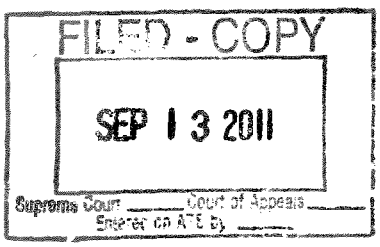
9-13-2011

Washington Federal Savings v. Engelen Respondent's Brief Dckt. 38484

IN THE SUPREME COURT OF THE STATE OF IDAHO

WASHINGTON FEDERAL SAVINGS, a United States corporation,	)	Supreme Court
	)	Docket No. 38484-2011
Plaintiff/Respondent,	)	
vs.	)	
H. CRAIG VAN ENGELEN and KRISTEN L. VAN ENGELEN;	)	
Defendants/Appellants.	)	



RESPONDENT'S BRIEF

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

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STATEMENT OF THE CASE

A. Nature of the Case

Respondent, Washington Federal Savings ("Washington Federal"), filed suit against the Appellants, H. Craig and Kristen Van Engelen ("Van Engelens"), upon their personal guaranty of six land/development and construction loans to Van Engelen Development, Inc. ("VED"). The District Court entered summary judgment against the Van Engelens in the sum of $5,036,998.86 (inclusive of attorneys fees and costs awarded), representing the combined deficiency balances due upon the loans following disposition of the real property collateral pursuant to statutory non-judicial deed of trust foreclosure sales. (R. Vol. III, p. 00519-00520).

After ultimately admitting they did in fact sign the subject continuing guaranty agreement, the Van Engelens asserted various affirmative defenses which they contend should have precluded the entry of summary judgment by the District Court. The District Court found most of the affirmative defenses asserted by the Van Engelens were fatally defective because, even if the alleged misrepresentations by bank representatives were true, they were made (1) approximately one year prior to the closing of the subject loans at issue herein; and (2) were made in the context of loans to a separate and distinct legal entity borrowing money from Washington Federal. Equally fatal was the absence of any contractual or legal duty for Washington Federal to disclose the existence of the Guaranty to the Van Engelens. The District Court's decision separately addresses each of the Van Engelens' affirmative defenses, and the basis upon which summary judgment was granted on each such defense. (Tr. p. 67 L. 10 - p. 77 L. 24.)

B. Brief Statement of the Facts and Course of Proceedings

1. Facts not in dispute.

The Van Engelens are a married couple with approximately 37 years of combined experience in real estate development. (R. Vol. II, p. 00366, at p. 5 L. 7-10; R. Vol. II, p. 00385, at p. 5 L. 22-24.) The Van Engelens are the principals of VED. (R. Vol. I, p. 00096, at ¶ 2; R. Vol. I, p. 00086, at ¶ 2.) The Van Engelens are also the principals of Northwest Development Company, Inc. ("NWD"). *Id.* In 2002, Washington Federal extended credit to VED in the amount of $126,000.00 ("2002 Loan"). (R. Vol. I, p. 00096, at ¶ 3; R. Vol. I, p. 00086, at ¶ 3.) On August 14, 2002, the Defendants signed a personal continuing guaranty on behalf of VED. (R. Vol. I, p. 00056-00057; R. Vol. II, p. 369 at p. 18 L. 20, p. 19 L. 25; R. Vol. II, p. 386 at p. 9, L. 16-23.) The Continuing General Guaranty Agreement ("Guaranty"), personally guaranteed "payment to Lender [Washington Federal] of all Obligations that Borrower [VED] owes to Lender now or in the future." (R. Vol. I, p. 00056-00057.) The Guaranty also reads in pertinent parts, as follows:

> **Written Notice Needed to Withdraw Guarantor's Promise.** Guarantor's Promise shall be a continuing guaranty 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.
>
> **Guarantor's Additional Waivers of Notice**. Lender does not have to notify Guarantor of any of the following events and this will not affect Guarantors Promise.
>
> (a) Lender does not have to notify Guarantor of Lender's acceptance of Guarantor's Promise.
> (b) Lender does not have to notify Guarantor when lender lends money or extends other credit to Borrower or acquires Obligations of Borrower. *Id.*

The 2002 Loan was paid in full by VED. (R. Vol. I, p. 00086-00087, at ¶ 5; R. Vol. I, p. 00096, at ¶ 5.) In February 2005, Washington Federal extended credit to NWD, ("2005 Loans"), the

proceeds of which were used by NWD to acquire Phases III and IV of the Carriage Hill Subdivision project. (R. Vol.III, p. 00418-00440.) The Van Engelens allege that during the course of negotiations and closing of the 2005 Loans to NWD, Washington Federal employees orally represented that personal guarantees would not be required. (R. Vol. I, p. 00087- 00088 at ¶¶ 10-20; R. Vol. I, p. 00097- 00098 at ¶¶ 10-21; R. Vol. III, p. 00452 at ¶ 8.)

In a series of six real estate development loans totaling $6,225,860.97, the loans at issue in this lawsuit, Washington Federal extended credit to VED, with the first of these loans closing on January 18, 2006 and the last closing on March 28, 2007 ("2006-2007 Loans"). (R. Vol. I, p. 00045 -00058 at ¶¶ 3 -6, Exhibits 1-6 attached thereto.) There is no dispute that VED ultimately defaulted on the 2006-2007 Loans. (R. Vol. I, p. 00046, at ¶ 6.) Following foreclosure of the collateral securing the 2006-2007 Loans, and after applying all credits and debits, a balance of $4,452,809.67 remained due and owing. (R. Vol. I, p. 00047-00048 at ¶¶ 7-10, Exhibit 7 attached thereto.) No dispute exists that the Van Engelens have not paid any part of the deficiency amounts. (R. Vol. I, p. 00048-00049 at ¶ 12.)

