10-30-2012

Idaho Trust Bank v. Christian Respondent's Brief Dckt. 39781

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO TRUST BANK, an Idaho corporation, f/k/a Idaho Trust National Bank,

Plaintiff/Respondent,

v.

MICHAEL R. CHRISTIAN, an individual,

Defendant/Appellant.

Supreme Court No.: 39781-2012

Ada County Case No.: CV OC 1109404

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and for the County of Ada

HONORABLE CHERI C. COPSEY, District Court, Presiding

Appealed from the Final Judgment entered on March 7, 2012

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TABLE OF CONTENTS

TABLE OF AUTHORITIES AND CASES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. Brief Statement Summarizing Nature of the Case

This case involves the enforcement of an absolute and unconditional personal guaranty and the guarantor's attempt to escape liability by misconstruing one word in the agreement – "owes" – in order to both eviscerate the entire purpose of the guaranty and to effectively provide himself with protections under Idaho's anti-deficiency statute that he expressly waived and that this Court has clearly and consistently stated are not applicable to a guarantor.

The parties have diametrically opposing interpretations of an absolute and unconditional personal guaranty. The creditor argues the guaranty unambiguously holds a guarantor independently liable for all debt that the principal debtor incurred but did not pay and the guarantor cannot rely upon certain legal protections (like bankruptcy, waiver, the one action rule, and the anti-deficiency statute) that the principal debtor might raise. The creditor's interpretation of the guaranty is based on the plain language of the entire guaranty, including express provisions wherein the guarantor agreed to be liable for any unpaid debt "whether: . . . barred or unenforceable against [the principal debtor] for any reason whatsoever" and even specifically agreed that he could not rely upon the anti-deficiency statute for protection.

The guarantor, however, argues that the guaranty unambiguously protects a guarantor from liability for unpaid debt whenever the principal debtor has a defense to liability. Guarantor's interpretation is based on his self-serving interpretation of one word in the guaranty and he admittedly ignores all the conflicting language in the guaranty. Guarantor's fall back

position is that his one-word interpretation of the guaranty is reasonable enough to create ambiguity and survive summary judgment.

The District Court told the guarantor that his interpretation was "simply wrong" and did not make sense. (Reporter's Transcript of Proceedings ("Tr") 45:13-14, 46:16-17) The District Court concluded that the creditor's interpretation was the only reasonable interpretation and entered summary judgment to enforce the unambiguous language of the guaranty. On *de novo* review, this Court should do the same.

B. Course of Proceedings Below

On May 13, 2011, Idaho Trust Bank ("ITB") filed its Verified Complaint for Breach of Guaranty. (Record on Appeal ("R") 005-031) The Verified Complaint stated that Trinity Investments, LLC ("Trinity") executed a promissory note to ITB in the original principal amount of $5,625,000.00 ("Note"), and that Michael Christian ("Christian") guarantied all sums due and owing from Trinity to ITB, including amounts under the promissory note, pursuant to a Commercial Guaranty ("Guaranty"). (R 006-007) The Verified Complaint sought to recover the amounts still unpaid and owing under the Guaranty. (R 008) In his Answer, Christian admitted signing the Guaranty and he did not assert any defense to liability; instead he requested an accounting of the debt and challenged whether it was calculated accurately. (R 032-035)

On August 5, 2011, ITB sought summary judgment on the unpaid debt owed and ITB provided a detailed running balance on the debt. (R 039-077) The loan balance showed that the final condo/collateral had been sold, with its net proceeds applied to the debt on June 27, 2011. (R 070) On August 18, 2011, Christian filed an opposition to summary judgment that again did

not challenge his liability under the guaranty but instead merely challenged a portion of the debt owed for late fees, default interest, and calculation of the proceeds/costs from liquidation of the collateral. (R 078-193)

On September 13, 2011, Christian filed a cross-motion for summary judgment and for the first time raised the argument that he was protected by the "plain language" of the guaranty he signed. (R 194-242) Christian did not deny that Trinity had failed to pay more than $1.7 million owed under the Note, but Christian argued that his guaranty should be interpreted to prevent those funds from being collected from himself as guarantor. Specifically, Christian argued that Trinity had a defense to further liability for the debt owed, pursuant to the anti-deficiency statute, and according to Christian's interpretation of the Guaranty, that defense would also protect Christian from liability. (R 232-242)

In its reply brief in support of summary judgment, ITB addressed all the issues regarding the calculation of the debt owed and sought partial summary judgment as to the $1.7 million, the minimum amount that unquestionably remained unpaid by the borrower and guarantor. (*See* Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment attached as Exhibit C to Motion to Augment, Pursuant To I.A.R. 30, filed on October 24, 2012.) In its opposition brief to Christian's cross-motion for summary judgment, ITB pointed out that Christian was completely ignoring and/or misconstruing the plain language and purpose of the Guaranty, which unambiguously obligates the guarantor on the entirety of the debt that remains unpaid, irrespective of the borrower's defenses and irrespective of collection efforts against the borrower or the collateral. (R 243-344)

On December 22, 2011, the Court heard argument on both motions for summary judgment. During oral argument, Christian raised no further challenges to the calculation of the debt amount. (Tr 19:21-38:10; 41:3-51:11) Instead, Christian focused all his arguments on the language of the Guaranty, arguing that one word in the guaranty – "owes" – should be interpreted to eviscerate the purpose of the guaranty and preclude recovery of the debt from Christian. The District Court pointed out some of the numerous flaws in Christian's interpretation of the Guaranty, specifically his improper conclusions about the word "owes." (Tr 42:21-43:6; 43:14-16; 45:13-16; 46:16-23; 47:2-3; 47:15-48:12) Then the Court correctly framed the legal issue:

> There's no dispute that Mr. Christian is a guarantor at this point. There's no dispute that he's bound by a contract of guaranty. . . . We know that a guaranty is an undertaking or a promise that acts as collateral to a primary obligation for another person or entity and it binds the performance of the . . . guarantor in the event of non-performance of the principal party. It's an independent contract. It is not the initial contract, the initial agreement.
>
> The principal debtor must be in default. There is no dispute that the principal debtor in this case is in default. Once there's a default and it's established, then you have to look at the contract language, the guaranty language, to determine whether the guarantor is now liable for the principal debt. The extent of the liability, the extent of any rights, any waivers, any authorizations are established by terms of the guaranty. A creditor is fully within his rights to exercise any express rights established under the guaranty agreement at his discretion. The rights of the creditor against a guarantor are strictly determined by the terms of the contract.
>
> . . . if there's an ambiguity, . . . you interpret it against the lender; the bank in this case. So the real question is is there an ambiguity.
>
> When the language, however, is unambiguous, the intent of the parties is derived from the language itself. The rights of the guarantor against the creditor are determined by the intent of the parties in the plain language.

