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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTER DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re	)	Case No. 09-14595-B-13
Roy E. Garrett and	)	
Donna S. Garrett,	)	
Debtors.	)	
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Roy E. Garrett and	)	Adversary Proceeding No. 09-1122
Donna S. Garrett,	)	DC No. TJB-1
Plaintiffs,	)	
v.	)	
United Security Bank, a	)	
California corporation,	)	
Defendant.	)	
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**MEMORANDUM DECISION REGARDING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE  
MOTION FOR SUMMARY ADJUDICATION**

This disposition is not appropriate for publication. Although it may cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9<sup>th</sup> Cir. BAP Rule 8013-1.

Timothy J. Buchanan, Esq., appeared on behalf of the movant/defendant, United Security Bank, a California Corporation.

Donald F. Drummond, Esq., appeared on behalf of debtors/plaintiffs, Roy E. Garrett and Donna A. Garrett.

1 Before the court is a motion for summary judgment or alternatively for  
2 summary adjudication (the “Motion”) filed by Defendant United Security Bank (the  
3 “Bank”). The Motion is opposed by the Plaintiffs/Debtors, Roy E. and Donna S.  
4 Garrett (the “Garretts”). This Motion relates to an adversary proceeding in which  
5 the Garretts seek, *inter alia*, (1) a determination of their obligations to the Bank and  
6 (2) cancellation of three deeds of trust the Bank holds against their real property.  
7 For the reasons set forth below, the motion for summary adjudication of undisputed  
8 facts and certain legal issues will be granted. The motion for summary judgment  
9 will be denied.

10 This memorandum decision contains the court’s findings of fact and  
11 conclusions of law required by Federal Rule of Civil Procedure 52(a), made  
12 applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure  
13 7052. The bankruptcy court has jurisdiction over this matter pursuant to 28 U.S.C.  
14 §1334 and 11 U.S.C. §523<sup>1</sup> and General Orders 182 and 330 of the U.S. District  
15 Court for the Eastern District of California. This is a core proceeding pursuant to 28  
16 U.S.C. § 157(b)(2)(O).

17 **Background.**

18 Prior to the hearing on this Motion, the court circulated to counsel a draft  
19 copy of this memorandum in the form of a tentative ruling. Each side had an  
20 opportunity to comment on the tentative ruling and the following list of undisputed  
21 facts includes the revisions agreed by counsel.<sup>2</sup> Upon review of the moving papers,  
22

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23 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to the  
24 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy  
25 Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the  
26 effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

27 <sup>2</sup>After the hearing, the court gave both parties an opportunity to submit a stipulation  
28 of additional undisputed facts for inclusion in this memorandum and supplemental points  
and authorities addressing the legal issues discussed below. Neither party submitted any

1 the arguments of counsel, and the evidence filed in support of and opposition to the  
2 Motion, the following facts appear to be undisputed and ripe for summary  
3 adjudication:

4 1. The Garretts are debtors in this bankruptcy case and the plaintiffs in this  
5 adversary proceeding.

6 2. The Garretts are trustees of the Garrett Family Trust of 1994 (the “Garrett  
7 Trust”).<sup>3</sup>

8 3. At all relevant times, the Garrett Trust owned three parcels of real property  
9 in Fresno County, which are the subject of this adversary proceeding and are more  
10 particularly identified in undisputed fact no. 23 below (the “Garrett Properties”).

11 4. The Garretts have two sons named Roy R. Garrett (“Roy R.”) and Forrest  
12 R. Garrett (together the “Garrett Brothers”).

13 5. The Garrett Brothers own a California corporation known as Garrett  
14 Brothers, Inc. (“GBI”). The Garretts have no interest in GBI.

15 6. On March 23, 2006, the Bank made an operating credit line loan to GBI in  
16 the amount of \$500,000 (the “\$500,000 Loan”). The \$500,000 Loan matured by its  
17 terms on March 10, 2007. The \$500,000 Loan is evidenced by a Commercial Loan  
18 Agreement and a Promissory Note of even date.

19 7. On March 23, 2006, the Garretts, on behalf of the Garrett Trust, signed a  
20 personal guaranty of the \$500,000 Loan (the “First Guaranty”).

