Nos. 20-15589, 20-16021

United States Court of Appeals
for the Ninth Circuit

LREP ARIZONA LLC, a Texas limited liability company,

Plaintiff - Appellee,

v.

597 BROADWAY REALTY LP, a New Jersey limited partnership; et al.,

Defendants - Appellants,

On Appeal from the United States District Court for the District of Arizona, Case No. 2:16-cv-04015-DLR

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee LREP Arizona, LLC, has no parent companies and no publicly held company has a 10% or greater ownership interest in it.

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INTRODUCTION

This appeal is part of a yearslong unsuccessful effort to avoid the consequences of a settlement agreement. The Opening Brief weaves a story of complex deception—where Appellee LREP Arizona LLC conspired to loan millions and not be repaid—over which Appellants insist there should be more litigation. As the district court concluded, however, although "much ink has been spilled in this case, the outcome is straightforward." 1-ER-20.

The Appellants ("Guarantors") gave guaranties to induce LREP to loan $4 million to Guarantors' business partners. As security, the borrower put up a parcel of land (the "Property"). Guarantors—sophisticated business people—backed up the value of their guaranty by showing off a $25+ million net worth and asked that upon default LREP collect first against the Property before seeking payment from them. After borrower defaulted, LREP foreclosed on the Property but the sale left a substantial deficiency.

LREP turned to the Guarantors for payment and threatened to sue. To avoid the lawsuit and for other concessions, Guarantors negotiated a settlement agreement—called the Forbearance and Consent Agreement ("Forbearance")—which included a pre-packaged consent judgment. In case of default, Guarantors agreed "to admit all of the allegations of the Lawsuit, waive any defenses thereto,

and consent to the entry of judgment." SER-42. They signed a stipulated motion for judgment. SER-55-61.

Many months later, and after making some payments and reconfirming their waivers and obligation to pay, Guarantors decided they wanted out of their agreement and alleged fraudulent inducement. At bottom, their theory is that they should be excused from paying because LREP allegedly let them believe they had "zero risk." They allege they would not have signed the guaranties (or the later Forbearance settlement) if LREP had not misrepresented the value of the Property and concealed that LREP did not expect the borrower to pay the loan. They say they would not have signed the Forbearance if LREP had revealed to them that the guaranties were unenforceable.

But Guarantors released those claims when they signed the Forbearance. The agreement states the facts they now complain they were ignorant of: the Property sold for $315,000, the borrower defaulted, and LREP would sue for payment. If they had been misled beforehand, they knew the truth at the time they executed the Forbearance, waived "any defenses," and signed a stipulated judgment.

Guarantors cannot assert fraud by claiming reliance on representations or omissions that "are shown by facts within [their] observation to be so patently and obviously false that [they] must have closed [their] eyes to avoid discovery of the truth." *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1031 (9th Cir. 1992). The

district court therefore correctly dismissed Guarantors' claims and enforced the Forbearance.

The Opening Brief raises several arguments designed to prolong litigation and delay collection. None has merit.

Guarantors demand an evidentiary hearing (or full-blown discovery and a jury trial) but a court only needs to hold an evidentiary hearing before enforcing a settlement agreement if there is a material dispute about the existence or terms of the agreement. Neither is genuinely disputed here. Guarantors' fraud claims are waived, and they fail to assert a viable claim regarding the Forbearance itself.

Furthermore, the Forbearance aside, the district court could have dismissed Guarantors' counterclaims for multiple other reasons it never had to reach, including that Guarantors cannot plead facts to establish multiple elements of fraud. This Court may affirm on these alternate grounds.

Finally, Guarantors claim that their agreement to toll the limitations period for deficiency claims is unenforceable. Guarantors' position is wrong. It would require this Court to disregard the Arizona Supreme Court's decision that anti-deficiency protections are waivable after a trustee's sale, *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 341 P.3d 452, 457 (Ariz. 2014), and a "broad consensus" nationwide holding "that [statutes of repose] *can* be expressly waived." *U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 886 (11th Cir. 2017).

JURISDICTION

Appellee agrees with Appellants' statement of jurisdiction.

ISSUES PRESENTED

1. In the Forbearance, Guarantors agreed to "admit all of the allegations of the" complaint, "waive any defenses thereto, and consent to entry of judgment against them." Guarantors, however, denied allegations in the complaint and raised defenses in the form of counterclaims. Did the court err when it dismissed the counterclaims as waived and enforced the Forbearance?

2. A district court has authority to summarily enforce a settlement agreement. Having dismissed the counterclaims, the district court enforced the terms of the Forbearance by entering the stipulated judgment for LREP. Did the district court abuse its discretion to summarily enforce the Forbearance?

3. LREP argued other reasons why the counterclaims should be dismissed as a matter of law. Should the Court affirm the judgment for other reasons supported in the record?

4. Did the district court err when it held the Forbearance's express tolling provision is enforceable?

STATEMENT OF THE FACTS AND CASE

I. Appellants guarantee a $4 million, high-risk, short-term business loan.

Appellants are Guarantors of a $4 million loan made by LREP to Guarantors' business partners, non-party borrower G Companies Management, LLC. Guarantors are sophisticated. Appellant Siddique was the Assistant Director of Banking Supervision at the Federal Reserve Board and Chief of Regulatory Affairs and Capital Adequacy for M&T Bank. SER-39. Appellant Lee claimed he had a net worth of more than $25 million, including an impressive portfolio of business and real estate interests, with some held in the Appellant 597 Broadway Realty, LP. SER-105-06.

Guarantors and the borrower had a preexisting business relationship before they sought a loan from LREP. They were obtaining financing for a beef and cattle business together, and Guarantors contributed $3 million for the venture. SER-17, ¶¶7-8. The Guarantors financed their $3 million by borrowing it from Horton, an Arizona resident. *Id*. ¶ 9. Apparently, the other financing for the business venture fell through and Horton demanded his money back. *Id*. ¶¶ 9-10.

With a lawsuit from Horton imminent, the Guarantors allege that their business partners convinced them to repay $1 million and borrow the rest from someone else both to repay Horton's money and to add more money to their joint

business interests.[1] *Id*. ¶¶ 10-11; SER-66; SER-134, ¶¶ 19-20. The borrower on the loan was their business partner, G Companies. For collateral, the partners offered a 63-acre parcel of coastal property in California and Guarantors offered personal guaranties (referred to in the singular as the "Guaranty"), backed up by their impressive financial statement. SER-105-06.

A. Key terms of the loan and guaranties.

The loan and Guaranty's terms reflect that this was a short-term, high-risk business loan. It has a six month term, interest rate of 36%, and a default rate of 46%. SER-66, § 1.5; SER113, § 3. It contains an "in reliance" clause, stating that that LREP made the loan because of the pledged Property and personal guaranties. SER-65, Recitals; SER105-06.

The Guaranty includes an inclusive integration clause and a comprehensive waiver of surety rights (including a waiver of "recourse to any guaranty or suretyship defenses"). SER-102-03, §§ 9, 18. The Guaranty also has a "no reliance" provision within the "Inducement of Lender" section, warranting that Guarantors were not relying on LREP for knowledge about the borrower and were fully informed about its financial wherewithal:

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[1] Guarantors contend (at 11) that their partners "conspired with LREP to defraud [Guarantors] into paying Horton $1 million." This is incorrect. Their brief cites the counterclaim allegation for this assertion, but it states that their partners—not LREP—"convinced [Guarantors] to pay Horton $1 million, and to obtain a new loan to pay off" the rest to Horton. 2-ER-227, ¶ 11.

> Guarantor represents and warrants that Guarantor is and will continue to be **fully informed** about all aspects of the financial condition and business affairs of Borrower . . . and Guarantor . . . **waives and fully discharges Lender from any and all obligations to communicate to Guarantor** any information whatsoever regarding the Indebtedness, Borrower, or the financial condition, business affairs or otherwise of Borrower.

SER-102, § 22 (emphasis added).

The Guaranty also sets forth a "Sequence of Lender's Remedies," in which LREP promises to "first pursue its remedies against Borrower (e.g., by the execution against the Property) and shall endeavor to satisfy the Indebtedness from the sale of the Property." SER-100, § 8. Thus, only after foreclosing on the Property, and "[t]o the extent that Lender is not fully satisfied from the proceeds of the sale of the Property . . . Lender may then seek its remedies against Guarantor without further delay." *Id.*

II. The borrower defaults, prompting LREP to foreclose on the Property.

The loan closed on October 7, 2015. SER-19, ¶ 17. At closing, like any refinancing, a large portion of the funds went directly to repay Horton. Another portion went to pre-pay three months of interest and other closing costs. The remaining cash – approximately $1.3 million – went to the borrower directly. *Id.*, ¶ 20. Apparently, the borrowers and Guarantors planned to use that new cash to finance a diamond trading business. SER-134, ¶ 20.

The borrower defaulted in February 2016. Although the Opening Brief (at 2) asserts that LREP "never intended to collect from the borrower," LREP promptly foreclosed on the Property. ECF-1-at-3, ¶ 8-9; SER-13, ¶ 8-9. The Property was publicly auctioned by the Orange County Superior Court on July 8, 2016. *Id*. Unfortunately, there was little interest in the Property, and LREP acquired it for a credit bid of $315,000. SER-20, ¶ 28.

