IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

PNC BANK, NATIONAL ASSOCIATION,	)	
	)	
Plaintiff / Appellant,	)	
	)	
vs.	)	
	)	Case No. S15Q1445
	)	
KENNETH D. SMITH, et al.,	)	
	)	
Defendants / Appellees.	)	
	)	

AMICUS CURIAE BRIEF
OF THE GEORGIA BANKERS ASSOCIATION

Curtis J. Romig
Georgia Bar No. 613990
Edwin M. Cook
Georgia Bar No. 154203
Leah F. McNeill
Georgia Bar No. 940554

BRYAN CAVE LLP
One Atlantic Center, Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309-3488
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

Attorneys for Amicus Curiae the Georgia Bankers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Pursuant to Supreme Court of Georgia Rule 23, the Georgia Bankers Association (the "***GBA***") files this Amicus Curiae Brief in support of Plaintiff-Appellant PNC Bank, National Association's ("***PNC***") position on the Certified Questions posed to this Court by the United States District Court for the Northern District of Georgia, Atlanta Division, in PNC Bank, National Association v. Kenneth D. Smith, et al., Case No. 1:14-CV-03368-ELR.

I. INTEREST OF AMICUS

The GBA is a trade and professional organization founded in 1892 to represent the interests of banks and thrift institutions in the State of Georgia. Virtually every Georgia bank and thrift institution is a member. One of the objectives of the GBA is to be the principal industry voice on banking issues to its members, the media, policy makers and the public.

The members of the GBA encompass both national and state-chartered banks. PNC, like almost all GBA member banks, engages in commercial loan transactions that are secured by real estate, and such loans frequently involve guarantors. The GBA believes that answering the first Certified Question by the Northern District of Georgia in the negative, and the second in the affirmative, is both consistent with a plain reading of O.C.G.A. § 44-14-161 (the "***Confirmation Statute***") and long-established case law permitting guarantors to waive all defenses

to collection of a debt except payment in full. Moreover, doing so would be consistent with Georgia's public policy of upholding parties' freedom to contract.

Finally, guarantors, who consist almost entirely of sophisticated businesses persons, routinely use the Confirmation Statute to subject banks to unnecessary and expensive litigation for the sole purpose of delaying both the foreclosure process and the ability of banks to collect on their loans. Instead of the expedited process intended by the General Assembly, guarantors work with borrowers to extend the confirmation process for years by needlessly extending discovery. This abuse of the Confirmation Statute has adversely affected business development and economic growth in Georgia, and defeated the purpose of obtaining guaranties, which are intended to provide an alternative way for lenders to secure and collect the monies they have loaned to borrowers. Accordingly, the GBA has a direct and critical interest in this matter because its members' lending practices will be affected by this Court's opinion.

II. INTRODUCTION

The GBA respectfully submits that the Certified Questions by the Northern District of Georgia should be answered in the manner advocated by Appellants, as compliance with the requirements contained in O.C.G.A. § 44-14-161 is not a "condition precedent" to a suit against a guarantor for amounts still owed after a foreclosure, and even if it was, that condition can be waived. A plain reading of

the Confirmation Statute, as well as extensive Georgia case law, confirms both of these points. Such a holding would also do much to correct the current abuse of the Confirmation Statute by commercial borrowers and guarantors.

As one Supreme Court Justice has noted, confirmation proceedings in Georgia have increasingly been utilized "by commercial property owners who rely on technical arguments to overturn a confirmation in which they fully participated." Ameribank, N.A. v. Quattlebaum, 269 Ga. 857, 860 (1998) (Fletcher, J., dissenting). While this abuse by some borrowers may be unavoidable under current Georgia law, there is no reason to believe that the Confirmation Statute should be extended by implication to protect *guarantors*, who are almost uniformly sophisticated business persons.

Specifically, guaranties for loans to acquire or develop real estate are almost exclusively used where the loan is made to a business entity. Usually, the lender requires a guaranty by the owners of such businesses because the business entity itself was created, and is intended, to limit the business owner's liability. Thus, a personal guaranty by the owner of the business is the only way to provide some measure of protection to the lender beyond the real estate itself.

