prerequisites for their business was no personal guarantee; (2) they had confirmed this with respect to the Carriage Hill No. 3 and 4 Loans; (3) with respect to the Carriage Hill No. 3 and 4 Loans, the Bank had twice told them that no personal guarantee would apply (which was

untrue.); and (5) the Bank never mentioned that, contrary to the agreement made in February 2005, these later loans would be subject to a personal guarantee. (R. Vol. III, p. 00453, ¶ 12.)

2. The Lawsuit and Course of Proceedings

VED ultimately defaulted on the Six Loans. (R. Vol. I, p. 00046, at ¶ 6.) The Bank instituted a non-judicial foreclosure sale upon the real property securing the respective loans. (R. Vol. I, p. 00047, at ¶ 7.) Even after the disposition of the collateral, a deficiency of $4,452,809.67 remained. (R. Vol. I, p. 00048, at ¶ 10.) The following table summarizes the deficiency balances calculated as of the date of the foreclosure sales:

Loan No.	Principal	Interest & Late Fees	Foreclosure Expenses	Sale Price	Balance
313170-3	214,634.56	10,959.80	2,865.88	214,634.56	13,825.68
316243-5	2,667,492.73	172,021.63	8,867.54	809,000.00	2,039,381.90
316250-0	2,695,995.83	216,513.27	9,416.25	568,000.00	2,353,925.35
329660-5	198,792.76	12,975.38	2,253.46	198,792.21	15,229.39
329683-7	224,619.76	14,653.86	2,266.36	224,579.76	16,960.22
329690-2	224,325.33	11,303.12	2.154.94	224,296.26	13,487.13

(R. Vol. I, p. 00058.) While the Bank thereafter sold some of the houses on the foreclosed property, (R. Vol. II, p. 00352, at p. 72 L. 5-23,) the Bank has not constructed additional homes on the lots, (R. Vol. II, p. 00352-00353, at p. 72 L. 24 – p. 73 L. 3,) and is simply holding the property in anticipation of further profits from the sale or development of the property in the future. (*Id.* at p. 76 L. 1-19.)

On September 9, 2009, the Bank filed a lawsuit against the Van Engelens in their capacity of personal guarantors for the deficiency of $4,452,809.67 plus interest. (R. Vol. I, p. 00008-00011.) The Bank filed a Motion for Summary Judgment on April 6, 2010. (R. Vol. I, p.

00019.) The parties both filed initial briefing and affidavits, (R. Vol. I, p. 00021-00058, 00065-00099.) The Bank vacated the hearing on this Motion so further discovery could be conducted. (*See* R. Vol. I, p. 00003, 00106.) Following this discovery, the parties re-briefed the Motion for Summary Judgment (R. Vol. II, p. 00288-307; R. Vol. III, p. 000398-00417,) and filed additional evidence. (R. Vol. I, p. 00117 – R. Vol. II, p. 00287; all R. Vol. III.) The Motion was scheduled for a hearing on October 28, 2010, but at that hearing the district court asked for additional briefing on a statute of limitations issue and clarification on the facts. (Tr. p. 5 L. 1 – p. 8 L. 25.) The parties provided this briefing and additional affidavits. (R. Vol. III, p. 00462-00495.)

At the summary judgment hearing held on November 12, 2010, the district court granted summary judgment[3] in favor of Washington Federal. (Tr. p. 45 L. 9 – p. 78 L. 2.) In particular, the district court held:

(1) That the oral statements and misrepresentations made by the Bank concerning the existence of the personal guarantee cannot alter the Bank's ability to enforce the terms of the agreement because of the operation of the Statute of Frauds, and because no consideration was given for a modification. (Tr. p. 52 L. 15-25 and p. 58 L. 16 – p. 61 L. 14.)

(2) That the statements made to the Van Engelens or misconduct by the Bank in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were irrelevant to the Six Loans at issue in this case taken out by VED. (Tr. p. 53 L. 16 – p. 54 L. 1.)

(3) That the Van Engelens defense of violation of the covenant of good faith and fair dealing fails because requiring the Bank to tell the Van Engelens

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[3] The district court stated its rationale entirely on the record of that hearing, and did not issue a separate written opinion.

about the existence of the guarantee would contradict an express term of the guarantee. (Tr. p. 62 L. 24 – p. 77 L. 7.)

(4) That there is no genuine issue of material fact that the Bank waived any of its rights with respect to the Guarantee because the statements made to the Van Engelens in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were inapplicable to the Six Loans taken out by VED. (Tr. p. 67 L. 14 – p. 68 L. 11.)

(5) That there is no genuine issue of material fact that the Bank is estopped from claiming the existence of the Guarantee because the Van Engelens could have discovered the existence of the Guarantee and because the statements in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were inapplicable to the Six Loans taken out by VED. (Tr. p. 68 L. 12 – p. 70 L. 12.)

(6) That there is no genuine issue of material fact on the Van Engelens' defense of quasi-estoppel because the statements in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were inapplicable to the Six Loans taken out by VED. (Tr. p. 71 L. 5-18.)

(7) That there is no genuine issue of material fact on the Van Engelens' defenses of set-off, mitigation, unjust enrichment, and double recovery because a guarantor is not entitled to the protections of Idaho's anti-deficiently statute. (Tr. p. 72 L. 13 – p. 76 L. 4.)

(8) That there is no genuine issue of material fact on the Van Engelens' defenses of misrepresentation and discharge because the Van Engelens waived any disclosure of the guarantee and because any matters in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were inapplicable to the Six Loans taken out by VED. (Tr. p. 76 L. 17 – p. 77 L. 7.)

(9) That there is no genuine issue of material fact on the question of whether the guarantee was intended to apply to the Six Loans because the language of the guarantee extends to all obligations. (Tr. p. 76 L. 5-16.)

(10) There is no genuine issue of material fact on the Van Engelens' defense of fraudulent inducement because representations as to future events will not support fraud or fraudulent inducement. (Tr. p. 77 L. 8-18.)[4]

The Court therefore entered judgment against the Van Engelens in the sum of $5,036,998.86, which included costs and attorney fees. (R. Vol. III, p. 00519-00520.) The Van Engelens contend that the district court erred in granting summary judgment to the Bank because genuine issues of material fact do exist on their affirmative defenses.

ISSUES PRESENTED ON APPEAL

1. **Whether the district court erred in holding that no genuine issues of material fact existed on the Van Engelens' affirmative defenses, and therefore granting summary judgment in favor of the Bank.**

2. **Whether the Van Engelens are entitled to attorney fees on appeal pursuant to Idaho Appellate Rules 40 and 41, and Idaho Code § 12-12-(3).**

ARGUMENT

A. Standard of Review

When the Supreme Court reviews the granting of a motion for summary judgment, it applies the same standard used by the trial court in ruling on the motion. *Infanger v. City of Salmon,* 137 Idaho 45, 46-47, 44 P.3d 1100, 1101-1102 (2002). Because summary judgment is an extreme remedy, the Court must construe all disputed facts, and draw all reasonable inferences from the record, in favor of the non-moving party, the Van Engelens. *Mackay v. Four*

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[4] The Van Engelens do not appeal the district court's finding that no genuine issue of material fact exists on their affirmative defense of failure to state a claim upon which relief can be granted, set off, unfair and deceptive trade practices, and unclean hands.