III. After LREP threatens suit, Guarantors and LREP execute the Forbearance.

After the foreclosure, LREP exercised its right to pursue enforcement of the guaranties for the remaining balance and "notified Guarantors that it intend[ed] to file a lawsuit against the Guarantors." SER-40; SER-20, ¶¶ 29-32. In response, Guarantors sought to delay the lawsuit while they obtained financing for repayment. [*Id*.] The parties then negotiated the July 14, 2016, Forbearance and Consent Agreement. SER-40-46; SER-20, ¶ 29.

In the Forbearance's "Recitals," the parties state their agreed understanding of the facts to that point. Among other things, the Recitals state that:

- LREP had "foreclosed the Property . . . prior to enforcing its rights for repayments from the Guarantors." SER-40.
- The "Property was sold . . . for the sum of $315,000.00." *Id*.
- The remaining indebtedness was $4,626,487.32, with interest accruing at the default interest rate. *Id*.

- LREP "has exhausted all of its obligations under the Loan and Guarantees" to seek payment from Guarantors and that LREP "made a proper demand on the Guarantors for payment of the Deficiency." *Id.*
- LREP "notified Guarantors that it intends to file a lawsuit against the Guarantors to enforce its right," and the complaint was attached to the Forbearance. *Id.*
- That, "in order to forebear the filing of the lawsuit, Guarantors have agreed to enter into this Agreement." *Id.*

Guarantors, sophisticated business people, avoided the filing of a lawsuit against for at least thirty days, received the right to a $33,333.33 discount on the amount owed (a 10% interest waiver), avoided the potential litigation costs that would be assessed against them, and obtained a right to a refund if LREP collected additional amounts from the borrower. SER-40-42, §§ 1, 6-7. In exchange, Guarantors agreed to pay $150,000 toward the balance during the forbearance period and the remaining balance by the end of the term. *Id.* §§ 3-4.[2]

Guarantors also agreed to settle the pending litigation over the Guaranty and agreed that if they defaulted on this new agreement, then LREP "shall file the Lawsuit in the form attached" to the Forbearance and "Guarantors consent to the

[2] Guarantors repeatedly tell this Court (at 8, 9, 13, 46) that they paid a $2 million "forbearance fee" in exchange for the Forbearance. This is not correct. The amount paid was not a fee, it was a payment on the loan balance owed, and it was $150,000, not $2 million. *See* SER-41, § 3 ("initial payment" is "applied against the Deficiency").

filing of the Stipulated Motion for Entry of Judgment and the Order of Judgment in the form" attached to the Forbearance. SER-42, § 9.

To avoid doubt, the Forbearance went on to state: "For the sake of clarity, Guarantors agree to **admit all of the allegations** of the Lawsuit, **waive any defenses thereto**, and **consent to the entry of judgment** against them upon Guarantor's breach [of] their obligations to timely make" payments. *Id*. (emphasis added). The Forbearance included the stipulated judgment, signed by all parties. *Id.*; SER-55-61.

Guarantors also agreed to "waive any defense under the deficiency laws to the collection of the Indebtedness from Guarantors" and "toll . . . the Lender's legal requirement to commence an action to recover balance of the Indebtedness. . . including, but not limited to the requirements set forth in A.R.S. § 33-814." SER-42, § 2. The Forbearance also allowed LREP to extend the term for an additional fifteen days upon request. SER-40, 42, §§1, 8.

IV. Guarantors pay some debt, get more extensions from LREP, and confirm two more times that they waive any defenses.

Between July 14 and July 27, Guarantors made the required initial payments of $150,000 and at Guarantors' request LREP agreed to grant the fifteen-day extension to August 30 to pay the balance. SER-27; SER-62-63; SER-10, ¶ 6. Under the terms of that extension, the parties agreed that all other terms in the Forbearance

"remain in full force and effect, including, but not limited to, the tolling provisions." SER-62-63.

By the end of the extension, Guarantors failed to pay anything more, and on November 18, 2016, LREP filed the pre-packaged complaint and stipulated consent judgment. ECF 1, 3-ER-396. Despite their breach, LREP continued to work with Guarantors and in March 2017, the parties negotiated the "Consent and Payment Agreement" (the "Consent") to allow Guarantors to mortgage certain properties to make a $1.7 million payment on the loan.[3] SER-28; SER-33-37; ECF 11; SER-10. In an act of good faith, LREP again gave Guarantors the right to a refund if their partners paid the loan and a separate right to purchase the Property. SER-33-37.

The Consent marked the **third** time Guarantors recommitted to their settlement and waiver of any defenses to payment of the indebtedness: "Guarantors agree that in consideration for the benefits of this Agreement, Guarantors waive any defenses to their obligation to make payment." SER-35, § 10.

V. Guarantors refuse to honor the Forbearance and allege counterclaims.

Guarantors made no payments after the Consent. Breaching the Forbearance, Guarantors refused to "admit all allegations" and "consent to the entry of judgment."

[3] Guarantors' brief also claims (at 8, 13, 46) this was a "forbearance fee." Their own allegations confirm it was a payment on the loan balance, and the judgment entered here credited it as such. *See* SER-20, ¶ 30 (describing payment as made "purportedly under the . . . guaranties"); SER-10, ¶ 6.d.

ECF 99 at 3. Instead, they "filed an answer and brought counterclaims for restitution, unjust enrichment, and fraud in the inducement." *Id.*; SER-12.

Guarantors muddle several allegations together to describe their fraud theory. In the end, they all revolve around one assertion: Guarantors should be saved because they "thought that they were incurring zero risk." ECF 74 at 16.

A. Fraud Theory 1: The Property Value

The Guarantor's primary allegation is that LREP "exaggerated the value of the Property," because LREP "knew" that "the Property was not worth very much," leaving Guarantors exposed on what they claim should have been a superfluous Guaranty. *See* SER-18, ¶¶ 45-46. To get there, Guarantors allege the borrower (**not** LREP) provided Guarantors with an "appraisal" and represented the Property was worth $27 million. SER-18, ¶ 12. As to LREP, Guarantors allege that LREP "inspect[ed] the Property" and its agent Karen Blandini represented "that the Property was worth as much as $27 million, and was conservatively worth at least $10 million." SER-18-19, ¶¶ 14-16. Guarantors do not allege that Blandini was herself an appraiser, has expertise in land valuation, or was giving anything other than a layperson's opinion.

B. Fraud Theory 2: No Intent to Pay

Guarantor's related theory is that LREP knew at the time of the loan that the borrower had no intention to repay the loan. OB at 12-13. The Opening Brief cites

paragraphs 12-16 and 24 of the counterclaims to support this conclusion. *See* OB at 13. Those paragraphs allege that:

- The borrower represented that the Property was worth $27 million and that "upon information and belief" LREP knew this was false (¶ 12);
- The borrower and LREP agreed to "non-recourse" loans, other than the recourse against the Property and Guarantors (¶ 13);
- LREP visited the Property in August 2015 and met with the borrower (¶¶ 14-15);
- LREP's representative, Blandini, told Guarantors that the property was worth as much $10—$27 million and that they should have "no concerns" about guaranties (¶ 16).

Paragraph 24 concludes that LREP did not expect the borrower to repay the loan but offers no factual allegations for that conclusion. SER-19.

Finally, Guarantors allege that LREP "cajoled" Guarantors into the Forbearance, and into making payments toward the indebtedness. For support, the Opening Brief cites (at 13) paragraphs ¶¶ 29-30 of the counterclaims, which merely restate those assertions.

C. LREP moves to dismiss the counterclaims, discovery proceeds, and Guarantors ask to amend their counterclaims.

LREP moved to dismiss the counterclaims because Guarantors are bound by their settlement agreement, including the signed stipulation for entry of judgment. LREP also showed how the fraud claims failed as a matter of law. 2-ER-204.

While LREP's motion was pending, the parties engaged in extensive initial discovery, including as part of the Mandatory Initial Discovery Program in the

District of Arizona. *See* General Order 17-08 (D. Ariz.) (requiring robust early disclosure); *see e.g.*, ECF 72-73, 75-76, 83-84, 87-88 (notices of service of discovery).

While LREP's motion was pending, Guarantors sought leave to amend the counterclaims and add Blandini, Michael Allen and their companies A&B Capital Investments, LLC and KAMCO International LLC. 2-ER-170. Armed with emails LREP disclosed in discovery, the proposed amendment would have added allegations to try to bolster Guarantors' claims that they should not be held to the Forbearance, including that Blandini once emailed Guarantors that they were KAMCO "clients"; KAMCO was their fiduciary because the same email said that KAMCO would seek the "best possible" terms; and KAMCO did not disclose its financial relationship with LREP. *Id.* ¶¶ 17-18, 23. Guarantors also wanted to add allegations that KAMCO used their alleged "fiduciary" relationship to pressure Guarantors into signing the Forbearance and that an LREP principal said in emails that the borrower's $27 million appraisal was a "joke" and "bullshit." *Id.* ¶ 42; *see* OB at 17 (discussing emails).

D. The district court dismisses the counterclaims.

The district court granted LREP's motion to dismiss and denied leave to amend. 1-ER-15. The court reasoned that a "forbearance agreement of the type entered into by the parties is essentially a pre-litigation settlement of an impending

legal dispute, which the Court may enforce." 1-ER-18. The district court explained that it was "prepared to . . . enter the stipulated judgment once it obtained jurisdiction over Defendants through proper service of process. But for Defendants' disregard of their waivers, this litigation probably would have long since been over." *Id*.