(Tr 52:19-54:3).

The District Court then ruled that the language was unambiguous in obligating Christian for the unpaid amounts that were still owed, notwithstanding any statutory prohibition against recovering those amounts from Trinity:

> But here it's very clear in looking at the language of the guaranty that it's an unconditional guaranty and that there is no requirement that the lender proceed against the collateral or proceed against the debtor before proceeding against the guarantor. . . . I think when you read the totality of this guaranty, they make it clear that it is not the liability of – the present liability of the debtor that determines whether the guarantor is still liable. It's not the present liability. . . . If there's any transactions that could be voidable, normally those things – and they give examples like infancy, insanity, ultra-vires or otherwise, even if that were to occur, even if the debtor would have those defenses, the guarantor would still be – it would still be considered an indebtedness for the purposes of this guaranty and that's what I think that waiver language deals with. So when I look at all of this, it appears to me that this is an extremely broad guaranty and I don't find a basis upon which the guarantor can escape liability. . . . So I find that the guaranty contrary to argument is unambiguous. It is clear and unambiguous and that Christian's argument that he was effectively discharged fails.

(Tr 54:14-57:15)

On January 9, 2011, Christian filed his motion for reconsideration, raising the same argument about the meaning of "owes." (R 360-71) On January 11th, the District Court issued the Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Cross-Motion for Summary Judgment and it issued the separate Partial Judgment in the amount of $1,743,448.01, plus pre and post-judgment interest. (R 372-75) On January 23rd, ITB filed its opposition to the motion for reconsideration and on February 6th, Christian filed his reply brief. (R 376-404) On February 8th, the District Court denied the motion for reconsideration, noting, "Having reviewed all memoranda, the Court finds that Christian is simply rearguing the

motions the Court heard on December 22, 2011. He does not establish a manifest error of law or fact." (R 405)

On March 7, 2012, the District Court reissued the Partial Judgment as a Final Judgment. (R 410-11) On March 15th, Christian filed his Notice of Appeal, listing five different issues that are really only the same one issue – Christian's insistence that the word "owes" be defined as "legally enforceable." (R 412-15) On March 29th, Christian filed a Chapter 7 bankruptcy. For whatever reason, Christian gave notice of this filing in the District Court case but he did not initially give notice to this Court. (*See* Affidavit of Barry Marcus in Support of Request for Extension of Time to File Appellant's Brief, filed on June 27, 2012)

C. Concise Statement of the Facts

The facts are all undisputed. The only question raised below was how to interpret the language of an unconditional commercial guaranty.

On December 8, 2006, Trinity executed the Note in the original principal amount of $5,625,000.00. (R 005-012, 039-046) The Note was secured by certain real property, pursuant to the terms of a recorded Construction Deed of Trust (the "Deed of Trust"). (R 005-012, 039-046, 199-206) The Note was further secured by the Guaranty signed by Christian. (R 005-017, 039-051) Trinity defaulted on the Note. (R 005-009, 039-043) ITB could have immediately pursued collection against Christian, irrespective of the collateral. Instead, ITB agreed to first collect as much as possible from the collateral, leaving Christian free from collection and bankruptcy for several years. Trinity and Christian were unable to complete the construction, marketing and sale of the collateral/condos. So Trinity and ITB signed a stipulation to appoint a

receiver to sell the real property collateral. (R 207-231, 293-315) Christian signed the stipulation as the attorney for Trinity.[1] (R 295-96)

The receiver, Arthur J. Berry, spent much of 2010 and 2011 selling the real property collateral, with all expenses, sales prices, revenue, and other relevant information provided to Trinity, and to its attorney Christian. (R 317-24) All of the real property collateral was sold by the summer of 2011 and the receiver made his final disclosures of expenses and revenues, which information was again provided to Christian as attorney for Trinity. (R 326-41) Neither Christian nor Trinity ever raised any objection to how the real property collateral was liquidated to pay down the debt owed by Trinity and Christian. (R 293) The final collateral revenues were applied to the loan on June 27, 2011. (R 067) Trinity had administratively dissolved on March 8, 2011. (R 261)

Having attempted to pay off the debt as much as possible through the collateral, ITB then brought this lawsuit to recover from its other collateral source, the guarantor Christian. Christian does not deny that more than $1.7 million remains unpaid under the Note and would be owed by Trinity. Christian, however, argues that ITB would be prevented from collecting those sums

[1] In his Appellant's Brief, Christian shades the facts to imply that somehow ITB was unilaterally taking actions contrary to Christian's desires and contrary to his interests. (Appellant's Brief, p. 3) In fact, ITB bent over backward to be fair with Christian. ITB had to front significant costs to the receiver in order to get the collateral sold. Christian, as authorized agent of Trinity, stipulated to the receivership and had all the information necessary to object to any of the actions taken by the receivership. ITB could have brought this lawsuit against Christian in 2007 at the time of the default but instead first tried to get full recovery through the collateral. Obtaining a deficiency judgment against Trinity would obviously have been worthless. Christian, as manager of Trinity, is fully aware that no further collection is possible against the defunct and dissolved company.

against Trinity, pursuant to the anti-deficiency statute, and therefore the same protection should be afforded to Christian pursuant to his self-serving interpretation of one word in the Guaranty. The relevant sections of the Guaranty are cited below and plainly show how Christian has completely misconstrued the contractual terms. ITB is merely attempting to collect under its straight-forward unconditional commercial guaranty language, and the District Court has already informed Christian that his twisted reading of one word in the guaranty is completely nonsensical for several reasons.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondents are entitled to attorney fees and costs on appeal pursuant the Guaranty contract and pursuant to Idaho Code § 12-120(3) and Idaho Appellate Rule 41. This argument is addressed in detail later in this brief.