Rivers Packing Co., 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008); *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992). Summary judgment is appropriate only if the evidence in the record and any admissions show that there is no genuine issue of any material fact regarding the issues raised in the pleadings and that the moving party is entitled to judgment as a matter of law. *Mareci v. Coeur D'Alene School Dist. No. 271*, 150 Idaho 740, 250 P.3d 791 (2011). A nonmoving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009). In the present case, the Van Engelens have made a showing sufficient to establish the existence of genuine issues of material fact on the elements essential to establish their affirmative defenses. *See, Brewer v. Washington RSA No. 8 Ltd. P'ship*, 145 Idaho 735, 739, 184 P.3d 860, 864 (2008). As such, the district court erred in granting summary judgment to the Bank.

B. Evidence Concerning the Bank's Course of Misconduct Establishes Genuine Issues of Material Fact on the Van Engelens' Affirmative Defenses

Contrary to the district court's ruling, the Van Engelens have demonstrated that genuine issues of material fact exist on their affirmative defenses. One key ruling that permeated the district court's opinion was the court's determination that any misrepresentations or other misconduct by the Bank in the context of the Carriage Hill No. 3 and No. 4 loans entered into by NWD was irrelevant to the Six Loans at issue in this case entered into by VED. In so finding, the Court essentially held that all of the misconduct described by the Van Engelens was

irrelevant to the case and therefore insufficient to raise a genuine issue of material fact. In fact, this course of misconduct is highly relevant to the Van Engelens' affirmative defenses.

The Bank's misrepresentations concerning the personal guarantees extended to loans to both NWD and VED. The representations concerning the Carriage Hill No. 3 and No. 4 loans taken out by NWD are relevant to the course of conduct that led to the Van Engelens' decision to cause VED to take out the Six Loans at issue in this case. First, it is important to note that when Washington Federal approached Craig Van Engelen in 2004, it approached him to solicit business from the Van Engelens, not from any particular entity the Van Engelens owned. (R. Vol. I, p. 00097, at ¶ 7; R. Vol. III, p. 00463, at ¶ 4.) The Van Engelens own several entities through which they develop real property. (R. Vol. II, p. 00366, at p. 6 L. 5 – p. 12 L. 4; R. Vol. III, p. 00462, at ¶ 3.) NWD and VED are only two of those entities. (*Id.*)

The Van Engelens had not done business with the Bank for several years due to a previous bad experience, and thus were not eager to do business with the Bank again. (R. Vol. I, p. 00097, at ¶ 6.) Consequently, they were demanding about the terms on which they would do business with the Bank in the future. Indeed, they would not do any future business with the Bank 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.) In that regard, after a conversation with another developer in 2005, Craig Van Engelen determined that he would no longer cause any of his businesses to take out loans that were backed by personal guarantees. (R. Vol. II, p. 00374-00375, at p. at 40 L. 15 – p. 41 L. 18.) Craig Van Engelen made this policy clear to the Bank. (R. Vol. III, p. 00463-00464, at ¶¶ 6-7; R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19.)

In early 2005, the Van Engelens began developing the Carriage Hill project. (R. Vol. I, p. 00097, at ¶ 8.) At the time that Craig Van Engelen first discussed the project with Brian Churchill from the Bank, the Van Engelens had not decided which of their various entities would develop the project. (R. Vol. III, p. 00463, at ¶ 5.) However, in those initial conversations it was discussed that the loans for the project would not be guaranteed. (*Id.* at ¶¶ 5-7; R. Vol. I, p. 00097, at ¶¶ 10-12.) It was not until later that it was decided that the first two loans for the project would be taken out by NWD. (R. Vol. III, p. 00463, at ¶ 5.) As it turned out, NWD and VED were both used in the development of the Carriage Hill project and both borrowed money from the Bank for the project. (*Id.*)

Thus, the relationship the Bank was seeking when it made its representations was a relationship with the Van Engelens, not any particular entity owned by the Van Engelens. Craig Van Engelen told Mr. Churchill that for the Bank to get the Van Engelens' business, the Bank would have to agree to loans without personal guaranties from the Van Engelens. (R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19; R. Vol. III, p. 00463, at ¶¶ 5-7.) 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.) The representation was reaffirmed during the closings for the 2005 loans to NWD. (R. Vol. III, p. 00464, at ¶ 8.) In fact, Gloria Henson from the Bank specifically told the Van Engelens that no guaranties were required because the Van Engelens had done business with the Bank for so many years with a successful track record. (R. Vol. II, p. 00372-00373, at p. 32 L. 20 – p. 33 L. 9.) In fact, these statements were untrue, as a continuing personal guarantee existed for loans

taken out by NWD. (R. Vol. II, p. 00369, at p. 20 L. 20 – p. 21 L. 18; R. Vol. III p. 00463, ¶ 6.) Had that continuing guarantee been disclosed, the Van Engelens would have known to inquire about whether continuing guarantees existed for any of their other entities.

The Van Engelens subsequently caused VED to take out the loans for the further development of the Carriage Hill project. (R. Vol. III, p. 00464, at ¶ 9.) Those loans are the loans at issue in this lawsuit. (*Id.*) The Van Engelens cannot recall why they switched to VED from NWD for the at-issue loans. (R. Vol. II, p. 00376, at p. 47 L. 8-21; R. Vol. III, p. 00464, at ¶ 9.) However, to them it was immaterial which entity took out the loans, because of their stated policy to the Bank that they would not take out any loans on behalf of any of their entities if they had to personally guarantee those loans. (R. Vol. III, p. 00464, at ¶ 7.) After falsely affirming that the loans were not guaranteed during the closing of the NWD loans, the Bank failed to inform the Van Engelens of its new position that the subsequent loans to VED for the same project would be personally guaranteed. (*Id.* at ¶¶ 9-10.)