The district court rejected Guarantors' arguments to avoid their waivers, explaining that the "allegations in the counterclaims make clear that Defendants entered into the Forbearance Agreement after they knew that the Property" sold for $315,000 at auction, and "knew or should have known that Plaintiff, [the borrower], and/or their agents might have misrepresented the value of the Property." *Id*. Consequently, regardless of the facts surrounding the signing of the Guaranty, Guarantors could "not avoid their obligations and waivers under the separately negotiated and executed Forbearance Agreement when the fundamental factual basis for the alleged fraud either was known or should have been known." *Id*.

Finally, the district court rejected the Guarantors' argument that their agreement to toll and waive the 90-day limitations period in A.R.S. § 33-814 is unenforceable. The district court concluded that (1) Arizona law permits a guarantor to waive the protections of § 33-814 *after* a trustee's sale; and (2) even if § 33-814(A) established a statute of repose, parties may nevertheless "waive or agree to toll such periods through an *express* agreement." *Id*. at 6.

E. The court enters judgment after rejecting Guarantors' motion for reconsideration.

Following the dismissal, Guarantors moved for reconsideration and LREP renewed its motion for entry of the stipulated judgment. SER-3; 2-ER-138. Denying the reconsideration motion, the district court explained, "[i]n entering into the Forbearance agreement, [Guarantors] agreed not to contest the allegations against them and consented to the entry of judgement. These waivers were clearly designed to avoid embroiling [LREP] in the type of protracted litigation that regrettably has occurred here nonetheless." 1-ER-12. The court concluded, "[t]hough for years now [Guarantors] have steadfastly refused to abide by the Forbearance Agreement, the Court will enforce it." *Id*.

VI. Meanwhile, Guarantors were suing the borrower in California, based on contradictory allegations.

While Guarantors were claiming that LREP had duped them, they were also suing the borrower in California state court. SER-128.[4] The Guarantors' allegations are worth noting because they directly contradict their allegations in this case. They allege:

- Guarantors "were reluctant to guaranty the loan, but did so after [the borrower defendants] assured them that the [Property] was worth $27

[4] LREP asked the district court to take judicial notice of Guarantors' contradictory complaint in California, which this court also has authority to do. *See Frlekin v. Apple, Inc.*, 979 F.3d 639 n.1 (9th Cir. 2020) (court "may take judicial notice of court filings and other matters of public record") (citation omitted).

million," including by providing the Guarantors with an appraisal. *Id.* at 7, ¶ 19.

- The borrower defendants "convinced" the Guarantors that the $1.3 million cash portion of the "LREP Loan should be used for a new diamond trading business that, according to [the borrower defendants], would quickly generate revenue to pay off the LREP Loan." *Id*. at 7, ¶ 20.

- "To protect themselves in the event of a [borrower] default on the LREP Loan, [the Guarantors] entered into an agreement with [the borrower defendants] that detailed how the parties would pay off the LREP Loan in the event of default," including what to do "[i]f the land did not pay off the loan." *Id*. at 7-8, ¶ 21 & at 40-41.

Guarantors' suit against the borrower for breach of this side agreement, among other claims, is still pending.

SUMMARY OF ARGUMENT

The Court should affirm the district court's judgment enforcing the Forbearance. Its clear terms prohibit Guarantors' alleged counterclaims and should be enforced as written. Moreover, the district court correctly held that Guarantors have failed to allege a viable claim for fraudulent inducement of the Forbearance.

This Court may also affirm on other grounds the district court did not reach. The record shows that Guarantors' counterclaims alleging fraudulent inducement fail as a matter of law regardless of the Forbearance.

Finally, the Court should affirm the district court's decision that the post-foreclosure waiver and tolling of Guarantors' defense under A.R.S. § 33-814 is valid and enforceable.

ARGUMENT

I. The district correctly dismissed Guarantors' claim that they should not be bound by the Forbearance.

The district court correctly dismissed Guarantors' counterclaims and enforced the Forbearance. This Court reviews the grant of a motion to dismiss de novo. *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1053 (9th Cir. 2011). The Court must "inquire whether the . . . factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Id*. at 1054 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). When a party's claims are grounded in fraud, the allegations in the counterclaim must satisfy the heightened particularity pleading standard of Rule 9(b) and must do so with "plausible allegations" under *Iqbal*. *Id*. Finally, denial of leave to amend is reviewed for abuse of discretion. *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1114 (9th Cir. 2014).

A. The Forbearance waives Guarantors' counterclaims, including the fraud theories.

The district court correctly concluded that the Guarantors waived their counterclaims in the Forbearance Agreement. 1-ER-18-19.

1. The Forbearance's clear and unambiguous terms waive Guarantors' new claims.

The Forbearance, like any settlement agreement, is a contract subject to familiar rules of contract interpretation. *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). A court's "purpose in interpreting a contract is to ascertain and enforce

the parties' intent." *ELM Ret. Ctr., LP v. Callaway*, 246 P.3d 938, 941 (Ariz. Ct. App. 2010) (citation omitted). To determine intent, a court "look[s] to the plain meaning of the words as viewed in the context of the contract as a whole." *Id*. at 941-42 (internal quotation marks and citation omitted). When those terms are "plain and unambiguous, [the contract's] interpretation is a question of law for the court" and extrinsic evidence is precluded. *Id*. (internal quotation marks and citation omitted).

Here the text and contract as a whole show that the Forbearance contains an enforceable express waiver barring Guarantors' counterclaims. A waiver is "the express, voluntary, intentional relinquishment of a known right." *Russo v. Barger*, 366 P.3d 577, 580 (Ariz. Ct. App. 2016) (internal quotation marks and citation omitted).

The text of the waiver provisions is comprehensive and unequivocal: Guarantors agreed to "admit all of the allegations of the Lawsuit, waive any defenses thereto, and consent to entry of judgment against them." SER-42, § 9. The Guaranty agreed to expressly waive "any defense under the deficiency laws to the collection of the Indebtedness" and that the Forbearance was the "entire agreement between the Parties, and that they shall not be bound by any terms, statements, conditions or representations, oral or written, express or implied not herein contained." SER-41, § 2; SER-43, § 13.

Further, the Forbearance's Recitals section conspicuously describes the disputed claims, the exact amount owed following the sale of the Property, the borrower defaulted, LREP "exhausted all of its obligations" before seeking payment from Guarantors, Guarantors were being called to pay, and LREP "notified Guarantors that it intends to file a lawsuit against the Guarantors to enforce its right in the form attached" to the Forbearance. SER-40.

With these Recitals, the text unambiguously shows that Guarantors had actual notice of the very facts about which they claim ignorance to support their fraud claims. By agreeing to the Forbearance, the Guarantors have expressly, voluntarily, and intentionally waived whatever claim they may have had if they were misled regarding those same facts. *See Mackey v. Philzona Petroleum Co.*, 378 P.2d 906, 908-09 (Ariz. 1963) (explaining that under Arizona law the "accepted principle is that the power of avoidance for fraud . . . is lost if the injured party, after having acquired knowledge, actual or constructive, of the fraud, manifests to the other party an intention to affirm" even if the party is not aware they could rescind the agreement); *cf. Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504, 512 (9th Cir. 1957) (dismissing claim when, "after full knowledge of the fraud or deceit, he goes forward and executes [a contract] notwithstanding such fraud").

With actual notice, the district court correctly found that Guarantors waived their fraud counterclaims. 1-ER-19-20.[5] And if the district court wanted to pile on, it needed only to look to the Consent signed eight months later where Guarantors for the **third** time confirmed that they waived any defense to payment of the indebtedness, and that they were not relying on any "terms, statements, conditions or representations, oral or written, express or implied," other than those in the written, signed agreements. SER-33-37.

2. Guarantors' arguments cannot overcome the Forbearance's plain meaning.

Guarantors' arguments to the contrary fail. *See* OB at 51-57 (arguing that Forbearance does not waive their "then unknown" claims). Guarantors can only point to general rules: that the meaning of a release or waiver turns on the "intent" of the parties, that a release generally does not waive claims that are "not within the contemplation of the parties when the settlement was agreed upon," and that intent is a question of fact. *Id*. at 53 (quoting *Dansby v. Buck*, 373 P.2d 1 (Ariz. 1962)).

But the Opening Brief does not conduct an examination of the text of the Forbearance as it must (or the later Consent, an agreement they ignore). As shown above, it was "within the contemplation of the parties" to waive *any* defenses,

[5] In addition, the waivers explicitly eliminated the various defenses to the Guaranty that Guarantors tried to raise below, such as unconscionability, lack of consideration, or any defense arising under § 33-814. Aside from the limitations defense under § 33-814 (*see* below, § IV), Guarantors no longer argue otherwise.

including those based on "representations, oral or written, express or implied," that are inconsistent with the facts laid out in the Forbearance itself. SER-43, § 13.

Moreover, Guarantors cannot use extrinsic evidence to call that clear intent into question (or compel an unnecessary evidentiary hearing prior to dismissal). *ELM Ret. Ctr.*, 246 P.3d at 942 (interpretation of "plain and unambiguous" terms is a question of law for the court); *Lattin v. Shamrock Materials LLC*, No. 1 CA-CV 19-0761, 2020 WL 6140626, at *3 (Ariz. Ct. App. Oct. 20, 2020) (refusing to consider extrinsic evidence party insisted supported "differing interpretations" because "Arizona courts will not consider parol evidence when interpreting a contract unless the contract's terms are 'reasonably susceptible' to the movant's alternative interpretation"); *see also Wojciechowski v. Kohlberg Ventures, LLC*, 923 F.3d 685, 690 (9th Cir. 2019) ("The best evidence of the parties' intent is the settlement agreement itself, as interpreted according to traditional principles of contract law" (cleaned up)).