III. ARGUMENT

A. Standard of Review

In an appeal from an order granting summary judgment, the appellate court's standard of review is the same standard used by the District Court in ruling on a motion for summary judgment. *See Edmunds v. Kraner,* 142 Idaho 867, 871, 136 P.3d 338, 342 (2006); *see also U.S. Bank Nat. Ass'n v. Kuenzli,* 134 Idaho 222, 225, 999 P.2d 877, 880 (2000); *see also First Sec. Bank v. Murphy,* 131 Idaho 787, 790, 964 P.2d 654, 657 (1998). Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law summary judgment is proper." *Id.* Summary judgment is "not a

disfavored procedural shortcut;" rather, it is the "principal tool... by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Paugh v. Ottman,* 2008 U.S. Dist. LEXIS 52281, *9-10 (D. Idaho 2008) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 377 (1986) (alterations in original)).

When interpreting the language and/or terms of a contract, the Court must determine the intent of the parties. Where the language of the contract is clear and unambiguous, the intent of the parties is found exclusively in the language of the contract. *Nat'l Produce Distributors v. Miles & Meyer, Inc.*, 75 Idaho 460, 465, 274 P.2d 831, 833-34 (1954) ("While it is true that where the terms of a contract are ambiguous its interpretation and meaning is a fact question to be determined by the jury, yet, on the other hand, where a contract is clear and unambiguous, not involving any absurdities or contradictions, it is the best evidence of the intent of the parties and hence a determination of its meaning and its legal effect are a question of law for determination by the court. An examination of the whole of the contract in this case discloses that it is clear and unambiguous.").

Thus, the first determination is whether the contract is unambiguous, *i.e.* without absurdity or reasonable conflicting interpretations, and that decision is made as a matter of law and is subject to *de novo* review by the appellate court. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 454-55, 259 P.3d 595, 600-01 (2011) ("When interpreting a contract, this Court begins with the document's language. In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the

plain wording of the instrument. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review.") (quoting *Potlatch Education Ass'n v. Potlatch School District No.* 285, *148* Idaho 630, 633, 226 P.3d 1277, 1280 (2010)); *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 779, 69 P.3d 1035, 1040 (2003) ("In determining whether a contract is ambiguous, this Court ascertains whether the contract is 'reasonably subject to conflicting interpretation.'").

In determining whether the contract is ambiguous, the Court will examine the entire contract, *see Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003) ("The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole."); *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000) ("To determine the intent of the parties, the contract or other writing must be viewed as a whole and in its entirety."), and the Court will only construe the language in a way that gives full force and effect to all parts of the contract. *See Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000) ("The Daughartys suggest a reading of the deed that would eliminate half of the last line above. . . . This interpretation however, contradicts this Court's rule that various provisions in a contract must be construed to give force and effect to every part thereof. . . . The deed here can be interpreted to give full force and effect to both the transfer clause and the limitation clause equally."); *Palomo v. J.R. Simplot Co.*, 131 Idaho 314, 317, 955 P.2d 1093, 1096 (1998) ("The Court should construe the various provisions of the agreement, if possible, so as to give force and effect to every part of the agreement. . . . We are

obligated to read the two provisions consistently if we can, and here that is possible. . . . We think it is possible to construe these provisions consistently, and therefore, we find that the stipulation is unambiguous."); *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993).

If unambiguous, then as a matter of law the Court will interpret and apply that unambiguous language. *See, e.g.*, *Bennett v. Bliss*, 103 Idaho 358, 360, 647 P.2d 814, 816 (Ct. App. 1982) ("Where a contract is clear and unambiguous, its meaning and legal effect are questions of law for determination by the court."). If the language is ambiguous, then the fact finder will determine the true intent of the ambiguous language.

The District Court properly applied the above legal standards. (Tr 52:7-54:3) The *de novo* application of these legal standards, to the facts, law, and record of this case, can only result in one conclusion: the decision of the District Court should be affirmed, as will be more fully explained in the sections below.

B. The District Court Correctly Concluded that the Guaranty is Unambiguous in Obligating Christian to Pay the Remaining Amounts that Are Owed by Trinity but Remain Unpaid, Even if ITB is Barred from Recovering Further Against Trinity

The District Court concluded that the Guaranty is unambiguous in its language holding Christian liable for amounts owed, *i.e.* incurred but unpaid, regardless of whatever separate collection could or could not be had against Trinity: "But here it's very clear in looking at the language of the guaranty that it's an unconditional guaranty and that there is no requirement that the lender proceed against the collateral or proceed against the debtor before proceeding against

the guarantor. . . . But it also makes clear that . . . even if it's barred or unenforceable against the borrower for any reason whatsoever, it still survives." (Tr 54:14-19, 56:15-18) The District Court was correct. The Guaranty is in fact unambiguous in preventing Christian from escaping his obligation based on any defense related to the principle debtor. This Court should reach the same conclusion, based on all the same reasons.

This Guaranty is extremely broad and is unambiguous in making three points that completely reject the argument raised by Christian. First, the Guaranty makes the guarantor liable for every possible type of debt incurred and owed by Trinity to ITB. Christian is put on clear notice that he is agreeing to be liable for all debt incurred under the Note and any future debt owed between Trinity and ITB:

> . . . Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligation under the Note and the Related Documents. . . . Under this Guaranty, Guarantor's liability is unlimited and Guarantor's obligations are continuing.
>
> . . . The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, reasonable attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts liabilities and obligations.
>
> ....
>
> CONTINUING GUARANTY. THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL

> AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS.
>
> . . . This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied.

(R 048-051) (emphasis added); (Tr 29:17-30:2: "I just really don't find that . . . to be ambiguous . . . its pretty far reaching.").

Next, the Guaranty unambiguously makes the point that the guarantor's obligation to pay this debt is independent and parallel to the borrower's obligation, such that the creditor's decision not to collect against the borrower (*e.g.* by not seeking a deficiency judgment after sale of the collateral) or the collateral is completely irrelevant:

> This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness.
>
> ....
>
> Release of any other guarantor or termination of any other guaranty of the Indebtedness shall not affect the liability of Guarantor under this Guaranty. . . .
>
> . . . Guarantor authorizes Lender, either before or after any revocation hereof, without notice or demand and without lessening Guarantor's liability under the Guaranty, from time to time; ... (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties endorsers, or other guarantors on any terms or in a manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order of manner of sale thereof, including without

> limitation, any non-judicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine. ...
>
> . . . Guarantor waives any right to require Lender . . . (B) to make any presentment, protest, demand . . . (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; . . . (F) to pursue any other remedy within Lender's power;

(R 048-051) (emphasis added); *see Valley Bank v. Larson*, 104 Idaho 772, 775-76, 663 P.2d 653, 656-57 (1983) (lender can waive right to require creditor to proceed first against debtor); *see also CIT Financial Srvcs. v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990) (with unconditional guaranty, a creditor is not required to exhaust its remedies against the debtor prior to pursuing the guarantor nor is it required to repossess the collateral before looking to the guarantor for payment).