There is also no dispute that the Van Engelens never delivered written notice of the withdrawal of their respective guarantees for loans or credit extended to VED. (R. Vol. II, p. 369, p. 20, L. 1 - 15; R. Vol. II, p. 391, p. 32, L. 8-14.) Further, there is no dispute that neither Washington Federal or the Van Engelens signed any other writing that would otherwise modify the subject continuing Guaranty for the 2006-2007 Loans. There is no evidence, testimony, and/or allegation proffered by the Van Engelens on the record below that Washington Federal made misrepresentations regarding the requirement of personal guaranties with respect to the 2006-2007 Loans to VED.

2. The Lawsuit.

On September 9, 2009, Washington Federal filed suit against the Van Engelens in their capacity as guarantors of the 2006-2007 Loans to VED. (R. Vol. I, p. 00008-00012.) On October 2, 2009, the Van Engelens filed a pro se answer wherein they asserted more than twenty-five affirmative defenses. (R. Vol. I, p. 00013-00018.) On April 6, 2010, Washington Federal filed its Motion for Summary Judgment. (R. Vol. I, p. 00019-00058.)

Legal counsel for the Van Engelens filed a notice of appearance on or about April 16, 2010. The Van Engelens then filed their opposition to Washington Federal's summary judgment motion on May 13, 2010, along with an alternate motion to continue summary judgment for the purpose of permitting more time to analyze the legal and factual issues of the case and to conduct discovery/depositions. (R. Vol. I, p. 00065-00099.) On August 13, 2010, pursuant to the Van Engelens' Motion and the District Court's Order, the Van Engelens filed their Amended Answer and Demand for Jury Trial which asserted fifteen affirmative defenses. (R. Vol. I, p. 00110-00114.)

Washington Federal's summary judgment Motion was continued, and the parties re-briefed the summary judgment motion, (along with supplemental affidavits and various motions), and provided supplemental briefing at the District Court's invitation addressing the applicability of the statute of frauds. (R. Vol. I, p. 00117-00200; R. Vol. II, p. 00201-00397; R. Vol. III, p. 00398-00506.) The summary judgment hearing was ultimately heard on November 12, 2010. (Tr. P. 10-78.) Ruling from the bench, the District Court granted summary judgment to Washington Federal on its claims, as well as to all the affirmative defenses asserted by the Van Engelens. (Tr. p. 77, L. 19 - 24.)

On December 14, 2010, the District Court entered a Judgment in favor of Washington

Federal against the Van Engelens in the sum of $4,996,101.65 (inclusive of pre-judgment interest). (R. Vol. III, p. 00511-00512.) On January 25, 2011, the Van Englens filed a timely Notice of Appeal as to "Whether the district court erred by granting summary judgment in favor of the Plaintiff, conferring a judgment against the Van Engelens." (R. Vol. III, p. 00513-00518.) In response to Washington Federal's application for fees and costs, the District Court entered an Amended Judgment against the Van Engelens in the sum of $5,036,998.86. (R. Vol. III, p. 00519-00520.)

C. Standard of Review

The Supreme Court employs the same standard of review as the district court when ruling on motions for summary judgment. *Zingiber Inc., LLC v. Hagerman Highway Dist.,* 150 Idaho 675, 680, 249 P.3d 868, 873 (2011). Moreover, when the evidence reveals no disputed issues of material fact, then only questions of law remain, for which the Supreme Court exercises free review. *Id.* Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

Summary judgment cannot be granted for Washington Federal if there are remaining affirmative defenses that have not been put at issue on that motion for summary judgment. *Sirius LLC v. Erickson*, 144 Idaho 38, 43, 156 P.3d 539, 544 (2007). However, the Van Engelens bear the burden of proof as to each of the affirmative defenses asserted on appeal. *Chandler v. Hayden*, 147 Idaho 765, 769-71, 215 P.3d 485, 489-91 (2009)("[W]e conclude that a non-moving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment.").

Notably, the District Court in the instant case fully accepted the Van Engelens' version of the facts regarding the alleged misrepresentations and attendant circumstances. (Tr. p. 45, L. 14 - 20; p. 51 L. 18 - 24; p. 52, L. 6 - 17.) The District Court then applied Idaho law to the facts viewed in light most favorable to them and rendered its ruling of summary judgment in favor of Washington Federal. (Tr. p. 77, L. 19 - 24.)

As to evidentiary issues, Idaho has long held that trial judges have "broad discretion as to the admission of evidence and the exercise of that discretion will not be overturned absent the clear showing of abuse." *Cosgrove By and Through Winfree v. Merrell Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 473, 788 P.2d 1293, 1296 (1989). *citing Cheney v. Palos Verdes Investment Corp.*, 104 Idaho 897, 900, 665 P.2d 661, 664 (1983). Trial judges also are give broad discretion in determining relevancy. *Id. citations omitted.*

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 Washington Federal is entitled to attorney fees on appeal pursuant to (i) Idaho Appellate Rules 40 and 41, (ii) the subject Guaranty; and (iii) Idaho Code § 12-120(3).**

ARGUMENT

Although the issues presented on appeal are framed in the Appellants' brief in the broadest possible terms, their arguments are much narrower, focusing primarily on two questions:

- *Did Washington Federal have a duty to disclose the existence of the 2002 continuing Guaranty when extending the 2006-2007 Loans to VED?*

- *Was the alleged oral modification of the 2002 continuing Guaranty barred by (i) the Statute of Frauds, (ii) lack of consideration, and/or (iii) lack of relevant evidence?*

A. The District Court Did Not Err When it Found that Washington Federal had no Duty to Disclose the Subject Continuing Guaranty

In support of their affirmative defenses, the Van Engelens repeatedly assert that Washington Federal had a duty to disclose the existence of the subject Guaranty. (R. Vol. I, p. 00068-00078; R. Vol. I, p. 00112 at ¶¶ 6, 10 -13; R. Vol. III, p. 00404-00414; R. Vol. III, p. 00472; Appellants' Brief, p. 24 -32, 40; Tr. p. 41 L. 13-19.) This common theme was recognized by the District Court:

> [T]he essential argument that's pervasive throughout all of the affirmative defenses is that somehow the bank should have disclosed the existence of the 2002 guaranty agreement even though there's an express waiver of their requirement to disclose. (Tr. p. 64, L. 1-5.)
>
> As I indicted earlier, the pervasive theme thought [sic] all of these affirmative defenses seems to stem from this idea that the Van – that the bank had some obligation to remind them that they had signed this continuing guaranty in 2002. (Tr. p. 66, L. 25 - p. 67, L. 4.)