Given this context, there is no reason why this Court should reject a plain reading of the Confirmation Statute – which does not reference guarantors – and extend by implication its protections to such sophisticated parties. Such a reading

would be particularly inappropriate given the fact that many other forms of asset protection, including a variety of limited liability entities, have been recognized since the Confirmation Statute was passed during the Great Depression.

Finally, even if the Court agreed with such a strained reading of the Confirmation Statute, it is the long standing policy of this State to recognize the freedom of contract, and more specifically, the ability of a party to prospectively waive certain defenses. By contrast, the "parade of horribles" Appellees suggest will occur if this Court reaffirms its long standing commitment to this principle, and adopts the reasoning of HWA Properties, Inc. v. Cmty. & S. Bank, 322 Ga. App. 877 (2013), cert. denied (Nov. 18, 2013), has not occurred in the two years since that case was decided. Thus, there is little reason to believe such problems will arise given the ability of sophisticated parties like guarantors to negotiate more favorable terms.

In short, the only catastrophe with which this Court need concern itself is the havoc currently being inflicted on Georgia's overburdened court system through abuse of the foreclosure process via the Confirmation Statute. Answering the first Certified Question in the negative, and the second Certified Question in the affirmative, would help alleviate this problem.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Compliance With The Requirements Contained In O.C.G.A. § 44-14-161 Is Not A Condition Precedent To Pursue A Guarantor For A Deficiency After A Foreclosure Has Been Conducted.

The GBA respectfully requests that this Court answer Certified Question Number 1 in the negative as to guarantors because: (1) neither the plain reading of O.C.G.A. § 44-14-161 nor its legislative history supports Appellees' position that the Confirmation Statute applies to guarantors; and (2) Georgia's right to freedom of contract supports the clear intention that a commercial guaranty obligation is a separate and distinct debt obligation rendering the guaranty additional security not subject to the Confirmation Statute's restrictions.

1. Neither The Plain Language Of The Confirmation Statute Nor Its Legislative History Supports Appellees' Position That The Confirmation Statute Applies To Guarantors.

In 1935, the General Assembly enacted the Confirmation Statute "to limit and abate deficiency judgments in suits and foreclosure proceedings." First Nat. Bank & Trust Co. v. Kunes, 230 Ga. 888, 890 (1973). As explained by Justice Fletcher, the Confirmation Statute "was passed during the Depression to help individual debtors by precluding lenders from bringing deficiency actions. The act protected homeowners by requiring the trial court to approve a foreclosure sale only if the sale price reflected the true market value of the property." Ameribank, 269 Ga. at 860 (1998) (Fletcher, J., dissenting).

In theory, a confirmation hearing is a simple proceeding wherein the court examines the procedural fairness of the foreclosure sale and ensures that the property is sold for at least its fair market value. O.C.G.A. § 44-14-161(b). Judicial and legislative concern for the plight of distressed homeowner borrowers, however, has been used by savvy commercial borrowers and guarantors to transform simple and expedited confirmation proceedings into multi-year affairs that give both borrowers and guarantors the opportunity to eliminate their separate contractual debt obligations. Particularly troubling is the fact that confirmation proceedings have increasingly been utilized "by commercial property owners who rely on technical arguments to overturn a confirmation in which they fully participated." Ameribank, N.A., 269 Ga. at 860 (Fletcher, J. dissenting).

Under Georgia common law there was no confirmation requirement. If the purchase price paid pursuant to a valid foreclosure sale did not satisfy the secured indebtedness, the lender could maintain a direct action against the debtor for the deficiency. Calhoun v. Phoenix Mut. Life Ins. Co., 46 Ga. App. 807 (1933). The General Assembly, when enacting the Confirmation Statute, deviated from Georgia common law. Thus, under the cardinal principle of statutory interpretation, the

Confirmation Statute must be strictly construed. See Oberdorfer v. Smith, 102 Ga. App. 336, 339 (1960).[1]

