STATE OF MICHIGAN

IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

APPENDIX – VOLUME I
PLAINTIFF/COUNTER-DEFENDANT/CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 18, 2022

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EXHIBIT 1

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware limited liability company,

Plaintiff,

v.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company, PARK STREET GROUP, LLC, a Michigan limited liability company, DEAN J. GROULX, an individual,

Jointly and severally,
Defendants.

Case No.: 2018 – 163298 – CB
Hon. Martha Anderson

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SECOND AMENDED COMPLAINT

Plaintiff Soaring Pine Capital Real Estate and Debt Fund II, LLC ("Plaintiff" or "Soaring Pine") by and through its attorneys, Rossman Saxe, P.C., for its Second Amended Complaint ("SAC") against Defendants Park Street Group Realty Services, LLC ("Park Street Realty"), Park Street Group, LLC ("Park Street Group"), and Dean J. Groulx (collectively, with Park Street Realty and Park Street Group, "Defendants") states as follows:

JURISDICTIONAL AND COMMON ALLEGATIONS

1. Soaring Pine is a limited liability company formed under the laws of Delaware. It has members domiciled in Michigan, and it conducts business in the state of Michigan.

2. Park Street Realty is a limited liability company formed under the laws of Michigan with a resident agent of record who is Defendant Dean J. Groulx with a last known resident agent address of 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304.

3. Park Street Group is a limited liability company formed under the laws of Michigan with a resident agent of record who is Paul L. Nine with a last known resident agent address of 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304.

4. Dean J. Groulx is an individual with a last known address of 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304.

5. Venue is proper in Oakland County because Defendants reside in Oakland County, Michigan.

6. This Court has jurisdiction over this matter as the amount in controversy is in excess of $25,000.00.

Factual Allegations Related to Defendants' Obligations to Plaintiff

7. Park Street Realty entered into a Mortgage Note dated August 12, 2016 in the original principal amount of Five Hundred Thousand and 00/00 dollars ($500,000.00). The Mortgage Note is attached at **Exhibit 1**.[1]

8. Park Street Realty entered into a Loan Agreement dated August 12, 2016. The Loan Agreement is attached at **Exhibit 2**.

[1] Defendants have copies of all of the loan documents referred to in this SAC, and which comprise the parties' contractual relationship.

9. Park Street Realty entered into an Amended and Restated Mortgage Note dated September 23, 2016 in the original principal amount of One Million and 00/00 dollars ($1,000,000.00). The Amended and Restated Mortgage Note is attached at **Exhibit 3**.

10. Park Street Realty entered into an Amendment to Loan Agreement dated September 23, 2016. The Amendment to Loan Agreement is attached at **Exhibit 4**.

11. Park Street Realty's Amended and Restated Mortgage Note dated September 23, 2016 matured, pursuant to its terms, as of September 23, 2017.

12. Park Street Realty failed to make payment in full as of the date of maturity on September 23, 2017.

13. By correspondence to Defendants dated December 27, 2017, Soaring Pine declared default and made demand. *See* **Exhibit 5**.

14. The indebtedness owed to Soaring Pine by Defendants was supposed to be secured by mortgages granted by Park Street Group to Plaintiff against multiple real properties.

15. The real properties which are the subject of this action are and/or were located in the counties of Wayne, Washtenaw, Lapeer, Saginaw, Ingham, and Genesee (the "Mortgaged Properties"). The identification of the original mortgaged properties is attached at **Exhibit 6**.

16. The Mortgaged Properties are identified in multiple mortgages in favor of Soaring Pine executed by Park Street Group and are summarized as follows:

a. Wayne County Properties: September 23, 2016, Mortgage, recorded Liber 53270 Page 575 Wayne County Records, attached at **Exhibit 7**.[2]

[2] Exhibit 7 is a so called "blanket mortgage" over 36 separate parcels. Each of these parcels also has their own individual recorded mortgage granted by Park Street Realty to Plaintiff, and those individual mortgages are not attached hereto.

b. Washtenaw County Property: August 12, 2016, Mortgage, recorded 6339456 L: 5172 P: 816 Washtenaw County Records for the property commonly known as 850 Frederick Street, Ypsilanti, Ml 48197. Attached at **Exhibit 8**.

c. Lapeer County Property: August 12, 2016, Mortgage, recorded Liber 2852 Page 341 Lapeer County Records for the property commonly known as 1572 Millville Road, Lapeer, Ml 48446. Attached at **Exhibit 9**.

d. Saginaw County Property: August 12, 2016, Mortgage, recorded B: 2873 P: 2466 Saginaw County Records for the property commonly known as 2322 Robinwood Avenue, Saginaw, Ml 48601. Attached at **Exhibit 10**.

e. Genesee County Property: August 12, 2016, Mortgage, recorded in 201610070069744 P: 15 Genesee County Records for the property commonly known as 1919 Carmanbrook Parkway, Flint, Michigan 48507. Attached at **Exhibit 11**.

f. Ingham County Property: August 12, 2016 Mortgage recorded in 2016037778 Ingham County Records for the property commonly known as 1717 Bailey Street, Lansing, Michigan 48910.

17. The indebtedness of Park Street Realty to Plaintiff is guaranteed by the Continuing Unlimited Guaranty dated August 12, 2016 of Park Street Group. The Park Street Realty Continuing Guaranty is attached at **Exhibit 12**.

18. The indebtedness of Park Street Realty to Plaintiff is guaranteed by the Continuing Unlimited Guaranty dated September 23, 2016 of Dean J. Groulx. The Groulx Continuing Guaranty is attached at **Exhibit 13**.

19. Park Street Realty is in default of the Amended Mortgage Note for reasons including, without limitation, that the Note matured as of September 23, 2017 and Park Street Realty failed to pay the remaining outstanding balance.

20. Defendant Park Street Group, LLC and Defendant Dean J. Groulx are in default of their guarantees for reasons including, without limitation, that they have failed to make payment to Plaintiff of the indebtedness due on the Note after it matured on September 23, 2017.

21. As of the filing of this SAC, the outstanding balance has not been payed off, and all Defendants have been in ongoing and continuous default from the maturity date up to and including the present date.

Defendants Misrepresent Their Prior Experience
In Order to Induce Plaintiff to Enter into the Loan Agreement

22. Plaintiff incorporates all previous allegations by reference, as if set forth fully herein.

23. In order to induce Plaintiff into lending $1,000,000.00 to Park Street Realty, allegedly for the purpose of purchasing, renovating, and reselling tax-forfeited residential properties in or near the City of Detroit, Defendant Groulx engaged in a series of material misrepresentations – involving his experience in the industry and the fundamental question of whether he would be able to repay the loan – which Plaintiff relied upon in deciding to lend Park Street Realty the subject funds.

24. Prior to making a decision to enter into a loan agreement with an individual or entity, Plaintiff carries out a due diligence review of the borrower. Some of the information is obtained through third-parties and other sources independent of the borrower. However, Plaintiff obtains a significant amount of information directly from the borrower herself. Such information generally relates to matters that are private and confidential and is not available by other means.

25. Thus, Plaintiff relies on borrowers to provide truthful and accurate information during the due diligence period so that Plaintiff can accurately determine the amount of the loan, the terms of the loan, and generally to assess the ability of the borrower to repay the loan.

26. It is reasonable for Plaintiff to rely on the Defendants' representations regarding such facts. Plaintiff verifies that the information provided conforms with the information that it already has on a potential borrower and/or information that it can readily obtain about the borrower.

27. In addition, it is in the borrower's interest to work cooperatively with Plaintiff during this process in order to reach an agreement on a loan that works for her business and on terms that she can repay.

28. Thus, the borrower's representations, the accuracy of which Plaintiff reasonably relies on, plays an important and material role in Plaintiff's decision on whether to enter into a loan agreement with the potential borrower and the terms of any such loan.

29. In this case, Defendant Groulx made a number of representations to various individuals at Soaring Pine, as set forth in detail below, regarding his experience in the residential redevelopment market, including but not limited to: the volume of properties handled; his and his companies' access to many of the largest sources of available real estate – including the Detroit Land Bank and the City of Highland Park; the ownership structure of the companies that were to be involved in the project proposed by Groulx; his role in his work with Glenn Prentice and David Prentice; his access and relationships with the companies that would be carrying out the actual reconstruction/repair work, and others.

30. During the course of the parties' negotiations and decision to enter into the loan agreement, Defendant Groulx made the following material misrepresentations:

a. Through Park Street Group and/or a related entity, Groulx had a right of first refusal to purchase homes from the Detroit Land Bank and the City of Highland Park;

b. In the year prior to the execution of the loan documents, Park Street Group bought and sold over 500 residential houses, notes, and/or land contracts;

c. Groulx's failure to disclose that two of his business partners, Larry McKenzie and Andy DeAngelis, who were to take part in the project that Soaring Pine agreed to fund through the loan agreement, quit working with Groulx in the first half of 2016 and that Groulx had to return his former Park Street Group partners' investment capital and divide up the real estate entities – which were to serve as collateral for the loan from Soaring Pine – with McKenzie and DeAngelis, just as Groulx was negotiating the loan with Soaring Pine;

d. Groulx's failure to disclose that Glenn Prentice had also decided to leave the company at approximately the same time as McKenzie and DeAngelis – Glenn is David Prentice's father and was the individual who established the residential redevelopment business and the partnership's business model; he developed all the partnership's contacts with the local governmental authorities and contractors, knew the prime locations for property acquisition, and other individuals and entities involved in the residential redevelopment;

e. Groulx's failure to disclose that, just as he was negotiating the loan from Soaring Pine, he and David Prentice were "wrapping up and closing out the [Park Street Group] partnership with me acting as the operating manager."

f. Groulx's failure to disclose that the "company was [in active wind-down phase]," and that, while the company "still had assets, [it] was being wound down."

g. Groulx's failure to disclose that the properties that he intended to offer as collateral were properties that were intended to be sold as part of the wind down phase, with the proceeds to be distributed among the members of Park Street Group;

h. Groulx's proposal that Soaring Pine invest in a new business that he was prepared to launch, when no such business existed;

i. Groulx's use and reference to the remaining assets of Park Street Group to create the facade that he was starting up his own new company and not, in reality, closing Glenn Prentice's company;

j. Groulx's representation that he had funding sources for the alleged new company, but these alleged funding sources had "decided to discontinue" when no such funding sources existed;

k. Groulx's failure to disclose that his role in the "opportunities that I had been participating in for the last three or four years…" was non-managerial, that Glenn Prentice and David Prentice managed the business, and that Groulx lacked the knowledge, expertise, connections, history, and experience to manage a residential redevelopment business.

31. As a direct and proximate result of Defendants fraud and their failure to meet their obligations under the loan documents Soaring Pine has incurred substantial damages.

COUNT I - BREACH OF CONTRACT
(Park Street Realty – Mortgage Note)

32. Plaintiff incorporates all previous allegations by reference as if set forth fully herein.

33. Park Street Realty entered into a Mortgage Note dated August 12, 2016 in the original principal amount of Five Hundred Thousand and 00/00 dollars ($500,000.00). Ex. 1.

34. Park Street Realty entered into a Loan Agreement dated August 12, 2016. Ex. 2.

35. Park Street Realty entered into an Amended and Restated Mortgage Note dated September 23, 2016 in the original principal amount of One Million and 00/00 dollars ($1,000,000.00). Ex. 3.

36. Park Street Realty entered into an Amendment to the Loan Agreement dated September 23, 2016. Ex. 6.

37. Park Street Realty's Amended and Restated Mortgage Note dated September 23, 2016 matured as of September 23, 2017.

38. Park Street Realty failed to make payment in full as of the date of maturity. By correspondence to Park Street Realty dated December 27, 2017, Soaring Pine declared default and made demand. Ex. 5.