The District Court's finding that Washington Federal had no duty to disclose the 2002 continuing Guaranty was proper as their was neither a contractual nor legal duty to disclose.

1. No contractual duty existed for Washington Federal to disclose the Guaranty.

Washington Federal is under no contractual duty to disclose the existence of the Guaranty. (R. Vol. I, p. 00056-00057.) In fact, as set forth above, the Guaranty specifically removes any duty to notify the Van Engelens when Washington Federal lends money or extends other credit to VED. Paragraph 7 of the Guaranty entitled "Guarantor's Additional Waivers of Notice" reads:

> Lender does not have to notify Guarantor of any of the following events and this will not affect Guarantor's Promise.
>
> (a) Lender does not have to notify Guarantor of Lender's acceptance of Guarantor's

Promise.

(b) Lender does not have to notify Guarantor when lender lends money or extends other credit to Borrower or acquires Obligations of Borrower.

(R. Vol. I, p. 00056-00057.) Said differently, the Van Engelens waived any right to receive notice from Washington Federal when it lent money or extended other credit to VED (the Borrower).

The rights of a creditor against a guarantor are determined strictly from the terms of the guaranty agreement. If the guaranty is clear and unequivocal, there is no occasion for the court to consider extrinsic evidence of the parties' intent. Rather, the intent of the parties must be derived from the language of the guaranty if it is unambiguous. *Valley Bank v. Larson,* 104 Idaho 772, 775, 663 P.2d 653, 656 (1983); *McGill v. Idaho Bank & Trust,* 102 Idaho 494, 498, 632 P.2d 683, 687 (1981); *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 319, 870 P.2d 663, 672 (Ct.App.1994); *CIT Financial Services v. Herb' Indoor RV Center, Inc.,* 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct.App.1990); *Johnson Equipment v. Nielson,* 108 Idaho 867, 871, 702 P.2d 905, 909 (Ct.App. 1985). Further, when the guaranty is unconditional, the guarantor may not imply limitations upon the creditor's right to recover. *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct.App.1990).

As the District Court noted in its oral decision, the Van Engelens never asserted that the Guaranty is ambiguous. (Tr. p. 46, L. 8-10; p. 57, L. 17-19.) The District Court found that the Guaranty was clearly a future guaranty. (Tr. p. 46, L. 16 -47 L. 2.) The District Court also found that the Guaranty clearly required a written notice to Washington Federal by the Van Engelens to withdraw their guaranty promise. (Tr. p. 47, L. 3-25.) Significantly, the District Court also recognized that Washington Federal had no duty to disclose the continuing Guaranty because a

specific provision under Guaranty states it does not have to do so. (Tr. p. 66, L. 2-7; p. 66, L. 25 - p. 67, L. 9.) All the Van Engelens needed to do to withdraw their guaranty promise was to give Washington Federal written notice of the same. (R. Vol. I, p. 00056-00057 at ¶ 3; Tr. p. 47, L. 6 - 14; p. 58, L. 7-15; p. 59, L. 16-23.) Finally, the District Court properly concluded that the Van Engelens' contention that they didn't recall signing the Guaranty as a reason for not issuing a written withdrawal of their promise is not an excuse under the law. (Tr. p. 31, L. 25 - p. 32 L. 8; p. 33, L. 7 - 11.)

2. No duty of disclosure arises under the Restatement of Torts.

In support of their argument that Washington Federal had a duty to disclose the existence of the 2002 Guaranty, the Van Engelens rely upon Restatement 2d Torts §551 (*see* Appellants' Brief, p. 24-25, 29.), as follows:

> **§ 551. Liability for Nondisclosure**
>
> (1) One who falls 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, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (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 he 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.

(Emphasis added). The Van Engelens' reliance upon the Restatement is misplaced because (a) no fiduciary duty existed between them and Washington Federal, and (b) any alleged misrepresentations were made in context of the 2005 Loans to NWD, not the 2006-2007 Loans at issue herein.

a. No fiduciary duty existed between Washington Federal and the Van Engelens.

In Idaho, a general debtor-creditor relationship does not create a fiduciary relationship. *Idaho First Nat. Bank v. Bliss Valley Food, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991). This Court in *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.,* 119 Idaho 171, 804 P.2d 900 (1991) has previously held the following:

> We have been unable to locate any case in which a fiduciary relationship was held to arise solely through a longstanding creditor-debtor relationship or prior dealings between the customer and the bank." ... The rule expressed in the above cases holds that the relationship in a lender-borrower situation is a debtor-creditor relationship, and not a fiduciary relationship.

119 Idaho at 176, 804 P.2d at 905 (citing Dugan v. First National Bank of Wichita, 227 Kan. 201, 606 P.2d 1009, 1015 (1980). A fiduciary relationship may arise between a lender and a borrow in limited circumstance where (i) an agreement between the parties creates a duty; or (ii) when the

lender exercises complete control over the disbursement of funds. *See Madrid v. Roth*, 134 Idaho 802, 804-05, 10 P.3d 751, 753-74 (Ct.App.2000) *citing Wooden v. First Security Bank of Idaho, N.A.*, 121 Idaho 98, 100, 822 P.2d 995, 997 (1991).