21 8. The First Guaranty was limited to the \$500,000 Loan and any “renewals,  
22

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23 supplemental materials.

24 <sup>3</sup>There is no evidence before the court as to the terms of the Garrett Trust. It is not  
25 clear why the Garrett Trust was not named as a party to this adversary proceeding. Further,  
26 there is no evidence to suggest that the Garretts have or had any personal liability to the  
27 Bank. All of the documents relevant to this adversary proceeding were issued in the name  
28 of the Garrett Trust. The court deems the Garretts’ appearance and prosecution of this  
adversary proceeding to be on behalf of themselves personally and as trustees of the Garrett  
Trust.

1 extensions, modifications and substitutions” thereof (First Guaranty ¶ 3).

2 9. The First Guaranty was not a “continuing guarantee” within the meaning  
3 of Cal.Civ.Code 2814. The First Guaranty specifically limited the Garrett Trust’s  
4 liability based on the principal balance of the \$500,000 Loan. It contained a  
5 provision at paragraph 2 which stated:

6 My liability will not exceed \$500,000 of the principal amount  
7 outstanding at default, plus accrued interest, attorneys’ fees and  
8 collection costs, when allowed by law, and all other costs, fees  
9 and expenses agreed to be paid under all agreements  
evidencing the Debt and securing the payment of the Debt.  
You may, without notice, apply this Guaranty to such Debt of  
the Borrower as you may select from time to time.

10 10. On September 6, 2006, the Garrett Brothers, on behalf of GBI, signed a  
11 Renewal Promissory Note and Commercial Loan Agreement to renew the \$500,000  
12 Loan, increase the loan amount to \$650,000, and restate the maturity date to be  
13 March 10, 2007 (the “\$650,000 Loan”).

14 11. On the same date, the Garretts’ son, Roy R., signed the Garretts’ names,  
15 on behalf of the Garrett Trust, to a new agreement, purportedly to guaranty the  
16 \$650,000 Loan (the “Second Guaranty”).

17 12. At that time, the Garretts had no knowledge of the \$650,000 Loan and  
18 they did not authorize Roy R. to sign the Second Guaranty on behalf of themselves  
19 or the Garrett Trust.

20 13. On March 27, 2007, the Garrett Brothers, on behalf of GBI, signed a  
21 Renewal Promissory Note and a Commercial Loan Agreement to renew the  
22 \$650,000 Loan, increase the loan amount to \$750,000, and extend the maturity date  
23 to March 10, 2008 (the “\$750,000 Loan”).

24 14. On the same date, Roy R. signed the Garretts’ names on behalf of the  
25 Garrett Trust, to a new agreement, purportedly to guarantee the \$750,000 Loan (the  
26 “Third Guaranty”).

27 15. At that time, the Garretts had no knowledge of the \$750,000 Loan and  
28 they did not authorize Roy R. to sign the Third Guaranty on behalf of themselves or

1 the Garrett Trust.

2 16. On or about March 10, 2008, GBI informed the Bank that it could not pay  
3 the balance owing on the \$750,000 Loan by the extended maturity date.

4 17. Thereafter, the Garretts and the Garrett Brothers met with representatives  
5 of the Bank to discuss options for dealing with the debt, including a forbearance  
6 agreement.

7 18. Prior to that meeting, the Garretts had no knowledge that Roy R. had  
8 signed their names to the Second and Third Guaranties.

9 19. On April 21, 2008, the Garretts, on behalf of the Garrett Trust, signed a  
10 Forbearance and Loan Workout Agreement (the "Forbearance Agreement"). Under  
11 the Forbearance Agreement, the Bank agreed to forbear from enforcing its rights  
12 under the \$750,000 Loan until June 5, 2008.

13 20. The Forbearance Agreement included a list of documents that the Bank  
14 was holding relating to the \$750,000 Loan. With reference to the Third Guaranty,  
15 the Forbearance Agreement recited:

16 A. WHEREAS, Lender is the current beneficial holder  
17 of the following:

18 . . .