The Opening Brief's listing of various assertions and alleged extrinsic "facts" (at 54-55) would not change the outcome in any event.

First, Guarantors' allegation that they did not know every single piece of evidence supporting their waived defenses is not the standard in weighing whether a waiver is unknowing or involuntary. If that were the law, then any post-settlement unsatisfied party could conjure some new alleged detail that was not disclosed and

unknown, and then self-servingly declare they would not have agreed. *See Facebook, Inc. v. Pac. Nw. Software*, 640 F.3d 1034, 1040 (9th Cir. 2011) ("A release in such an agreement would be useless to end litigation if it couldn't include claims arising from the settlement negotiations itself.").

Second, the inclusion of integration and "no reliance" clauses further confirms the parties' intent to resolve the claims based on the facts set forth in the Forbearance. *See Steak n Shake Enters., Inc. v. Globex Co.*, 110 F. Supp. 3d 1057, 1083-84 (D. Colo. 2015), *aff'd* 659 F. App'x 506 (10th Cir. 2016) (holding that when party "acknowledged not once but *twice*" that agreements "contain the entire agreement between the parties . . . it is simply unreasonable to continue to rely on representations after stating in writing that you are not so relying") (internal quotations omitted).

Third, none of the alleged extrinsic facts have any legal significance anyway. For example, Guarantors allege that the Forbearance was "thrust on them hastily" and that LREP paid "virtually no consideration." These are not allegations that change the meaning of the Forbearance's plain language—nor do Guarantors contend otherwise. Rather, these are distractions from the legal issues on appeal.

Moreover, the generic contention that LREP "fraudulently concealed" information that would have "alerted them to the fact that they had a claim against LREP" is also not germane to the scope of the waiver. If Guarantors had been misled

about the Property value or the amount of deficiency, they were indisputably aware of those facts at the time they signed the waivers, including that they were not relying on other representations outside the Forbearance.

Fourth, Guarantors note (at 56-57) that some courts require a "clear statement" to conclude that a release covers a claim for fraudulent inducement. They have no Arizona authority for this proposition. And if anything, the cited cases confirm that the specific language here (including recitals of the specific facts about which Guarantors claim to have been previously misled) meet the standards applicable in those jurisdictions. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, 1010-11 (9th Cir. 1999) (interpreting Delaware law, noting that "when specific recitals in a release are followed by general language, the general language is restricted by the specific recital"); *Dakota Partner, LLP v. Glopak, Inc.*, 634 N.W.2d 520, 524-25 (N.D. 2001) (analyzing contract language, not extrinsic evidence, and concluding that agreement did not waive a fraud defense when it stated only that the party would not "offset" amounts due rather than broader language, such as "a waiver of all 'defenses'").

B. The district court correctly rejected the claim that Guarantors were fraudulently induced into the Forbearance.

The Opening Brief separately argues (at 41-51) that the district court erred by dismissing its claim that the Forbearance is unenforceable because of fraudulent inducement.

As with any fraud claim, a fraudulent inducement claim requires specific allegations showing that the claimant relied on a false representation of fact, and that the claimant had the "right to rely on it," i.e., the reliance was justified. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982); *see also Meritage Homes Corp. v. Hancock*, 522 F. Supp. 2d 1203, 1218 (D. Ariz. 2007) (claim of fraudulent inducement, including one based on a failure to disclose, "requires proof of all nine of the elements of actionable fraud").

The Opening Brief argues (at 44-46) that when Guarantors signed the Forbearance: (1) they did not know LREP knew the property value would be lower than the borrower's appraisal; (2) that LREP had allegedly concealed the "nonrecourse" nature of the loan, and that borrower wouldn't repay; and (3) that LREP's agent had allegedly acted as Guarantors' fiduciary, and had an interest in the loan. Ultimately, Guarantors argue they only signed because LREP "actively concealed the factual basis for any defenses about which Appellants would otherwise have known."[6]

[6] In their pleadings, Guarantors contended that LREP concealed that "much, if not most," of the loan did not get paid in cash to the borrower. SER-22, ¶¶ 45.b, 46.b. They seem to have abandoned that allegation on appeal. Good; it is preposterous. As they explain in their allegations, most of the loan's proceeds went directly to pay off another lender who was threatening to sue. *See* SER-17, ¶¶ 8-11.

At its core, Guarantors' theory is that LREP and the putative third-party defendants "cajoled" Guarantors (sophisticated multimillionaires schooled in finance, lending, business, and real estate) into signing the Forbearance without telling Guarantors that LREP and its co-conspirators "knew" that Guarantors mistakenly thought they had "zero risk" on the loan despite (1) the loan was replacing a pre-existing loan where they were under threat of lawsuit, and (2) their Guaranty stated the opposite. The district court was correct to conclude that these allegations are meritless.

1. Guarantors' allegations about the Forbearance, even if believed, could not show justifiable reliance.

The allegations related to LREP's beliefs about the Property value, the "nonrecourse" nature of the loan, and whether the borrower would repay the loan fail because they do not establish the required justifiable reliance.

Reliance on another's representations or omissions is not justified when the party "knows that it is false or its falsity is obvious to him." Restatement (Second) of Torts § 541 (1977). A party who claims to be a "potential victim of a fraud may not ignore a manifest danger." *Vigortone AG Prod., Inc. v. PM AG Prod., Inc.*, 316 F.3d 641, 645 (7th Cir. 2002). Thus, a party claiming fraud "will be denied recovery" if the claimed representations or omissions "are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth." *Atari Corp*, 981 F.2d at 1031 (holding that claimant

could not recover because it "possessed facts demonstrating that the representations upon which it claims to have relied were patently and obviously false").

The facts here were front-and-center in the Forbearance. It states the true facts about the borrower's default for non-payment, the foreclosure and resulting credit for the Property, the situation concerning recourse, and that Guarantors were being called on their obligations. If the Guarantors still relied on the prior appraisal or a belief that they had no risk, they would be relying on something "patently and obviously false."

Under Guarantors' fraud theory, the plain text of the Forbearance "was a gigantic warning flag unaccountably ignored." *Vigortone*, 316 F.3d at 646 ("The reason or at least a reason for barring the reckless fraud plaintiff from obtaining relief is that when a person or firm . . . closes its eyes to a manifest danger, suspicion arises that it wasn't actually fooled by the false representations of which it is complaining."); *see also Meritage Homes*, 522 F. Supp. 2d at 1218 (rejecting allegation that party was defrauded by a failure to disclose status of contract when signing release because party acknowledged he was aware of status of contract when he signed release).

Additionally, the record shows that Guarantors did not actually rely on LREP's representations about the Property or the Guarantor's business in the first place. Contrary to their implausible allegations here, in their California lawsuit,

Guarantors have claimed that *the borrower* (not LREP) misled them about the Property, and that *the borrower* breached an agreement to repay LREP out of their diamond trading business revenues in the event the Property did not cover the loan. SER-134-35, 139, ¶¶ 18-23, 46-50; Case and Fact §VI. Thus, Guarantors have alleged that they always knew that the Property may not cover the loan balance and had entered into a side agreement with the borrower to deal with that possibility.

Furthermore, the allegations that LREP concealed or misrepresented that the loan is "nonrecourse" (i.e., that LREP would pursue the borrower's Property but not sue the borrower before pursuing Guarantors), fail for an additional reason. Guarantors could not have justifiably relied on such a concealment or misrepresentation because both the Forbearance *and* the Guaranty explain the issue accurately.

The Guaranty contains a non-boiler-plate "Sequence of Lender's Remedies" section providing that if LREP is not "fully satisfied from the proceeds of the sale of the Property . . . [LREP] may then seek its remedies against Guarantor without further delay." The Forbearance echoes this section. *See* SER-40 (recital stating that upon default, LREP "was obligated to first execute against and foreclose the Property . . . prior to enforcing its rights for repayment from the Guarantors").

Guarantors' proposed amended counterclaim does not cure the lack of justifiable reliance. For instance, allegations that Blandini held herself (or KAMCO)

out as Guarantors' fiduciary does not make reliance on representations or omissions contradicting the Forbearance or Guaranty justifiable. As to the Forbearance, at most Guarantors allege (without supporting facts) that Blandini "fraudulently represented the KAMCO defendants were Appellants' fiduciaries regarding both the loan and the forbearance agreement" while actually representing LREP. OB at 18, 47. The record citations supporting those assertions (2-ER-191-95) do little more than parrot the conclusion. As vague and inadequate as that allegation is to state a fraud claim, nothing about it suggests that Guarantors could ignore the true facts stated in the Forbearance or Guaranty.

Finally, *Parrish v. United Bank of Arizona*, 790 P.2d 304 (Ariz. Ct. App. 1990), does not support reversal. There, Parrish sought a loan from a bank and the bank suggested Parrish partner with a general contractor it referred to him. The bank did not tell Parrish that it knew the contractor was behind on loans to the bank and in financial difficulty. *Id*. at 305. The contractor and Parrish obtained a loan but soon defaulted. As part of a workout agreement, Parrish agreed to a new loan and released the bank from claims he may have had. *Id*. The Court held that the release did not prevent Parrish's claims related to its nondisclosure because, at the time, the bank "knew or should have known that Parrish was mistaken as to the facts surrounding his [then unknown] damages." *Id*. at 306.