In this instance there is (i) no agreement or contract creating a fiduciary duty between the parties, (ii) nor did Washington Federal exercise complete control over disbursement of the 2006-2007 Loans. Rather, the funds were disbursed to the Van Engelens on each of the six separate loans who then exercised complete control over the funds. (R. Vol. I, p. 00046 at ¶ 4.) As such, no fiduciary duty under Idaho law was imposed upon Washington Federal to disclose the existence of the 2002 continuing Guaranty.

b. The alleged misrepresentations were made in the context of the 2005 Loans to NWD, not the 2006-2007 Loans to VED.

As noted above, the District Court assumed for the purposes of summary judgment that the Van Engelens' allegations regarding the misrepresentations in 2005 by Washington Federal employees were true. (Tr. p. 45, L. 14 - 20; p. 51 L. 18 - 24; p. 52, L. 6 - 17.) Throughout his various affidavits, Craig Van Engelen consistently acknowledged that the alleged misrepresentations were made during the course of negotiation and closing of the 2005 Loans to NWD. (R. Vol. I, p. 00097 at ¶¶ 10 - 15; R. Vol. III, p. 00452 - 00453 at ¶¶ 8, 12.) Although he mistakenly identified VED as the borrowing entity for the 2005 Loans in his initial affidavit, he subsequently corrected that error and acknowledged that NWD was the borrower. (R. Vol. III, p. 00464 at ¶ 8.)

The Van Engelens offered no evidence below to suggest that during negotiation and closing of the 2005 Loans to NWD, the parties discussed, or even contemplated, the 2006-2007 Loans to VED. Nor did they offer evidence that Washington Federal employees made any representations

whatsoever concerning the Van Engelens' personal guaranty of the 2006-2007 Loans to VED, only that Washington Federal failed to disclose the existence of the 2002 guaranty.

In substance, the alleged misrepresentations were "you [Van Engelens] don't have to personally guaranty the loans to NWD." As discussed at more length in Section B.1 below, the District Court recognized the separate legal status of NWD and VED, and found that the allegations of misrepresentation, even if proven true, "are irrelevant to the current cause of action based on loans that were ultimately made at least a year later to the Van Engelens' corporate entity, Van Engelen Development, Inc." (Tr. p. 53, L. 16 - p. 54, L. 1.) The district court's finding is consistent with a reasoned interpretation and application of the various duties described in sections 2(b) - (e) of Restatement §551. To conclude otherwise, the Court must (i) ignore the specific waiver contained in the guaranty, and (ii) find that statements concerning the guaranty of loans to one legal entity may, by reason of nothing more than common stock ownership, be relied upon in subsequent transactions involving loans to a distinct legal entity. Such a conclusion would permit the very party [Van Engelens} who bears primary responsibility to maintain the individual integrity of each entity, the discretion to assert or ignore the corporate veil to their personal benefit. Clearly such a result is absurd.

B. The District Court Did Not Err When It Found that (1) the Van Engelens' Alleged Oral Modification of the Guaranty violated Idaho's Statute of Frauds, I.C. § 9-505(2); (2) that Any Alleged Modification Failed for Lack of Consideration; and (3) the Alleged Misrepresentations Relating to the 2005 Loans to NWD were Irrelevant.

1. Statute of Frauds - I.C. § 9-505(2)

In its decision, the District Court also held that any oral modifications of the continuing personal Guaranty, either by the Van Engelens or Washington Federal, would run afoul Idaho's

Statute of Frauds, I.C. § 9-505(2). Idaho Code § 9-505 reads in part as follows:

> In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
> ...
> (2) A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section 9-506, Idaho Code.
> ...

Contrary to the Van Engelens' contention otherwise, *USA Fertilizer, Inc. v. Idaho First Nat. Bank,* 120 Idaho 271, 815 P.2d 469 (Ct.App. 1991) is directly on point in relation to oral modifications of guarantees. In *USA Fertilizer, Inc. v. Idaho First Nat'l Bank*, 120 Idaho 271, 276, 815 P.2d 469, 474 (Ct.App.1991), the Court held that oral modifications of a guarantee are barred under the foregoing provisions of the statute of frauds. In that case, the Defendant-Bank issued an irrevocable letter of credit guarantee in the amount of $15,000.00 in favor of Plaintiff-fertilizer company for a term of 30 days. *Id.* at 272. The bank argued that it issued the letter of credit guaranty solely for the purpose of ensuring that the plaintiff would not be "left hanging" pending the approval and processing of an operating loan, for the bank's customer Sterling Smith, and that once the operating loan was approved, the plaintiff could no longer look to the letter of credit, only to the funds available for payment from the approved operating loan. *Id.* at 274-75.

The plaintiff argued, *inter alia,* that an additional "interpretation" of the 30 day letter of credit guaranty was provided by a bank representative, which further clarified the parties' original understanding of the letter of credit. *Id.* at 275. The plaintiff alleged that during this phone call, the bank representative's "interpretation" allowed the plaintiff to demand payment any time Mr. Smith's account was thirty days late, and thus morphed into a continuing guarantee extending to all unpaid

billings incurred through the 1987 crop season, (as opposed to just the initial application of fertilizer to Mr. Smith's fields). *Id.* at 273-275.

In a footnote, the Court in *USA Fertilizer* made an important distinction that "evidence of the parties" subsequent conduct may be admissible to explain or clarify the meaning intended by the parties to a contract. However, this principle is pertinent to issues involving the applicability of the parol evidence exclusionary rule; it does not apply to avoid the operation of the statute of frauds." *Id.*. at 275. (emphasis added). The Court further held that to the extent plaintiff sought to argue that this "evidence as altering the original terms of the guarantee, we note that such an oral modification would be barred under the statute of frauds." *Id.* at 275. (emphasis added).