39. Park Street Realty is in default of the Amended Mortgage Note for various reasons including, without limitation, that the Note matured as of September 23, 2017.

40. Pursuant to the terms and conditions of the loan documents the entire unpaid balance of the Amended Mortgage Note has matured and is due and payable immediately.

41. Plaintiff's damages are in excess of Twenty-Five Thousand and 00/00 dollars ($25,000.00).

42. The Mortgage Note, Loan Agreement and all related loan documents provide for the payment by Park Street Realty of all Plaintiff's costs, including reasonable attorneys' fees incurred by Plaintiff, in connection with the administration, enforcement, remedial and/or protective activities of the indebtedness, including the cost of any inspection by Plaintiff, tax searches, title updates, filing and recording fees, environmental remediation costs, UCC searches and the like, and including by way of description and not limitation, such charges incurred in any court.

COUNT II - BREACH OF CONTRACT
(Park Street Group – Guaranty)

43. Plaintiff incorporates by reference the above paragraphs.

44. The indebtedness of Park Street Realty to Plaintiff is guaranteed by the Unlimited Guaranty dated August 12, 2016 of Park Street Group. Ex. 12.

45. Park Street Group is in default of its guaranty for reasons including, without limitation, that it failed to honor its Guaranty by making payment after the Note matured on September 23, 2017 and Park Street Realty failed to repay the outstanding balance.

46. Pursuant to the terms of the loan documents the entire unpaid balance of the Note matured and is due and payable immediately.

47. Plaintiff's damages are in excess of Twenty-Five Thousand and 00/00 dollars ($25,000.00).

48. The guaranty provides for the payment by Park Street Group of all reasonable costs, legal expenses and attorney's fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Plaintiff, its parent or affiliates), paid or incurred by the Plaintiff in endeavoring to collect all or any part of this indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing the guaranty.

COUNT III - BREACH OF CONTRACT
(Dean J. Groulx – Guaranty)

49. Plaintiff incorporates by reference the above paragraphs.

50. The indebtedness of Park Street Realty to Plaintiff is guaranteed by the Unlimited Guaranty dated August 12, 2016 of Dean J. Groulx. Ex. 13.

51. Dean J. Groulx is in default of his guaranty for reasons including, without limitation that he has have failed to honor his guaranty by making payment after the Amended Mortgage Note matured on September 23, 2017.

52. Pursuant to the terms of the loan documents the entire unpaid balance of the Note matured and is due and payable immediately.

53. Plaintiff's damages are in excess of Twenty-Five Thousand and 00/00 Dollars ($25,000.00).

54. The guaranty provides for the payment by Defendant Dean J. Groulx of all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Plaintiff, its parent or affiliates), paid or incurred by the Plaintiff in endeavoring to collect all or any part of this indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing the guaranty.

COUNT IV – FRAUDULENT INDUCEMENT
(All Defendants)

55. Plaintiff incorporates by reference the above paragraphs.

56. Defendants made material representations to Soaring Pine and Soaring Pine's representatives during negotiations leading up to the parties' loan agreement of the parties' loan agreement.

57. Defendants' misrepresentations are set forth above and were made for the purpose of misleading Soaring Pine about Defendants' business – including its ownership, origin, and the fact that it was being wound down at the time the negotiations were taking place – and the fact that Groulx had not planned to start a new residential redevelopment business, that he had just lost over half his partners, and that he had no other potential investors. Defendants misrepresentations were further made to falsify Groulx's prior role in the partnership and to conceal the fact that he lacked the experience, knowledge and connections required to run a successful residential redevelopment business.

58. Defendants' representations were material to Soaring Pine's decision to enter the loan agreement and had it known the true state of Defendants' experience and business it would not have agreed to make any loan to Groulx or the Park Street entities.

59. Defendants' material representations were false.

60. Defendants knew that the material representations were false or recklessly made the representations as a positive assertion without knowledge of their truth.

61. Defendants made the representations with the intention that Soaring Pine act on them.

62. Soaring Pine acted in reasonable reliance on Defendants' representations.

63. Soaring Pine suffered injury in the form of substantial financial losses.

64. Plaintiff's damages are in excess of Twenty-Five Thousand and 00/00 dollars ($25,000.00).

COUNT V – INNOCENT MISREPRESENTATION
(Against all Defendants)

65. Soaring Pine incorporates all previous allegations by reference as if fully set forth herein.

66. Defendants' representations, as set forth in the preceding paragraphs, were false and were made in connection with Soaring Pine's decision whether to enter into the loan agreement with Defendants, and thereafter, in the context of the parties' contractual relationship.

67. Soaring Pine relied on the false representations and would not have entered into the loan agreement with Defendants had it known that the representations identified above were false.

68. Soaring Pine suffered sas a direct and proximate result of its reliance on Defendants' representations, while Defendants received the benefit of the $1,000,000 loan from

Soaring Pine. Defendants never paid back the loan amount, but instead used the funds to benefit Defendants directly.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

a. That the Court specifically make a finding that Defendants have engaged in fraudulent conduct in order to induce Soaring Pine to enter into the loan agreement when, had it known the true status of Defendants' experience and business it would not have agreed to enter into a loan agreement with Defendants;

b. That Defendants be found liable to Plaintiff for the indebtedness on the eLoan Agreement, and Guarantees as set forth herein, and that a money judgment(s) be entered in favor of Plaintiff and against Defendants, jointly and severally, for an amount in excess of Twenty-Five Thousand and 00/00 dollars ($25,000.00);

c. That the loan agreement be rescinded based on Defendants' fraudulent and inequitable conduct;

d. That the Court enter an award of damages against Defendants for all attorneys' fees as a damage provided for in the terms and conditions of the loan documents;

f. That the Court enter an award of damages against Defendants for all receiver fees and costs as a damage provided for in the terms and conditions of the loan documents; and

g. That the Court grant whatever additional relief, in law or equity, including costs, interest, sanctions and attorney's' fees may be allowed by law which it deems just and equitable.

Date: February 13, 2019

Respectfully submitted,

ROSSMAN SAXE, P.C.

Attorneys for Plaintiff

By: /s/ Mark C. Rossman
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PROOF OF SERVICE

I, Mark C. Rossman, certify that on this day of 13th day of February December 2018, filed Plaintiffs' First Amended Complaint with the Clerk of the Court of the County of Oakland using the MiFile System which served same upon all counsel of record.

/s/ Mark C. Rossman
Mark C. Rossman

Dated: February 13, 2019

EXHIBIT 1

MORTGAGE NOTE

Principal Amount: $500,000.00 **Birmingham, Michigan**

Maturity Date: August 12, 2017 **Dated: August 12, 2016**

FOR VALUE RECEIVED, the undersigned, PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company ("Borrower"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 promises to pay to the order of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), at its offices located at 335 East Maple Road, Birmingham, Michigan 48009, or at such other place as Lender may designate in writing, the principal sum of Five Hundred Thousand and 00/100 Dollars ($500,000.00), plus interest as hereinafter provided, in lawful money of the United States. Subject to the terms and conditions of this Note, the Lender will, during the term of this Note, make available to the Borrower, and then the Borrower may borrow from the Lender, and repay and re-borrow, at any time prior to the Maturity Date, any amount up to a maximum principal amount at any one time outstanding of Five Hundred Thousand and 00/100 Dollars ($500,000.00)

Interest Rate.

Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) ("Interest") per annum;

Repayment.

Commencing on September 1, 2016, and continuing on the first day of each calendar month thereafter through the Maturity Date (each, a "Payment Date"), Borrower shall pay to Lender monthly payments as follows:

Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due.

Months 3, 4, 5 & 6 – Borrower shall pay to the Lender interest only payments on the outstanding principal balance of the Loan, at the Interest Rate and

Months 7, 8, 9, 10, 11 & 12 – Borrower shall pay to the Lender principal and Interest on a Fifteen (15) year amortization,

Final Payment shall be due on the Maturity Date of August 12, 2017 of a balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest.

Except as otherwise agreed in writing by Lender, all amounts payable under this Agreement shall be paid by electronic funds transfer ("EFT") from Borrower's designated bank account to such bank account as may be designated by Lender from time to time. Borrower shall provide such information and shall execute such authorizations as Lender may from time to time require to allow Lender to withdraw payments due hereunder directly from Borrower's designated bank account.

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3. **Definitions.**

"Business Day" means any day which is neither a Saturday or Sunday nor a legal holiday on which commercial banks are authorized or required to be closed in Detroit, Michigan;

"Collateral Documents" mean the Collateral Documents as defined in the Loan Agreement.

"Costs of Collection" means upon the occurrence of an Event of Default and during the continuance thereof (after giving effect to applicable notice and cure periods) or upon the occurrence of a bankruptcy related Event of Default without giving effect to any cure period or to any period in which the applicable proceeding may be contested, all third party out-of-pocket expenses incurred by Lender in connection with the administration, collection and enforcement of the Loan, including reasonable attorney fees, the cost of tax searches, UCC searches and similar charges and costs and expenses incurred in any court or bankruptcy proceeding.

"Event of Default" means the payment of any principal or interest under this Note is not made within five (5) days after the date when due under this Note or the occurrence of any other Event of Default, as defined in the Loan Agreement.

"Loan" means all amounts outstanding under this Note.

"Loan Agreement" means that certain Loan Agreement entered into between Borrower and Lender dated of even date with this Note, as same may be amended, modified or altered from time to time.

"Maturity Date" means August 12, 2017, unless accelerated sooner pursuant to the terms of this Note.

"Note" means this Note made payable by Borrower to the order, and for the benefit, of Lender.

"Payment Date" means the date each payment is due hereunder.

4. **Interest Computation; Application of Funds.**

Interest shall be calculated for the actual number of days elapsed on the basis of a three hundred sixty (360) day year, including the first date of the applicable period to, but not including, the date of repayment. The Lender may apply all payments received under this Note to accrued interest, to the principal balance outstanding under this Note and to costs, fees and expenses payable by the Borrower in any order determined by the Lender in its sole discretion. If any Payment Date is not a Business Day, such Payment Date shall be extended to the next succeeding Business Day and such extension of time shall be included in computing any interest in respect of payment due on such date.

5. **Interest Limitation.**

Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the

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maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid or payable by the Borrower in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Note. If Lender shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall become due and payable thirty (30) days from the date of such determination.

6. **Events of Default; Remedies.**

Upon the occurrence of an Event of Default and during the continuance thereof, Lender may, subject to any notice and cure periods in the Loan Agreement, declare the entire unpaid and outstanding principal balance hereunder and all accrued interest, together with all other indebtedness of Borrower to Lender, to be due and payable in full forthwith, without further presentment, demand or notice of any kind, all of which are hereby expressly waived by Borrower, and thereupon Lender shall have and may exercise any one or more of the rights and remedies provided herein or in any Collateral Documents. The remedies provided for hereunder are cumulative to the remedies for collection of the amounts owing hereunder as set forth in the Collateral Documents and as provided by law. Nothing herein is intended, nor should it be construed, to preclude Lender from pursuing any other remedy for the recovery of any other sum to which Lender may be or become entitled for breach of the terms of this Note, Loan Agreement or any Collateral Documents relating hereto.

7. **Costs of Collection.**

Borrower agrees, in case of an Event of Default (and while such Event of Default continues) to pay all Costs of Collection.

8. **Default Rate of Interest.**

During any period(s) that an Event of Default has occurred and is continuing, or after the Maturity Date or after acceleration of maturity, the outstanding principal amount of this Note shall bear interest at a rate equal to five percent (5.0%) per annum greater than the interest rate otherwise charged hereunder.

9. **Late Charges.**

If any required payment is not made date it is due, then, at the option of Lender, a late charge in the amount of five percent (5.0%) of the payment so overdue may be charged.