19 5. Those certain Guaranties dated March 27, 2007 (collectively  
20 "Guaranties") executed by the Garrett Family Trust, Roy R.  
21 Garrett, individually; and Forrest R. Garrett (collectively  
hereinafter referred to as the "Guarantors"); in favor of Lender  
wherein Guarantors, individually, agreed to all terms of and  
guaranty of the payment and performance of the Note.

22 21. Other than the above reference to the pre-existing Guaranties, nothing in  
23 the Forbearance Agreement constituted a new contractual guaranty of any of GBI's  
24 debt to the Bank.

25 22. Prior to execution of the Forbearance Agreement, the Bank did not have a  
26 lien on any of the Garrett Properties to secure GBI's debt. The Forbearance  
27 Agreement makes no reference to pre-existing liens.

28 23. The Forbearance Agreement included three covenants whereby the

1 Garretts agreed to execute deeds of trust against the Garrett Properties. The  
2 Forbearance Agreement stated at paragraphs 2(e), (f) & (h) as follows:

3 2. Condition Precedent to Forbearance of Loan. Lender's  
4 forbearance of its rights to foreclose and/or commence other  
5 action on its matured obligation of the Note is subject to the  
6 following:

7 . . .

8 e. As additional security for the Loan Obligation and as  
9 fair and adequate consideration for the forbearance  
10 contemplated herein and to secure compliance with the  
11 terms contained herein, including the payment in full of  
12 the Note, Roy Garrett and Donna Garrett as trustees of  
13 the Garrett Family Trust shall execute a new deed of  
14 trust encumbering that certain real property located in  
15 Fresno County located at 8485 S. Chestnut Ave Fresno,  
16 California bearing Assessor's Parcel Number 335-170-  
17 13 further described in Exhibit A attached hereto and  
18 made a part hereof (the "8485 S. Chestnut Deed of  
19 Trust"). The 8485 S. Chestnut Deed of Trust shall be  
20 subordinate in lien priority only to a deed of trust in  
21 favor of Federal Land Bank Association of Kingsburg,  
22 recorded May 22, 2003 as document number  
23 20030114759;

24 f. As additional security for the Loan Obligation and as  
25 fair and adequate consideration for the forbearance  
26 contemplated herein and to secure compliance with the  
27 terms contained herein, including the payment in full of  
28 the Note, Roy Garrett and Donna Garrett as trustees of  
the Garrett Family Trust shall execute a new deed of  
trust encumbering that certain 20-acre parcel of real  
property located in Fresno County on S. Chestnut Ave  
Fresno, California bearing Assessor's Parcel Number  
335-140-23S further described in Exhibit B attached  
hereto and made a part hereof (the "20-Acre Deed of  
Trust"). The 20-Acre Deed of Trust shall be subordinate  
in lien priority only to a deed of trust in favor of Federal  
Land Bank Association of Kingsburg, recorded May 22,  
2003 as document number 20030114759.

. . .

h. As additional security for the Loan Obligation and as  
fair and adequate consideration for the forbearance  
contemplated herein and to secure compliance with the  
terms contained herein, including the payment in full of  
the Note, Roy Garrett and Donna Garrett as trustees of  
the Garrett Family Trust shall execute a new deed of  
trust encumbering that certain real property located in  
Fresno County located at 8529 S. Chestnut Ave Fresno,  
California bearing Assessor's Parcel Number 335-1701-

1 12 further described in Exhibit D attached hereto and  
2 made a part hereof (the "8529 S. Chestnut Deed of  
3 Trust"). The 8529 S. Chestnut Deed of Trust shall be  
4 subordinate in lien priority only to a deed of trust in  
5 favor of Federal Land Bank Association of Kingsburg,  
6 record May 22, 2003 as document number  
7 20030114759.

8 24. The Forbearance Agreement recited that the \$750,000 Loan matured on  
9 March 10, 2008, and that it had an outstanding balance of \$717,157.56.

10 25. Donna Garrett read the Forbearance Agreement before signing it but her  
11 husband Roy E. Garrett, elected not to read it before signing it.

12 26. On April 21, 2008, the Garretts, as trustees of the Garrett Trust, also  
13 executed and notarized three deeds of trust in favor of the Bank giving the Bank a  
14 security interest in the Garrett Properties (the "Trust Deeds").