This case is far different. Guarantors and their partners were already in business together, already faced an imminent collection lawsuit from Horton, Guarantors warranted they were not relying on LREP to understand the borrower's financial condition, and the facts about which LREP is alleged to have misled appear on the first page of the Forbearance. The undisputed record proving that Guarantors could not have justifiably relied on LREP's alleged representations and omissions was simply not present in *Parrish*.

2. The Opening Brief's "active concealment" theories fail.

The Opening Brief argues that LREP is also liable for inducement because, when executing the Forbearance, LREP "actively concealed" that (1) "LREP itself knew" the borrower did not intend to repay the loan; (2) that the borrower's appraisal was not trustworthy; and (3) that KAMCO/Blandini acted on LREP's behalf. The failure to show justifiable reliance aside, this theory fails.

The law governing fraudulent concealment requires more than nondisclosure: there must be intentional actions taken to conceal the information. Under the Restatement, a party "to a transaction who by concealment or other action **intentionally prevents** the other from acquiring material information" may be liable. Restatement (Second) of Torts § 550 (emphasis added). The "concealment or other action" means affirmative actions intended to conceal or cover-up. *See id*. cmt. a (illustration stating that a party may be liable "if he paints over" a defect to

conceal it); *King v. O'Reilly Motor Co.*, 494 P.2d 718 (Ariz. Ct. App. 1972) (citing Restatement and giving example of "wrecked car repaired and painted over"). Merely possessing information and not disclosing it does not qualify as "concealment"—the concealment must be "active." *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.3d 12, 36 (Ariz. 2002) (holding concealment could be shown where affirmative acts showed the bank "actively strategized to cover up the pending collapse of" a borrower's financial condition).

None of Guarantors' allegations meet this standard. The allegation that LREP did not tell Guarantors that LREP doubted the borrower's rosy appraisal is not active concealment of a material fact (in fact, the appraised value itself was not a fact at all (*see* §III.A., below)). Indeed, the only affirmative act of concealment alleged on LREP's part is that LREP "concealed the drafts of the loan documents to prevent Appellants from knowing the loan would be nonrecourse and the property was essentially worthless." OB at 44.

This allegation has at least two flaws. First, it is unexplained how the loan documents would have shown that "the property was essentially worthless." There is not a single allegation that LREP "knew" the Property was worthless, or that LREP thought Guarantors believed the Property would fully cover the debt. Nor is there any explanation of how the loan documents would reveal that fact.

Second, this allegation is implausible and illogical on its face. Whatever the case may be with the "drafts" of the loan documents, it cannot be the case that LREP concealed drafts "to prevent Appellants from knowing the loan would be nonrecourse." As stated above, the Guaranty agreement spells this fact out for Guarantors in § 8, "Sequence of Lender's Remedies." SER-100. There was no cover-up here, even believing all of Guarantors' allegations.

Nor are there any allegations (even conclusory) describing actions LREP took to conceal other facts regarding the loan. For example, the Court will not find any allegation that LREP took steps to hide Blandini's role or play her off as a "fiduciary" when negotiating the Forbearance. Instead, what the Court will find is another example where the Forbearance's text states facts about which the Guarantors now claim ignorance. The Forbearance identifies Blandini and her company (putative defendant A&B Capital) as ***LREP's designee*** for payment under the Forbearance. SER-41, § 5. If Guarantors believed that Blandini was their "fiduciary," then nothing in the counterclaim allegations or record shows that LREP was aware of that fact, much less took action to conceal its relationship with Blandini from Guarantors.

3. Guarantors' fraudulent inducement claim is implausible and does not satisfy Rule 9(b).

LREP argued below that Guarantors' fraud claims also fail to clear the Rule 8 plausibility and 9(b) specificity pleading hurdles. 2-ER-220-21; 2-ER-167-68.

Although the Opening Brief side-steps this issue, it also merits dismissal of the counterclaims and leave to amend.

In addition to pleading plausible allegations under Rule 8, Rule 9(b) requires a fraud claim's allegations to "identify 'the who, what, when, where, and how of the misconduct charges,' as well as 'what is false or misleading'" and "why it is false." *Cafasso*, 637 F.3d at 1055 (internal quotation marks and citation omitted).

The Opening Brief's factual statement and its cited portions of the record reveals the counterclaims' deficiencies in relying predominantly on sweeping, conclusory statements.

For example, the Opening Brief argues that LREP (and the putative defendants) "cajoled" Guarantors into executing the Forbearance, and "concealed fraud underlying the original loan transaction." OB at 13 (citing 2-ER-230, ¶¶ 29-30 and 3-ER-318-24). The citations, however, merely repeat these conclusory allegations that the parties "executed" the forbearance (¶ 29), and that "LREP cajoled Defendants into paying" toward the indebtedness (¶ 30). And the citation for the accusation that LREP "concealed fraud underlying the original loan transaction"? It is just the signed Forbearance. *See* OB at 13 (citing 3-ER-318-24). Repeating words like "actively concealed," "fraud," and "cajoled" does not convert a fact-less conclusion into a specific factual allegation compliant with Rules 8 and 9. These are not allegations of the who, what, when, where, and how of a fraud.

Other allegations fare no better. For example, Guarantors allege that LREP "actively concealed" that they thought the borrower's appraisal was a "joke," or "bullshit". *See* OB at 17 (citing 2-ER-185, ¶ 19). This allegation merely states that LREP had an opinion. There are no factual allegations that LREP knew what Guarantors thought of the appraisal or the value of the Property. There are no allegations that LREP took steps to "actively conceal" this opinion—just that it had one.

In addition, Guarantors contend the parties "fraudulently represented the KAMCO defendants" were "fiduciaries regarding both the loan and the forbearance agreement." OB at 18 (citing 2-ER-191-95). But the record citation is to allegations in the proposed amended complaint stating conclusions that "KAMCO were . . . fiduciaries regarding the . . . Forbearance Agreement," and that KAMCO "concealed" that they represented LREP in the "Forbearance Agreement" negotiations. 2-ER-192, ¶ 60.a-b. Conclusory allegations are not well-pleaded facts and do not come close to satisfying Rule 9(b)'s particularity requirement.

These vague allegations, "which identif[y] a general sort of fraudulent conduct but specif[y] no particular circumstances of any discrete fraudulent statement, is precisely what Rule 9(b) aims to preclude." *Cafasso*, 637 F.3d at 1057.

II. The district court correctly enforced the Forbearance and entered the stipulated judgment.

The Opening Brief argues (at 28-35) that the district court should not have entered judgment "summarily enforcing" the Forbearance. This Court reviews the district court's enforcement of a settlement agreement for abuse of discretion. *Doi v. Halekulani*, 276 F.3d 1131, 1136 (9th Cir. 2002).

A. The district court had power to enforce the Forbearance.

There is no dispute that the trial court has power to summarily enforce a settlement agreement. *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 957 (9th Cir. 1994). The Opening Brief's contention that the district court needed to first hold an evidentiary hearing or full jury trial is misguided. An evidentiary hearing is required only when "material facts concerning the *existence* or *terms* of an agreement to settle are in dispute." *Callie v. Near*, 829 F.2d 888, 890-91 (9th Cir. 1987). "*Callie*, of course, stands for the unremarkable proposition that 'the district court may enforce only *complete* settlement agreements. . . .'" *Doi*, 276 F.3d at 1138 (quoting *Callie*, 829 F.2d at 890).

Here, the Forbearance is a complete settlement agreement. There is no material dispute as to its existence or terms. "[T]hus there was no need for an evidentiary hearing on whether an agreement existed." *Doi*, 276 F.3d at 1139.

Guarantors do not dispute the existence of the Forbearance (neither, for that matter, the re-confirming Consent months later). SER-20, ¶ 29; SER-44-45, 55-58;

SER-33-37. Nor is there a dispute about the content of its written terms. Therefore, the district court was empowered to dismiss Guarantors' claims without the need of an evidentiary hearing or trial. *See Doi* at 1139 ("There was no need for an evidentiary hearing on whether an agreement existed, or what its terms were . . . ."); *Ellerd v. Cty. of Los Angeles*, 273 F. App'x 669, 670 (9th Cir. 2008) ("No evidentiary hearing is required because there is no dispute over material terms.").

Furthermore, the district court's order promotes the "very important policies that favor giving effect to agreements that put an end to the expensive and disruptive process of litigation." *Facebook*, 640 F.3d at 1039 (enforcing settlement agreement despite claims that adversary misled settling party about value of shares to induce settlement).

B. The Opening Brief's arguments against enforcement fail.

First, the Opening Brief (at 28-30) contends that an evidentiary hearing is especially required when a resisting party claims fraudulent inducement. But that is not the law. If it were, every second-guessing settling party would have a way to extract more leverage by extending litigation. This Court has rejected that result. *Facebook*, 640 F.3d at 1040 (negotiating releases and waivers "would be useless to end litigation if it couldn't include claims arising from the settlement negotiations"); *see also In re Deepwater Horizon*, 786 F.3d 344, 363 (5th Cir. 2015) (explaining

that a "party may not challenge a settlement agreement on the basis of an alleged fraud that 'relates to the underlying merits of the claim that was settled'").