Third and most important for this case, the Guaranty unambiguously provides that the guarantor is agreeing that he will remain liable for all those amounts incurred, irrespective of what defenses the borrower may have (like the defense of the anti-deficiency statute). The only defense for the guarantor is that the debt is "fully and finally paid":

> "Indebtedness" includes, without limitation, loans advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts liabilities and obligations whether:...barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or other otherwise); . . .
>
> . . . .
>
> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses

> arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor my suffer by reason any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full of legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; . . . (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.
>
> Guarantor further waives and agrees not to assert or claim at any time any deduction to the amount guaranteed under this Guaranty for any claims of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower . . . .

(R 048-051) (emphasis added); *McGill v. Idaho Bank & Trust Co.*, 102 Idaho 494, 499, 632 P.2d 683, 688 (1981) (guarantor can waive defense of release of principal debtor).

All of this contractual language is unambiguous. This form Guaranty was drafted specifically to anticipate and refute just the type of argument that Christian has raised, which has been raised so many times before. *See Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 319, 870 P.2d 663, 672 (Ct. App. 1994) (rights strictly determined by terms of guaranty contract and when guaranty is unconditional, the guarantor may not imply limitations upon the creditor's right to recover).

Pursuant to the unambiguous terms of the Guaranty, ITB has not been repaid in full for all of the debt the borrower incurred and owes under the promissory note, so ITB can continue to make itself whole by collection from the guarantor. The guarantor is specifically precluded from arguing that this unpaid debt is "barred or unenforceable against Borrower for any reason whatsoever," including the anti-deficiency statute, and the creditor is also specifically precluded from "requir[ing] Lender . . . to proceed directly [, *e.g.*, to obtain a deficiency judgment,] against any person, including Borrower." Christian explicitly agreed to waive these arguments, yet he continues to raise them. ITB has these protections in the Guaranty for just this type of case; where further attempts to seek a deficiency judgment against a dissolved and insolvent Trinity would have been a completely wasted effort. ITB asks this Court to enforce these unambiguous terms by finding that the District Court was correct in finding that these terms were "very clear" in holding Christian liable.

C. Christian's Definition of "Owes" Is Incorrect and He Therefore Fails to Refute His Unambiguous Liability Under the Guaranty

In the face of ITB's straightforward interpretation of the Guaranty, Christian alleges he is protected from liability based on one word in the Guaranty: owes. Christian argues that owes has an unambiguous and exclusive meaning: "legally enforceable." (Tr 28:14-25: " MR. MARCUS: I think what owes means is pretty clear. There's a legally enforceable obligation.") Thus, he argues that the amounts unpaid by the borrower are only recoverable from the guarantor if they are still "legally enforceable" against the borrower. Under Christian's "exclusive" definition of owes, if the debt is not "legally enforceable" against the borrower due to

bankruptcy, the one-action rule, the anti-deficiency statute, waiver, or any other borrower defense, then the guarantor is similarly protected from liability.

Christian's back up argument is that "legally enforceable" is not an exclusive definition of owes but is still a "reasonable" conflicting definition and therefore there is ambiguity in the agreement such that summary judgment should be denied.

The District Court repeatedly refuted Christian's attempt to both exclusively redefine "owes" and to create an ambiguity about what "owes" and the Guaranty means:

> Well -- you know, the problem is you're trying to take one word, owes, and create this ambiguity that I don't think exists and you're ignoring all of the other language that specifically includes waivers arising from deficiencies, arising from any other impairment, . . . you're making a lot about owes, but I don't think you've read – you haven't read the whole contract in the context of the contract. . . . I think you're reading a lot into that word that I don't think exists. . . . So I think your whole argument about owes is simply wrong. I think this guaranty, that makes it clear that it's wrong because otherwise that has no meaning. . . . No, I'm sorry. The meaning of owes, you're simply wrong. The cases that you cite to are distinguishable from what we have here. Everything that we look at depends on what the contract says and for you to -- for the definition of owes to be what you say it is, that provision that I just read to you would have no meaning. . . . I'm simply telling you I don't think that your argument makes sense. . . . So I don't believe and I'm not going to accept that what is a commonly understood word has been redefined by judicial fiat. . . . And I think this contract makes it clear that regardless of what happens with the debtor, even if the debtor is -- and according to this, discharged in bankruptcy . . . that will still be considered an indebtedness unpaid for the purposes of the enforcement of the guaranty. So it really -- what -- what it's saying is that indebtedness is not defined by whether the party still has a legal obligation to pay, which is what you're trying to say, is that if the borrower no longer has a legal obligation, they're out. Well, then that really eviscerates these provisions.

(Tr 42:21-43:6; 43:14-16; 45:13-16; 46:16-23; 47:2-3; 47:15-48:12). Again, the District Court was absolutely correct in pointing out how Christian's definition of "owes" is completely

nonsensical and runs contrary to almost every other provision in the Guaranty and therefore cannot be used to "invent" an ambiguity.

1. The Word "Owes" is Not Exclusively Defined as "Legally Enforceable"; "Owes" is Commonly Used and Defined Without Any Reference to "Legally Enforceable" and this Definition Fits Perfectly Into the Context of the Guaranty

Christian's interpretation of the Guaranty is wrong, first and foremost, because "owes" does not have the exclusive meaning of "legally enforceable." The District Court said it best: "I think you're reading a lot into that word that I don't think exists. . . . No, I'm sorry. The meaning of owes, you're simply wrong. . . . I'm simply telling you I don't think that your argument makes sense." (Tr 43:14-16, 46:16-17, 47:2-3)

The term "owes" is commonly used to refer to an obligation to pay money, irrespective of whether that obligation is still legally enforceable. *See, e.g.*, Blacks Law Dictionary (9th ed. 2009) ("**owing,** *adj.* That is yet to be paid; owed; due <a balance of $5,000 is still owing>."); Merriam-Webster Dictionary ("owe: transitive verb: 2(a)(1) to be under obligation to pay or repay in return for something received; . . . 2(b): to be indebted to"). To owe money is to have incurred a debt that you have not yet paid. That is the common definition of "owes" and it completely ignores the additional question of whether the creditor can legally enforce what is owed. Many of the uses of the term "owe" are completely without reference to whether the obligation is legally enforceable, *i.e.* I owe the bank a lot of money (irrespective of whether the bank can legally enforce that obligation if I default).