10. **No Waiver of Default.**

Acceptance by Lender of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default. During an Event of Default, neither the failure of Lender promptly to exercise its right to declare the outstanding principal and accrued unpaid interest hereunder to be immediately due and payable, nor, upon the occurrence of an Event of Default, shall the failure of Lender to demand strict performance of any other obligation of Borrower or any other person who may be liable hereunder constitute a waiver of any such rights, nor a waiver of such rights in connection with any future default on the part of Borrower or any other person who may be liable hereunder.

11. Waiver of Jury Trial.

BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. BORROWER, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, AND BANK, EACH KNOWINGLY AND VOLUNTARILY AND FOR THEIR RESPECTIVE BENEFIT WAIVE ANY RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY CLAIM, DISPUTE, CONFLICT, OR CONTENTION, IF ANY, AS MAY ARISE UNDER THIS NOTE OR THE LOAN EVIDENCED BY THIS NOTE, AND AGREE THAT ANY LITIGATION BETWEEN THE PARTIES CONCERNING THIS NOTE OR THE LOAN EVIDENCED BY THIS NOTE SHALL BE HEARD BY A COURT OF COMPETENT JURISDICTION SITTING WITHOUT A JURY.

12. General.

Borrower and all guarantors of this Note, if any, hereby jointly and severally waive presentment for payment, demand, notice of non-payment, notice of protest or protest of this Note, diligence in collection or bringing suit, and hereby consent to any and all extensions of time, renewals, waivers, or modifications that may be granted by Lender with respect to payment or any other provisions of this Note, and to the release of any collateral or any part thereof, with or without substitution. The liability of Borrower shall be absolute and unconditional, without regard to the liability of any other party hereto. This Note shall be deemed to have been executed in, and all rights and obligations hereunder shall be governed by, the laws of the State of Michigan.

13. Other Documents.

Borrower and Lender have signed other Collateral Documents in conjunction herewith providing for security for this Note or other matters. Reference is hereby made to the Collateral Documents for additional terms relating to the transaction giving rise to this Note, the security or support given for this Note and additional terms and conditions under which this Note matures, may be accelerated or prepaid.

Signature Page Follows

DJG

[Signature page to Construction Mortgage Note]

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: Dean J. Groulx

Name: Dean J. Groulx

Its: MEMBER

EXHIBIT 2

LOAN AGREEMENT

THIS LOAN AGREEMENT ("Agreement") shall be effective as of the 12 of August, 2016, by and between **SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC,** a Delaware limited liability company, whose address is 335 East Maple Road, Birmingham, Michigan 48009 ("Lender"), and **PARK STREET GROUP REALTY SERVICES, LLC,** a Michigan limited liability company, whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 ("Borrower").

WITNESSETH:

WHEREAS, Lender and Borrower desire to enter into the loan transactions described in this Agreement, provided Borrower adheres to all of the terms and conditions of this Agreement as hereinafter described; and

WHEREAS, Borrower has requested that Lender lend funds to Borrower upon the terms and conditions described in this Agreement; and

WHEREAS, Lender desires to lend such funds to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and the following several and mutual recitals, representations, warranties, promises, covenants, conditions and stipulations herein contained, Borrower and Lender do hereby covenant and agree as follows:

SECTION 1 DEFINITIONS

In this Loan Agreement and in the Collateral Documents herein referenced the following general words, phrases and expressions shall have the respective meanings attributed to them:

1.1. **"Agreement"** shall mean this Loan Agreement, and all amendments, modifications and extensions hereof.

1.2. **"Lender"** shall mean Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company.

1.3. **"Borrower"** shall mean Park Street Group Realty Services, LLC, a Michigan limited liability company.

1.4. **"Collateral"** shall mean the Premises now owned by Borrower and Guarantor which collectively have a value of $750,000.00, described in any of the Collateral Documents, including, but not limited to the following:

(a) Premises (as hereinafter defined);

(b) All general intangibles and contract rights related to the Premises, including all licenses, permits and registrations;

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(c) all equipment, including all machinery, furniture, fixtures, trade fixtures, furnishings and personal property located upon the Premises and/or used in connection therewith, now or hereafter owned by Borrower; and

(d) all accessions, parts, attachments, and accessories used or intended for use in connection with the foregoing, and proceeds, products, proceeds of hazard insurance, and eminent domain proceedings, and condemnation awards of all of the foregoing, and all repossessions, returns and records of any of the foregoing.

1.5. **"Collateral Documents"** shall mean any and all documents, instruments, notes, guaranties, mortgages, assignments, security agreements, indemnification agreements, environmental certificates and indemnity agreements, estoppels, certificates and written memoranda referred to herein, or executed in connection herewith or therewith, now or hereafter existing, in form and substance satisfactory to Lender.

1.6. **"Commitment Fee"** shall mean Twenty-Five Thousand and 00/100 Dollars ($25,000.00) which is due and payable to lender at closing from the Loan.

1.7. **"Environmental Laws"** shall mean all laws, regulations and rules of the United States of America, State of Michigan, local authorities and their respective agencies and departments relating to pollution or the protection of the environment, including but not limited to, those governing the use, storage, treatment, handling, production or disposal of Hazardous Materials and/or the emission, discharge or release of Hazardous Materials into the environment. Environmental Laws include, without limitation, the Clean Air Act (42 USC 7401 et sea,.), Clean Water Act (33 USC 1251 et sea.), Resource Conservation and Recovery Act of 1976 (42 USC 6901 et seg.), Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 USC 9601 et seg.), Hazardous Materials Transportation Act (49 USC 1801 et seg.), Solid Waste Disposal Act (42 USC 6901 et seg.), and Toxic Substances Control Act (15 USC 2601 et sef.), as each of such laws have been or are hereafter amended, together with all rules and regulations promulgated by the U.S. Environmental Protection Agency, and all additional environmental laws, rules and regulations in effect on the date hereof and as are hereafter enacted, including the common law and including the terms and conditions of any permits, approvals, orders and/or judgments relating to the Premises.

1.8. **"Event(s) of Default"** shall mean any of the events listed in Section 7 of this Agreement, provided that any requirement for the giving of notice, lapse of time or both, has been satisfied.

1.9. **"Guarantor(s)"** shall mean unlimited personal guarantees of Dean J. Groulx, individually, and Park Street Group, LLC, a Michigan limited liability company.

1.10. **"Hazardous Materials"** shall mean any flammables, explosives, radioactive materials, hazardous wastes, friable asbestos or any material containing asbestos, toxic substances or related materials, including, without limitation, substances now or hereafter defined as hazardous substances, hazardous materials or toxic substances in or under any Environmental Law(s).

1.11. **"Improvements"** shall mean improvements located on, or to be constructed on, the Premises in accordance with the Plans including, without limitation, all infrastructure and utility work.

1.12. **"Indebtedness"** shall mean:

(a) all indebtedness, obligations and liabilities of the Borrower and Guarantor under the Loan or arising under any of the Collateral Documents, of whatsoever kind, nature and description, primary or secondary, direct, indirect or contingent, due or to become due, and whether now existing or hereafter arising, and including without limitation of the generality of the foregoing, all indemnities, defenses and hold harmless obligations of Borrower and Guarantor to Lender in connection with the Loan;

(b) a $500,000.00 term loan made by Lender in connection with the Loan and/or the Collateral Documents as provided herein, and whether made at Lender's option or otherwise, and the Loan and all notes now or hereafter executed or existing in connection herewith, and interest accrued thereon, from time to time;

(c) all future advances made by Lender for the protection or preservation of Lender's rights and interests in the Collateral, as expressly provided herein or in the Collateral Documents, including, but not by way of limitation, advances for taxes, levies, assessments, insurance or maintenance of the Collateral which are not timely paid by Borrower in accordance with the terms of this Agreement;

(d) all third party out-of-pocket costs and expenses actually incurred by Lender in connection with or arising out of the protection, enforcement or collection of any of the foregoing, including without limitation, reasonable attorneys' fees; and

(e) all costs and expenses actually incurred by Lender in connection with, or arising out of, the sale, disposition, liquidation or other realization [including, but not by way of limitation, the taking, retaking or holding, and all proceedings (judicial or otherwise)] of the Collateral, including, without limitation, reasonable attorneys' fees, to the extent permitted herein.

1.13. **"Lease(s)"** shall mean all leases, licenses, land contracts, or occupancy agreements of any kind whatsoever on the Premises.

1.14. **"Legal Requirements"** shall mean the following, as applicable, with respect to the Improvements and the use, ownership, occupancy and maintenance of the Premises, including accessibility for disabled or handicapped persons:

(a) all laws, ordinances and regulations of the United States of America, the State of Michigan, and all county and municipal governments and regulating authorities having jurisdiction;

(b) the orders of any court or regulatory, administrative or municipal authority; and

(c) the terms and conditions of all governmental approvals, licenses, permits (including building permits and certificates of occupancy) issued by local government authorities.

1.15. **"Loan"** shall mean a term loan in the Loan Amount.

1.16. **"Loan Amount"** shall mean Five Hundred Thousand and 00/100 Dollars ($500,000.00).

1.17. **"Organizational Documents"** shall mean and include Borrower's (and Borrower's members') operating agreement, certified articles of organization and a certificate of good standing duly

issued by the Michigan Department of Labor and Economic Growth.

1.18. **"Permitted Encumbrances"** shall mean the recorded easements and restrictions affecting the Premises and described in the Mortgage (hereinafter defined).

1.19. **"Premises"** shall mean the homes described in Exhibit A ("~~Additional~~ Collateral") or substitute collateral as provided in paragraph 9.3.**"Project"** shall mean the Premises and Improvements.

1.20. **"Title Insurance"** shall mean title insurance acceptable to Lender for insuring first mortgage liens on all additional collateral listed in Exhibit A.

SECTION 2 LOAN

2.1. **Loan Amount**: Lender agrees to lend to Borrower and Borrower agrees to take from Lender the Loan in the Loan Amount upon the terms, covenants and conditions hereinafter set forth.

2.2. **Use of Proceeds**: The proceeds of the Loan shall be used for working capital, including to acquire and renovate the Premises.

2.3. **Term**: The maturity date of the Loan is set forth in the Note.

2.4. **Interest Rate**: The Loan shall bear interest in accordance with the terms of the Note.

2.5. **Repayment**: The Loan shall be paid in accordance with the terms of the Note.

2.6. **Prepayment**: The Loan may be prepaid only in accordance with the terms of the Note.

2.7. **Promissory Note**: Borrower shall evidence its obligation to repay the Loan by executing its Promissory Note in the principal amount of the Loan Amount. The Promissory Note is sometimes referred to herein as the "Note." The Note shall be dated as of the date of delivery by Borrower to Lender.

2.8. **Security**: As security for the payment of the Loan, the Note, and all loans and advances made pursuant to this Agreement and the Collateral Documents, and for the performance and observance of the terms and conditions of this Agreement and the Collateral Documents, Borrower shall execute and deliver to Lender or cause to be executed and delivered to Lender the following Collateral Documents:

(a) A first, prior, valid, enforceable and perfected Mortgages on the Premises (the "Mortgage"), including land, roads and easements, and rights to the beneficial use and enjoyment of the Premises, and upon all Improvements, appurtenances and Borrower owned fixtures located thereon, including all personal property of Borrower used in the operation of the Improvements, subject only to the Permitted Encumbrances, if any.

(b) A first security agreement covering all personal property owned by Borrower.

(c) The Guarantees.

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(d) Financing statements as necessary to perfect the security interests and liens of the Lender with respect to the security described above.

(e) Any other documents requested by the Lender to evidence or secure the Loan.