In the case at bar, the Van Engelens seek to nullify the continuing Guaranty based upon (i) allegations that Washington Federal orally agreed they would not be required to guaranty the 2005 Loans to NWD, and (2) Washington Federal's failure to disclose the existence of the guaranties during closing of the 2006-2007 Loans to VED. In each instance, the Van Engelens are asking this Court to allow oral modification of the Guaranty. The former argument necessarily relies upon an alleged oral modification of the explicit provision of the Guaranty which requires written notice of any withdrawal thereof by the Van Engelens. The latter argument similarly relies upon oral statements to modify the provisions of the Guaranty wherein the Van Engelens specifically waived notice of (a) Washington Federal's acceptance of the Van Engelens' promise to pay, and (b) any loans extended to VED. Based upon Idaho Code §9-505, as interpreted in *USA Fertilizer*, the Van Engelens' arguments are fatally flawed as a matter of law. Therefore the District Court's ruling that the Statute of Frauds barred any alleged oral modification of the Guaranty - i.e, the requirement that their guaranty promise could be withdrawn only upon receipt of written notice - should be affirmed

on appeal.

2. Lack of Consideration.

Despite the Van Engelens' contention otherwise, their attempt to withdraw their guaranty promise orally is a modification of the continuing Guaranty. Paragraph 3 of the Guaranty entitled "Written Notice Needed to Withdraw Guarantor's Promise" clearly states that the Van Engelens' continuing guaranty "shall remain effective until Lender actually receives written notice from Guarantor that Guarantor withdraws Guarantor's Promise." (R. Vol. I, p. 00056-00057 at ¶ 3.) Any deviation or change from this clearly worded contractual requirement constitutes a modification.

Consideration is required for a modification of a contract. *Brand S. Corp. v. King*, 102 Idaho 731, 733, 639 P.2d 429, 431 (1981). "[T]he general rule is well stated to the effect that where a party merely does that which in law he is bound to do, he cannot demand any additional pay therefor, and if he obtains an additional promise from the other party, it is nudum pactum and unenforceable." *Id. citing Massey-Ferguson Credit Corp. v. Peterson*, 102 Idaho 111, 626 P.2d 767 (1981).

In *King* the parties entered into a written logging contract which included a loan from the plaintiff to the defendant in the sum of $140,000.00. *King* 102 Idaho at 732. After the contract was signed, the lumber market collapsed. *Id.* The defendant/debtor alleged that a conversation had taken place with the plaintiff's representative, wherein the representative told the defendant, *inter alia,* that the defendants should try to save themselves from bankruptcy and to forget about the $140,000.00 debt. *Id.* The plaintiff denied discussing forgiveness of the debt. *Id.* The *King* Court held, that even if the alleged oral conversation took place, the alleged oral modification was unenforceable and of no effect because the record was silent as to any evidence of valid consideration passing between the parties. *Id.* at 733.

Similarly herein, there is no evidence whatsoever that any valid consideration passed from the Van Engelens to Washington Federal in exchange for oral modification of the Guaranty. (Tr. p. 59, L. 24 - p. 60, L. 24.) In the absence of valid consideration for the alleged oral modification of the Guaranty, the District Court's entry of summary judgment should be affirmed.

3. Lack of Relevant Evidence.

The Van Engelens have repeatedly alleged misrepresentation and/or concealment by Washington Federal employees at the time of making the 2005 Loans to NWD. Mr. Van Engelen's Supplemental Affidavit serves only to reaffirm this position. (R. Vol. III, p. 00451-00454.) Therein, Mr. Van Engelen attempts to establish a connection between the 2005 Loans to NWD and the 2006-2007 Loans to VED. In a curious twist by a debtor, Mr. Van Engelen would have the Court believe that VED is the alter ego of NWD because the 2005 Loans and the "later loans were substantially for the same project." *Id.* The District Court described this effort as "nuance". (Tr. p. 14, L. 24 - p. 15, L. 3; p. 70, L. 8-13.) Recognizing the clear legal distinction between NWD and VED, the Court rejected this proposition, finding that such fact is material to the Van Engelens' liability under their Guaranty of the 2006-2007 Loans to VED. (Tr. p. 30, L. 23 - p. 31, L. 7; p. 38, L. 19 - p. 39, L. 15; p. 53, L. 1 - 11.)

Finding that the Van Engelens' "subjective beliefs are not reasonable", the District Court held that "any allegations about actions during the [2005] Northwest Development loan negotiations are irrelevant to the current cause of action based on loans that were ultimately made at least a year later to the Van Engelens' corporate entity, Van Engelen Development, Inc." (Tr. p. 53, L. 1 - p. 54, L. 1.)

C. The Van Engelens Failed to Meet their Burden of Proof as to All Elements of Their Affirmative Defenses.

The District Court, in support of its entry of summary judgment in favor of Washington Federal, addressed each of the Van Engelens' affirmative defenses, making specific findings as to why each separate defense failed to prove all necessary elements to survive summary judgment respectively. *See Chandler v. Hayden*, 147 Idaho 765, 769-71, 215 P.3d 485, 489-91 (2009)("[W]e conclude that a non-moving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment."). As the Van Engelens are not appealing the affirmative defenses of (i) failure to state a claim upon which relief can be granted; (ii) set off; (iii) unfair and deceptive trade practices, and (iv) unclean hands, Washington Federal will not address the same here. (Appellants' Brief, p. 10, fn. 4.)