15 27. Each of the Trust Deeds was given to secure "Secured Debts." The term  
16 "Secured Debts" was specifically defined at paragraph 3 of the Trust Deeds to  
17 include the \$750,000 Loan documents signed by GBI, the Forbearance Agreement,  
18 and future obligations of GBI:

19 3. SECURED DEBTS. The term "Secured Debts" includes  
20 and this Security Instrument will secure each of the following:

21 A. Specific Debts. The following debts and all  
22 extensions, renewals, refinancing, modifications and  
23 replacements.

24 1. A promissory note or other agreement, No.  
25 80979801, dated March 27, 2007, from Garrett  
26 Brothers, Inc. (Borrower) to Lender, with a loan  
27 amount of \$750,000.00. One or more of the  
28 debts secured by this Security Instrument  
contains a future advance provision.

2. A Forebearance [sic] and Loan Workout  
Agreement of even date herewith by and between  
Garrett Borthers, Inc., a California corporation,  
Roy Eugene Garrett and Donna Ann Garrett, as  
trustees of the Garrett Family Trust of 1994 dated  
February 7, 1994, Roy R. Garrett, Forrest R.  
Garrett and United Security Bank.

B. All Debts. All present and future debts from Garrett  
Brothers, Inc. to Lender, even if this Security Instrument

1 is not specifically referenced, or if the future debt is  
2 unrelated to or of a different type than this debt. . . .

3 28. The Trust Deeds do not reference the Second and Third Guaranties and  
4 do not include any of the Guaranties in the description of “Secured Debts.”

5 29. Donna Garrett read the Trust Deeds before signing them. Roy E. Garrett  
6 did not read the Trust Deeds.

7 30. On July 7, 2008, the Garretts, on behalf of the Garrett Trust, signed an  
8 Amendment to Forbearance and Loan Workout Agreement, further extending the  
9 forbearance term for the \$750,000 Loan to August 5, 2008 (the “Amendment”).

10 31. Donna Garrett read the Amendment before she signed it.

11 32. GBI defaulted on the terms of the \$750,000 Loan, the Forbearance  
12 Agreement, and the Amendment.

13 **Issues Presented.**

14 There are two issues to be decided in this adversary proceeding; (1) Is the  
15 Garrett Trust personally liable to the Bank for any part of GBI’s debt to the Bank,  
16 and (2) Does the Bank hold an enforceable lien against the Garrett Properties to  
17 secure GBI’s debt?

18 **A. Applicable Law.**

19 **1. Summary Judgment Standard.**

20 Summary judgment is appropriate, “if the pleadings, depositions, answers to  
21 interrogatories, and admissions on file, together with the affidavits, if any, show that  
22 there is no genuine issue as to any material fact and that the moving party is entitled  
23 to a judgment as a matter of law. A summary judgment, interlocutory in character,  
24 may be rendered on the issue of liability alone, although there is a genuine issue as  
25 to the amount of damages.” Fed. R. Civ. P. 56(c), (made applicable in this  
26 adversary proceeding by Fed. R. Bankr. P. 7056).

27 A material fact is one that might affect the outcome of the suit under the  
28 governing law and irrelevant or unnecessary factual disputes will not be considered

1 in a motion for summary judgment. *Anderson, et al. v. Liberty Lobby, Inc., et al.*,  
2 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

3 The moving party bears the burden of showing that there is no genuine  
4 dispute as to each issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S.  
5 317, 325, 106 S.Ct. 2548, 2554 (1986). However, the party adverse to a motion for  
6 summary judgment cannot simply deny the pleadings of the movant; the adverse  
7 party must designate “specific facts showing that there is a genuine issue for trial.”  
8 Fed.R.Civ.P. 56(e). More precisely, “[i]t is not enough that the nonmoving party  
9 point to disputed facts; rather, they must make a sufficient showing to establish the  
10 existence of a triable issue of material fact as to an element essential to the moving  
11 party’s case.” *In re Powerburst Corporation*, 154 B.R. 307, 309-310  
12 (Bankr.E.D.Cal. 1993), citing *Lake Nacimiento Ranch v. San Luis Obispo County*,  
13 830 F.2d 977, 979-980 (9<sup>th</sup> Cir.1987), cert. denied 488 U.S. 827, 109 S.Ct. 79, 102  
14 L.Ed.2d 55 (1988).