While the rule is not absolute, a "narrow exception" exists only when a "defendant subsequently uncovers previously unavailable evidence that the plaintiff was in fact *not injured at all*, or sustained only *de minimis* injuries." *Id*. Only then "must [the court] hold an evidentiary hearing to weigh the newly-discovered evidence of fraud." *Id*. For instance, in *Russell v. Puget Sound Tug & Barge Co.*, 737 F.2d 1510, 1510-11 (9th Cir. 1984) and in *Deepwater Horizon*, evidence came to light that the plaintiff, who had submitted claims for substantial physical injuries, was never really injured and had faked the injuries. *Deepwater Horizon*, 786 F.3d at 363-64 (discussing *Russell* as "particularly instructive" example of the "narrow exception").

Guarantors' counterclaims do not fit this "narrow exception." LREP was unquestionably injured: it loaned $4 million and has not been repaid. Guarantors' claim it was entitled to an evidentiary hearing would only be correct if, for instance, LREP represented in the Forbearance that the Property sold for $315,000 but it actually sold for $10 million. But here, each of Guarantors' claims relate to the underlying enforceability of the original Guaranty, not that LREP fabricated its injury.

Guarantors' assertion that the Forbearance itself was procured by fraud is no answer. The *City Equities* case is instructive. There, a party entered into a settlement agreement, apparently based on a belief that other entities would continue funding lease costs. 22 F.3d at 956. If the party defaulted on the lease, the agreement provided that the party would "automatically forfeit" its lease. *Id*. The settling party also "expressly waived all claims" that the settlement "is not enforceable," and agreed that it relied "only on the representations and agreement(s) set forth in the" settlement agreement "and not on any other oral or written communication." *Id*. (internal quotation marks omitted). Just after signing the agreement, the settling party found out that the other entities "did not plan to fund" as anticipated, and as a consequence there was a default. *Id*. at 957. The party alleged it was "fraudulently induced" into the agreement by the "promis[e] to fund." The bankruptcy court rejected these arguments and summarily enforced the agreement. *Id*.

This Court affirmed, concluding that "[s]ummary enforcement is particularly suited to, and indeed seems virtually implicit in, an agreement with terms as unequivocal, and with consequences of default as utter and final, as this one." *Id.* at 958. The fact that the party alleged fraudulent inducement did not change that "no material facts are in dispute." *Id*. at 958. Moreover, even if the funding entities had made false promises, the settling party "could not have reasonably relied on them" because the party "expressly and unambiguously admitted that it was not relying on

any inducements not contained therein" and the party "expressly waived the right to assert any claim" based on the conduct of the other parties. *Id*. at 958.

Guarantors' argument fails for the same reasons. The Forbearance's terms are "unequivocal" and the "consequences of default"—the filing of a signed stipulation for judgment—are "utter and final." *Id*. As in *City Equities*, Guarantors "expressly waived" any defenses to enforcement and were not relying on any "statements, conditions or representations, oral or written, express or implied, not" contained in the Forbearance. *Id.* at 958; SER-43, § 13.

Second, the Opening Brief argues (at 30-31) that summary enforcement is permitted only if the district court follows "summary judgment-like procedures." Other than citing procedural background of various cases where those procedures had been used, the Opening Brief cites no case holding that such a rule exists.

Furthermore, none of the cases Guarantors cite (at 32) as having "reversed judgments" arise in the context of the enforcement of a complete settlement agreement. Instead, each involves uncompromised disputes where courts surprised litigants with dismissal. *See Norse v. City of Santa Cruz*, 629 F.3d 966, 972-73 (9th Cir. 2010) (summary judgment granted on eve of trial without any dispositive motions, when there had been no "adequate notice and opportunity to be heard"); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 935 (10th Cir. 1975) (claims dismissed without notice, not in context of settlement or stipulated judgment);

Gellman v. State of Md., 538 F.2d 603, 606-07 (4th Cir. 1976) (judgment issued before any responsive pleading, any motion to dismiss filed, no discovery, and no notice of intent to consider a motion to dismiss on the merits); *Choudry v. Jenkins*, 559 F.2d 1085, 1089 (7th Cir. 1977) (case dismissed without dispositive motion and when "most importantly, the district court itself definitively declared that it was limiting its attention to [a] temporary restraining order"). That is not the issue here.

Third, the Opening Brief argues (at 33-35) that it should be entitled to a full-blown jury trial, not just an evidentiary hearing. This argument is not at issue on appeal. If the Court reverses the enforcement of the Forbearance, it can be left to the district court to determine what sort of hearing should be held.

Furthermore, in their Guaranty, Guarantors waived their right to a jury trial "in respect of any issue . . . whether sounding in tort or contract or otherwise." SER-101, § 16.

Likewise, the Ninth Circuit has rejected the Guarantors' argument claiming a right to a jury trial. *See Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709-10 (9th Cir. 1989) (holding "motion to enforce the settlement agreement essentially is an action to specifically enforce a contract," and is therefore an equitable issue to which no jury-trial right attached).

Guarantors argue (at 34) that *Adams* is distinguishable because they asserted counterclaims. But that is a distinction without a difference. Guarantors' argument

conflates an evidentiary hearing to decide the Forbearance's enforcement with resolution of the counterclaims on the merits. Indeed, in *Adams*, the Court explained that a motion to enforce a settlement agreement remains equitable "even if the party resisting specific enforcement disputes the formation of the contract," or raises other defenses. *Id*. at 710.

III. The Court may also affirm because the fraud claims fail to state a claim and the proposed amendments would have been futile.

As the district saw, the Guarantors' counterclaims are a Russian nesting doll. They allege that the Forbearance was obtained by fraud largely because they claim the underlying guaranties were obtained by fraud. In briefing below, LREP showed that these claims were futile for other reasons. The Opening Brief ignores these other arguments, each of which also supports affirmance here. *See McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (court "may affirm on any ground supported by the record").

A. No material fact: the Counterclaim theory that LREP or others misrepresented the value of the Property fails as a matter of law.

First, the purported false representations or omissions about LREP's beliefs about the Property's value are not misrepresentations of fact capable of supporting a fraud claim. To the contrary, "[a]n appraisal is an opinion of value and 'actionable fraud must be based upon a misrepresentation of material fact, and not upon an expression of opinion.'" *Gould v. M&I Marshall & Isley Bank*, 860 F. Supp. 2d 985,

990 (D. Ariz. 2012) (dismissing fraud claim) (citation omitted). Under Arizona law, a lender's "mere representation as to value" is not a representation as to past or existing fact, but one of future opinion "and will not support a claim for fraud." *Frazier v. Sw. Sav. & Loan Ass'n*, 653 P.2d 362, 365 (Ariz. Ct. App. 1982). *See also* Restatement (Third) of Suretyship & Guaranty § 12 (guaranty may be voidable based on fraudulent misrepresentation of "facts," not opinion).

Second, the fact that LREP internally may have distrusted the borrower's high-end appraisal, or that LREP allegedly inspected the Property does not change the result. In addition to being mere opinions (a "joke"), a lender does not have "a duty to disclose to a borrower an appraisal it obtains as part of its own underwriting purposes." *Gould*, 860 F. Supp. 2d at 990 (dismissing claim alleging that lender wrongly refused to disclose its own appraisal, which would have shown defects). *See also* Restatement (Third) of Suretyship & Guaranty § 12, cmt. f (the Restatement "places no burden on the obligee to investigate for the benefit of the secondary obligor").

B. No justifiable reliance: Guarantors specifically disclaimed relying on LREP or others for information about the borrower or its property.

As with the failure to plead justifiable reliance at the Forbearance stage (§I.B.1), the same is true at the loan and Guaranty stage. As the Guaranty conspicuously states, Guarantors expressly agreed that they would **not** have a legal

right to rely on LREP's representations about the borrower's financial condition and LREP was discharged from **any** duty to communicate such information to Guarantors. Section 22 of the Guaranty, "Inducement of Lender" states in relevant part:

> Guarantor hereby represents and warrants that **Guarantor is and will continue to be fully informed about all aspects of the financial condition and business affairs of Borrowe**r . . . that Guarantor deems relevant to the obligation of Guarantor hereunder, and **Guarantor hereby waives and fully discharges Lender from any and all obligations to communicate** to Guarantor any information whatsoever regarding the Indebtedness, Borrower, or the financial condition, business affairs or otherwise of Borrower . . . .

SER-110, § 22 (emphasis added). In other words, Guarantors told LREP that they were "fully informed" about the borrower's financial status and were not relying on LREP to educate them.

Although in general a broad disclaimer of any representations may not, by itself, foreclose a fraud claim, this is not a broad or generic disclaimer. *See Formento v. Encanto Bus. Park*, 744 P.2d 22, 26 (Ariz. Ct. App. 1987) (noting that integration clause will not automatically bar parol evidence of fraud). Courts frequently enforce "no-reliance" clauses when (like here) a party makes a specific promise that it has not relied on a particular representation of the other party. *See Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 735 (2d Cir. 1984) (under New York law, fraud claim does not survive when "substance of disclaimer tracks the substance of the alleged misrepresentation" and approving of dismissal of

claim when party agreed it had "full familiarity with the financial condition"); *Vigortone*, 316 F.3d at 644-45 (approving of enforcement of "no reliance" clauses between sophisticated parties).

Given the specific disclaimer, Guarantors cannot rely justifiably on the alleged representations and omissions about the borrower "as a matter of law because they contradict the unambiguous text of the guaranties." *Wyrick v. Bus. Bank of Texas, N.A.*, 577 S.W.3d 336, 348 (Tex. Ct. App. 2019) (affirming dismissal of fraudulent inducement claim because guarantor could not have justifiably relied on bank's alleged promise to secure more collateral for loan when guaranty stated otherwise).