In direct contradiction of this maxim of statutory construction, some courts have on occasion broadly interpreted two undefined, ambiguous terms in the statute – debtor and deficiency judgment – to extend the Confirmation Statute's protection to guarantors. See, e.g., First Nat. Bank & Trust Co. v. Kunes, 128 Ga. App. 565, 568 (1973) aff'd, 230 Ga. 888 (1973) (interpreting debtor to include "all who were presently subject to payment of the debt, or who might be subjected to payment thereof, if within the knowledge of the payee of the note"); United States v. Yates, 774 F. Supp. 1368, 1372 (M.D. Ga. 1991) (interpreting deficiency judgment to include actions against borrowers and guarantors). Such a broad interpretation and improper application of the Confirmation Statute has wiped away millions of dollars of debt that remained post-foreclosure. The legislative history and the plain language of the statute, however, clearly rejects such a broad reading and its results.[2]

---

[1] "Because this limitation is in derogation of the lender's rights at common law, the statute must be strictly construed against the *debtor* under the rule of statutory construction." Ameribank, N.A., 269 Ga. at 860 (Fletcher, J., dissenting).

[2] In 1933, two years before the Confirmation Statute was enacted, a bill was introduced in the Georgia House of Representatives to completely abolish a creditor's right to seek a judgment for a deficiency after foreclosure. 1933 Ga. H. Journal 311. The General Assembly rejected this version, however, ultimately choosing to uphold the creditor's common law right to seek a deficiency judgment,

For instance, the legislative history does not support a broad definition of "debtor." The broad definition of debtor was created by the Georgia Court of Appeals in Kunes where the Court, without referencing any legislative history of the statute to reach its conclusion, concluded that "[i]t would only be under the principle of reduction ad absurdum to say the General Assembly wished to protect the principal debtor from double payment, but did not have any concern whatever for endorsers and guarantors." Kunes, 128 Ga. App. at 567-68. In contrast to the Court's theory of legislative intent set forth in Kunes, a prior version of the Confirmation Statute stated that notice of a confirmation hearing was only to be given to the "mortgagor, grantor, their heirs, legal representatives, successors or assignees of grantor or mortgagor." 1935 Ga H. Journal 159. Notably, the term guarantor is not included within this list.

Although this language was consolidated to the single term "debtor" in the final version of the statute, which was approved and enacted just twenty-two days after this prior version was proposed, the General Assembly's exclusion of guarantors in its list is clearly important. See id. Based on this exclusion, the General Assembly, when using the term "debtor" in the enacted version of the statute, did not intend for a "debtor" to include guarantors. If the General

---

but limited that right by requiring the creditor to first comply with the requirements of the statute. See Kunes, 230 Ga. at 890-91.

Assembly had intended to include guarantors as part of the confirmation statute, it would have done so.

Moreover, by definition, a deficiency judgment cannot be brought against a guarantor. A deficiency judgment is "a judgment for that party of a debt secured by a mortgage not realized from a sale of the mortgaged property." Hill v. Moye, 221 Ga. App. 411, 412 (1996). As explained by the United States Court of Appeals for the Seventh Circuit when it interpreted Georgia's Confirmation Statute, a lender's action against a guarantor is not a deficiency judgment, but instead a "suit . . . on the guaranty, not on the confirmation; and in that suit the value of the land, as distinct from what [the lender] paid for it, is irrelevant." Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC, 740 F.3d 1146, 1150 (7th Cir. 2014) cert. denied, 135 S. Ct. 92 (2014) (interpreting Georgia law). In holding that an action against a guarantor should not be construed as a deficiency judgment under the terms of the confirmation statute, the Seventh Circuit explained that a deficiency judgment is (and can only be) sought against a borrower.

In sum, neither a plain reading of O.C.G.A. § 44-14-161 nor its legislative history supports Appellees' contention that the Confirmation Statute is a condition precedent to pursuing a guaranty obligation.

2. Georgia's Right To Freedom Of Contract Supports The Position That A Commercial Guaranty Obligation Is A Separate And Distinct Debt Obligation Rendering The Guaranty Additional Security Not Subject To The Confirmation Statute's Restrictions.