Christian has no logical basis for his claim that "legally enforceable" is the exclusive and therefore unambiguous definition of owes. Clearly "owes" can have a much more general meaning unrelated to whether the debt is still legally enforceable. Instead, the dictionary definition of "owes" as "incurred and not yet paid" fits perfectly with all of the other language in the Guaranty that holds that Christian is obligated for what is owed by Trinity, irrespective of whether Trinity had any defenses against collection by ITB, like bankruptcy discharge, the one-action rule or anti-deficiency statutes, or waiver. Christian's argument that owes must be exclusively defined as "legally enforceable," unambiguously allowing him to find protection under the anti-deficiency statute, is illogical and must be rejected.

2. Christian's Definition of "Owes" as "Legally Enforceable" is Also Not a Reasonable "Conflicting Interpretation" to Create an Ambiguity Because it Directly Conflicts with the Numerous Provisions of the Guaranty.

Christian's definition of "owes" is clearly not the exclusive definition. More importantly, Christian's definition is not even a reasonable definition when considered in the full context of the Guaranty. Christian asked the District Court to ignore the rest of the Guaranty, which the District Court refused to do: "Well -- you know, the problem is you're trying to take one word, owes, and create this ambiguity that I don't think exists and you're ignoring all of the other language that specifically includes waivers arising from deficiencies, arising from any other impairment, . . . you're making a lot about owes, but I don't think you've read – you haven't read the whole contract in the context of the contract." (Tr 42:21-43:6) When the full Guaranty is considered, the word owes cannot mean "legally enforceable" or it would create mass contradiction in the Guaranty.

i. Christian's Definition Creates a Contradiction in the Definition of Indebtedness.

The first glaring contradiction would be found in the definition of Indebtedness. Owes is just one word in that definition. The first sentence of the definition of Indebtedness states: "The word 'Indebtedness' as used in this Guaranty means all of the principal . . . , accrued unpaid interest thereon and all collection costs and legal expenses . . . , now existing or hereafter arising or acquired that Borrower . . . owes or will owe Lender." The second sentence, which Respondent asks be ignored, states, "'Indebtedness' includes, without limitation, loans advances, debts, [etc.] whether: . . . barred or unenforceable against Borrower for any reason whatsoever." (R 048-049) Thus, if owes is defined as only obligations that are "legally enforceable," then the statement "whether: . . . barred or unenforceable against Borrower for any reason whatsoever" is in direct conflict and would have to be ignored. The District Court pointed out the conflict that Christian's interpretation of owes as "legally enforceable" would create:

> What is the meaning of the language "whether barred or unenforceable against the borrower for any reason whatsoever"?. . . So, in other words, the language that defines indebtedness has no meaning? . . . Yes. It has no meaning. So, in other words, that part where it says whether barred or unenforceable against the borrower for any reason whatsoever has no meaning.

(Tr 26:5-30:2). Despite Christian's best attempts to gloss over or muddle up this contradiction that he was creating, the District Court correctly concluded that the conflict is clear. (Tr 29:9-15: "MR. MARCUS: Well, Your Honor, let's look at the second sentence. The second sentence

includes a lot of things in it. And it in itself is practically unintelligible. THE COURT: I don't think it is unintelligible. I think it's pretty straight forward.")[2]

As a matter of law, Christian's definition of owes cannot be considered reasonable because it would require the Court to ignore the complete definition of Indebtedness, which is prohibited when interpreting a contract. *See Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000); *Palomo v. J.R. Simplot Co.*, 131 Idaho 314, 317, 955 P.2d 1093, 1096 (1998); *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993).

On the other hand, the definition of owes as "incurring a debt that remains unpaid" is perfectly reasonable because it ensures that the definition of Indebtedness is wholly consistent. Much of the definition lists all of the ways that debt can be incurred for which the guarantor will be liable and then the last part of the definition states that the guarantor will remain liable for those unpaid debts even if the borrower is protected from liability "for any reason whatsoever." ITB's definition of "owes" does not create a conflict and is the only reasonable definition.

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[2] In the Appellant's Brief, Christian makes another attempt at trying to explain away the clear and obvious conflict. (Appellant's Brief, p. 21) However, Christian's explanation depends on omitting important provisions in the Guaranty and he even quotes the sentence but leaves out large portions without any ellipses as the required placeholder. The structure of the sentence is actually simple (as stated by the District Court): first it contains a long list of methods (twelve separated by commas) whereby the borrower can incur debt for which the guarantor will be liable, and then a colon followed by a long list of modifiers (fourteen separated by semi-colons) that modify everything that preceded the colon. Apparently, Christian is arguing that all of the fourteen modifiers only apply to one of the twelve methods of incurring debt. His only explanation is that the modifiers are closer to the last method mentioned, so they should only apply to that last method. Such an argument is illogical.

ii. Christian's Definition Creates Numerous Other Contradictions in the Guaranty.

The District Court properly found that Christian's definition of "owes" was unreasonable because it would completely nullify the rest of the Guaranty:

> Well -- you know, the problem is you're trying to take one word, owes, and create this ambiguity that I don't think exists and you're ignoring all of the other language that specifically includes waivers arising from deficiencies, arising from any other impairment, arising -- for example, that are extinguished, that -- I just-- I think -- you're making a lot about owes, but I don't think you've read – you haven't read the whole contract in the context of the contract. . . . So it really -- what -- what it's saying is that indebtedness is not defined by whether the party still has a legal obligation to pay, which is what you're trying to say, is that if the borrower no longer has a legal obligation, they're out. Well, then that really eviscerates these provisions.

(Tr 42:21-43:6, 48:6-12)

The following nine examples reveal how Christian's interpretation of Indebtedness would eviscerate the purpose and language of the Guaranty, contrary to law.