SECTION 3 CONDITIONS PRECEDENT TO CLOSING. DISBURSEMENT OF THE LOAN:

3.1. The obligation of Lender to close the Loan and make the initial advance of the proceeds of the Loan is subject to the following conditions precedent, which shall be in form and substance acceptable to Lender in all respects:

3.1.1. Execution of all documents evidencing and securing the Indebtedness.

3.1.2. Lender shall have received the Organizational Documents; and:

(a) **Mortgage Title Insurance.** The Title Insurance shall be an ALTA Loan Policy issued by Title Insurer selected by Lender and issued in an amount equal to the estimated value of each of the homes listed in Exhibit A as Additional Collateral. Title Insurance shall show marketable title in Borrower or Park Street Group, LLC in each of the homes listed in Exhibit A. Lender's mortgages will constitute a first lien upon the Premises in Exhibit A (the "Title Policy"). The amount of Title Insurance for each home will be based on the estimated value of each home listed.

(b) **Insurance**. It is understood that the Premises at time of purchase will be "uninsurable" Borrower however while marketing any of the Premises to prospective purchasers after certificates of occupancy have been procured by the municipality will purchase all risk insurance for the full replacement value of the Premises and the improvements as well as public liability insurance in an amount acceptable to Lender naming Lender as a loss payee. In addition, Borrower agrees to purchase all risk insurance for the replacement value of the Additional Collateral listed in Exhibit A as well as public liability insurance in an amount acceptable to Lender naming Lender as a Loss Payee if the Premises are insurable in their current condition.

(c) **Taxes**. The Borrower agrees to pay all real estate taxes due and assessed against the Premises when due or in accordance with any payment plan approved by the applicable taxing authority.

(d) **Compliance with Michigan Construction Lien Act**. Borrower shall be in compliance with the construction lien laws of the State of Michigan, as amended when any renovations are done to the premises. Borrower shall have prior to any renovations to the premises, Borrower shall have recorded in the office of the appropriate County Register of Deeds, a Notice of Commencement as required by said Construction Lien Act, prior to the first "actual improvement" to the Premises or prior to any repair or construction activities at the Premises. Further, neither Borrower, nor any Contractor, agent, employee or any other person or entity shall have taken any action which would constitute an "actual physical improvement" to the Premises prior to the recordation of Lenders Mortgage on the premises and Lender receives first mortgage lien coverage by the Title insurer. The term "actual physical improvement" shall be defined as the same is defined in the Construction Lien Act of Michigan. Borrower shall also designate a "Designee" acceptable to Lender as required by the Construction Lien Act.

(h) **Compliance with All Governmental Laws and Regulations**. With respect

to any renovations or improvements to the Premises Borrower agrees to obtain any governmental approvals and/or permits necessary from the required governmental authority(ies) for the renovations and/or improvements to the Premises, and if requested by Lender shall submitted satisfactory evidence thereof to the Lender.

(i) **Zoning**. If requested by Lender, evidence that the Premises are lawfully zoned to accommodate the Improvements, if any, and that all prerequisite conditions of Borrower pursuant to said zoning have been timely, properly and completely complied with. If there are no Improvements, evidence that the Premises is properly zoned for Borrower's intended use.

3.1.3. Lender shall have received the Commitment Fee as defined in Section 1.6 above.

SECTION 4 INTENTIONALLY OMITTED

SECTION 5 REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants to Lender as follows, as of the date hereof:

5.1. **Authority**:

(a) Borrower is a limited liability company, duly organized and validly existing under the laws of the State of Michigan and has the power to own property and to carry on its business as now being conducted, and is duly qualified to do business, and is in good standing, in the jurisdiction in which the transaction of its business makes such qualification necessary and has a certificate of good standing.

(b) Borrower has full power and authority to enter into this Agreement, to make the borrowings hereunder, to execute and deliver the Note and the Collateral Documents, and to incur the obligations provided for herein, all of which have been duly authorized by all proper and necessary membership action. No consent or approval of any public authority is required as a condition to the validity of this Agreement or the Note, Mortgage or any other Collateral Document.

(c) Borrower will procure all necessary governmental approvals, permits and licenses for any improvements and/or renovations to the Premises.

5.2. **Title**: Borrower will be the holder of good and valid fee title to the Premises and represents and warrants that there are no mortgages, liens or encumbrances on said Premises except for the Leases and Permitted Encumbrances and those liens in favor of Lender. Borrower represents it is the holder of good and valid fee title to the homes listed in Exhibit A as Additional Collateral and warrants that there are no mortgage or liens, or encumbrances on said homes except for the Leases and Permitted Encumbrances and those liens in favor of Lender.

5.3. **Litigation**: There are no actions, suits or proceedings pending or threatened against or affecting Borrower or Guarantors, or the Premises or any other property of Borrower, in any court or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, which may result in any material adverse change in the business, properties or assets or in the condition, financial or otherwise, of Borrower or Guarantor. Neither Borrower, nor any Guarantors, is in default with respect to any order, writ, injunction, decree or

demand of any court or federal, state, municipal or other governmental department, commission, board, bureau, agency, instrumentality, default under which might have consequences which would materially and adversely affect their respective business or properties.

5.4. **Financial Condition**: The financial statements heretofore delivered to Lender are complete and correct in all material respects and fully present the financial condition of Borrower and Guarantor. The financial statements of Borrower fully present the result of its operations and transactions in its surplus accounts as at the date and for the period referred to and the same have been prepared in accordance with generally accepted accounting principles applied on a consistent basis throughout the period involved. There are no liabilities, direct or indirect, fixed or contingent, of Borrower or Guarantor as of the date of such financial statements or balance sheet(s) which are not reflected therein or in the notes thereto. There has been no material adverse change in the financial condition or operation of Borrower or Guarantor since the date of said financial statements or balance sheet(s).

5.5. **Adverse Contracts. Etc.**: Borrower is not a party to any contract or agreement or subject to any other restriction or unusually burdensome order of any regulatory commission, board or agency which materially and adversely affects its business, properties or assets or its condition, financial or otherwise. The execution and performance of this Agreement will not result in the creation of any other encumbrance or charge upon any asset of Borrower pursuant to the terms of any other agreement. No provision of any existing mortgage, indenture, contract or agreement or affecting the Premises is in effect which would conflict with or in any way prevent the execution, delivery or carrying out of the terms of this Agreement. The consummation of the Loan transaction and the execution of this Agreement and the Collateral Documents will not violate the terms and conditions of any contract or agreements to which Borrower or any Guarantor is a party.

5.6 **Utilities**: All utility services necessary for the use of the Premises as contemplated hereby are or will be available at the boundaries of the Premises, including water supply, storm and sanitary sewer facilities, gas, electric and telephone facilities and no off-site easements are required.

5.7 **Liens**: Other than Collateral Documents and Construction Contracts, Borrower has made no contract or arrangement of any kind, the performance of which by the other party thereto would give rise to a lien or claim of lien on the Premises.

5.9. **Access**: There is access to and from a public right away to and from the Premises sufficient for motor vehicles including all construction equipment.

5.10. **Default**: No event or circumstance on the part of Borrower has occurred under this Agreement, the Note or the Collateral Documents, now existing and no event has occurred and is continuing which with notice or the passage of time or either would constitute an Event of Default under any thereof.

SECTION 6 PARTICULAR COVENANTS OF BORROWER

6.1. **Insurance**:

(a) **Liability and Casualty Insurance**. To maintain insurance on the Premises in

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accordance with Paragraph 3.12 (b) above.

6.2. **Payment of Taxes**: Borrower shall pay all taxes in conformance with Paragraph 3.12 (c) above.

6.3. **Observance of Rules**: Borrower covenants and represents and warrants that Borrower has and will continue at all times to promptly comply with all applicable laws, ordinances, regulations or requirements of any governmental authority relating to Borrower's business, property or affairs, including without limitation, the Premises.

6.4. **Business Existence**: Borrower will keep and cause to be kept in full force and effect and in "good standing", its existence as a limited liability company and all rights, licenses, leases and franchises reasonably necessary to conduct the business of the Borrower.

6.5. **Environmental Matters**: Borrower shall: (i) cause the Premises to be in compliance with all applicable Environmental Laws, rules and regulations; (ii) act promptly and in accordance with all requirements as to time and date required by applicable law and the preparation of any remediation plan and in the carrying out of that remediation plan; and (iii) comply promptly in all respects with the Environmental Certificate executed and delivered to Lender on even date. Further, if: (a) a claim of a violation of any Environmental Law, ordinance or regulation is made by any governmental authority with respect to the Premises, (b) Lender reasonably believes that a new recognized environmental condition exists at the Premises; and/or (c) an Event of Default occurs and is continuing, Borrower shall furnish to Lender such environmental updates and questionnaires as Lender may reasonably request thereafter and, to the extent reasonably required by Lender, perform such further studies, testing and/or remediation as a result thereof.

6.6. **Control; Limitation on Sale: Further Encumbrance**:

(a) Borrower shall not further encumber, mortgage or permit any security interest or lien to attach to the Premises, without the prior written consent of Lender, except for Leases, encumbrances, mortgages or security interests in favor of Lender (See Section 6.8 below which further defines).

6.7. **Compliance**: Borrower shall comply with all applicable Legal Requirements, all covenants, restrictions and easements affecting the Premises, including building and use restrictions.

6.8. **Non-Pledge**: Borrower and Guarantor will not, without the prior written consent of Lender, mortgage or pledge as security for any other loans obtained by Borrower or Guarantor, the Premises as described herein, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Premises. If any such mortgage or pledge is entered into without the prior written consent of the Lender, the entire Indebtedness secured hereby, may, at the option of Lender, be declared immediately due and payable without notice. Further, Borrower and Guarantor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Premises for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Lender's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Premises or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Borrower or Guarantor. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or

placed by Borrower or Guarantor on the Premises under a security agreement the lien or title of which is superior to the lien created by any Mortgages Borrower or Guarantor execute in favor of Lender, all the right, title and interest of Borrower or Guarantor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Borrower and Guarantor shall nevertheless be and are hereby assigned to Lender and are covered by the lien of all the Mortgages Borrower or Guarantor grants to Lender.

SECTION 7 DEFAULT AND REMEDIES

7.1. **Default:** The entire unpaid Indebtedness shall be deemed matured and shall become immediately due and payable, at the option of Lender, without notice or demand, except as otherwise specifically required herein and without regard to any maturity date, upon the occurrence of any of the following events of default (each, an "Event of Default" and collectively, the "Events of Default"), which shall be deemed to be an Event of Default under this Agreement, the Note and the Collateral Documents:

(a) Default shall be made in the payment by Borrower of any installment of principal and/or interest under the Note or of any payment required to be made by Borrower pursuant to this Agreement or under any Collateral Document, within five (5) days after the date such payment is due, which is not cured within 10 days of written notice to Borrower by Lender; or

(b) Failure of Borrower to make any deposit of funds required hereunder or under any Collateral Documents within thirty (30) days after written demand therefor; or

(c) The filing of any construction lien against the Premises or any part thereof or any interest or right made appurtenant thereto which is not discharged or bonded over by a statutory bond (so as to cause the lien to be removed from title) or title insured by Title Insurer to the satisfaction of Lender within thirty (30) days from the date of Borrower's receiving knowledge thereof; or

(d) Any representation or warranty heretofore or hereafter made by or on behalf of Borrower or any Guarantor is found by Lender to have been false or misleading in any material respect when made or subsequently breached in any material and adverse respect; or

(e) Intentionally Omitted; or

(f) Intentionally Omitted; or

(g) There shall occur: (i) a termination of existence or dissolution of Borrower; or (ii) a sale out of the ordinary course of business by Borrower of all or of a substantial part of its assets; or (iii) a breach or violation of Section 6.6 of this Agreement; provided, however, with respect to: (A) Section 6.6(a), if within ten (10) days after Lender's receipt of the Permitted Transfer Documents, Lender determines that the Permitted Transfer Documents evidence a conveyance that is not a Permitted Transfer, Borrower shall have ten (10) business days from receipt of written notice from Lender to cure the same; and (B) Section 6.6(b), the cure period set forth in Section 7.1(c) shall apply to construction or monetary liens; or