Georgia has historically emphasized the importance of freedom of contract in the exercise of purely contractual rights. See, e.g., Coffey Enterprises Realty & Dev. Co., Inc. v. Holmes, 233 Ga. 937, 938 (1975). In fact, such contractual rights are the underlying rationale of a creditor's right to conduct a non-judicial foreclosure sale, as such a procedure results from a "purely contractual matter between two parties in the exercise of private property rights." Id.

Under Georgia law, a guaranty agreement is a contract whereby "a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit . . . given to his principal." O.C.G.A. § 10-7-1. Further, the contract of guaranty creates an obligation "which is separate and distinct from that of the principal debtor, and where [the guarantor] renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract." Etheridge v. W.T. Rawleigh Co., 29 Ga. App. 698, 702 (1923).

A guaranty agreement is utilized as a traditional method of protecting a bank's capital investment. See Inland Mortg. Capital Corp., 740 F.3d at 1149. Under Georgia law, a "contract of guaranty or suretyship is primarily one to pay the debt of another which may be due and payable by the principal debtor [or

borrower] to the creditor upon default." Roswell Festival, LLLP v. Athens Int'l, Inc., 259 Ga. App. 445, 448 (2003). A guarantor therefore "obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit . . . given to his principal." O.C.G.A. § 10-7-1. When executing a guaranty, the guarantor promises the creditor that he will pay if the principal borrower is unable to do so.[3]

The enforceability of this promise is an important concern for lenders, as the lender views the guaranty as an effective means to lessen its risk when a loan becomes unrecoverable from a borrower, as the guarantor "renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract." Etheridge, 29 Ga. App. at 702. Simply put, a guaranty agreement is a contract for additional security and is to be interpreted as such. See Citrus Tower Boulevard Imaging Ctr., LLC v. Owens, 325 Ga. App. 1, 11 (2013).

Georgia courts have recognized that "[t]he failure to obtain confirmation of a sale does not operate to extinguish the remaining debt; rather, it simply precludes the person exercising the power of sale from instituting suit to obtain a deficiency judgment." Worth v. First Nat. Bank of Alma, 175 Ga. App. 297, 298 (1985); Matter of Wiggins, 167 B.R. 990, 992 (Bankr. M.D. Ga. 1993) aff'd sub nom. Citizens Bank of Americus v. Wiggins, 167 B.R. 992 (M.D. Ga. 1994) (citing

[3] Most guaranties go one step further and, once the loan is in default, allow a lender to collect from the guarantor without first attempting to collect from the borrower.

Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 854 (5th Cir. 1979)). A creditor's failure to confirm does not prevent its pursuit of other contractual security as payment on the indebtedness following foreclosure, because the underlying debt remains. See Worth, 175 Ga. App. at 298 (holding that creditor permitted to enforce contractual right against certificate of deposit assigned as additional security); Inland Mortg. Capital Corp., 740 F.3d at 1149 ("Failure to obtain confirmation of a sale does not operate to extinguish the remaining debt" and thus "does not estop a creditor from pursuing other contractual security on debt.") (citations omitted).

Because any remaining debt survives foreclosure, the creditor may pursue separate collateral, such as a third-party guaranty, until it is made whole regardless of whether it complied with the Confirmation Statute. See Inland Mortg. Capital Corp., 740 F.3d at 1149. Courts have stated that a failure to obtain confirmation "simply renders it impossible for the holder to sue on it, just as would a discharge in bankruptcy of the maker." Turpin v. N. Am. Acceptance Corp., 119 Ga. App. 212, 217 (1969); see also Taylor v. Thompson, 158 Ga. App. 671, 672 (1981); Powers v. Wren, 198 Ga. 316, 321 (1944); Marler v. Rockmart Bank, 146 Ga. App. 548, 549 (1978). This is particularly important to the creditor, as often the borrower's only asset is the real estate securing the loan. In such cases, the guaranty by the borrower's owner is the only way to provide an additional measure

of protection to the lender beyond the real estate itself. Accordingly, Georgia's public policy favoring freedom of contract supports parties contracting for a separate and distinct debt obligation that is additional security not subject to the Confirmation Statute.