As with the NWD loans, the Bank never disclosed to the Van Engelens during negotiations or closing for the at-issue loans to VED that the loans would be personally guaranteed. (*Id.*). At no time during the negotiations and closings for any of the loans taken out by entities owned by the Van Engelens after those initial conversations in late 2004/early 2005, did anyone from the Bank inform them that they had already signed guarantees and that those guarantees would apply to the new loans taken out by their entities between 2005 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.) Because they had previously been told that the loans they caused their businesses to borrow would not be guaranteed, they had no reason to believe that the loans at issue in this lawsuit were subject to a continuing guarantee. (*Id.*) Indeed, they caused VED to borrow money from the Bank in reliance on the Bank's previous representations that the loans would not be guaranteed. (*Id.*)

Thus, the representations concerning the NWD loans are relevant. It was not until later in the negotiations that it was decided that the first two loans for the project would be taken out by NWD. In fact, Craig Van Engelen did not remember that the first two loans were taken out by NWD instead of VED until he reviewed the documents produced by the Bank after he filed his first affidavit; he originally remembered that all of the loans related to the Carriage Hill project were taken out by VED. (R. Vol. III, p. 00464, at ¶ 8.) Accordingly, this case is not about which of the two entities owned by the Van Engelens took out the loans because continuing guarantees had been signed as to both entities. Instead it is about the personal guarantees signed by the Van Engelens and the Bank's course of conduct with respect to those guarantees. Indeed, the Bank's conduct and representations that the first two loans were not guaranteed, coupled with the Bank's failure to disclose its position that the subsequent loans would be guaranteed, deceitfully led the Van Engelens to believe that the subsequent loans taken out by VED for the same project also were not guaranteed.

Because of the Van Engelens' position that they would not guarantee any loans during negotiations for the 2005 loans to NWD, the Bank knew that the Van Engelens were under the misimpression that any future loans taken out by their companies were not subject to personal

guarantee. Under those circumstances, the Bank had a duty to correct this misimpression. Rest. 2d Torts § 551. The Bank, however, did not disclose the subsequent loans to VED were personally guaranteed by the Van Engelens. Thus, the misrepresentations made with respect to the 2005 loans to NWD create issues of fact as to whether personal guarantee can be enforced with respect to the 2006 and 2007 loans to VED. Contrary to the district court's holding, genuine issues of material fact exist on the Van Engelens' affirmative defenses. As such, the district court erred in granting summary judgment in favor of the Bank.

1. Genuine Issues of Material Fact Exist on the Van Engelen' Defense of Waiver

The Van Engelens asserted the affirmative defense that the Bank waived the Guarantee. Waiver is a voluntary, intentional relinquishment of a known right or advantage. *Margaret H. Wayne Trust,* 123 Idaho at 256, 846 P.2d at 907. Waiver of a contract provision is shown when the intention to waive is clearly present and the party asserting the waiver shows that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment. *Magic Valley Foods, Inc. v. Sun Valley Potatoes, Inc.,* 134 Idaho 785, 788, 10 P.3d 734, 737 (2000). Waiver may be inferred from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel. *Margaret H. Wayne Trust*, 123 Idaho at 256, 846 P.2d at 907.

Contrary to the district court's finding otherwise, (Tr. p. 67 L. 14 – p. 68 L. 11,) the Bank's course of conduct demonstrates that there is a genuine issue of material fact as to whether the Bank waived the personal guarantee. As noted above, when the Bank approached the Van Engelens about reestablishing their relationship, the Van Engelens made it clear to the Bank that

they would not do any future business with the Bank 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.) In fact, Craig Van Engelen told Brian Churchill that for the Bank to get the Van Engelens' business it would need to make the loan to the Van Engelen businesses without personal guaranties from the Van Engelens. (R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19; R. Vol. III, p. 00463-00464, at ¶¶ 5-7.) 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.) With respect to the first two loans taken out by NWD for use on the Carriage Hill project, two Bank representatives affirmatively stated that no personal guarantee would be required for these loans, despite the existence of a continuing guarantee for loans taken out by NWD. (R. Vol. II, p. 00373, p. 33 L. 3-9; R. Vol. II, p. 00390, at p. 25 L. 23 – p. 27:8; R. Vol. II, p. 00373, p. 36 L. 4-22.; R. Vol. III p. 00463, ¶ 6; R. Vol. II, p. 00369, at p. 20 L. 20 – p. 21 L. 18.) These circumstances show a clear and unequivocal act manifesting the intent to waive, as well as conduct amounting to estoppel

Relying upon the Bank's previous representations that the loans would not require guarantees, the Van Engelens caused VED to take out the loans for the further development of the Carriage Hill project, which are the loans at issue in this lawsuit. (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.) As with the NWD loans, the Bank never disclosed to the Van Engelens during any negotiations for the at-issue loans to VED and the

closings of those loans that the loans would be personally guaranteed. (R. Vol. III, p. 00464, at ¶ 9-10.) The loan documents themselves did not reference any personal guarantee. (R. Vol. II, p. 00340, at p. 23 L. 11-14.) Because of the Van Engelens' position that they would not guarantee any loans during negotiations for the 2005 loans to NWD, the Bank knew that the Van Engelens were under the misimpression that any future loans taken out by their companies were not subject to personal guarantee. Under those circumstances, the Bank had a duty to correct this misimpression. Rest. 2d Torts § 551. The Bank, however, did not disclose the subsequent loans to VED were personally guaranteed by the Van Engelens. In short, Van Engelens altered their position to their detriment because these assurances induced them to cause their company to enter into the loan agreements with the Bank without first revoking the continuing Guarantee. (R. Vol. III, p. 00465, at ¶¶ 10-11.) Because the Bank evidenced an intention to waive the Guarantee and the Van Engelens reasonably relied upon that waiver and altered their position to their detriment, the Bank's Motion for Summary Judgment should have been denied.

2. Genuine Issues of Material Fact Exist on the Van Engelens' Defense of Equitable Estoppel

The Van Engelens contend that the Bank should be equitably estopped from enforcing the Guarantee. Estoppel is a bar by which a party is precluded from denying a fact of consequence because his own previous actions have led another party to conduct himself in such a way that the other party would suffer. *Mountain States Tel. & Tel. v. Lee,* 95 Idaho 134, 135-36, 504 P.2d 807, 808-809 (1972). It is based on the concept that it would be inequitable to allow a person to induce reliance by taking a certain position and, thereafter, take an inconsistent

position when it becomes advantageous to do so. *Regjovich v. First Western Investments, Inc.*, 134 Idaho 154, 158, 997 P.2d 615, 619 (2000). The elements of equitable estoppel are (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice. *Terrazas v. Blaine County ex rel. Bd. of Com'rs,* 147 Idaho 193, 200 n. 2, 207 P.3d 169, 176 n. 2 (2009). Because it concealed the existence of the Guarantee and did not correct its misleading assertions that no personal guarantee would be required for the Van Engelens' business with the Bank, the Bank is estopped from enforcing the Guarantee.