15 The parties may use summary judgment to dispose of all or any part thereof  
16 the opponents claim or cross claim. Fed.R.Civ.P. 56(a) & (b). The court may sua  
17 sponte grant summary judgment in favor of a nonmoving party as long as the  
18 moving party was provided a “full and fair opportunity to ventilate the issues in the  
19 motion.” *United States v. Real Property Located at 25445 via Dona Christa,*  
20 *Valencia California*, 138 F.3d 403, 407, n.4 (9th Cir. 1998), citing *Cool Fuel, Inc. v.*  
21 *Connett*, 685 F.2d 309, 311 (9th Cir. 1982). The filing of a formal cross-motion is  
22 not necessary. *Local 453, International Union of Electrical, Radio & Machine*  
23 *Workers, AFL-CIO v. Otis Elevator Company*, 314 F.2d 25, 27 (2d Cir. 1963).

#### 24 **Analysis.**

#### 25 **The Garretts’ Personal Liability.**

26 There is no dispute that the First Guaranty, which the Garretts signed on  
27 behalf of the Garrett Trust to guarantee the \$500,000 Loan, was limited to that  
28 obligation. It was not a “continuing guaranty” within the meaning of Cal.Civ.Code

1 § 2814. GBI and the Bank agreed twice to renew and extend the terms and  
2 substantially increase the amount of GBI's obligation, but the Garretts were not part  
3 of those negotiations and their signatures on the Second and Third Guaranties were  
4 forged by Roy R. The substantial increase in GBI's debt under the \$650,000 and  
5 \$750,000 Loans did not fall within the scope of a "renewal, extension, modification,  
6 and substitution" of the \$500,000 Loan which is all the Garretts consented to when  
7 they signed the First Guaranty. Under applicable California law, the Bank's  
8 agreement to substantially increase the amount of GBI's debt, without the  
9 knowledge or consent of the Garretts, fully exonerated the Garrett Trust from any  
10 further liability under the First Guaranty. Cal.Civ.Code § 2819.<sup>4</sup> That exoneration  
11 became effective upon GBI's execution of the \$650,000 Loan without regard to  
12 subsequent events that took place in March 2008. The Garrett Trust was not bound  
13 by the Second and Third Guaranties because the Garretts did not sign them.

14 When the Garretts met with the Bank in early March 2008 to discuss the  
15 Forbearance Agreement, neither they nor the Garrett Trust had any liability to the  
16 Bank. It is undisputed that the Garretts had no knowledge of the \$650,000 and  
17 \$750,000 Loans prior to that meeting. It is undisputed that prior to that meeting, the  
18 Garretts had no knowledge of the Second and Third Guaranties, or that Roy R. had  
19 signed their names to those documents. The Bank contends that by signing the  
20 Forbearance Agreement, which referenced the \$750,000 Loan documents and the  
21 Third Guaranty, the Garretts implicitly ratified Roy R.'s forgery of their names on  
22  
23

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24 <sup>4</sup>Civil Code § 2919 states in pertinent part:  
25

26 A surety is exonerated, except so far as he or she may be indemnified  
27 by the principal, if by any act of the creditor, without the consent of  
28 the surety the original obligation of the principal is altered in any  
respect, or the remedies or rights of the creditor against the principal,  
in respect thereto, in any way impaired or suspended.

1 the Third Guaranty and retroactively gave Roy R. authority to do so.<sup>5</sup> However,  
2 ratification involves numerous questions of fact which cannot be decided in this  
3 motion for summary judgment. Under California law, implied ratification of an  
4 agent's act can be made by accepting or retaining the benefit of the act with notice  
5 of the act. *Ach v. Finkelstein*, 264 Cal.App.2d 667, 677 (1968). Ordinarily, "[a]  
6 principal must have knowledge of material facts at the time of the alleged  
7 ratification in order to be held liable for the unauthorized act of another." *Chastain*  
8 *v. Belmont*, 43 Cal.2d 45, 58 (1954).