B. Georgia Law Permits A Guarantor To Waive All Defenses To A Debt.

The GBA respectfully requests that this Court answer Certified Question Number 2 in the affirmative because Georgia case law has repeatedly affirmed both the right of parties to freely enter into contracts and the ability of guarantors to waive any defenses to collection of a debt. Appellees' argument that guarantors cannot waive the confirmation process by contract, or that permitting them to do so is contrary to Georgia's public policy, thus lacks any basis in Georgia law and contradicts Georgia's consistent, historical support of the freedom to contract.

As Georgia courts have repeatedly held, Georgia's public policy favors the individual freedom to enter into contracts and to contract at will. Am. Mgmt. Servs. E., Inc. v. Fort Benning Family Communities, LLC, 318 Ga. App. 827 (2012). Furthermore, "it is the paramount public policy of this State that courts will not lightly interfere with the freedom of parties to contract on any subject matter, on any terms, unless prohibited by statute or public policy, and injury to the public interest clearly appears." Kothari v. Tessfaye, 318 Ga. App. 289, 298 (2012) quoting Bryan v. MBC Partners, L.P., 246 Ga. App. 549, 552 (2000). As

such, parties should be entitled to contract on their own terms without the courts saving one side or another from the effects of a bad bargain; they should be permitted to enter into contracts that may actually be unreasonable or may lead to hardship. Hibbard v. McMillan, 284 Ga. App. 753 (2007); Auldridge v. Rivers, 263 Ga. App. 396 (2003). Finally, "a party's broad freedom to contract includes *the right to waive his or her defenses to the enforcement of that contract.*" Kothari, 318 Ga. App. at 298 (emphasis added).

Importantly, Georgia courts have long held that a guarantor may waive *all* of his or her defenses to a debt except payment in full, and to rule otherwise would contradict extensive Georgia case law on exactly this point. Hampton Island, LLC v. Asset Holding Co. 5, LLC, 320 Ga. App. 880, 886 (2013) (guarantor's waiver of all "legal or equitable defenses whatsoever to which Guarantor might otherwise be entitled, to the extent permitted by law, other than payment in full of all of the obligations" held enforceable); Hanna v. First Citizens Bank & Trust Co., Inc., 323 Ga. App. 321, 327 (2013), reconsideration denied (July 17, 2013), cert. denied (Nov. 18, 2013) (guarantor's waiver of all "legal and equitable defenses whatsoever" barred Guarantor's defense of release by novation), reconsideration denied (July 17, 2013), cert. denied (Nov. 18, 2013).[4]

[4] See also Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 795 (2011) (guarantor's claim that there was no evidence he personally guaranteed modified note was barred by language of guaranty, in which guarantor expressly waived all

Appellee, in recognition of this overwhelming authority, argues that waiver of the protections found in O.C.G.A. § 44-14-161 is nevertheless impermissible as to guarantors because: (1) failure to comply with the Confirmation Statute deprives a court of subject matter jurisdiction, which cannot be waived; and (2) such a waiver would violate public policy, which is intended to protect a "debtor" from double payment on a loan. [Brief of Appellee at pp. 20-29]. Neither argument is correct.

1. The Confirmation Statute Does Not Create Or Govern Subject Matter Jurisdiction In Georgia Courts For Suits Against Guarantors.

Appellees incorrectly attempt to transform compliance with the Confirmation Statute into a predicate for subject matter jurisdiction in any subsequent suit against a guarantor for amounts owed on a loan after foreclosure. [Brief of Appellee at pp. 20-24]. That claim, however, has no basis in Georgia law. Specifically, Appellees fail to cite a *single* Georgia decision to support their argument that "failure to confirm [a] sale in compliance with the [Confirmation Statute] deprives a subsequent court of jurisdiction," and instead rely on an unpublished opinion by the Northern District of Georgia to support the novel proposition that the Confirmation Statute creates subject matter jurisdiction. [Id. at

---

notices or defenses to which he might be entitled); Fielbon Dev. Co., LLC v. Colony Bank of Houston Cnty., 290 Ga. App. 847, 854 (2008) (guarantor waived all defenses, including defenses of novation and increased risk, and thus consented in advance to bank's actions).

p. 20 citing Archer Capital Fund, LP v. TKW Partners, LLC, CIV.A. 1:08-CV-2747, 2009 WL 2356072, at *4 (N.D. Ga. July 27, 2009) (compliance with Confirmation Statute is akin to the requirement under O.C.G.A. § 9-11-41(d) that a party who voluntarily dismisses a suit must pay court costs before recommencing suit against the same party)].