The Bank's false representations and concealments are described in detail above. Of particular note, the Bank knew that the Van Engelens would not do any future business with the Bank through any of their entities if they were required to personally guarantee any loans. (R. Vol. III, p. 00463-00464, at ¶¶ 6-10.) The Bank assured them that they would not be required to guarantee any loans. (*Id.*) While making this representation, the Bank did not disclose that the guarantees the Van Engelens had signed earlier on behalf of some of their entities, including NWD and VED, were continuing and would by their terms apply to the new loans taken out by the Van Engelens on behalf of both NWD and VED. (*Id.*) The Bank, which admittedly knew otherwise, (R. Vol. II, p. 00343-00344, at p. 36 L. 23 – p. 37 L. 5,) continued to conceal the existence of the guarantees in order to induce the Van Engelens to take out further loans with the

Bank. The Van Engelens actually relied on the Bank's misstatements and concealments by causing VED to enter into the loan agreements with the Bank for the at-issue loans. (R. Vol. II, p. 00371, at p. 27 L. 22 – p. 28 L. 16; R. Vol. III, p. 00465, at ¶¶ 10-11.) The circumstances show that these false representations and concealment were made with the intent that the Van Engelens rely on these misrepresentations and nondisclosure to cause their businesses to borrow money from the Bank.

Furthermore, contrary to the district court's holding otherwise, the Van Engelens could not readily discover the truth. Idaho law provides that that one may not assert estoppel based upon another's misrepresentation if the one claiming estoppel had readily accessible means to discover the truth. *Regjovich,* 134 Idaho at 158, 997 P.2d at 619. If one either knew or had the ability with reasonable diligence to determine the truth, the second element of equitable estoppel is lacking. *Id.* The Van Engelens testified that they didn't remember signing the Guarantee and never received a copy of the Guarantee. (R. Vol. I, p. 00086, at ¶ 3; R. Vol. I, p. 00096, at ¶ 3.) As the Bank admitted, the Guarantee, which was signed approximately four years before, was not even referenced in the loan documents. (R. Vol. II, p. 00342-00343, at p. 30 L. 12 – p. 34 L. 14 and p. 36 L. 4-22.)

This is similar to the circumstances in *Lewis v. Continental Life and Accident Co.,* 93 Idaho 348, 461 P.2d 243 (1969). In that case, a county purchased a group life insurance plan covering county employees, relying upon a representation that the policy would cover all county employees who had been covered under the county's prior insurance plan. The master policy was kept in the county clerk's vault. A handbook that explained the benefits in simple language

was supplied by the insurer and distributed to employees. When the widow of an employee made a claim for benefits, the insurer denied coverage based upon provisions in the master policy that were not mentioned in the handbook and that contradicted the representations made to the county. In that case, the employee reasonably relied upon the insurance agents' representations and the description of coverage provided in the employee handbook because there was no opportunity to learn of additional terms contained only in the master policy held in the county's vault. *See, e.g., Tiffany v. City of Payette,* 121 Idaho 396, 403, 825 P.2d 493, 500 (1992) (party claiming estoppel must show "lack of knowledge and of the means of knowledge of the truth as to the facts in question"); *Alder v. Mountain States Tel. & Telegraph Co.,* 92 Idaho 506, 511, 446 P.2d 628, 633 (1968) (a party claiming estoppel must be "excusably ignorant of the true facts"). Similarly, the Van Engelens did not have access to the means by which to learn of the Guarantee, which was in the possession of the Bank and which they had never received a copy of, and thus were excusably ignorant of the true facts.

The reasonableness of the Van Engelens' reliance is further underscored by the Bank's conduct. In light of the Bank's affirmative misrepresentations that no guarantee would be required for loans taken out by the Van Engelens and their entities and the Bank's failure to disclose the existence of the guarantees at any of the loan documents or closings, the Van Engelens could not reasonably have discovered that these new loans to NWD and VED were covered by prior guarantees that they did not remember signing. In fact, even if the Van Engelens had remembered their continuing guarantee, they had no reason to believe this Guarantee applied to the any loans taken out by the Van Engelens after 2005 because the Bank

affirmatively told them no guarantee would be required. As genuine issues of material fact exist on the Van Engelens' defense of equitable estoppel, the district court erred in granting summary judgment in favor of the Bank.

3. Genuine Issues of Material Fact Exist on the Van Engelens' Defense of Quasi Estoppel

The Van Engelens assert that the Bank should be estopped from taking a new position that the Guarantee secures the loans. The doctrine of quasi-estoppel prevents a party from taking a position inconsistent with an earlier position, to the detriment of the person seeking application of the doctrine. *City of Eagle v. Idaho Dept. of Water Res.*, 247 P.3d 1037, 1042 (2011). Therefore, the doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position; and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Terrazas,* 147 Idaho at 200 n. 3, 207 P.3d at 176 n. 3. "Quasi estoppel is distinguished from equitable estoppel 'in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient.'" *Willig v. State, Dept. of Health & Welfare*, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995) *citing Evans v. Idaho State Tax Comm.*, 97 Idaho 148, 150, 540 P.2d 810, 812 (1975). Rather, "[t]he doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position." *Willig*, 127 Idaho at 261, 899 P.2d at 971.

In this case, the district court rejected the doctrine only because it held that the Bank's misconduct was irrelevant to the Six Loans. The error of this position is described in detail above. The Bank's present position that the continuing Guarantee applies to the Six Loans is contrary to its other stated positions, when it solicited the business of the Van Engelens, that personal guarantees would not be required. (R. Vol II, p. 00372-00373, at p. 31 L. 24 – p. 33 L. 9; R. Vol. II, p. 00399, at p. 24 L. 23-27 and p. 28 L. 14-23; R. Vol. III, p. 00463-00466, at ¶¶ 6-12.) This original position was a key factor in the Van Engelens' decision to cause their company to enter into the Six Loans, (R. Vol. III, p. 00463-00465, at ¶¶ 6-11,) thereby giving a significant advantage and benefit to the Bank. The Bank gained an advantage because it induced the Van Engelens to cause their business to enter loans with the Bank after the Van Engelens had determined not to do business with the Bank if a guarantee was required. (R. Vol. II, p. 00373, at p. 34 L. 23 – p. 35 L. 19; R. Vol. III, p. 00463, at ¶ 6.) It would be unconscionable to now permit the Bank to change its position concerning the applicability of the Guarantee to loans taken out by the Van Engelens after it maintained its original position in order to induce the Van Engelens to cause their company to enter into these loans. Under these circumstances, the district court erred in finding that there was no genuine issue of material fact with respect to the affirmative defense of quasi estoppel.

4. Genuine Issues of Material Fact Exist on the Van Engelens' Defense of Good Faith and Fair Dealing

The Van Engelens assert that the Bank violated the covenant of good faith and fair dealing. The covenant of good faith and fair dealing is an obligation implied in every contract.

See Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 287, 824 P.2d 841, 862 (1991) (discussing the doctrine in the context of guarantees); *In re Target Indus., Inc.*, 328 B.R. 99, 121 (Bankr. D.N.J. 2005) ("Lenders are bound by an implied covenant of good faith and fair dealing by virtue of their contractual relationship with a guarantor"). As the Idaho Supreme Court has said:

> the covenant of good faith and fair dealing requires "that the parties perform in good faith the obligations imposed by their agreement," *Badgett v. Security State Bank*, 116 Wash.2d 563, 807 P.2d 356, 356 (1991), and a violation of the covenant occurs only when "either party ... violates, nullifies or significantly impairs any benefit of the ... contract...." *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 669, 799 P.2d 70, 75 (1990); *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 778 P.2d 744 (1989).