C. LREP had no duty to disclose the information it allegedly concealed.

Guarantors cannot establish that LREP is liable for concealment at the loan stage either. As discussed above (§I.B.2), neither the original counterclaims nor the proposed amended allegations adequately allege any actionable "active concealment" of a material fact. At most, Guarantors allege that LREP failed to disclose information about the Property and the borrower (i.e., *Guarantor*'s business partner).

Even if these related to material facts, LREP could be liable for nondisclosure "if, but only if," LREP had a duty to disclose. Restatement (Second) of Torts § 551. *See Gould*, 860 F. Supp. 2d at 989 (under Arizona law and Restatement, when the

facts do not show active concealment, the inducement claim is "limited to simple nondisclosure and necessarily require[s] a duty to disclose").

Under the Restatement, a lender may have a duty to disclose to a guarantor if the lender/obligee:

> (a) knows facts unknown to the secondary obligor that materially increase the risk beyond that which the oblige has reason to believe the secondary obligor intends to assume; and
>
> (b) has reason to believe that these facts are unknown to the secondary obligor; and
>
> (c) has a reasonable opportunity to communicate them to the secondary obligor.

Restatement (third) of Suretyship & Guaranty § 12(3). There is "no burden on the obligee to investigate for the benefit of the secondary obligor." *Id*. cmt. f. And § 12(3) does not require the obligee "to take any particular steps to ascertain whether the secondary obligor is acquainted with facts that the obligee may reasonably believe are known to both of them." *Id*.

Aside from asserting conclusions without particularized factual allegations (LREP "knew" that the risks of collection "were unknown to Appellants," *see* OB at 44-45), Guarantors do not provide facts which would give rise to a duty to disclose here. There are no allegations showing LREP knew anything about what risks Guarantors intended to take; no allegations indicate that LREP had a "reason to believe" any facts about borrower's financial status were "unknown to the secondary obligor." Restatement (third) of Suretyship & Guaranty § 12(3). Indeed, the record

is the opposite: Guarantors concede that they—not LREP—were the borrower's business partners. SER-17, ¶7-8. And Guarantors agreed that they were "fully informed" of the financial status of their partners and they fully discharged LREP from having to provide them with that information." SER-102, § 22. Guarantors simply have not alleged facts which, if believed, would create a duty to disclose.

D. The proposed allegations of a fiduciary relationship fail as a matter of law.

The Opening Brief emphasizes repeatedly the proposed amended allegations that Blandini held herself and KAMCO out as Guarantors' fiduciaries. Those claims would have been futile and were correctly rejected for several reasons.

As to the fraudulent inducement claims, the fiduciary allegations hit the same wall as Guarantors' flawed theories against LREP. As set forth above (§III.B), Guarantors cannot show justifiable reliance by blaming Blandini or KAMCO instead of LREP about opinions of the Property, the likelihood of paying on the Guaranty, or whether Guarantors' business partner would default on the loan. The fiduciary claim would also not erase the significance of Guarantors' promise to stay "fully informed" about the borrower's financial affairs.

Furthermore, the proposed amended claim fails to plead facts sufficient to make out a claim that Blandini or KAMCO were fiduciaries under Arizona law. "A fiduciary relationship has been described 'as something approximating business agency, professional relationship, or family tie impelling or inducing the trusting

party to relax the care and vigilance he would ordinarily exercise.'" *Taeger v. Catholic Family and Cmty. Servs.*, 995 P.2d 721, 726 (Ariz. Ct. App. 1999) (citation omitted). Mere trust is insufficient. There must be "great intimacy, disclosure of secrets, [or] intrusting of power." *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 335 (Ariz. Ct. App. 1996).

Guarantors' allegations do not meet this standard. They cite only two snippets from emails in which Blandini said that KAMCO would get Guarantors the best possible deal and were "clients." These snippets do not show a "great intimacy," a "disclosure of secrets," or an "entrusting of power."

The allegations are also an implausible post-hoc lawyer's invention. Originally, Guarantors' fraud theory was that LREP, **through its agent Blandini**, represented the Property was worth between $10 and $27 million. *See* SER-18-19, ¶ 16. Only after receiving discovery from LREP did they allege that Guarantors thought Blandini was their agent, not LREP's, and that no one ever told them Blandini was working for LREP. *See, e.g.*, OB at 12. If so, then on what basis did they allege that Blandini was LREP's agent originally?

Finally, there are **no** factual allegations supporting the conclusory assertions that KAMCO continued "acting as fiduciaries" in the negotiation of the Forbearance. Indeed, the Forbearance identifies Blandini (and putative defendant A&B Capital) as **LREP's designee**, not Guarantors' fiduciary. *See* SER-41, § 5.

E. The district court was correct to dismiss with prejudice.

Given the incurable flaws in Guarantors' legal theories, the district court correctly denied leave to amend and dismissed the counterclaims with prejudice. A "dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013) (internal quotation marks and citation omitted).

The district court was also well within its discretion to deny leave to add third-party claims. *See City of Hudson v. Janiszewski*, 351 F. App'x 662, 666-67 (3d Cir. 2009) (affirming denial of leave to amend futile third-party complaint). Even if any part of the new claims could survive a motion to dismiss, allowing them to prolong LREP's lawsuit would unfairly prejudice LREP, as the district court observed. 1-ER-11-12. *See City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 454 (9th Cir. 2011) (affirming denial of leave to amend because, in addition to futility, leave may be denied when amendment would be prejudicial).

IV. Guarantors' express tolling and waiver of the time limit to bring a deficiency action is enforceable.

Guarantors' final argument on the merits (at 57-68) is that their agreement to toll and waive the limitations period in Arizona's anti-deficiency statute, A.R.S.

§ 33-814(A), is unenforceable.[7] The district court correctly followed Arizona Supreme Court precedent and rejected this argument. As the Eleventh Circuit neatly summarized, Guarantors' position that a statute of repose cannot be tolled by express agreement is "inconsistent with both law and logic." *Preston*, 873 F.3d at 883.

A. Arizona law permits parties to waive anti-deficiency protections after a trustee's sale.

The Arizona Supreme Court held that, to the extent anti-deficiency protections are non-waivable, Arizona law restricts only the prospective waiver of those protections, not post-foreclosure waiver when the amount of the deficiency is known. In *CSA 13-101 Loop, LLC v. Loop 101, LLC*, the court addressed whether a guarantor's waiver of the right to compel a fair market value determination could be enforced. 341 P.3d 452 (Ariz. 2014). The original loan and guaranty documents "all expressly waived the fair market value provision." *Id*. at 453. The court held that a guarantor could not "prospectively" make an "advance waiver" because it would subvert the "identifiable public policy" in the statute if lenders began routinely including the waivers in loan and guaranty documents. *Id*. at 456-57.

[7] Guarantors cannot contest that LREP timely filed the complaint if the tolling and waiver agreement is enforceable. LREP filed its complaint on November 18, 2016, fewer than 90 days after the August 30 end of the tolling term, so whether the limitations period is deemed tolled or waived entirely, the complaint is timely. SER-62-63.

The court's holding, however, explicitly applies only to *prospective* waivers (i.e., in the loan or guaranty). As the court explained, its "holding does not preclude a borrower from agreeing, after a non-judicial foreclosure commences, not to seek a fair market value determination." *Id*. at 457.

The Forbearance's tolling agreement and waiver is not a prospective waiver. It is a post-trustee-sale settlement agreement entered into after the deficiency amount was known.

Guarantors' arguments to the contrary are not persuasive.

First, they argue (at 64-65) that *CSA 13-101* supports their position. They contend that the waiver here was "prospective" because it occurred before the lawsuit was filed. That argument elides the text of the opinion, which states that "our holding does not preclude a borrower from agreeing, **after a non-judicial foreclosure commences**." *Id*. at 457 (emphasis added).

The key distinction between an enforceable and unenforceable waiver is plainly the trustee's sale – the date on which the amount of an alleged deficiency liability is known. Thus, *CSA 13-101* makes clear that those protections may be waived when the deficiency liability is no longer unknown and prospective. As a recent decision in the Arizona court explained, while a "pre-default waiver of anti-deficiency protection offends public policy by shifting the unpredictable risks of possible default from lender to borrower . . . , a post-default contractual waiver does

not raise the same concerns because it involves predictable risks and an actual default." *Aerial Funding LLC v. Van Sickle*, No. 1 CA-CV 19-0543, 2020 WL 6140700, at *2 (Ariz. Ct. App. Oct. 20, 2020) (holding that post-default settlement agreement controlled).

Second, Guarantors argue (at 62-63) that "courts have recognized § 33-814(D) as a statute of repose that is not subject to tolling or equitable doctrines." This argument lacks legal support—none of the cases cited address tolling or waiver by agreement, much less hold that either § 33-814 or statutes of repose in general are "not subject to tolling." In *Valley National Bank of Arizona v. Kohlhase*, for instance, the court determined whether a lawsuit filed before a trustee's sale occurred would satisfy the 90-day requirement in § 33-814. 897 P.2d 738, 740-41 (Ariz. Ct. App. 1995). The court held that the existing lawsuit was adequate; a second one was unnecessary. *Id*. at 741-42. The Guarantors' reliance on the case is misplaced.