The reasoning in Archer that Appellees recycle in their brief, however, is flawed, because Georgia's Confirmation Statute has nothing to do with subject matter jurisdiction, which instead is governed by other statutes set forth in the Georgia Code. See, e.g., O.C.G.A. § 15-6-8 (setting forth powers and jurisdiction of Georgia Superior Courts). It would be an anathema if every time a Georgia statute referenced a condition to suit that Georgia courts found such condition to be a non-waivable prerequisite for subject matter jurisdiction. For example, there are many "condition precedents" to suit created by statue that a party may waive: a person may waive personal service of a complaint, O.C.G.A. § 9-10-73, or notice of a probate proceeding, O.C.G.A. §§ 53-11-6(a) and 53-5-22(a), or an objection to improper venue, either by contract via a forum selection clause, Brown v. U.S. Fid. & Guar. Co., 208 Ga. App. 834, 835-36 (1993), or by failing to object at the time of filing. O.C.G.A. § 9-11-12(h). Parties may also consent to extra-judicial proceedings such as arbitration, O.C.G.A. § 9-9-3, and thereby implicitly waive their right to a jury trial, and can even waive constitutional rights like the right to

avoid self-incrimination. Thus, the mere fact that a statute mentions certain preconditions to bringing suit does not mean that such requirements are necessary for a Georgia court to establish subject matter jurisdiction, or that such preconditions cannot be waived.

Moreover, even if compliance with the Confirmation Statute is an "essential element" of a claim against a guarantor, [see Amicus Curiae Brief of Barry McWhirter and Lethco Brock, Jr. at p. 10], it does not also bar a contractual waiver of that element. For example, a party can prospectively waive "essential elements" of a claim, such as the requirement to prove damages in a breach of contract action. See, e.g., O.C.G.A. § 13-6-7 (liquidated damages provisions in a contract are enforceable, and obviate need to prove damages).

In short, Appellees' "condition precedent" framework for interpreting the Confirmation Statute does not mean that compliance with the Confirmation Statute is inherently a subject matter jurisdiction issue that cannot be waived. There is also no reason to believe that the elements of a claim against a guarantor, which is simply a breach of contract claim, are so sacrosanct as to be beyond the realm of waiver. Thus, this Court should decline to provide additional protections to guarantors not explicitly contemplated by the Confirmation Statute itself.

2. Public Policy Does Not Preclude Waiver By Guarantors Of The Confirmation Statute's Protections.

The public policy of Georgia also does not prevent guarantors from waiving any protections they might have under the Confirmation Statute. While Appellees are correct that the Confirmation Statute was intended to provide some measure of protection for debtors, i.e. *borrowers*,[5] there are many good reasons why those protections should not be extended to cover guarantors.

First, in the context of loans where the Confirmation Statute applies – i.e. loans secured by real estate – guarantors are almost always sophisticated business persons or entities. This is because guaranties are rarely required for residential home loans, but are commonly used in loans to business entities to acquire or develop real estate. In many cases, the business entity's sole asset is the real estate being acquired. Consequently, guaranties by the owners of such businesses or other related parties are almost always required by the lender because the business entity itself is a single purpose entity created to limit the business owner's liability to the property in question. A personal guaranty by the owner is the only way to provide an additional measure of security to the lender beyond the real estate itself. This contention is borne out by the fact that in Appellees' case, as well as in each amici curiae brief filed by guarantors and borrowers, the borrowers are LLC's or corporations. These facts are also mirrored by the decisions in HWA Properties,

[5] See Supra pp. 5-10 for the proper scope of "borrowers."