Bliss Valley Foods, Inc., 121 Idaho at 287, 824 P.2d at 862.

The Bank breached this duty when it concealed the existence of the Guarantee and did not correct its misleading assertion that no guarantee would be required for the Van Engelens' transactions with the Bank, particularly when they knew that the Van Engelens were under a misapprehension about the existence and applicability of the guarantee. A party to a business transaction has a duty to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;" and "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)(b), (c), and (e). *See* Rest. 2d Torts § 551(1) ("One 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.")

Under the covenant of good faith and fair dealing, banks are obligated to inform even continuing guarantors of new liability when the bank has reason to believe that the guarantor is unaware of this new liability. An illustrative case is *Lacrosse State Bank v. Estate of McLoone,* 359 N.W.2d 179, 1984 WL 180170 (Wis. App. 1984) (unpublished). In that case, a bank sought to enforce a continuing guarantee against an individual who previously had an interest in the borrower company, but who the bank knew no longer had an interest at the time of the new loan. The court noted that:

> Although the bank had no obligation to give any notice to [guarantor of his potential new liability] under the broad language of [guarantor's] continuing guaranty, a guaranty is a contract and, as with any contract, a party seeking enforcement must have acted in good faith . . . . the bank knew or should have known that [guarantor] had no reason to guarantee new . . . loans. With this knowledge, fairness dictated that the bank at least give [guarantor] some notice or warning if it expected to hold him liable for new . . . loans.

Id. at *1.

Such is the case here. The Bank acted in bad faith by not disclosing the existence of the guarantees when it made the at-issue Six Loans to Van Engelen Development in 2006 and 2007. This is especially true after learning of the Van Engelens' position during the negotiations for the 2005 loans to NWD that they would not personally guarantee any loans from the Bank. The Bank had ample evidence that the Van Engelens were unaware of the Guarantee. In fact, the Bank itself fostered the Van Engelens' misunderstanding. In 2005, the Bank falsely assured the Van Engelens that no personal guarantee applied to the Carriage Hill No. 3 and No. 4 Loans. It

is a breach of the covenant to tell the Van Engelens that no guarantee applied to those loans, and then not inform the Van Engelens that a prior Guarantee would apply to the subsequent Six Loans taken out VED in 2006 and 2007. The Bank's misrepresentations and silence violates and significantly impairs the contract, because it prevented the Van Engelens from the opportunity to exercise their contractual right to terminate the continuing Guarantee prior to causing VED to enter into the loan agreement. (R. Vol. I, p. 00087, at ¶ 19; R. Vol. I, p. 00097, at ¶ 20.) As the Bank has violated its own duties of good faith and fair dealing, it cannot now enforce the Guarantee against the Van Engelens.

The district court held that this defense failed because requiring the Bank to tell the Van Engelens about the existence of the guarantee would contradict an express term of the Guarantee contained in an "express waiver of [the Bank's] requirement to disclose." (Tr. p. 62 L. 24 – p. 77 L. 7.) The district court correctly noted that express terms of a contract may not be overridden by those implied from the covenant of good faith and fair dealing, *Huyett v. Idaho State University*, 140 Idaho 904, 910, 104 P.3d 946, 952 (2004). However, 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. The Van Engelens did waive notice of certain matters, as contained in Section 6 and 7 of the Guarantee. In particular, the Van Engelens waived the right to be informed about the Bank's extension of the repayment or renewal of the borrower's obligations; ceasing to extend credit to the borrower; changes in the agreement with the borrower; release of the borrower; release of collateral; application of collateral; acceptance of the guarantee;

extension of other credit to the borrower; or the failure of the borrower to pay. (R. Vol. I, p. 00056.) Nowhere in that agreement is an express waiver of disclosure of the existence of the Guarantee. Therefore, contrary to the district court's holding otherwise, the requirement of disclosure under the circumstances imposed by the covenant of good faith and fair dealing does not contradict an express provision of the contract. As such, particularly where the Bank was aware of and had actively fostered the Van Engelens' misapprehension that no guarantee would apply, the Bank's failure to disclose the existence of the Guarantee violates the covenant of good faith and fair dealing. 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. Genuine Issues of Material Fact Exist on the Van Engelens' Affirmative Defenses of Fraud/Misrepresentation/Discharge

The Van Engelens assert that the Bank's failure to disclose the existence of the continuing Guarantee and failure to correct the Bank's misrepresentations that no guarantee would be required renders the Guarantee voidable, unenforceable, and discharges the Van Engelens. *See Marine Bank, Nat. Ass'n v. Meat Counter, Inc.*, 826 F.2d 1577 (7th Cir. 1987) (a question of fact existed on whether a guarantee was voidable due to misrepresentation). Indeed, "[i]f the secondary obligor's assent to the secondary obligation is induced by fraudulent or material misrepresentation by the obligee upon which the secondary obligor is justified in relying, the secondary obligation is voidable by the secondary obligor." Rest. 3d Sur, § 12(1). Notably, "a misrepresentation occurring after the execution of a continuing guaranty may render the secondary obligation voidable with respect to extensions of credit subsequent to the

misrepresentation." Rest. 3d Sur, § 12, cmt i. *See Sumitomo Bank of California v. Iwasaki*, 447 P.2d 956, 958 (Cal. 1968) ("intentional or negligent misrepresentation or active suppression of the truth, will discharge the surety as to any subsequently incurred liability.")

The Bank's non-disclosure of the existence of the continuing Guarantee is itself a material misrepresentation. Nondisclosure constitutes a material misrepresentation when the obligee: (a) knows facts unknown to the secondary obligor that materially increase the risk beyond that which the obligee has reason to believe the secondary obligor intends to assume; (b) has reason to believe that these facts are unknown to the secondary obligor; and (c) has a reasonable opportunity to communicate them to the secondary obligor. Rest. 3d Sur, § 12(3). This principle also appears in the law of tort, wherein "[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). A party to a business transaction has a duty to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;" "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 "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)(b), (c), and (e). *See 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); *Tusch Enterprises v. Coffin,* 113 Idaho 37, 42, 740 P.2d 1022, 1027 (1987) (approving Rest. 2d Torts § 551); *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). Further, when, as here, "the creditor, rather than debtor, solicits the surety . . . the creditor has a greater duty of disclosure . . . If the circumstances warrant disclosure by the creditor and the creditor fails to disclose, the surety will be discharged." *Peoples Nat'l Bank of Wash. v. Taylor*, 711 P.2d 1021, 1026 (Wash. App. 1985).