1. Waiver

A waiver is a voluntary, intentional relinquishment of a known right. *Frontier Fed. Say. & Loan Ass'n v. Douglass,* 123 Idaho 808, 812, 853 P.2d 553, 557 (1993). A party asserting that provisions of a written contract were subsequently waived or modified by oral agreement or by conduct of the parties has the burden of proving assertion by clear and convincing evidence. *Bouten Const. Co. v. M & L Land Co.*, 125 Idaho 957, 965, 877 P.2d 928, 936 (Ct.App. 1994). 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 will not be inferred except from clear and unequivocal act manifesting intent to waive. *Jones v. Maestas* 108 Idaho 69, 71, 696 P.2d 920, 922 (Ct.App. 1985).

The Van Engelens have produced no admissible evidence to rebut Mr. Churchill's affidavit, that Washington Federal did not voluntarily or intentionally waive its right to enforce the subject continuing Guaranty, or to show that they altered their position to their detriment. (R. Vol. p. 00049 at ¶ 14.) As admitted by the Van Engelens themselves, all allegations regarding discussions with Washington Federal regarding the Van Engelens' guaranty promise run to the 2005 Loans with NWD, not to the 2006-2007 Loans to VED - a separate and distinct legal entity. As noted by the District Court, there is nothing in the record below to support, as the Van Engelens suggest, that it made no difference to Washington Federal which entity borrowed the 2006-2007 Loans. (Tr. p. 38, L. 22 - p. 39, L. 12.) Therefore, the District Court's finding that Washington Federal did not waive the Van Engelens' guaranty promise applicable of the 2006-2007 Loans to VED is supported both in fact and in law and should be affirmed accordingly.

2. Equitable Estoppel

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 or her prejudice. *Regjovich v. First Western Investments, Inc.*, 134 Idaho 154, 158, 997 P.2d 615, 619 (2000). All factors of equitable estoppel are of equal importance, and there can be no estoppel absent any of the elements. *Id.* Finally, Idaho courts have long held that one may not claim estoppel based upon another's misrepresentations if the one claiming estoppel has readily accessible means to discover the truth. *Id.*

The Van Engelens' equitable estoppel defense claims fails for several reasons. First, as discussed at length above, the alleged misrepresentations/concealment regarding their personal guaranty of loans to a separate and distinct legal entity has no relevance to the loans at issue in case at bar. Second, as the District Court found, the Van Engelens indeed had the ability to discover the truth about the 2002 continuing Guaranty, as they have admitted signing the document. The fact that they didn't recall signing the Guaranty, failed to read it before signing it, or misplaced it, does not provide an excuse in the law. If this were the case, any party could avoid their contractual obligations by claiming the same.

Finally, the Van Engelens have produced no admissible evidence that they relied upon the alleged misrepresentations.[1] Said differently, there is no admissible evidence in the record that the VED could have obtained financing for the real estate project from another lending institution without the requirement of personal guaranty. The Van Engelens have alleged, that before entering into the 2005 Loans with Washington Federal, they solicited loan proposals from other lending institutions, that the other banks submitted "stronger proposals", which did not require the Van Engelens to personally guaranty the loans. (R. Vol. II, p. 000371 at p. 25 L. 25 - p. 28 L. 21; R. Vol. I, p. 00087 at ¶ 9; R. Vol. I, p. 00097 at ¶ 9.) In substance, the Van Engelens assert that "but for" their reliance upon Washington Federal's misrepresentations, they could have secured loans with a competing bank without the necessity of a personal guaranty. In order to establish this element of their defense, the Van Engelens must necessarily introduce evidence of the terms offered by the

[1] The District Court granted Washington Federal's Motion to Strike testimony contained in paragraph 6 of the Mr. Van Engelen's Supplemental Affidavit that reads "...other banks had submitted proposals not requiring personal guarantees" as inadmissible hearsay, conclusory, and irrelevant. (Tr. p. 10, L. 10 - 19; R. Vol. III, p. 00455 - 00457; R. Vol III, p. 00452 at ¶ 6.)

competing banks.

In Mr. Van Engelens' deposition, he testified that the competing bank proposals were provided in writing, and that the proposals were probably in the landfill. (R. Vol. II. p. 000371 at p. 27, L. 7 - 16.) This "reliance" evidence argued by the Van Engelens consists entirely of testimony concerning the contents of writings that were never offered into evidence. Thus, in addition to the other reasons outlined above, the Van Engelens' affirmative defense of equitable estoppel fails as they cannot show a reliance to their detriment.

3. Quasi Estoppel

The Van Engelens' quasi-estoppel argument is equally lacking in merit. Quasi estoppel is only established 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 position; 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. *Allen v. Reynolds*, 145 Idaho 807, 812, 186, P.3d 663, 668 (2008).

Again, Washington Federal did not change its position concerning the necessity of a personal guaranty. As demonstrated above, the six VED loans at issue in this lawsuit are distinct transactions from the 2005 Loans upon which the Van Engelens rely. The subject Guaranty imposes personal liability upon the Van Engelens for obligations taken out and defaulted upon by VED, not NWD. Moreover, no advantage to Washington Federal, nor a disadvantage to the Van Engelens occurred other than what was contracted for under the Guaranty. The Van Engelens were not induced to change positions, because as argued above, there is no admissible evidence to prove that VED

would, or could, have obtained loans from other banks without the requirement of a personal guaranty. Finally, because Washington Federal did not take an inconsistent position as to the Van Engelens' guaranty of the 2006-2007 Loans, and because it did not receive a benefit due to VED's non-payment of the same, there is no unconscionable conduct on behalf of Washington Federal to support the Van Engelens' defense of quasi estoppel. Therefore, the District Court's entry of summary judgment on this affirmative defense should be affirmed.