Inc., 322 Ga. App. 877 and Cmty. & S. Bank v. DCB Investments, LLC, 328 Ga. App. 605 (2014), reconsideration denied (July 29, 2014), cert. denied (Jan. 20, 2015), reconsideration denied (Mar. 2, 2015), in which the borrowers were businesses, and the guaranties were provided by the business owners, related parties, or even other businesses. Thus, it strains credulity for Appellees and other amici curiae to argue that a Depression-era statute intended to protect homeowner borrowers should be extended to protect guarantors, who are almost uniformly sophisticated business persons that employ countless measures to limit their liability, including single-purpose business entities and abuse of the confirmation process itself. Given this context, and the aforementioned freedom to contract so central to Georgia law, a ruling in favor of Appellees would contradict the intent of the statute and the principles of Georgia contract law.

Second, the specter of unlimited and broad guaranties to which Appellees and other amici curiae refer in their briefs is unfounded and unsupported. Commercial guaranties already typically contain broader waiver provisions than promissory notes because the business borrower whose loan is being guaranteed will frequently seek multiple or repeated loans. Thus, executing one guaranty to cover all present and future debts, along with a waiver of all defenses specific to each debt, is used to speed the process by which the business borrower can obtain new funding streams or loans. If the Court affirms the reasoning in HWA and

DCB, guarantors will simply be less inclined to execute broad, unlimited guaranties with multiple waivers of their defenses, a precaution they have already begun to take since the recent recession.

Third, as noted supra, Georgia has a long and well documented public policy of favoring the freedom to enter into contracts. American Management Services East, Inc., 318 Ga. App. 827. This policy should not be curtailed through the strained reading of the Confirmation Statute advocated by Appellees, particularly where the purpose and protections of that statute are intended to be limited.

While Appellees are correct that the Confirmation Statute was intended to provide protection to borrowers, there is simply nothing in the statute to support the conclusion that it was intended to protect guarantors of commercial loans. The reason is simple: the difference between the typical home owner borrower the Confirmation Statute was meant to protect, and the typical commercial guarantor, is significant. Georgia public policy has no interest in providing yet one more method for such sophisticated business persons to shelter their assets from recovery, and thus this Court should answer the first Certified Question in the negative, and the second Certified Question in the affirmative.

This 11th day of September, 2015.

Respectfully submitted,

/s/ Curtis Romig
Curtis J. Romig
Georgia Bar No. 613990
Edwin M. Cook
Georgia Bar No. 154203
Leah F. McNeill
Georgia Bar No. 940554

BRYAN CAVE LLP
One Atlantic Center, Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309-3488
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

Counsel for Amicus Curiae the Georgia Bankers Association

CERTIFICATE OF SERVICE

This is to certify that I have this day served the following with a copy of the foregoing Brief of Georgia Bankers Association as Amicus Curiae in Support of Petition for Certiorari via the Georgia Supreme Court's electronic filing system and via U.S. mail, postage prepaid, addressed as follows:

Walter H. Bush
Christopher B. Freeman
F. Xavier Balderas
Carlton Fields Jorden Burt, P.A.
One Atlantic Center, Suite 3000
1201 West Peachtree Street, NE
Atlanta, Georgia 30309-3455

R. Matthew Reeves
Elizabeth L. Clack-Freeman
Andersen Tate & Carr, P.C.
One Sugarloaf Centre, Suite 4000
1960 Satellite Blvd.
Duluth, Georgia 30097

John A. Christy
Scott D. McAlpine
Schreeder, Wheeler, & Flint, LLP
1100 Peachtree Street, NE
Suite 800
Atlanta, GA 30309

Bruce Edenfield
Bruce M. Edenfield, P.C.
232 East Main Street
Dahlonega, Georgia 30533

Kyle L. Wise
Wilson Brock & Irby, L.L.C.
Suite 700, 2849 Paces Ferry Road
Atlanta, Georgia 30350

Jessica L. Vaughn
Vaughn & Clements
109 W. Hicks Street
Calhoun, GA 30701

This 11th day of September, 2015.

/s/ Curtis J. Romig
Curtis J. Romig
Georgia Bar No. 613990

BRYAN CAVE LLP
One Atlantic Center, Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309-3488
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

Counsel for Amicus Curiae the Georgia Bankers Association