(h) The Collateral or any material part thereof shall be destroyed or materially damaged, and not rebuilt, repaired or replaced to the extent required by the terms of this Agreement or any Collateral Documents; or

(i) The failure or breach of any other non-monetary covenant, or any warranty, promise, or representation herein contained and/or contained in either Note or in any of the Collateral Documents and the continuation of such failure or breach for a period of thirty (30) days after written notice thereof to the Borrower; provided, however, if a different period or notice requirement is specified for a particular breach under any other subsection of this Section 7 or any other document (notice shall not be required for a default under Subsections, 7.1(d), 7.1(g) [except as expressly set forth in Section 7.1(g)], 7.1(j), and 7.1(k)), then that specific provision shall control; provided, further, that the thirty (30) day cure period provided by this Section 7.1(i) shall not be in addition to any cure period specifically provided elsewhere in this Agreement or in the Note or any Collateral Document; notwithstanding the foregoing, should an Event of Default exist under a Subsection other than 7.1 (a), 7.1(d), 7.1(g) [except with respect to the cure of construction or monetary liens], 7.1(j), and 7.1(k), then the applicable cure period may be extended for an additional period of ninety (90) days as long as Borrower has commenced the cure and diligently pursues the cure within the initial thirty (30) day period and thereafter; or

(j) Should any of the following occur with regard to Borrower or any Guarantor:

(i) a general assignment for the benefit of creditors; or

(ii) the filing of a voluntary petition under any bankruptcy or insolvency law; or

(iii) the filing of any involuntary petition under any bankruptcy or insolvency law by the creditors of Borrower or any Guarantor, said petition remaining undischarged for a period of ninety (90) days; or

(iv) the appointment by any court of a receiver to take possession of substantially all assets of Borrower, any Guarantor or of the Premises, said receivership remaining undischarged for a period of ninety (90) days; or

(v) attachment, execution or other judicial seizure of substantially all of assets of Borrower or any Guarantor, such attachment, execution or other seizure remaining undismissed or undischarged for a period of ninety (90) days after the levy thereof for assets other than the Premises; or

(vi) attachment, execution or other judicial seizure of the Premises, such attachment, execution or other seizure remaining undismissed or undischarged for a period of thirty (30) days after the levy thereof; or

(vii) any judgment against Borrower, or any garnishment, attachment or other levy against the property of Borrower, with respect to a claim for any amount in excess of Twenty-Five Thousand Dollars ($25,000.00) remains unpaid, unstayed on appeal, undischarged, unbonded or undismissed for a period of sixty (60) days; or

(viii) any judgment against any Guarantor, or any garnishment, attachment or other levy against the property of any Guarantor, with respect to a claim for any amount in excess of Twenty-Five Thousand Dollars ($25,000.00) remains unpaid, unstayed on appeal, undischarged, unbonded

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or undismissed for a period of sixty (60) days.

(k) If Hazardous Materials are found on, upon or under the Premises, in amounts in excess of the amounts permitted by the Environmental Laws, and if such Hazardous Materials are not removed or remediated as required by any governmental authority having jurisdiction within the time periods required by said governmental authority or, within the time period required by applicable laws, ordinances or regulations or if Borrower fails to commence and prosecute remediation within the time periods required by law or by any such governmental authority.

7.2. **Borrower's Obligation to Give Notice of Event of Default**: Borrower shall give written notice to Lender of the occurrence of any Event of Default or the existence of any event which would, with the passage of time or giving of notice or both, constitute an Event of Default hereunder promptly after discovery of any such event.

7.3. Intentionally Omitted

7.4. **Application of Funds in Account: Default Charge**: After maturity of the Note, by acceleration or otherwise:

(a) Lender shall have the right to apply all or any part of said funds or of any funds in any account of Borrower then maintained with Lender to payment of principal and accrued interest under the Note at Lender's discretion and the obligations of Borrower hereunder.

(b) Borrower shall pay interest at the default rate of interest set forth in the Note.

7.5. **Remedies are Cumulative**: All remedies provided for herein are cumulative and shall be in addition to any and all other rights and remedies provided by law, including banker's lien and right of offset. The exercise of any right or remedy by Lender hereunder shall not in any way constitute a cure or waiver of an Event of Default or invalidate any act done pursuant to any notice of default or prejudice Lender in the exercise of any of its rights hereunder or under the Mortgage, unless in the exercise of said rights, Lender realizes all amounts owed under the Note, the Mortgage and hereunder.

7.6. **Waiver of Certain Laws**: To the extent permitted by applicable law, all parties hereto, except Lender, hereby agree to waive and do hereby absolutely and irrevocably waive and relinquish the benefit and advantage of any non-judicial valuation, stay, appraisement, extension or right to a judicial hearing prior to foreclosure, pursuant to statute and case made and provided, now existing or which may hereafter exist, which but for this provision, might be applicable to any sale made under the judgment, order or decree or any court, or otherwise, based on any promissory note or Collateral Documents contemplated hereby or on any claim for interest on the promissory note or on any security interest contemplated by this Agreement.

7.7. **Receiver**: Lender herein, upon the happening of an Event of Default, shall be entitled without notice or contest, and completely without regard to the adequacy of any security for the debt, to the appointment of a receiver of the business, including Borrower's rights under the Leases, if any, and Premises and of the rents and profits derived therefrom during the term of the Loan. This appointment shall be in addition to any other rights, relief or remedies afforded Lender. Such receiver, to the extent permitted by court order, which may include the following in addition to any other rights to which he, she or it shall be entitled, may exercise the rights granted herein to Lender hereunder and under the

Collateral Documents and shall be authorized to sell, foreclose or complete foreclosure on all security interests contemplated by this Agreement for the benefit of Lender. In the event of any deficiency, Borrower shall remain liable therefor.

7.8. **WAIVER OF JURY TRIAL**: BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL RIGHT, BUT THAT THE SAME MAY BE WAIVED. BORROWER, AFTER CONSULTATION (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, KNOWINGLY AND VOLUNTARILY, HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THE LOAN, THIS AGREEMENT OR ANY COLLATERAL DOCUMENT.

7.9. **Assignments**. Borrower hereby assigns to Lender as collateral security for the Loan, all of Borrower's right, title and interest in all contracts and agreements, including without limitation, all purchase agreements to sell Premises (defined below), all construction contracts and all contracts with engineers and architects (collectively, the "Assigned Contracts"). Following an Event of Default, at Lender's election, upon written notice to Borrower, the Assigned Contracts shall be deemed assigned to Lender and Borrower shall execute, or cause the counter party to execute, any necessary documentation to evidence the assignment of the Assigned Contracts.

SECTION 8 MISCELLANEOUS

8.1. **No Waiver**: No waiver of any default or breach by Borrower hereunder shall be implied from any omission by Lender to take action on account of such default if such default persists or is repeated. No express waiver shall affect any default other than the default specified in the waiver, and it shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by Lender to or of any act by Borrower requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act.

8.2. **No Third Parties Benefited**: This Agreement is made and entered into for the sole protection and benefit of Lender and Borrower, their successors and assigns, and no other person or persons shall have any right of action hereon.

8.3. **Actions**: Lender shall have the right to commence, appear in or defend any action or proceeding purporting to affect the rights, duties or liabilities of the parties hereunder. In connection therewith, Lender may incur and pay costs and expenses, including a reasonable attorneys' fee. Borrower agrees to pay to Lender on demand all such expenses.

8.4. **Commissions and Brokerage Fees**: Borrower agrees to indemnify Lender from any responsibility and/or liability for the payment of any commission, charge or brokerage fees to anyone which may be payable in connection with the making of the Loan herein contemplated unless such commission, charge or brokerage fee is due pursuant to a written agreement between Lender and the applicable broker; it being understood that any such commission, charge or brokerage fees will be paid directly by the Borrower to the party or parties entitled thereto. Lender represents and warrants to Borrower that Lender has not dealt with the Borrower through the agency of any person or entity in a manner which would, in Lender's good faith opinion, provide such person or entity with a claim for a

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commission or fee.

8.5. **Successors and Assigns**: The terms hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto; provided, however, that Borrower shall not assign its rights hereunder in whole or in part without the prior written consent of Lender. Any such assignment without said consent shall be void.

8.6. **Modifications**: Without any notice to or any further assent by any other persons, except for Borrower, the liability of Borrower to Lender for any Indebtedness may, from time to time, in whole or in part, be renewed, extended, modified, accrued, compromised or released by Lender. Any Collateral or liens for any such Indebtedness may be exchanged, sold, discharged or surrendered by Lender upon written notice to Borrower, all without affecting the obligations of any parties hereto under this Agreement or any other persons who may become subject to this Agreement and any assignment, pledge, guaranty, security agreement or chattel mortgage contemplated hereby. All of the obligations of any parties hereto, except Lender, contemplated by this Agreement shall be deemed to be joint and several.

8.7. **Continuing Agreement**: All of Borrower's and/or any other parties' agreements, representations, warranties and certificates under, pursuant or relating to this Agreement shall survive and continue until all Indebtedness hereunder is paid in full as to both principal and interest.

8.8. **Payment of Costs**: It is understood and agreed that Borrower shall pay, now or hereafter, all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by Lender in connection with the consummation and closing of the Loan. All of said amounts required to be paid by Borrower as aforesaid may, at Lender's option, be charged by Lender as an advance against the proceeds of the Loan. All costs, including reasonable attorneys' fees incurred by Lender, in connection with the administration, enforcement, remedial and/or protective activities of the Loan, including the cost of any inspection by Lender, tax searches, title updates, filing and recording fees, environmental remediation costs, UCC searches and the like, and including by way of description and not limitation, such charges incurred in any court or bankruptcy proceedings, shall be paid by Borrower and secured by the Collateral Documents.

8.9. **Additional Documentation**: Borrower, from time to time, upon written request of Lender will make, execute, acknowledge and deliver all such further and additional instruments and take all such further action as may be reasonably required to carry out the intent and purpose of this Agreement and to provide for the payment of all loans, notes, borrowings and advances according to the intent and purpose herein and therein expressed.

8.10. **Governing Law**: This Agreement, the Note and all Collateral Documents shall be interpreted and the rights of the parties hereunder shall be determined under the laws of the State of Michigan.

8.11. **Financing Statements**: No financing statements covering any collateral or proceeds thereof, as contemplated by this Agreement, are on file in any public office, except financing statements with Lender and Borrower's prior lender, which, with respect to Borrower's prior lender, Borrower represents and warrants shall be discharged on or immediately following the date hereof.

8.12. **Counterparts**: This Agreement may be executed in several counterparts, and each executed counterpart shall constitute an original instrument, but such counterparts shall together constitute

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but one and the same instrument.

8.13. **Inclusion by Reference:** All of the various instruments and documents referred or alluded to in this Agreement shall be deemed to be included herein and made a part hereof as though specifically set forth herein, word by word; provided, however, that if any conflict exists with respect to the rights of Lender, then the terms of such instruments, documents, pledges and security agreements will govern.

8.14. **Severability:** Should any part, term or provision of this Agreement be determined by the courts to be illegal or in conflict with any law of the State of Michigan, the validity of the remaining portions or provisions of the Agreement shall not be affected thereby.

8.15. **Notices:** All notices or demands hereunder to the parties hereto shall be sufficient if made in writing and (a) sent by certified mail, return receipt requested, postage prepaid; (b) sent by a recognized overnight courier for next business day delivery; or (c) delivered by personal service, and addressed to the parties as set forth on the first page hereof. Notice made in accordance with these provisions shall be deemed delivered at the time of written receipt if delivered by hand, on the third business day after mailing if mailed by certified mail, or on the next business day after deposit with a recognized overnight courier service if delivered by overnight courier, provided, that it is sent for next business day delivery, guaranteeing such delivery.