4. Good Faith and Fair Dealing

It is a standard principal of Idaho contract law that every party to a contract has a duty of good faith and fair dealing that includes the obligation not to impede or render impossible the required performance of the other party under that contract. *Kepler v. WHW Management Inc.*, 121 Idaho 466, 472, 825 P.2d 1122, 1128 (Ct.App.1992). However, a breach of the covenant does not occur when a party merely exercises its rights under the contract. *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 288, 824 P.2d 841, 863 (1991). Moreover, there can be no breach of the implied covenant of good faith and fair dealing when that alleged breach is based upon an allegation that would violate an express enforceable term of the underlying contract. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). This Court has rejected "the amorphous concept of bad faith as the standard for determining whether the covenant has been breached. *Id. citing Metcalf v. Intermountain Gas Co.,* 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). Rather, "the covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Id. citing Jenkins v. Boise Cascade Corp.,* 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). Thus, an objective determination can only be made by considering a party's reasonableness in carrying out the contract provisions. *Id.*

The contract at issue herein is the Van Engelens' continuing personal Guaranty. The Guaranty unambiguously imposes an express obligation upon the Van Engelens to guaranty "any present or future Obligations Borrower owes to Lender and shall remain effective until Lender actually receives written notice from Guarantor that Guarantor withdraws Guarantor's Promise." (R. Vol. I, p. 00056 - 00057 at ¶ 3.) There is no dispute that the Van Engelens signed the Guaranty and that they did not give written notice withdrawing their promise. It is improper to entertain the Van Engelens' subjective beliefs in relation to whether or not Washington Federal knew or should have known that the Van Engelens were aware or unaware of the existence of the Guaranty. Because Washington Federal was merely exercising its rights under the Guaranty, there can be no breach of the implied covenant of good faith and fair dealing. Accordingly, the District Court's ruling below should be affirmed.

5. Fraud/Misrepresentation/Discharge

In order to sustain a claim for misrepresentation or fraud, the Van Engelens must prove each of the following elements:(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) 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) reliance on the truth; (8) a right to rely thereon; and (9) consequent and proximate injury. *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986). "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) *citing Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 207, 61 P.3d 557, 564 (2002). "[T]here is a general rule in [the] law of deceit that a representation consisting of [a] promise or a statement as to a future event will not serve as [a] basis for fraud..." *Id. citing Sharp*

v. Idaho Inv. Corp., 95 Idaho 113, 122, 504 P.2d 386, 396 (1972).

The Van Engelens' claim of fraud is without merit. As the Van Engelens readily admit, the allegations of fraudulent statements took place in reference to the 2005 Loans to NWD. The Van Engelens go to great lengths to persuade this Court that this case is about what occurred in relation to the 2005 Loans with NWD. However, this case involves the Guaranty signed by the Van Engelens for loans made to VED. The 2005 Loans to NWD involved a separately executed guaranty all together. The attempt by the Van Engelens to bootstrap allegations of fraud for the 2005 Loans to the 2006-2007 Loans is not supported under Idaho law, as actions for fraud are not tenable for statements of future events.

There is no evidence in the record below to suggest that at the time of the 2005 Loans, the parties contemplated or discussed the 2006-2007 Loans. Certainly Washington Federal was under no legal obligation to extend the 2006-2007 Loans back in 2005. Thus, the Van Engelens' argument for alleged fraud in relation to the Guaranty for VED and/or that Washington Federal made a promise without the intention of keeping is misplaced.

In addition, the Van Engelens' defense of fraud fails because as discussed above, they had no reliance or right to rely upon the alleged misrepresentations because they could have easily ascertained the truth regarding the Guaranty that they signed. The Van Engelens could have then simply provided Washington Federal with written notice to withdraw their guaranty promises. Further, as discussed above, the Van Engelens have no right to rely upon the alleged misrepresentations, as they contractually waived any need for Washington Federal to disclose the existence of the Guaranty. Finally, the Van Engelens have provided no evidence of damage or injury

required for finding of fraud. The District Court's entry of summary judgment in favor of Washington Federal was sound and should be affirmed.

6. Intent of Whether Guarantee Was to Apply

The District Court did not err when it held that the continuing Guaranty applied to the 2006-2007 Loans as the unambiguous language in the Guaranty clearly applied to all future obligations to VED unless revoked in writing. The Van Engelens argue that because the 2006-2007 Loan documents don't reference the continuing Guaranty, their was no intent for the continuing Guaranty to apply. This position is contrary to the clear language contained in the Guaranty itself. As argued above, the fact that the Van Engelens didn't remember signing the Guaranty is no excuse under the law. Additionally, Washington Federal was under no duty to disclose or remind the Van Engelens about the Guaranty on the 2006-2007 Loans as outlined above. There is no dispute of fact that the Van Engelens were obligated under the continuing Guaranty to pay for the obligations of VED in relation to the 2006-2007 Loans. Accordingly, the District Court's decision should be upheld.

7. Fraudulent Inducement

For the reasons argued above in relation to fraud and misrepresentation, the Van Engelens' affirmative defense of fraudulent inducement equally fails.

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

The Van Engelens argue that in the event the Guaranty is found to be enforceable against them, there exists genuine issues of material fact on whether Washington Federal actually suffered any damages or that it failed to mitigate its damages. The Van Engelens reason that because Washington Federal owns the real property collateral by virtue of trustees' sales, it has an obligation

to mitigate its damages through future sales of the property.

While Washington Federal does not contest that there exists a general duty to mitigate damages, such duty must only be reasonable. *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 (Ct.App. 1990). Here, Washington Federal acted reasonably by properly foreclosing upon the collateral via notice and sale pursuant to Idaho Code § 45-1501, *et seq.* Once a sale is made pursuant to Idaho Code § 45-1501, *et seq.* all interest in the property is foreclosed and terminated as to all persons having an interest therein, (and entitled to notice under the act), and there is no right of redemption. *See*, Idaho Code § 45-1508. The Van Engelens, as guarantors, have no right to look to the real property collateral in an effort to lessen their damages. Because the Van Engelens unconditionally guaranteed the obligations of Van Engelen Development, any implied obligation which limits Washington Federal's right of recovery, (i.e. an implied obligation to develop or sell the property at a later date), is improper.