- *"This is guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any Collateral . . . ."*

In contradiction to the above language, Christian is arguing that the Lender cannot enforce the guaranty if it has failed to exhaust its remedies against Trinity by not getting a deficiency judgment, even if case law states that the anti-deficiency statute has no application to guarantors.

- *"The guaranty . . . will continue in full force until all the Indebtedness incurred or contracted . . . shall have been fully and finally paid and satisfied . . . ."*

In contradiction to the above language, Christian is arguing that the guaranty does not continue in full force, even though not fully and finally paid and satisfied, if the Bank fails to get a deficiency judgment against the borrower.

- *"Lender [is authorized] . . . to apply such security and direct the order of manner of sale thereof, . . . as lender in its discretion may determine."*

In contradiction to the above language, Christian is arguing that the Lender does not have discretion with how to apply the security and direct its sale; rather the Lender is required to get a deficiency judgment against the borrower.

- *"Guarantor waives any right to require Lender . . . to proceed directly against or exhaust any collateral held by Lender from Borrower . . . ."*

In contradiction to the above language, Christian/Guarantor is arguing that he has a legal right to require the Lender to proceed against the borrower for a deficiency judgment or else have no claim under the Guaranty.

- *"Guarantor waives any right to require Lender . . . to pursue any other remedy within Lender's power."*

In contradiction to the above language, Christian/Guarantor is arguing that he has a right to require the Lender to get a deficiency judgment against the borrower if real property collateral is sold to pay the debt.

- *"Guarantor also waives any and all . . . rights or defenses arising by reason of any . . . 'anti-deficiency' law . . . which may prevent Lender from bringing . . . .a claim for deficiency, against Guarantor before or after Lender's commencement or completion of any foreclosure action . . . ."*

In contradiction to the above language, Christian/Guarantor is arguing that he has a right under the anti-deficiency law to prevent the Lender from bringing a deficiency action against Christian. *See First Security Bank of Idaho v. Gaige*, 115 Idaho 172, 174-75, 765 P.2d 683, 685-86 (1988) (holding that anti-deficiency protections afforded the borrower/grantor under I.C. § 45-1512 do not extend to guarantors and noting enforceability of waiver of anti-deficiency protection for guarantor); *see also, Valley Bank*, 104 Idaho at 775-76, 663 P.2d at 656-57 (waive right to require creditor to proceed first against debtor); *McGill*, 102 Idaho at 499, 632 P.2d at 688 (waive defense of release of principal debtor). (R 55:20-25: "Court: And, of course, there's case law that says the anti-deficiency law does not extend to the guarantor. It is there only for the debtor.")[3]

[3] This contradiction is particularly egregious. The law in Idaho has been clear for many years (since the 1980s) that a guarantor has no protection under the anti-deficiency statute that only protects the borrower. With this background, the parties signed the Guaranty that included an express provision that merely reconfirmed that the guarantor could not rely on the anti-

- *"Guarantor also waives any and all . . . rights or defenses arising by reason of . . . . the cessation of Borrower's liability from any cause whatsoever, other than payment in full of legal tender of the Indebtedness.*

In contradiction to the above language, Christian/Guarantor is arguing that he has a defense based on the "cessation of borrower's liability" under the anti-deficiency statute, notwithstanding the undisputed $1.7 million that remains owing.

- *Guarantor waives . . . any defenses given to guarantors at law or in equity other than actual payment and performance of Indebtedness.*

In contradiction to the above language, Christian/Guarantor is arguing that he has a defense to payment and performance "other than actual payment." (Tr 56:15-57:2: "But it also makes clear that even if – even if it's barred or unenforceable against the borrower for any reason whatsoever, it still survives. If there's any transactions that could be voidable, normally those things – and they give examples like infancy, insanity, ultra-vires or otherwise, even if that were to occur, even if the debtor would have those defenses, the guarantor would still be – it would still be considered an indebtedness for the purposes of this guaranty and that's what I think that waiver language deals with.")

- *"If payment is made by Borrower . . . on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy . . . the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty."*

In contradiction to the above language, Christian argues that the Borrower's bankruptcy would result in the complete cancellation of any Indebtedness, *i.e.* there would be no "unpaid" Indebtedness. (Tr 27:7-28:13; 44:20-45:25, 47:20-48:12: "with due respect, counsel, again, you have to look at the entire contract. . . . the very thing that I posited to you, this agreement makes clear that even if the debtor is completely discharged in bankruptcy, it still shall be considered unpaid for the purposes of the enforcement of this guaranty.")

Christian has no logical means of harmonizing his interpretation of Indebtedness and all of the above-quoted language from the Guaranty. Instead, Christian merely argues that these

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deficiency statute. Despite this understanding, Christian is asking this Court to interpret the Guaranty to provide Christian the same protection that the borrower receives under the anti-deficiency statute. (R 251-54) This interpretation is completely illogical and unreasonable.

other provisions are somehow subservient to the word owes. Christian admits that his definition of "owes" makes all of the other provisions in the Guaranty irrelevant:

> The District Court relied heavily on other portions of the Guaranty Agreement, to the exclusion of the primary definition of the guaranteed 'Indebtedness,' to determine that the guaranty obligation unambiguously includes the balance of the Note, even though no longer 'owed' by Trinity. However, those other terms depend on the present existence of an 'Indebtedness,' i.e., an amount the borrower presently 'owes' and remains legally obligated to pay. If no 'Indebtedness' exists, they are irrelevant.

(Appellant's Brief, p.22) He then goes on to specifically detail how each of the nine contradictory provisions is made irrelevant by his definition of "owes." (Appellant's Brief, p.23-26) Christian is making arguments that disprove his own defense. As he points out, none of these other provisions would be necessary in the Guaranty if the definition of owes and Indebtedness was limited to only those debts that are still legally enforceable against the borrower. It is a basic principle of contract interpretation that the contract cannot be interpreted to make other provisions irrelevant. The parties would not have included all of those additional nine provisions if the definition of owes and Indebtedness made them irrelevant.