8.16. **Hold Harmless/Indemnity:** Borrower and Guarantors hereby assume responsibility and liability for, and hereby hold harmless and indemnify Lender from and against any and all, by way of example but without limitation, liabilities, demands, obligations, injuries, costs, damages (direct, indirect), awards, loss of interest not exceeding the legal rate, principal, or any portion of the Loan, charges, expenses, payments of monies and reasonable attorneys' fees, incurred or suffered, directly or indirectly, by Lender and/or asserted against Lender by any person or entity whatsoever, including Borrower or Guarantors, arising out of this Agreement, the Note or the Collateral Documents, or any other document executed pursuant to this Agreement, or the relationship herein set forth or the exercise of any right or remedy including the realization, disposition or sale of the Premises, or any portion thereof, or the exercise of any right in connection therewith, for which Lender may be liable, for any reason whatsoever, unless: (a) caused by the intentional acts or gross negligence of Lender, its employees or authorized agents; or (b) such assertion by Borrower and/or Guarantor is made in good faith.

8.17. **Relationship:** Nothing contained in this Agreement or any action of Lender or Borrower shall create any relationship of agency, partnership, co-venture, joint venture so as to render Lender liable in any manner to any party dealing with Borrower and Borrower and Guarantors shall indemnify, defend and hold Lender harmless from and against any claim that Lender is, or has acted in the capacity of an agent, partner, co-venturer or joint venturer of or with Borrower unless any such claim results from an intentional act or gross negligence of Lender or its employees or authorized agents. All obligations of Lender hereunder, including the obligation to make money advances are imposed solely and exclusively for the benefit of Borrower and its successors and assigns and no other person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will make money advances in the absence of strict compliance with any or all such conditions, and no other person shall, under any circumstances, be deemed to be a beneficiary of such conditions, any and all of which may be freely waived in whole or in part by Lender at any time if in its sole discretion it deems it desirable to do so.

8.18. **Entire Agreement:** This Agreement, the Note and other Collateral Documents

constitute the entire agreement between Lender and Borrower concerning the subject matter of this Agreement and supersede any conflicting terms and conditions set forth in any other agreement between the parties.

SECTION 9 REPORTS:

9.1. Borrower shall provide to Lender a Bi-Weekly reports identifying all homes purchased by Borrower with Loan, and the cost of each home and approximate cost of renovations. The Bi-Weekly Reports will also include an updated valuation statement of the Premises pledged as Collateral pursuant to Exhibit A attached.

9.2. **Sale of Homes Purchased with Loan Proceeds**: The Borrower shall provide Lender with five (5) days prior written notice of a sale of any home purchased with the Loan (a "Home Sale"). Upon consummation of a Home Sale, Borrower shall to pay to Lender a success fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold ("Success Fee").

9.3. **Sale of Homes listed per Exhibit A**: Upon the sale of any home listed in Exhibit A, Borrower agrees to provide Lender with substitute collateral via placement of a first priority mortgage on another home of equal value (per estimates of value listed, Exhibit E) in which Borrower has fee title and in which Lender will be in a first lien position.

Exhibit A attached: Premises pledges as Collateral.

Exhibit B attached: Mortgage Note

Exhibit C attached: A form of Mortgage

Exhibit D attached: Two (2) Guarantees

Exhibit E attached: Chart of Value of Collateral

9.4 **Discharge of Mortgages/Financing Statements**. Upon the fulfilment of all of Borrower's obligations to Lender hereunder, Lender shall promptly (a) discharge all mortgages or liens in favor of Lender on the Premises or the substitute collateral described in paragraph 9.3, and (b) terminate all financing statements in favor of Lender in regards to Borrower or its assets.

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IN WITNESS WHEREOF, Lender and Borrower have each caused this Loan Agreement to be executed all as of the day and year first above written.

LENDER:

SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC, a Delaware limited liability company

By: _____

Its: EVP

Dated: 8/12/16

BORROWER:

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: _____

Dean J. Groulx

Its: Sole Member

Dated: Aug. 12, 2016

GUARANTOR:

PARK STREET GROUP. LLC, a Michigan limited liability company

By: _____

Dean J. Groulx

Its: Sole Member

Dated: Aug. 12, 2016

EXHIBIT A

Additional homes to be offered as Collateral for the loan:

1. 850 Frederick St., Ypsilanti, Michigan 48197

   Estimated Value: $65,396.00

Legal description:

All that certain parcel of land situated in the City of Ypsilanti, County of Washtenaw and State of Michigan, being known as follows:

The Westerly 48 feet of the Southerly 132 feet of land lying at Northeast corner of Orchard and Frederick Street on Lot 69, Worden Gardens, unrecorded.

Property address/Commonly known as: 850 Frederick St., Ypsilanti, MI 48197
Parcel Id: 11-11-39-431-009

2. 1572 Millville Rd. Lapeer, Michigan 48446

   Estimated Value: $120,796.00

Legal description:

SEC 31 T8N R10E THE N 1/2 PRT OF NW FRL 1/4 SEC 31 BEG AT A PT ON W SEC LINE THAT IS S 1375.95 FT FROM NW CRN OF SEC 31, TH CONTINUING S 200.00 FT ALONG SAID W SEC LINE, TH S 89 DEG 22' E 440.0 FT ALONG N LINE OF S 50 A OF NW FRL 1/4 AS OCCUPIED, TH N 200.0 FT, TH N 89 DEG 22' W 440.0 FT TO POB EXCEPT THE NORTH 1/2 THEREOF, CONTAINS 1.01 A.

Commonly known as: 1572 Millville Rd. Lapeer, Michigan 48446
Parcel Id: 014-031-004-10

3. 2322 Robinwood Avenue, Saginaw, Michigan 48601

   Estimated Value: $70,451.00

Legal description:

Lot 20, including 1/2 vacated alley adjacent thereto, Block 30, Saginaw Improvement Company's Addition B, City of Saginaw, Saginaw County, Michigan according to the plat thereof as recorded in Liber 2, Page 15 of Plats, Saginaw County Records.
PIN: 11-0977-00000

Commonly known as: 2322 Robinwood Avenue, Saginaw, Michigan 48601
Parcel Id: 11-0977-00000

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4. 1919 Carmanbrook Pkwy, Flint, Michigan 48507

Estimated Value: $41,541.00

Legal description:

Westgate Park Lot 50, BLK 1; Westgate Park manor part of outlot beginning at NWLY corner of lot 50, Block 1 of Westgate Park, Th SLY ALG WLY Line of 50 lot, 85 ft to SWLY corner of 50 lot; TH SWLY ALG SLY Line of 50 lot extended SWLY 100 ft; Th NWLY to a pt, on NLY line of 50 lot extended SWLY 100 ft from beginning; Th NELY 100 ft to POB.

Property address/Commonly known as: 1919 Carmanbrook Pkwy, Flint, MI 48507
Parcel Id: 40-24-376-189

5. 7629 Dacosta, Redford, Michigan 48239

Estimated Value: $40,597.00

Legal description:

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF WAYNE, STATE OF MICHIGAN, AND IS DESCRIBED AS FOLLOWS:

NORTH 20.0 FEET OF LOT 488 AND ALL OF LOT 489, INCLUDING 1/2 VACATED ALLEY AT THE REAR, FRISCHKORN'S PARK VIEW SUBDIVISION. ACCORDING TO THE RECORDED PLAT THEREOF, AS RECORDED IN LIBER 41, PAGE 95, OF PLATS, WAYNE COUNTY RECORDS.

Property Address: 7629 Dacosta, Redford, Michigan 48239
Parcel Id No. : 22-116023-4/22-1116023

6. 12845 Jane St., Detroit, MI 48205

Estimated Value: $50,216.00

Legal description:

N JANE LOT 10 AND LOT 11 DURUSSELL SUB L44 P66 PLATS, WCR 21/664 65.65 IRREG

Commonly known as: 12845 Jane St., Detroit, MI 48205
Tax Parcel Number: 21011847-48

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7. 18611 Carrie, Detroit, Michigan 48234

Estimated Value: $44,470.00

Legal description:

W CARRIE LOT 42 HUTTON & PITCHERS 7 MILE DR SUB L 42 P 32 PLATS, WCR 15/226 35 X 126

Commonly known as: 18611 Carrie, Detroit, Michigan 48234
Tax Parcel Number: 15008511

8. 13881 Saratoga St., Detroit, MI 48205

Estimated Value: $35,361.00

Legal description:

N SRARATOGA LOT 276 PULCHER ESTATE SUB L44 P76 PLATS, WCR 21/656 35X120

Commonly known as: 13881 Saratoga St., Detroit, MI 48205
Tax Parcel Number: 21019152

9. 16257 Manning, Detroit, MI 48205

Estimated Value: $34,647.00

Legal description:

THE EAST 16 FEET OF LOT 348 AND THE WEST 25 FEET OF LOT 349, AVALON HEIGHTS SUBDIVISION, AS RECORDED IN LIBER 49, PAGE 100 OF PLATS, WAYNE COUNTY RECORDS

Commonly known as: 16257 Manning, Detroit, MI 48205
Tax Parcel Number: 21023434

10. 12559 Elmdale, Detroit, MI 48213

Estimated Value: $39,485.00

Legal description:

N ELMDALE LOT 463 GRATIOT GARDENS SUB L32 P14 PLATS, WCR 21/455 40 X 150

Commonly known as: 12559 Elmdale, Detroit, MI 48213
Tax Parcel Number: 21007368

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11. 11470 Indiana, Detroit, MI 48204

Estimated Value: $45,909.00

Legal description:

E INDIANA LOT 186 WESTLAWN SUB NO 3 L32 P12 PLATS, WCR 18/390 35 X 100

Commonly known as: 11470 Indiana, Detroit, MI 48204
Tax Parcel Number: 18015529

12. 9997 Archdale, Detroit, MI 48227

Estimated Value: $48,815.00

Legal description:

W ARCHDALE LOT 2678 FRISCHKORNS GRAND-DALE SUB NO 7 L59 P6 PLATS, WCR 22/591 37.95 X 123

Commonly known as: 9997 Archdale, Detroit, MI 48227
Tax Parcel Number: 22072071

13. 1717 & 17198 Bailey, Lansing, Michigan 48910

Estimated Value: $73,428.00

Legal description:

Lot 10, Block 2, Assessor's Plat No 28, L/P 10/33

Commonly known as: 1717 & 17198 Bailey, Lansing, Michigan 48910
Tax Parcel Number: 33-01-01-22354-061

14. 5231 Marlborough, Detroit, Michigan 48224

Estimated Value: $39,923.00

Legal description:

W Marlbourough Lot 89 Sefton Park Sub L38 P86 Plats, WCR 21/478 35 X 126.89A

Commonly known as: 5231 Marlborough, Detroit, Michigan 48224
Tax Parcel Number: 21059525

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EXHIBIT 3

AMENDED AND RESTATED
MORTGAGE NOTE

Principal Amount: $1,000,000.00 **Birmingham, Michigan**

Maturity Date: September 23, 2017 **Dated: September 23, 2016**

FOR VALUE RECEIVED, the undersigned, PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company ("Borrower"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 promises to pay to the order of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), at its offices located at 335 East Maple Road, Birmingham, Michigan 48009, or at such other place as Lender may designate in writing, the principal sum of One Million and 00/100 Dollars ($1,000,000.00), plus interest as hereinafter provided, in lawful money of the United States. Subject to the terms and conditions of this Amended and Restated Note, the Lender will, during the term of this Amended and Restated Note, make available to the Borrower, and then the Borrower may borrow from the Lender, and repay and re-borrow, at any time prior to the Maturity Date, any amount up to a maximum principal amount at any one time outstanding of One Million and 00/100 Dollars ($1,000,000.00)

Interest Rate.

Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) ("Interest") per annum;

Repayment.

Commencing on October 23, 2016, and continuing on the twenty-third (23rd) day of each calendar month thereafter through the Maturity Date (each, a "Payment Date"), Borrower shall pay to Lender monthly payments as follows:

Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due. However, interest on the first Five Hundred Thousand and 00/100 Dollars ($500,000.00) advance made on August 12, 2016 shall be paid at the closing on this Amended and Restated Note.

Months 3, 4, 5 & 6 – Borrower shall pay to the Lender interest only payments on the outstanding principal balance of the Loan, at the Interest Rate and

Months 7, 8, 9, 10, 11 & 12 – Borrower shall pay to the Lender principal and Interest on a Fifteen (15) year amortization,

Final Payment shall be due on the Maturity Date of September 1, 2017 of a balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest.

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Except as otherwise agreed in writing by Lender, all amounts payable under this Agreement shall be paid by electronic funds transfer ("EFT") from Borrower's designated bank account to such bank account as may be designated by Lender from time to time. Borrower shall provide such information and shall execute such authorizations as Lender may from time to time require to allow Lender to withdraw payments due hereunder directly from Borrower's designated bank account.

3. **Definitions.**

"Business Day" means any day which is neither a Saturday or Sunday nor a legal holiday on which commercial banks are authorized or required to be closed in Detroit, Michigan;

"Collateral Documents" mean the Collateral Documents as defined in the Loan Agreement.

"Costs of Collection" means upon the occurrence of an Event of Default and during the continuance thereof (after giving effect to applicable notice and cure periods) or upon the occurrence of a bankruptcy related Event of Default without giving effect to any cure period or to any period in which the applicable proceeding may be contested, all third party out-of-pocket expenses incurred by Lender in connection with the administration, collection and enforcement of the Loan, including reasonable attorney fees, the cost of tax searches, UCC searches and similar charges and costs and expenses incurred in any court or bankruptcy proceeding.

"Event of Default" means the payment of any principal or interest under this Amended and Restated Note is not made within five (5) days after the date when due under this Amended and Restated Note or the occurrence of any other Event of Default, as defined in the Loan Agreement.

"Loan" means all amounts outstanding under this Amended and Restated Note.

"Loan Agreement" means that certain Loan Agreement as amended entered into between Borrower and Lender dated August 12, 2016 and Amended with an effective date of September 1, 2016, as same may be amended, modified or altered from time to time.

"Maturity Date" means September 1, 2017, unless accelerated sooner pursuant to the terms of this Amended and Restated Note.

"Amended and Restated Note" means this Note made payable by Borrower to the order, and for the benefit, of Lender.

"Payment Date" means the date each payment is due hereunder.

4. **Interest Computation; Application of Funds.**

Interest shall be calculated for the actual number of days elapsed on the basis of a three hundred sixty (360) day year, including the first date of the applicable period to, but not including, the date of repayment. The Lender may apply all payments received under this Amended and Restated Note to accrued interest, to the principal balance outstanding under this Amended and Restated Note and to costs, fees and expenses payable by the Borrower in any order determined by the Lender in its sole discretion. If any Payment Date is not a Business Day, such Payment

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Date shall be extended to the next succeeding Business Day and such extension of time shall be included in computing any interest in respect of payment due on such date.

5. **Interest Limitation.**

Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Amended and Restated Note. Should any interest or other charges, charged, paid or payable by the Borrower in connection with this Amended and Restated Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Amended and Restated Note. If Lender shall reasonably determine that the interest rate applicable to this Amended and Restated Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Amended and Restated Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Amended and Restated Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall become due and payable thirty (30) days from the date of such determination.

6. **Events of Default; Remedies.**

Upon the occurrence of an Event of Default and during the continuance thereof, Lender may, subject to any notice and cure periods in the Loan Agreement, declare the entire unpaid and outstanding principal balance hereunder and all accrued interest, together with all other indebtedness of Borrower to Lender, to be due and payable in full forthwith, without further presentment, demand or notice of any kind, all of which are hereby expressly waived by Borrower, and thereupon Lender shall have and may exercise any one or more of the rights and remedies provided herein or in any Collateral Documents. The remedies provided for hereunder are cumulative to the remedies for collection of the amounts owing hereunder as set forth in the Collateral Documents and as provided by law. Nothing herein is intended, nor should it be construed, to preclude Lender from pursuing any other remedy for the recovery of any other sum to which Lender may be or become entitled for breach of the terms of this Amended and Restated Note, Loan Agreement or any Collateral Documents relating hereto.

7. **Costs of Collection.**

Borrower agrees, in case of an Event of Default (and while such Event of Default continues) to pay all Costs of Collection.

8. **Default Rate of Interest.**

During any period(s) that an Event of Default has occurred and is continuing, or after the Maturity Date or after acceleration of maturity, the outstanding principal amount of this Amended and Restated Note shall bear interest at a rate equal to five percent (5.0%) per annum greater than the interest rate otherwise charged hereunder.

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9. Late Charges.

If any required payment is not made date it is due, then, at the option of Lender, a late charge in the amount of five percent (5.0%) of the payment so overdue may be charged.

10. No Waiver of Default.

Acceptance by Lender of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default. During an Event of Default, neither the failure of Lender promptly to exercise its right to declare the outstanding principal and accrued unpaid interest hereunder to be immediately due and payable, nor, upon the occurrence of an Event of Default, shall the failure of Lender to demand strict performance of any other obligation of Borrower or any other person who may be liable hereunder constitute a waiver of any such rights, nor a waiver of such rights in connection with any future default on the part of Borrower or any other person who may be liable hereunder.

11. Waiver of Jury Trial.

BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. BORROWER, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, AND BANK, EACH KNOWINGLY AND VOLUNTARILY AND FOR THEIR RESPECTIVE BENEFIT WAIVE ANY RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY CLAIM, DISPUTE, CONFLICT, OR CONTENTION, IF ANY, AS MAY ARISE UNDER THIS AMENDED AND RESTATED NOTE OR THE LOAN EVIDENCED BY THIS AMENDED AND RESTATED NOTE, AND AGREE THAT ANY LITIGATION BETWEEN THE PARTIES CONCERNING THIS AMENDED AND RESTATED NOTE OR THE LOAN EVIDENCED BY THIS AMENDED AND RESTATED NOTE SHALL BE HEARD BY A COURT OF COMPETENT JURISDICTION SITTING WITHOUT A JURY.

12. General.

Borrower and all guarantors of this Amended and Restated Note, if any, hereby jointly and severally waive presentment for payment, demand, notice of non-payment, notice of protest or protest of this Amended and Restated Note, diligence in collection or bringing suit, and hereby consent to any and all extensions of time, renewals, waivers, or modifications that may be granted by Lender with respect to payment or any other provisions of this Amended and Restated Note, and to the release of any collateral or any part thereof, with or without substitution. The liability of Borrower shall be absolute and unconditional, without regard to the liability of any other party hereto. This Amended and Restated Note shall be deemed to have been executed in, and all rights and obligations hereunder shall be governed by, the laws of the State of Michigan.

13. Other Documents.

Borrower and Lender have signed other Collateral Documents in conjunction herewith providing for security for the prior Note as defined below and this Amended and Restated Note or other matters. Reference is hereby made to the Collateral Documents for additional terms relating

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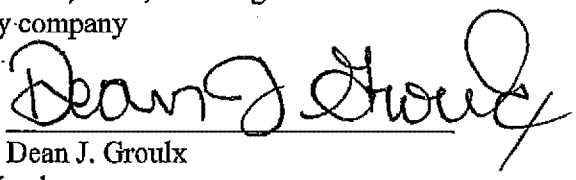
to the transaction giving rise to the prior Note and to this Amended and Restated Note, the security or support given for the prior Note and this Amended and Restated Note and additional terms and conditions under which this Amended and Restated Note matures, may be accelerated or prepaid.

14. Restated Note.

This Note amends, restates, supersedes and replaces the Mortgage Note dated August 12, 2016 in the principal amount of $500,000.00 by the undersigned payable to the Lender (the "Prior Note") provided however (i) execution and delivery by the undersigned of this Amended and Restated Note shall not in any manner or circumstances to be deemed a payment of a novation or to have terminated, extinguished or discharged any of the undersigned indebtedness evidenced by the Prior Note, all of which indebtedness shall continue under and shall hereinafter be evidenced and governed by this Amended and Restated Note and (ii) all collateral and guaranties securing or supporting the Prior Note shall continue and secure and support this Amended and Restated Note.

The undersigned acknowledges and agrees that the collateral includes without limitation, all collateral and rights and properties described in in Exhibit A of the Amendment to Loan Agreement of even date. The collateral also includes all UCC financing statements between the Borrower, Borrower's Guarantors and the Lender filed after execution of the prior Note.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: 

Name: Dean J. Groulx

Its: Member

EXHIBIT 4

AMENDMENT TO LOAN AGREEMENT

This Amendment to Loan Agreement is made effective September 23, 2016, between Park Street Group Realty Services, LLC, a Michigan limited liability company ("Borrower"), and Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender").

PRELIMINARY STATEMENT

A. Borrower and Lender entered into a Loan Agreement dated August 12, 2016 ("Loan Agreement") providing terms and conditions governing certain loan and other credit accommodations extended by Lender to Borrower ("Indebtedness").

B. Borrower and Lender have agreed to amend the terms of the Loan Agreement as provided in this Amendment.

AGREEMENT

Accordingly, Borrower and Lender agree as follows:

1. **Amendments**. The Loan Agreement shall be amended as follows:

   a. Section 1.4 collateral shall mean the Premises now owned by Borrower and Guarantor which collectively have a value of $1,500,000.00 described in Schedule A of the Loan Agreement.

   b. Section 1.12 (b) the indebtedness under this Amended Loan Agreement has been increased from $500,000.00 term loan to a $1,000,000.00 term loan made by Lender to Borrower with an effective date of September 1, 2016. Section 3c is amended to read in its entirety as follows: The Lender shall receive and approve a satisfactory appraisal establishing appraised value of the Property on a "as-is" basis so that the Loan to value ratio is not more than 80%.

   c. Section 1.16 is amended as follows: "Loan Amount" shall mean One Million and 00/100 Dollars ($1,000,000.00).

   d. Section 1.19 "Premises" shall mean the homes described in Exhibit A.

   e. Section 1.20 "Title Insurance" shall mean title insurance acceptable to Lender for insuring first mortgage liens on all of the collateral listed in Exhibit A of the Loan Agreement.

   f. Section 2.8 "Security" as security for the repayment of the Amended and Restated Note of even date Borrower and/or Guarantor shall execute to

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Lender or cause to be executed and delivered to Lender the following additional collateral documents:

i. A first, prior, valid, enforceable and perfected Mortgages on the Premises attached hereto as Exhibit A (the " Mortgages"), including land, roads and easements, and rights to the beneficial use and enjoyment of the Premises, and upon all Improvements, appurtenances that Borrower and/or Guarantor owns and all fixtures located thereon, including personal property of Borrower used in the operation of the Improvements, subject only to the Permitted Encumbrances, if any. As well as a Blanket Mortgage on all Wayne County Properties.

g. Section 5.2 "Title" Is amended as follows:

i. Guarantor, Park Street Group, LLC, will be the holder and valid fee title to the Premises and represents and warrants that there are no mortgages, liens, or encumbrances on said Premises except for the permitted encumbrances and those liens in favor of Lender.

ii. Guarantor, Park Street Group, LLC represents as the hold of good and valid fee title to the homes listed in Exhibit A and warrants that there are no mortgages, liens, or encumbrances on said Premises except for the Leases and Permitted Encumbrances and those liens in favor of Lender.

iii. Guarantor represents it is the holder of good and valid fee title to the homes listed in Exhibit A and warrants that there are no mortgages or liens or encumbrances on said homes except for Leases and Permitted Encumbrances and those liens in favor of Lender.

h. Section 7.1 "Default" is hereby amended to add as an event of Default the death or mental or physical disability of Dean Groulx, the Guarantor and Member of the Borrowing entity.

i. Section 9.3 "Sale of Homes per Exhibit A" upon the sale of any home listed in Exhibit A attached to this Amended Loan Agreement, Borrower agrees to provide Lender with substitute collateral via placement of a first priority mortgage on another home of equal value (per the values listed in Exhibit B) in which Borrower or Guarantor has fee title and in which Lender will be in a first lien position.