9 Here, Roy R. was not acting as an agent, or purported agent, for the Garretts  
10 when he signed their names to the Third Guaranty. The Bank must therefore show  
11 that the Garretts, in executing the Forbearance Agreement and the Trust Deeds, had  
12 full knowledge that Roy R. had forged their names to the Third Guaranty and  
13 accepted what Roy R. had done. See *Gates v. Bank of America Nat. Trust &*  
14 *Savings Ass'n*, 120 Cal.App.2d 571, 547-48 (1953), citing *Ralphs v. Hensler*, 97 Cal  
15 296, 302-03 (1893).

16 The Bank also contends that the Garretts are estopped by their execution of  
17 the Forbearance Agreement from denying that the Garrett Trust has any personal  
18 liability to the Bank. "Estoppel has been invoked where one has been induced by  
19 the dilatory or negligent conduct of another to refrain from taking such action as lay  
20 in his power to retrieve his position and save himself from loss." *Reusche v.*  
21 *California Pacific Title Ins. Co.*, 231 Cal.App.2d 731, 738 (1965).

22 Estoppel is an equitable doctrine which here depends on unanswered  
23 questions and disputed facts. Perhaps the foremost unanswered question is, did the  
24 Bank know, or should the Bank have known, that the Garretts' signatures on the  
25 Second and Third Guaranties had been forged by Roy R. at the time it accepted

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26  
27 <sup>5</sup>The Bank also argued at the hearing that the Garretts expressly ratified the Third  
28 Guaranty. The court is not ruling here that the Bank cannot pursue an express ratification  
theory at trial.

1 those documents and at the time it prepared the Forbearance Agreement referencing  
2 those Guaranties? Based on the deposition testimony of Roy R., there is a triable  
3 issue of material fact as to what the Bank’s representative, Patricia Knoch, knew or  
4 should have known at the time she gave the unsigned Guaranty documents to Roy  
5 R., watched him leave the building, and accepted the “signed” documents back from  
6 him a few minutes later. Ms. Knoch did not personally witness the execution of  
7 those documents and she apparently did nothing to confirm that the Garretts were  
8 actually waiting outside the Bank and personally signed them. Did the Bank follow  
9 commercially appropriate or reasonable protocol by doing that?

10 The Bank complains about the Garretts’ lack of diligence and negligence in  
11 failing to review and inquire about the recitals in the Forbearance Agreement. The  
12 Garretts cannot be held to a higher standard of diligence and care than the Bank.  
13 Indeed, under California law, a creditor has the duty to act in the utmost good faith  
14 toward a surety. *Ely v. Liscomb*, 24 Cal.App.224, 228 (1914). If the Bank knew or  
15 should have known about the forgeries and failed to tell the Garretts at anytime after  
16 it accepted the forged documents from Roy R., then it would be very difficult for a  
17 court to find in favor of the Bank on its estoppel and ratification theories.

18 In summary, the Garrett Trust was exonerated from the First Guaranty and  
19 the Garretts did not sign the Second and Third Guaranties. The Forbearance  
20 Agreement and the Trust Deeds do not constitute a new contractual personal  
21 guaranty of the GBI debt. The court is persuaded that neither the Garretts, nor the  
22 Garrett Trust, have any personal liability to the Bank for any of the GBI debt unless  
23 the Bank can prevail on its ratification and estoppel claims and retroactively bind  
24 the Garrett Trust to the terms of the Third Guaranty. The Bank’s right to relief  
25 involves numerous disputed issues of material fact and cannot be resolved on this  
26 record by summary judgment. The Bank will bear the burden of proof on the  
27 ratification and estoppel claims.