Nor do Guarantors' other legal authorities address the issue on appeal: whether an express tolling agreement executed after a trustee's sale is enforceable. *See United Pac. Ins. Co. v. Cottonwood Props., Inc.*, 750 P.2d 907, 908 (Ariz. Ct. App. 1987) (holding that an amended complaint adding claim to enforce a lien after statutory time period to enforce does not relate back to original complaint); *Resolution Tr. Corp. v. Olson*, 768 F. Supp. 283 (D. Ariz. 1991) (holding that an amended complaint adding deficiency claim more than 90-days after trustee's sale

does not relate back to the filing of the original complaint); *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1115-16 (D. Ariz. 1998) (holding that anti-deficiency protections did not prevent federal government from pursuing deficiency claim on government-guaranteed home loan).

Guarantors simply have not provided any legal authority casting doubt on the district court's holding that a tolling agreement or waiver voluntarily executed after the trustee's sale is enforceable under Arizona law.

B. Even if § 33-814 imposes a statute of repose, an express agreement to toll a statute of repose is enforceable.

Guarantors also contend (at 59) that the time limit in § 33-814 is a "statute of repose" that may not be tolled or waived by agreement. This reading of § 33-814 is against the overwhelming weight of authority nationwide and the purpose of the statute.

Guarantors' position is out of step with a "broad consensus" nationwide holding "that [statutes of repose] *can* be expressly waived." *Preston*, 873 F.3d at 886 (holding that party may expressly waive ERISA statute of repose).

This "broad consensus" shows "a well-established background understanding that statutes of repose *are* subject to express waiver." *Id*. State and federal courts have consistently held that even if a statute of repose is not generally subject to *equitable* tolling, a party's *express* tolling agreement will be enforced. *See Lewis v. Taylor*, 375 P.3d 1205, 1210 (Colo. 2016) (concluding that "Courts presented with

express tolling agreements" have enforced tolling of statutes of repose). As the Colorado court explained, although equitable tolling may not apply because a "statute of repose is a judgment that defendants should be entirely free from liability," those same policy rationales "do not apply . . . where the parties expressly agreed not to assert the statute's time limitations." *Id*. at 1212. *See also Christie v. Hartley Constr., Inc.*, 766 S.E.2d 283, 288 (N.C. 2014) (beneficiaries of statute of repose "may choose to forego that protection" by agreement); *Bullington v. Precise*, 698 F. App'x 565, 570-71 (11th Cir. 2017) (affirming enforcement of tolling agreement and rejecting defendants' effort "to gain the benefit of a repose rule that they promised not to assert"); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 (LAK), 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012) (enforcing express tolling agreement); *ESI Montgomery Cty. Inc. v. Montenay Int'l Corp.*, 899 F. Supp. 1061, 1065 (S.D.N.Y. 1995) (same and distinguishing cases refusing to apply equitable tolling).

Moreover, Arizona law is consistent with the nationwide consensus. The "purpose" of § 33-814's limitation period "is to protect the defaulting debtors by giving them prompt notice of a creditor's intent to pursue an action for deficiency." *Kohlhase*, 897 P.2d at 741. The existence of an express agreement negotiated *after* a trustee's sale to delay imminent litigation gives the debtor notice of the deficiency claim and the lawsuit, serving "the purpose of the statute." *Id*. Moreover,

enforcement of an express tolling agreement is consistent with Arizona's strong policy of honoring "the private ordering of commercial relationships and seek[ing] to protect bargained-for expectations." *Ariz. Bank & Tr. v. James R. Barrons Tr.*, 351 P.3d 1099, 1102 (Ariz. Ct. App. 2015) (enforcing contractual waiver of certain anti-deficiency protections under § 33-814).

Guarantors argue (at 66) that the wave of cases going against them are distinguishable because "none of the cases cited by the district court hold that *all* statutes of repose can be tolled by agreement." Of course not. No court would have occasion to address "*all* statutes of repose." But in the overwhelming majority of cases, courts have concluded that while a statute of repose is not subject to equitable tolling, an express agreement is enforceable.

Guarantors' arguments against the nationwide consensus fails for several reasons.

First**,** *Midstate Horticultural Co. v. Pa. R. R. Co.*, 320 U.S. 356 (1943) does not support Guarantors. *See* OB at 59-60. *Midstate* is a 75-year-old decision holding that a limitations period in the Interstate Commerce Act could not be tolled because it would be inconsistent with the Act's policy of promoting the "general public interest in adequate, nondiscriminatory transportation at reasonable rates." *Id.* at 361. The Court reasoned that the Act did not allow private parties to privately alter the limitations period because the Act was a "comprehensive scheme of regulation"

that was meant to ensure "uniformity and equality of treatment . . . between carrier and shipper," and a private tolling agreement would disrupt that uniformity. *Id.*

Midstate does not "purport to impose a blanket rule prohibiting express waivers." *Preston*, 873 F.3d at 885 (distinguishing *Midstate*). Its holding is "by its own description bound up in the specifics of the Interstate Commerce Act." *Id.* Consequently, courts have consistently held that *Midstate*'s unique statutory context does not apply to other areas. *See, e.g.*, *Preston*, 673 F.3d at 885 ("[W]e just can't see how refusing to enforce a contractual waiver . . . could be deemed necessary to the fulfillment of ERISA's stated purpose"); *In re Lehman Bros.*, 2012 WL 6584524, at *2 (distinguishing *Midstate*); *see also* Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Laws*, 40 J. Corp. L. 143, 194 (2014) ("Most courts have limited *Midstate* to cases involving shippers and carriers" because of the case-specific features of the Interstate Commerce Act, including the "strong congressional policy favoring uniformity of rates among all shippers."). Guarantors have no basis to ask this Court to go against the vast majority of cases and expand *Midstate* beyond its holding to block the express tolling agreement at issue here.

Second, Guarantors' legal authority (at 66-67) for the proposition that "a statute of repose cannot be so waived" do not address whether a party's express tolling agreement is enforceable. Instead, these decisions merely serve as additional

support for the proposition that statutes of repose are generally not subject to *equitable* tolling principles. *See Nat'l Credit Union Admin. Bd. v. Barclays Capital, Inc.*, 785 F.3d 387, 392-93 (10th Cir. 2015) (holding that limitations period was subject to equitable waiver); *Roskam Baking Co., Inc. v. Lanham Mach. Co.*, 288 F.3d 895, 903 (6th Cir. 2002) (addressing whether limitation period was a waivable affirmative defense or a defense that could be raised later in case); *Sharon Steel Corp. v. W.C.A.B. (Myers)*, 670 A.2d 1194 (Pa. 1996) (considering whether equitable estoppel would prevent party from raising limitations defense).

Third, Guarantors' only remaining authority addressing an express agreement (at 66) is *Stone & Webster Eng'g Corp. v. Duquesne Light Co.*, 79 F. Supp. 2d 1, 8-9 (D. Mass. 2000). The case is an outlier and easily distinguished. There, the court would not enforce an "open-ended written waiver" of Pennsylvania's 12-year construction-claim statute of repose. *Id*. Acknowledging that "the issue [of waiver] is not free from doubt," the court distinguished contrary case law on the basis that the other cases did not deal with "an open-ended written waiver . . . which purported to extend the limitations period forever." *Id*. Thus, that court would likely have ruled in LREP's favor here, where the Forbearance had a tolling agreement tied to a very limited term (30 days extended to 45). In any case, the Court should give greater weight to the "broad consensus" of cases that have held express agreements enforceable.

C. A.R.S. § 33-814's time limit is a statute of limitations not a statute of repose.

Finally, although it is not necessary for the Court to reach this issue, Guarantors' argument is incorrect for an additional reason: the 90-day period in § 33-814 is a statute of limitations, not a statute of repose. Because it is a statute of limitations, § 33-814(A) measures its time limit from when a claim accrues – i.e., when a deficiency is created at the time of a trustee's sale. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014) (explaining that a statute of limitations creates a time limit from when the claim "accrues" and a statute of repose measures "not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant"); *see also Barclays Capital*, 785 F.3d at 394 (holding that limitation was not a statute of repose because, "dispositively, the [statute at issue] repeatedly refers to the date a claim accrues" and a statute of repose "is not related to the accrual of any cause of action") (internal quotation marks and citation omitted).

As the Opening Brief states, an Arizona court has called the § 33-814 limitation a "statute of repose." *See Kohlhase*, 897 P.2d at 741. That statement, however, is dictum without analysis. At issue there was whether § 33-814's limitation required a case to be initiated after the trustee's sale, or if one brought beforehand complied with the statute. *Id*. at 740-41. There was no occasion to consider whether the time limit is actually a statute of limitations. LREP submits

that an Arizona court examining the issue would conclude that the time limit is a statute of limitations measured from the time of accrual.

V. Attorneys' fees

As the Opening Brief notes, the parties stipulated to the amount of attorneys' fees award to LREP in the district court. *See* 2-ER-33-34. If Guarantors prevail on appeal and obtain a reversal of the judgment against them, then the attorneys' fee award should be vacated and remanded. If not, this Court should affirm the stipulated award. Separately, if LREP prevails on appeal, LREP requests an award of fees and costs related to the appeal as provided in the parties' agreements, A.R.S. § 12-341, § 12-341.01, and the rules and law of this Court.

RESPECTFULLY SUBMITTED this 2nd day of December, 2020.

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STATEMENT OF RELATED CASES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 20-15589, 20-16021

The undersigned attorney or self-represented party states the following:

☒ I am unaware of any related cases currently pending in this court.

☐ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

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Signature s/ Joseph N. Roth **Date** December 2, 2020

CERTIFICATE OF COMPLIANCE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 20-15589, 20-16021

I am the attorney or self-represented party.

This brief contains 13,480 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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Signature s/ Joseph N. Roth **Date** December 2, 2020