Under the Restatement (Second) of Torts and Idaho Law, the Bank clearly had a duty to correct its misleading statements and those false statements upon which it knew the Van Engelens were relying. As noted and described in detail above, the Bank failed to disclose the existence of the Guarantee when it knew that the Van Engelens believed that no guarantee applied, and in fact fostered is misapprehension with its statements that no personal guarantee would be required for the Van Engelens' transactions with the Bank. No personal guarantee was included in the loan documents, and no mention was made of the existence of the continuing Guarantee, despite the fact that in the previous transactions with respect to NWD, the Van Engelens had been assured that no guarantee would be required. Based on its negotiations with the Van Engelens concerning guarantees, the Bank had reason to know that the Van Engelens were unaware of the continuing Guarantee. The Bank had many opportunities to disclose the existence of the continuing Guarantee and its applicability to the Six Loans, including during the lunch to solicit the Defendant's business, during the loan negotiations, and at closing, but it did

not do so. Enforcing the continuing Guarantee imposes liability on the Van Engelens that they did not intend to assume. Had the Bank disclosed the existence of the continuing Guarantee at the time, the Van Engelens would have had an opportunity to revoke that Guarantee prior to closing and effectuate their intent, known and communicated to the Bank, that the Six Loans would not be subject to a personal guarantee. *See Sumitomo Bank of California*, 447 P.2d at 958 ("[T]he creditor must not misrepresent or conceal facts so as to induce or permit the surety to enter or continue in the relationship in reliance on a false impression as to the nature of the risk.")

The district court nevertheless held that this affirmative defense failed because the Van Engelens waived any disclosure of the guarantee and because any matters in connection with the Carriage Hill No. 3 and 4 loans taken out by NWD were inapplicable to the Six Loans taken out by VED. (Tr. p. 76 L. 17 – p. 77 L. 7.) The errors in these positions have been addressed in detail above. The Bank's conduct with respect to the Carriage Hill No. 3 and No. 4 loans is clearly relevant to the loans later taken by VED, and the Guarantee does not contain a waiver of disclosure of the existence of the Guarantee. The Bank's misrepresentations and material nondisclosure create genuine issues of material fact as to the enforceability of the alleged continuing Guarantee. Consequently, the Bank's Motion for Summary Judgment should have been denied.

6. There is a Genuine Issue of Material Fact as to Whether the Guarantee was Intended to Apply

The Van Engelens contend that because the Guarantee was not referenced in any of the documents related to the Six Loans, (*see* R. Vol. II, p. 00342-00343, at p. 30 L. 12 – p. 34 L. 14 and p. 36 L. 4-22), there is a genuine and material issue of fact as to whether the parties intended the Guarantee to extend to the Six Loans. The district court disagreed, holding that the Guarantee applied because it was a continuing guarantee, the language of which extends to all future obligations unless revoked. (Tr. p. 76 L. 5-16.) The district court's reasoning is called into question by the New York case *Cadle Co. v. Newhouse*, 300 A.D.2d 756 (N.Y.A.D. 2002).

In that case, the guarantor guaranteed a $50,000 loan in 1989. The guarantee was a continuing guarantee for the borrower's liabilities to the lender "now or hereafter existing." The initial $50,000 loan was paid in full. In 1991, the borrower negotiated a second $2 million loan from the lender's successor. The borrower defaulted on that loan, and the lender sought payment from the guarantor under the 1989 continuing guarantee. The court held that there was a genuine and material issue of fact as to whether the 1989 continuing guarantee was intended to apply to the second loan when "[n]ot one document in the record from [the lender] expressly links the 1989 guaranty to the 1991 loan." *Id.* Such is the case here. Despite the existence of a continuing guarantee, with language apparently extending to future transactions, no loan document relative to the Six Loans links the Guarantee to those loans. At the very least, this raises a genuine and material issue of fact as to whether the Guarantee was intended to apply to the Six Loans. The district court therefore erred in granting summary judgment in favor of the Bank.

7. Fraudulent Inducement

The Van Engelens assert that because of the Bank's misrepresentations, they were fraudulently induced to cause VED to enter into the Six Loans. The elements of fraudulent inducement are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.[5] *Aspiazu v. Mortimer*, 139 Idaho 548, 550, 82 P.3d 830, 832 (2003). A described in extensive detail in the sections above, the Bank knowingly made a false misrepresentation to the Van Engelens that no personal guarantee would be required for their loans with the Bank. These misrepresentations were made for the purpose of inducing the Van Engelens to cause their company to sign the loan documents, and the Van Engelens did so rely to their detriment. (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.) As described above, the Bank had a duty to correct these misrepresentations of fact; as such, the Van Engelens had a right to rely upon such statements.

[5] It is unclear whether an injury must be alleged when fraudulent inducement is advanced as an affirmative defense, rather than a claim or counterclaim. Regardless, the Van Engelens were damaged by causing VED to sign the loan documents.

The district court nevertheless held that this affirmative defense failed because the Bank's misrepresentations were representations as to future events which did not support a claim for fraudulent inducement. (Tr. p. 77 L. 8-18.) As the district court correctly noted, "An action for fraud or misrepresentation will not lie for statements of future events." *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 615, 114 P.3d 974, 985 (2005). *See Ferro v. Soc'y of Saint Pius X,* 143 Idaho 538, 544, 149 P.3d 813, 819 (2006). However, the Bank's fraud in this case was not about a future event, such as whether the Van Engelens would be required to sign a personal guarantee for future loans or whether previously signed personal guarantees would not be enforced for future loans. Rather, the Bank's misrepresentation was about the existence of personal guarantees which had been signed in the past. Furthermore, to the extent that any future representations were made, a "promise or statement that an act will be undertaken, however, is actionable, if it is proven that the speaker made the promise without intending to keep it." *Id.* The evidence presented by the Van Engelens at least raises a genuine issue of material fact that the Bank did not intend to keep its promise that the various loans in this case would not be subject to a personal guarantee. As such, genuine issues of material fact preclude summary judgment on this affirmative defense.[6]

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[6] The district court also noted that there could be no "misrepresentation" as to future facts in the context of waiver. (Tr. p. 68 L. 5-7.) The doctrine of misrepresentation is separate from that of waiver; waiver does not require a misrepresentation. However, to the extent that this doctrine is even applicable to this or any other of the Van Engelens' affirmative defenses, the

8. Genuine Issues of Material Fact Exist on the Van Engelens' Defense of as to Whether there are No Damages, Unjust Enrichment, Failure to Mitigate, and Double Recovery

Even if the Guarantee is ultimately found to be enforceable against the Van Engelens, genuine issues of material fact exist on whether the Bank has actually suffered any damages, the amount of damages the Bank has suffered, and whether the Bank has failed to mitigate its damages. The Bank seeks the deficiency of $4,452,809.67 from the Van Engelens based on the alleged continuing Guarantee. While the bank has sold some of the houses on the foreclosed property, (R. Vol. II, p. 00352, at p. 72 L. 5-23), the Bank has not constructed additional homes on the lots, (R. Vol. II, p. 00352-00353, at p. 72 L. 24 – p. 73 L. 3), and is simply holding the property in anticipation of further profits from the sale or development of the property in the future. (R. Vol. II, p. 00353, at p. 76 L. 1-19.) As a representative of the Bank has acknowledged, it may be possible for the Bank to recoup its losses by selling the property for more than the value it bid at the foreclosure sale. (R. Vol. II, p. 00330-00331, at p. 76 L. 25 – p. 77 L. 15.) In fact, any sale of the property mitigates the Bank's damages.