Following the Van Engelens' logic, if Washington Federal chose to hold onto the real property collateral for twenty years or more before deciding to sell off parcels (or in whole), the Court would be required to retain jurisdiction over this matter indefinitely to make a determination of damages. As titled owners of the collateral, Washington Federal can elect to either sit on the property or begin selling it immediately without reduction of the amount of damages owed under contract (not statute) by the Van Engelens, who never had an interest in the property to being with.

Here, as recognized by the District Court, Washington Federal acted within the express terms of the Guaranty by foreclosing upon the real property collateral. Under the Guaranty, the Van Engelens expressly waived any right to require Washington Federal to proceed against the real

property collateral or attempt to collect from the Borrower, VED. (R. Vol. p. 56 - 57 at ¶ ¶ 5, 6.) Thus, as the District Court properly found in relying upon Idaho law and the subject continuing Guaranty, Washington Federal could "chose to seek remedy from the Van Engelens, a foreclosure on the property or both." (Tr. p. L. 2 - 25.)

Notwithstanding the foregoing, the Van Engelens' failure to mitigate damages argument fails too because, as outlined at length above, the alleged misrepresentations and concealment by Washington Federal apply to different loan transactions than the damages which Washington Federal seeks under this lawsuit.

D. Washington Federal's Attorney Fees on Appeal.

In the event Washington Federal is successful in defending the Van Engelens' appeal in this matter, Washington Federal, as the prevailing party is entitled to attorneys fees and costs pursuant to Rules 40 and 41 of Idaho Appellate Rules arising from Idaho Code § 12-120(3) and the subject continuing Guaranty itself.

Idaho follows the "American Rule" with respect to an award of attorneys fees, which requires the respective parties to bear their own attorneys fees absent either (i) statutory authorization; or (ii) contractual right. *Great Plains Equipment, Inc.* v. *Northwest Pipeline Corp.*, 132 Idaho 754, 771, 979 P.2d 627, 644 (1999); *Jenkins v. Commercial Nat. Bank,* 19 Idaho 290, 297, 113 P. 463, ___ (1911)("It is the general rule that attorney's fees cannot be recovered in an action unless authorized by statute or by express agreement of the parties.").

1. Statutory Basis for Attorney's Fees - Recovery upon a Guaranty.

Idaho Code § 12-120(3) provides for attorney's fees claims "[i]n any civil action to recover

on open account...*guaranty*...and in any *commercial transaction* unless otherwise provided by law...." (emphasis added). Here, if Washington Federal is the prevailing party on appeal, it would be entitled to attorney's fees authorized by § 12-120(3) on two separate grounds: (1) recovery upon the Guaranty; and (2) recovery upon the commercial transaction involved in this case. A review of Washington Federal's Complaint shows that it is sought recovery upon the Van Engelens' guaranty of VED's obligations. (R. Vol. I. p. 00008 - 00012 at ¶ 6.) Accordingly, under Idaho Code § 12-120(3), Washington Federal is entitled to attorney's fees on appeal if the prevailing party.

2. Statutory Basis for Attorney's Fees - Recovery upon a Commercial Transaction.

Idaho Code § 12-120(3) authorizes attorney's fees to be awarded to Washington Federal as it sought recovery upon commercial transactions with the Van Engelens. Idaho uses a two-stage analysis for determining attorney fees for a prevailing party pursuant to a commercial transaction under Idaho Code § 12-120(3). *Great Plains Equip., Inc.*, 136 Idaho at 471. First, "there must be a commercial transaction that is integral to the claim"; and second "the commercial transaction must be the basis upon which recovery is sought." *Id.*

In this instance, Washington Federal is entitled to attorney's fees pursuant to Idaho Code § 12-120(3) because Washington Federal extended six (6) separate real estate development and construction loans, which were not for personal or household purposes. *See* I.C. § 12-120(3) ("The term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes."). Moreover, the commercial transaction of lending money was integral to Washington Federal's claims against the Van Engelens and was the basis upon which recovery was sought. Therefore, Washington Federal is also entitled to attorney's fees arising from the underlying

commercial transactions in this lawsuit as authorized under Idaho Code § 12-120(3).

3. Contractual Basis for Attorney's Fees.

In addition to attorney's fees authorized by statute, Washington Federal, as prevailing party on appeal, is entitled to its attorney's fees under contract agreement. Attorney's fees are allowable if provided for in a contract. *Lettunich v. Lettunich*, 141 Idaho 425, 434, 111 P.3d 110, 119 (2005). Contractual attorney fee provisions "represent an election by the parties to place the risk of litigation costs on the one who is ultimately unsuccessful. Such provisions are ordinarily to be honored by the courts." *Holmes v. Holmes*, 125 Idaho 784, 787 874 P.2d 595, 598 (Ct.App. 1994).

Here, the subject Guaranty provides specific language regarding allocation of risk for attorney's fees and costs to the Van Engelens as follows: "Guarantor agrees to pay a reasonable attorney's fee and all other costs and expenses which Lender may incur in enforcing or defending this agreement, whether or not a lawsuit is started." (R. Vol. I. p. 00056 - 00057 at ¶ 12.) Accordingly, Washington Federal is entitled to attorney's fees and costs under the express language of the subject Guaranty.

CONCLUSION

No issues of material fact exists to either Washington Federal's motion for summary judgement or as to the Van Engelens' affirmative defenses. As such, Washington Federal respectfully requests that the District Court's order of summary judgment be affirmed in whole.

RESPECTFULLY SUBMITTED this 13th day of September, 2011.

Chad E. Bernards
Attorney for Respondent, Washington Federal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document entitled RESPONDENT'S BRIEF, was served this 13 day of September, 2011, on the following by:

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