Christian's approach of trying to define the meaning of an entire document based on a narrow definition of one word is contrary to Idaho law, which requires interpreting the intent of a document based on the *whole* document. *See Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003); *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). In addition, Christian's attempt to nullify the majority of the language of the Guaranty cannot be accepted. *See Daugharty*, 134 Idaho at 735, 9 P.3d at 538; *Palomo*, 131 Idaho at 317, 955 P.2d at 1096; *Twin Lakes Vill. Prop. Ass'n, Inc.*, 124 Idaho at 137, 857 P.2d at

616.

Because his interpretation of Indebtedness is wholly inconsistent with a significant portion of the Guaranty, Christian's interpretation is not reasonable and cannot support his argument that an ambiguity exists. Instead, the nine provisions cited above confirm the plain language definition of Indebtedness found in the Guaranty: the Guarantor is obligated on all amounts that the Borrower owes (has incurred and has not repaid) and the Guarantor cannot raise any of the Borrower's potential defenses to liability, other than payment in full.

D. The Case Law Cited by Christian Regarding the Definition of "Owes" is Both Irrelevant and Distinguishable; Case Law Shows Once Again How Christian's Interpretation of the Guaranty Is Illogical.

In an effort to show that his definition of owes is either the exclusive definition or at least a reasonable definition, Christian cites several cases. The District Court found these cases to be wholly unhelpful:

> The cases that you cite to are distinguishable from what we have here. Everything that we look at depends on what the contract says and for you to -- for the definition of owes to be what you say it is, that provision that I just read to you would have no meaning. . . . Actually, counsel, if you'd go back and read those cases, they -- they apply to circumstances that are significantly different from those that are presented here and the contract language that they are looking at is also different. So I don't believe and I'm not going to accept that what is a commonly understood word has been redefined by judicial fiat. So I don't think that to be the case. But what you have to do is look at a contract in total as to what it means. . . . Mr. Christian is arguing that somehow the word owes is ambiguous – . . . I've read those cases and I don't believe that they stand for the proposition that the word owes has the meaning that you suggest in the – as long as it's in the presence of the language that appears here.

(Tr 46:16-23, 47:9-19, 55:2-11) Again, the District Court got it completely correct.

Those cases are completely unhelpful and irrelevant. Certainly owes could be and has been interpreted before to mean "legally enforceable." But what matters is its meaning in this contract. As shown above, it cannot be defined in this contract to mean "legally enforceable" because such a definition would contradict and eliminate much of the language in the Guaranty, in violation of basic contract interpretation principles. Hence, these cases are all irrelevant.

In addition, the cases cannot be said to establish an exclusive meaning for the word owes. As the District Court retorted, "So I don't believe and I'm not going to accept that what is a commonly understood word has been redefined by judicial fiat."[4] (Tr 47:9-19) Not one of the cases stands for the illogical proposition that anytime owes is written into a contract it must have the legal meaning of "legally enforceable" obligation.

Finally, all of the cases are also completely distinguishable and cannot stand for the principle that the word "owes" in any guaranty must mean "legally enforceable." None of the cases are from Idaho and none are factually similar. For every irrelevant and easily distinguishable case cited by Christian, ITB can cite five cases that hold that a guaranty's language is intended to hold a guarantor liable even when the debt is no longer legally enforceable against the borrower. *See In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th

[4] For an in-depth review of the cases cited by Christian in trying to prove that the definition of "owes" has been established by judicial fiat, please see ITB's Opposition to Defendant's Cross-Motion for Summary Judgment, which addresses how Christian repeatedly misconstrues the holdings of each case. (R 254-56) Christian also cites a few additional cases in his Appellant's Brief, but none of them purport to define owes as exclusively meaning "legally enforceable," none of them purport to interpret a guaranty based on the definition of owes, and none of them allow a guarantor to escape liability based on protections that statutes exclusively grant to the borrower.

Cir.2008) (stating that "a creditor can still seek to collect a debt from a co-debtor who did not participate in [a] reorganization-even if that debt was discharged as to the debtor in the plan" and "a third party could proceed against the debtor's ... guarantor for liabilities incurred by the debtor even if the debtor cannot be held liable"); *In re Lockard,* 884 F.2d 1171, 1179 (9th Cir.1989) (noting "a surety has obligations that are 'independent' and primary, not derivative of those of the debtor"); *R.I.D.C. Industrial Development Fund v. Snyder,* 539 F.2d 487, 490 n. 3 (5th Cir.1976); *McNulty v. McDonald*, 631 F. Supp. 2d 115, 119-20 (D. Me. 2009) ("Discharge of a debt in bankruptcy generally does not affect a guarantor's liability, but leaves the creditor free to pursue collection of the debt from a guarantor."); *Bloom v. Bender*, 48 Cal. 2d 793, 802, 313 P.2d 568, 573 (1957) ("It is, however, the general rule that a surety is not discharged when the liability of his principal is extinguished by operation of law.").

Numerous relevant cases arise in the area of bankruptcy. These cases uniformly hold that a bankruptcy discharge may make a debt legally unenforceable against a borrower but it does not protect the guarantor who must have an independent debt. These cases note that a guaranty would be worthless if the guarantor was no longer liable once a bankruptcy discharge made it unenforceable against the borrower: "Finally, common sense dictates that the guarantor remain fully liable even when the principal debtor seeks relief under the Bankruptcy Code. After all, what good is a guaranteed lease if the guarantor escapes liability when the debtor does?" *Bel-Ken Associates Ltd. P'ship v. Clark*, 83 B.R. 357, 359 (D. Md. 1988).

This is the exact point that the District Court made, for which Christian had no answer:

> THE COURT: So, in other words, if the borrower goes out and becomes bankrupt and therefore no longer is legally liable because they've been discharged, that that discharge ultimeately discharges any guarantor?
>
> . . . .
>
> MR. MARCUS: That's correct, Your Honor. . . .
>
> THE COURT: So what's the point of the guaranty . . . what you're saying is that essentially the guaranty has no meaning . . . then it doesn't make sense to me that you would ever even have a guarantor."

(Tr 26:5-27:3)

In sum, the cases support the obvious conclusion that "owes" could not have been intended to mean "legally enforceable" or else the Guaranty would be completely pointless; the guarantor would escape liability merely through a bankruptcy discharge to the borrower.[5] Christian cannot point to any relevant case law to support his illogical interpretation of the Guaranty. In fact, case law, to the extent it is relevant to interpreting this Guaranty, would only support ITB's interpretation of the Guaranty.