Contrary to the district court's holding otherwise, the Van Engelens are not attempting to invoke the protection of Idaho's anti-deficiency statute, Idaho Code § 45-1512, which is inapplicable to guarantors. *First Sec. Bank of Idaho v. Gaige*, 115 Idaho 172, 174, 765 P.2d 683, 685 (1988). These affirmative defenses assert that the Bank would inappropriately receive a

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misrepresentation was about past events, and any future statements are actionable because there is evidence that the Bank made the promise without intending to keep it.

windfall by collecting against the Van Engelens while still holding the valuable property. A party 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 this Court has said, "a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts, including reasonable expenditures, after actionable conduct has taken place." *Margaret H. Wayne Trust,* 123 Idaho at 261, 846 P.2d at 912. As a personal guarantee is an agreement to pay the amount due if the borrower fails to pay, it is analogous to a liquidated damages clause wherein the parties agree in advance to the amount of damages in case of a breach. Such damages must, of course, bear a reasonable relationship to actual damages. *See Graves v. Cupic,* 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954). Under these circumstances, summary judgment should not have been granted because genuine issues of material fact exist on whether the Bank has actually suffered any damages or has failed to mitigate its damages.

C. Statute of Frauds

In addition to the matters discussed above, another key ruling that permeated the district court's opinion was its holding that any oral statements or misrepresentations by the Bank concerning the Guarantee were irrelevant because such "modifications" to the Guarantee had to be in writing in order to satisfy the Statute of Frauds, Idaho Code § 9-505(2). *See First Interstate Bank of Idaho, N.A. v. West,* 107 Idaho 851, 853, 693 P.2d 1053, 1055 (1984). The Van Engelens do not contend that such statements by the Bank constituted "modifications" to the Guarantee, but rather that they support the Van Engelens' affirmative defenses that the

Guarantee cannot be enforced because of the doctrines of waiver, equitable estoppel, quasi estoppel, fraud and/or breach of the covenant of good faith and fair dealing. Each of those defenses are either exceptions to the Statute of Frauds or are defenses to which the Statute of Frauds simply does not apply. As such, the district court's ruling otherwise was an error.

1. *USA Fertilizer* is Inapposite

The district court premised its ruling that Statute of Frauds bars the Van Engelens' defenses on the court's incorrect reading of *USA Fertilizer, Inc. v. Idaho First Nat. Bank*, 120 Idaho 271, 815 P.2d 469 (Ct. App. 1991). The decision in *USA Fertilizer*, however, is inapposite as the facts and legal principles at issue in *USA Fertilizer* are completely different from the facts and defenses raised in the present case. First, the contract at issue in *USA Fertilizer* was not a personal guaranty, but instead was a commitment to USA Fertilizer by the bank in that case to loan money to USA Fertilizer's customer. *Id.* at 272-73, 815 P.2d at 470-71. Second, and more importantly, the defenses raised by the Van Engelens in this case of waiver, equitable estoppel, quasi estoppel, unclean hands, fraud and breach of the covenant of good faith and fair dealing were not at issue in *USA Fertilizer*.

In *USA Fertilizer*, 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 executed a standby letter of credit in favor to USA Fertilizer. The Bank also

issued a number of letters to USA Fertilizer stating the Bank's commitment to loan money to the farmer. USA Fertilizer was unsatisfied by the terms of the bank's commitment as stated in these letters. A USA Fertilizer representative therefore telephoned the Bank's loan officer to further discuss the terms of the Bank's commitment. The farmer ultimately defaulted on his obligations to USA Fertilizer, and USA Fertilizer sought relief from the Bank, asserting that the Bank had guaranteed payment for future the fertilizer deliveries. The Bank countered that it had guaranteed payment only as to the first shipment. In response, USA Fertilizer attempted to introduce evidence of the later telephone conversation. The Court noted that to the extent that USA Fertilizer was seeking to alter the original terms of the guarantee to lend, such an oral modification would be barred under the Statute of Frauds. *Id.* at 275, 815 P.2d at 473.

This holding is irrelevant to the present case. Here, the Van Engelens are not seeking to modify the personal guarantees. Instead, it is the Van Engelens' position that the Bank has waived its right, or is estopped from seeking, to enforce the continuing personal guarantees with respect to the loans that are at issue in this lawsuit. Nowhere in the *USA Fertilizer* decision did the Court of Appeals hold that the Statute of Frauds bars the Van Engelens' defenses of waiver, equitable estoppel, quasi estoppel, fraud and breach of the covenant of good faith and fair dealing. The case simply does not apply to the facts and defenses at issue in the present case.

2. The Statute of Frauds Does Not Bar the Van Engelens' Defenses

a. The Van Engelens' Waiver Defense is not Barred by the Statute of Frauds

The Statute of Frauds does not apply to the defense of waiver. This defense does not seek to modify as existing contract or create a new contract. Rather, waiver is a voluntary,

intentional relinquishment of a known right or advantage. *Margaret H. Wayne Trust,* 123 Idaho at 256, 846 P.2d at 907. Thus, waiver is not a modification of contract; it is the giving up of the right to enforce the contract. *Indep. Gas & Oil Co. v. T.B. Smith Co.*, 51 Idaho 710, 10 P.2d 317, 322-23 (1932). As such, there is no case holding that the Statute of Frauds bars the defense of waiver. Indeed, the case *Idaho Migrant Council, Inc. v. Nw. Mut. Life Ins. Co.*, 110 Idaho 804, 718 P.2d 1242 (Ct. App. 1986) specifically holds that the Statute of Frauds does not prevent a party from asserting that an agreement has been waived. In that case, a landlord and tenant entered into a lease agreement which contained a possession deadline. When the landlord failed to complete certain improvements to the building by that deadline, the tenant terminated the lease based on the breach of this possession clause. The landlord argued that because of certain oral statements made by the tenant, the tenant had impliedly waived the possession deadline contained in the lease. It was argued that the Statute of Frauds prevented this argument. The Court of Appeals disagreed and overturned the district court's order granting judgment on the pleadings to the tenant, holding:

> The Statute of Frauds, I.C. § 9–503, does not prevent [landlord] from claiming that [tenant] entered into a binding oral modification of the lease. "A defendant who is induced to rely on an oral agreement and who changes position to his own detriment cannot be defrauded by a plaintiff who interposes the Statute of Frauds to declare the agreement invalid." *Roundy v. Waner,* 98 Idaho 625, 628, 570 P.2d 862, 865 (1977).