28 ///

1 **The Bank's Security Interest in the Garrett Properties.**

2           Again, there is no dispute that the Garretts executed the Forbearance  
3 Agreement and the Trust Deeds on behalf of the Garrett Trust. Based on the  
4 language in those documents, the court is persuaded that those documents, on their  
5 face, are sufficient to create liens against the Garrett Properties which secure all of  
6 GBI's debt to the Bank. Notably, the Trust Deeds secure only GBI's obligations to  
7 the Bank. They make no reference to any of the Guaranties, so the  
8 forgery/ratification/estoppel issues, while relevant, are not determinative of the  
9 affect of the Trust Deeds. By hypothecating its property to secure the debts of GBI,  
10 the Garrett Trust became a surety under California law. Cal.Civ.Code § 2787. The  
11 Garrett Trust is entitled to pursue all of the defenses and remedies available to a  
12 surety under applicable law. The Garrett Trust was exonerated from the First  
13 Guaranty and none of the waivers in the Second and Third Guaranties have any  
14 application unless the Bank can establish that, under the theories discussed above,  
15 the Garrett Trust should be bound by the terms of those documents.

16           The Garretts have pled a claim to rescind or cancel the Trust Deeds based on  
17 various theories, including fraud and duress, and failure of consideration. "Whether  
18 or not there is a sufficient consideration to support a contract is always a question of  
19 fact." *In re Thomson's Estate*, 165 Cal. 290, 296 (Cal. 1913). Pursuant to  
20 Cal.Civ.Code § 2792, a forbearance agreement, such as the one at hand, "not having  
21 been entered into concurrently with the original obligation, requires a consideration  
22 to support it." *Id.* The Bank disputes the Garretts' right to relief under any theory.  
23 Again, those claims involve numerous factual issues which cannot be decided on  
24 this record by summary judgment.

25           The Bank's liens against the Garrett Properties are subject to the Garrett  
26 Trust's right to rescind or cancel the Trust Deeds under applicable law. Under  
27 California law, deeds of trust may be subject to cancellation or rescission on various  
28 grounds, including fraudulent misrepresentation. *Security-First Nat. Bank of Los*

1 *Angeles v. Earp*, 19 Cal.2d 774 (1942). Under Cal.Civ.Code § 1689(b)(1), contracts  
2 may be subject to rescission because consent was made by mistake, or obtained  
3 through duress, menace, fraud, or undue influence. *Donovan v. RRL Corp.* 26  
4 Cal.4th 261 (2001). The Garretts will bear the burden of proof on their  
5 rescission/cancellation claims.

6 **Conspiracy to Defraud An Elder Abuse.**

7 The Garretts allege in the second and fifth claims for relief that the Bank  
8 conspired to perpetrate a fraud on them and that the Bank committed elder abuse  
9 within the meaning of applicable state law. The Bank denies the allegations in the  
10 second and fifth claims for relief. The Motion with regard to those claims is  
11 premised on the assumption that the Bank will prevail on its ratification and  
12 estoppel claims. These issues cannot be decided without an evidentiary hearing.

13 **Conclusion.**

14 Based on the foregoing, the Bank's Motion for summary adjudication of the  
15 undisputed facts listed above will be granted. There appears to be no triable issue as  
16 to any of those facts.

17 As to the legal issues discussed above, the court is persuaded that as of early  
18 March 2008, when the Garretts met with the Bank to discuss GBI's default, neither  
19 the Garretts nor the Garrett Trust had any personal liability to the Bank and the  
20 Bank had no lien against the Garrett Properties. There is no triable issue of material  
21 fact as to the relevant events which preceded that meeting and the court can make  
22 that determination as a matter of law.

23 However, the relationship between the Garrett Trust and the Bank may have  
24 changed as a result of their meeting. The Garrett Trust will not be personally liable  
25 for GBI's debt to the Bank unless the Bank can prove, based on its ratification and  
26 estoppel theories, that the Garrett Trust should be bound by the terms of the Third  
27 Guaranty. There is no triable issue of material fact that the Garretts signed the  
28 Forbearance Agreement and the Trust Deeds on behalf of the Garrett Trust. By

1 signing the Trust Deeds, the Garretts gave the Bank liens against the Garrett  
2 Properties to secure the outstanding GBI debt. In so doing, the Garrett Trust  
3 became a statutory surety under applicable law. The Garrett Properties will not be  
4 free and clear of the Bank's liens unless the Garretts can prove a basis to set aside  
5 the Trust Deeds under applicable law.

6 Dated: April 9, 2010

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9 /s/ W. Richard Lee  
10 W. Richard Lee  
11 United States Bankruptcy Judge  
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