E. Alternatively, the Court Should Find that the Anti-Deficiency Statute is Not Applicable to a Sale by Receivership, Such that ITB Would Not Be Barred From Recovery Against Trinity and Mooting Christian's Entire Defense

Christian's entire argument against liability is based on his assertion that ITB is barred from recovering further against Trinity based on the anti-deficiency statute. If ITB is not barred from recovering further against Trinity, then Christian's entire defense would be mooted, leaving

[5] Numerous other examples could be given that expose the unreasonableness of Christian's interpretation of the Guaranty. For example, he is arguing that the Guaranty should be interpreted to require a creditor, after sale of collateral, to seek a deficiency judgment against the borrower. Such a requirement is completely illogical because seeking a deficiency judgment is (1) pointless where the borrower is typically insolvent and (2) an extra cost for which the guarantor will typically be liable.

him liable under the Guaranty regardless of his definition of owes. In its oral arguments in support of summary judgment and then in its Opposition to Christian's Motion for Reconsideration, ITB raised an alternative argument that the anti-deficiency statute does not apply to protect Trinity from liability because the sale of the collateral was not through a foreclosure but was instead through a stipulated sale by receivership. The District Court never reached the issue, instead ruling based on the unambiguous language in the contract. On these alternative grounds, the Court should find as a matter of law that Christian is liable under the Guaranty. *See Martel v. Bulotti*, 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003) ("This Court may uphold decisions on alternate grounds from those stated in the findings of fact and conclusions of law on appeal.").

Christian argues that the anti-deficiency statutes preclude ITB from further enforcement of the debt against the borrower, Trinity. The anti-deficiency statutes, however, by their plain terms, do not apply to a receivership sale of collateral. The collateral for the debt owed by Trinity was 21 townhomes. These townhomes were secured by a Deed of Trust but they were not sold pursuant to the deed of trust or pursuant to a judicial or non-judicial foreclosure. Instead, Trinity and ITB stipulated to the appointment of a receivership and the parties stipulated that the receiver would sell the townhomes. The stipulation regarding the sale by receivership did not indicate that ITB would be prevented from seeking a deficiency judgment, nor does any statute. (R 288-344) More importantly, the purpose of preventing a double recovery has been served here as the $1.7M indebtedness is net of the proceeds obtained by the receiver's efforts.

Idaho Code §§ 45-1503 and -1502 are the anti-deficiency statutes applicable to deeds of trust. These provisions address the recovery of a deficiency judgment after a "sale under a deed of trust" and where the "trust deed has been foreclosed by advertisement and sale." They do not address the facts of this case, where the parties stipulated to sell the collateral pursuant to receivership. Thus, it would appear that no statute is on point. ITB could not bring a lawsuit against Trinity under the Note without having first foreclosed the Deed of Trust, pursuant to I.C. § 45-1503. If the Deed of Trust was foreclosed, *i.e.* a "sale under a deed of trust," then ITB would have been subject to the anti-deficiency provisions found in I.C. § 45-1512. However, once the real property was sold pursuant to a stipulated receivership, neither of those statutes had any further applicability. ITB has contractual rights under the Note to recover an additional $1.7 million from Trinity and no applicable statute prevents recovery of that debt. Trinity, however, is administratively dissolved and has no assets. ITB, pursuant to the Guaranty, can instead seek recovery from Christian.

Christian's *only* defense to liability is his contention that Trinity no longer has a legally enforceable obligation on the debt it still owes and Christian can piggy-back on Trinity's anti-deficiency protection. As explained above, Trinity is still obligated and Christian therefore has no argument for such piggy-back protection. The District Court never reached this argument, but this statutory interpretation provides an additional reason for rejecting Christian's defense to liability, as a matter of law.[6]

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[6] Christian mentions that initially ITB conceded that the anti-deficiency statutes were inapplicable to a receivership sale. Christian cites no case law for the proposition that ITB

IV. ATTORNEY FEES ON APPEAL

A. Respondent is Entitled To Attorney Fees On Appeal Pursuant To Both Contract and Statute, Specifically the Guaranty and I.C. § 12-120(3)

Idaho R. Civ. Proc. 54(e)(1) provides that the prevailing party is entitled to reasonable attorney fees "when provided for by any statute or contract." In this case, an award of attorney's fees to ITB is appropriate under both contract – the Guaranty – and statute, I.C. § 12-120(3).

The Guaranty provides,

> **Attorneys' Fees: Expenses.** Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate an automatic stay or injunction), appeals, and any anticipated post judgment collection services. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

ITB is clearly entitled to its attorney fees in this appeal, pursuant to these contractual terms.

In addition, Idaho Code Section 12-120(3) is applicable:

> 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. . . .

(emphasis added). Clearly, the enforcement of a Guaranty falls within the meaning of a

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cannot correct arguments that it made in prior briefing. In fact, Christian had already similarly changed its arguments: Christian never raised the "owes" defense to liability in his Answer or in his opposition to summary judgment, but Christian later raised the issue.

commercial transaction. Thus, under both contract and statute, ITB is entitled to recover its attorney fees.[7]

V. CONCLUSION

For all the reasons stated above, ITB respectfully requests that this Court affirm the decision of the District Court granting summary judgment and awarding the $1.7 million judgment to ITB and against Christian. After *de novo* review, this Court should equally find that the Guaranty is unambiguous in making Christian liable for the unpaid debt.

Respectfully submitted this 29th day of October, 2012.

GREENER BURKE SHOEMAKER P.A.

By: _____
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[7] Of course such recovery is almost pointless, since Christian has obtained a bankruptcy discharge of this entire debt, including any attorney fee awarded on appeal, and has assets that will only pay a small percentage of the debt. In this way, by filing bankruptcy and getting the bankruptcy court to approve the trustee's abandonment of this appeal right for no value, Christian has escaped the normal application of Idaho's attorney fee rules and statutes and has forced ITB, even as a prevailing party, to shoulder the full cost of the appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30TH day of October, 2012, a true and correct copy of **RESPONDENT'S BRIEF** was served upon:

Barry Marcus
Marcus, Christian & Hardee, LLP
737 N. 7th Street
Boise, ID 83702

Counsel for Defendant

☐ U.S. Mail
☐ Facsimile (208) 342-2170
☒ Hand Delivery
☐ Overnight Delivery

Fredric V. Shoemaker
Loren K. Messerly