Idaho Migrant Council, Inc., 110 Idaho 806-807, 718 P.2d at 1244-45. This is based on the rationale that "a court of equity will not permit the Statute of Frauds itself to become an agent of fraud." *Roundy,* 98 Idaho at 628, 570 P.2d at 865.

Other cases have also recognized that a party may waive the right to enforce the terms of a written agreement governed by the Statute of Frauds. *See Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-522, 650 P.2d 657 (1982) (recognizing that a lessor may waive its right to enforce the terms of a lease, an agreement governed by the Statute of Frauds). Courts have even recognized that a party may waive the right to enforce a clause in an agreement requiring that all modifications be in writing. *See e.g., Rules Sales & Serv., Inc. v. U.S. Bank N.A.*, 133 Idaho 669, 675-76, 991 P.2d 857, 863-64 (Ct. App. 2000). Accordingly, the Statute of Frauds is not a bar to the Van Engelens' waiver defense, and therefore the district court erred in granting summary judgment on this basis.

b. The Van Engelens' Equitable Estoppel Defense is not Barred by the Statute of Frauds

As with all of the Van Engelens' defenses, their claim that the Bank is equitably estopped from asserting the existence of the Guarantee is not a modification of that Guarantee, but rather an assertion that it cannot be enforced. The Idaho Supreme Court has long recognized that equitable estoppel prevents a party from claiming that an oral promise is barred by the Statute of Frauds. *See Ogden v. Griffith*, 149 Idaho 489, 495, 236 P.3d 1249, 1255 (2010); *Boesiger v. Freer*, 85 Idaho 551, 563, 381 P.2d 802, 809 (1963); *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho 485, 490, 20 P.3d 21, 26 (Ct. App. 2001); *Cuevas v. Barraza*, 146 Idaho 511, 198 P.3d 740 (Ct. App. 2008); *Frantz v. Parke*, 111 Idaho 1005, 729 P.2d 1068 (Ct. App. 1986). While estoppel "does not vary the Statute of Frauds, [it does] bar the promisor from raising it as a defense." *Frantz*, 111 Idaho at 1010. Accordingly, the Statute of

Frauds is not a bar to the Van Engelens' equitable estoppel defense, and the district court therefore erred in granting summary judgment on this basis.

c. The Van Engelens' Quasi Estoppel Defense is not Barred by the Statute of Frauds.

Quasi estoppel, like equitable estoppel, prevents the Statute of Frauds from being used as a defense to an oral promise. *See Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003) (recognizing that quasi estoppel can be used to bar application of the Statute of Frauds, but holding that the conduct at issue did not satisfy the requirements of quasi estoppel). Accordingly, as with equitable estoppel, if the elements of quasi estoppel are satisfied, the Statute of Frauds does not bar the Van Engelens from relying on the Bank's pledge that the new loans would not be guaranteed. Accordingly, the Statute of Frauds is not a bar to this defense.

d. The Van Engelens' Fraud/Misrepresentation Defense is not Barred by the Statute of Frauds.

As discussed above, the Bank's failure to disclose the existence of the continuing guarantee and failure to correct the Bank's misrepresentations that no guarantee would be required renders the guarantee voidable, unenforceable, and discharges the Van Engelens. "[A] misrepresentation occurring after the execution of a continuing guaranty may render the secondary obligation voidable with respect to extensions of credit subsequent to the misrepresentation." Rest. 3d Sur, § 12, cmt i.; *see also Sumitomo Bank of California*, 447 P.2d at 958. Because fraud renders the guaranty void, it is not a modification of the guarantee within the Statute of Frauds. Therefore, the Statute of Frauds has no application to the Van Engelens' fraud defense.

e. The Van Engelens' Good Faith and Fair Dealing Defense is Not Barred by the Statute of Frauds.

The defense of violation of the implied covenant of good faith and fair dealing arises as to the terms of the existing guaranty or the loan agreements. *Idaho Power Co v. Cogeneration, Inc.*, 134 Idaho 738, 750, 9 P.3d 1204, 1216 (2000). It requires that parties perform in good faith the obligations imposed by the existing agreement. *Record Steel & Const., Inc. v. Martel Const., Inc.*, 129 Idaho 288, 292, 923 P.2d 995, 999 (Ct. App. 1996). Because there is no modification to the terms of the agreement, but rather the enforcement of a term implied into every agreement, *Idaho First Nat. Bank*, 121 Idaho at 287, 824 P.2d at 862, the Statute of Frauds is inapplicable to this defense.

f. The Van Engelens' Defense that the Guarantee was not Intended to Apply is Not Barred by the Statute of Frauds

The Van Engelens' argument with respect to this defense is that because the Guarantee was not refereed in any of the documents related to the Six Loans, there is a genuine and material issue of fact as to whether the parties intended the Guarantee to extend to the Six Loans. As with waiver or estoppel, this is not an attempt to modify the terms the agreement, but rather an argument that because of the circumstances, the agreement is inapplicable or unenforceable. As such, the Statute of Frauds does not apply to this defense.

g. The Van Engelens' Defense that they Were Fraudulently Induced to Cause VED to Enter into the Six Loans is Not Barred by the Statute of Frauds

The defense of fraudulent inducement is not related to the interpretation or modification of the Guarantee, but whether the Bank committed fraud. The Statute of Frauds is inapplicable.

h. The Van Engelens' Defense that the Guarantee was not Intended to Apply is Not Barred by the Statute of Frauds

This defense is not related to the interpretation or modification of the Guarantee, but the extent and existence of damages. As such, the Statute of Frauds is inapplicable.

D. Consideration

The district court also held that the Van Engelens' defenses failed because there was no evidence of consideration to support the "modification" of the Guarantee. (Tr. p. 59 L. 24 – 60 L. 17.) As noted above, the affirmative defenses raised by the Van Engelens are not "modifications" to the Guarantee, which would require mutual consent and consideration, *Brand S Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429, 431 (1981), but rather reasons why the Guarantee is unenforceable because of the conduct of the Bank. Contrary to the district court's holding, such affirmative defenses do not require the existence of consideration. *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). As such, the district court's finding that there was no consideration does not bar the Van Engelens' defenses.

E. Attorney Fees

If the Court finds in favor of the Van Engelens on this appeal, they will be the prevailing party on appeal and request costs and attorney fees pursuant to Idaho Appellate Rules 40 and 41, and Idaho Code § 12-120(3). Under I.A.R. 40, costs are generally allowed as a matter of course to the prevailing party. As to attorney fees, Idaho Code § 12-120(3) provides that:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

Id. As this case concerns a civil action to recover on a guaranty, the Van Engelens are entitled to attorney fees on appeal.

CONCLUSION

As genuine issues of material fact exist on the Van Engelens' affirmative defenses, they ask this Court to reverse the order of summary judgment and judgment entered by the district court, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 21st day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2011, I caused to be served **two** true and correct copies of the foregoing document as follows:

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