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j. "Hold Harmless" Borrower and Guarantor shall defend, indemnify and hold harmless Mortgagee, it employees, agents, shareholders, officers, members and directors from and against any and all claims, demands, penalties, liabilities, settlements, damages, costs or expenses (including but not limited to attorney fees) of whatever kind arising of or related to any liability claim brought by a current occupant, invitee or trespassers on the Premises for any personal injury (including without limit wrongful death) or property damage (real or personal) arising out of or related to the Premises.

k. "Life Insurance" Guarantor, Dean Groulx agrees that Lender at its option may purchase Life Insurance on his life in an amount to pay off the Loan balance with the understanding that all proceeds are to be used to pay Borrowers Loan obligations.

l. "Blanket Mortgage" At the time of closing Guarantor, Park Street Group, LLC, the title holder of the Properties in Exhibit A attached will be allowed to file "Blanket Mortgage" on all Wayne County Michigan Properties which will be recorded in the chain of title as soon as any outstanding title issues are resolved to the satisfaction of the Lender and the Title Company and all tax payment plans are accepted by Wayne County.

Attached as Exhibit A is a list of the legal descriptions of all the Collateral that supports this $1,000,000.00 Loan.

All other terms and conditions of the Loan Agreement dated August 12, 2016 remain in full force and effect.

Signature Page Follows

DJG

SIGNATURES

LENDER:

SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC, a Delaware limited liability company

By: E. J. Hurbut

Its: EVP / General Counsel

BORROWER:

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: Dean J. Groulx

Dean J. Groulx

Its: Sole Member

GUARANTOR:

PARK STREET GROUP, LLC, a Michigan limited liability company

By: Dean J. Groulx

Dean J. Groulx

Its: Sole Member

EXHIBIT A

EXHIBIT "A"

DESCRIPTION OF REAL ESTATE

The following described real estate, situated in the City of Detroit, County of Wayne, State of Michigan, to wit:

Parcel 1:	W MARLBOUROUGH LOT 89 SEFTON PARK SUB L38 P86 PLATS, WCR 21/478 35 X 126.89A Commonly known as: 5231 MARLBOROUGH, DETROIT, MICHIGAN 48224 Tax Parcel Number: 21059525
Parcel 2:	LOT 10, BLOCK 2, ASSESSOR'S PLAT NO 28, L/P 10/33 Commonly known as: 1717 & 17198 BAILEY, LANSING, MICHIGAN 48910 Tax Parcel Number: 33-01-01-22354-061
Parcel 3:	W ARCHDALE LOT 2678 FRISCHKORNS GRAND-DALE SUB NO 7 L59 P6 PLATS, WCR 22/591 37.95 X 123 Commonly known as: 9997 ARCHDALE, DETROIT, MI 48227 Tax Parcel Number: 22072071
Parcel 4:	E INDIANA LOT 186 WESTLAWN SUB NO 3 L32 P12 PLATS, WCR 18/390 35 X 100 Commonly known as: 11470 INDIANA, DETROIT, MI 48204 Tax Parcel Number: 18015529
Parcel 5:	N ELMDALE LOT 463 GRATIOT GARDENS SUB L32 P14 PLATS, WCR 21/455 40 X 150 Commonly known as: 12559 ELMDALE, DETROIT, MI 48213 Tax Parcel Number: 21007368
Parcel 6:	THE EAST 16 FEET OF LOT 348 AND THE WEST 25 FEET OF LOT 349, AVALON HEIGHTS SUBDIVISION, AS RECORDED IN LIBER 49, PAGE 100 OF PLATS, WAYNE COUNTY RECORDS Commonly known as: 16257 MANNING, DETROIT, MI 48205 Tax Parcel Number: 21023434
Parcel 7:	N SRARATOGA LOT 276 PULCHER ESTATE SUB L44 P76 PLATS, WCR 21/656 35X120 Commonly known as: 13881 Saratoga St., Detroit, MI 48205 Tax Parcel Number: 21019152
Parcel 8:	N JANE LOT 10 AND LOT 11 DURUSSELL SUB L44 P66 PLATS, WCR 21/664 65.65 IRREG Commonly known as: 12845 JANE ST., DETROIT, MI 48205 Tax Parcel Number: 21011847-48

Parcel 9:	W CARRIE LOT 42 HUTTON & PITCHERS 7 MILE DR SUB L 42 P 32 PLATS, WCR 15/226 35 X 126 Commonly known as: 18611 CARRIE, DETROIT, MICHIGAN 48234 Tax Parcel Number: 15008511
Parcel 10:	NORTH 20.0 FEET OF LOT 488 AND ALL OF LOT 489, INCLUDING 1/2 VACATED ALLEY AT THE REAR, FRISCHKORN'S PARK VIEW SUBDIVISION. ACCORDING TO THE RECORDED PLAT THEREOF, AS RECORDED IN LIBER 41, PAGE 95, OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 7629 DACOSTA, REDFORD, MICHIGAN 48239 Parcel Id No. : 22-116023-4/22-1116023
Parcel 11:	W AMERICAN LOT 37 MERRITT M WILLMARTHS SUB L21 P 87 PLATS, WCR 16/199 30 X 100 Commonly known as: 10431 AMERICAN, DETROIT, MICHIGAN 48204 Tax ID No.: 16024270
Parcel 12:	E NORTHLAWN LOT 451 WESTLAWN SUB L31 P68 PLATS, WCR 16/236 35 X 105.01 Commonly known as: 1238 NORTHLAWN, DETROIT, MICHIGAN 48238 Parcel ID No.: 16031607
Parcel 13:	LOT 1061 DAVID TROMBLY ESTATES SUBDIVISION NO. 4, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 48, OF PLATS PAGE(S) 44, WAYNE COUNTY RECORDS. Commonly known as: 13074 KILBOURNE ST., DETROIT, MI 48213 Tax ID No.: 21009931
Parcel 14:	S WADE LOT 425 DAVID TROMBLYS HARPER AVE SUB NO 1 L51 P24 PLATS, WCR 21/758 35 X 100.60 Commonly known as: 13412 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006037
Parcel 15:	N PFENT LOT 105 MAPLE VIEW PARK SUB L51 P76 PLATS, WCR 21/764 35 X 115 Commonly known as: 13641 PFENT, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021942
Parcel 16:	N PFENT W 35 FT LOT 28 CAROL PARK SUB L43 P23 PLATS, W C R 21/799 35 X 115. Commonly known as: 14053 PFENT, DETROIT, MI 48205 Parcel ID No.: 21021977
Parcel 17:	N WADE LOT 688 RAVENDALE SUB NO2 L49 P96 PLATS, WCR 21/739 35 X 110 Commonly known as: 14295 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006363

Parcel 18:	E LESURE LOT 204 & W 8 FT VAC ALLEY ADJ HURON HEIGHTS SUB L34 P71 PLATS, WCR 22/62 35 X 112 Commonly known as: 14870 LESURE, DETROIT, MICHIGAN 48227 Parcel ID No.: 22032612
Parcel 19:	S LAPPIN LOT 677 AVALON HEIGHTS SUB L49 P100 PLATS, WCR 21/789 40 X 125 Commonly known as: 16028 LAPPIN, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021645
Parcel 20:	W ANNOTT LOT 2217 DRENNAN & SELDONS LASALLE COLLEGE PARK SUB NO 7 L60 P30 PLATS, W C R 21/934 36 IRREG Commonly known as: 17803 ANNOTT, DETROIT, MI 48205 Parcel ID No.: 21035698
Parcel 21:	E Sherwood N 14.50 FT LOT 27 AND S 22.75 FT LOT 28 WARRENS FORD PACKARD SUB L37 P71 PLATS, W C R 15/221 37.25 X 124. Commonly known as: 18846 SHERWOOD, DETROIT, MI 48234 Parcel ID No.: 15011985-6
Parcel 22:	W ROWE LOT 89 TWIN PINES SUB L43 P58 PLATS, WCR 21/794 40 X 125.75 Commonly known as: 19353 ROWE, DETROIT, MICHIGAN 48205 Parcel ID No.: 21035983
Parcel 23:	W CARRIE LOT 405 PATERSON BROS & CO OUTER DRIVE-VAN DYKE SUB L46 P89 PLATS, WCR 15/260 40x100 Commonly known as: 19635 CARRIE, DETROIT, MICHIGAN 48234 Parcel ID No.: 15008433
Parcel 24:	N VIRGINIA PK LOT 199 MCGREGORS SUB L30 P39 PLATS, WCR 8/116 35 X 134.52A Commonly known as: 1982 VIRGINIA PARK, DETROIT, MI 48206 Parcel ID No.: 8002022
Parcel 25:	W GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L37 P23 PLATS, WCR 9/176 35 x 100 Commonly known as: 20125 GREELEY, DETROIT, MICHIGAN 48203 Parcel ID No.: 9019429
Parcel 26:	S BLAINE LOT 262 DEXTER BLVD SUB L30 P32 PLATS, WCR 12/172 34X105 Commonly known as: 3275 BLAINE, DETROIT, MICHIGAN 48206 Parcel ID No.: 12002175
Parcel 27:	LOT 30, RIVARD VILLAS SUBDIVISION, AS RECORDED IN LIBER 60 OF PLATS, PAGE 1, WAYNE COUNTY RECORDS. Commonly known as: 5315 LODEWYCK, DETROIT, MI 48224 Parcel ID No.: 21077928

Parcel 28:	LOT 513, AND THE EAST 9 FEET OF THE VACATED ALLEY ADJACENT THERETO, FRISCHKORN'S WARREN AVENUE PARK SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39, OF PLATS PAGE(S) 89, WAYNE COUNTY RECORDS. Commonly known as: 6403 BRACE, DETROIT, MI 48228 Parcel ID No.: 22081318
Parcel 29:	E BRYDEN LOT 279 FRISCHKORNS TIREMAN PARK SUB L34 P43, WCR 16/225 35 X 109 Commonly known as: 8190 BRYDEN, DETROIT, MICHIGAN 48204 Parcel ID No.: 16024481
Parcel 30:	E CARBONDALE LOT 152 SCRIPPS HOLDEN AVE SUB L19 P67 PLATS, WCR 16/210 30 X 94 Commonly known as: 8338 CARBONDALE, DETROIT, MICHIGAN 48204 Parcel ID No.: 16016568
Parcel 31:	ALL THAT CERTAIN PARCEL OF LAND SITUATED IN THE COUNTY OF WAYNE AND STATE OF MICHIGAN AND BEING KNOWN AND DESIGNATED AS FOLLOWS: LOT 153, COLLEGE VIEW SUBDIVISION, WAYNE COUNTY, MICHIGAN, RECORDED LIBER 45, PAGE 49 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 16589 BIRWOOD ST, DETROIT, MI 48221. Parcel ID No.: 16042468
Parcel 32:	LOT 146, MORIN PARK SUBDIVISION NUMBER 1 ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 41, PAGE 94, OF PLATS, WAYNE COUNTY RECORDS MICHIGAN. Commonly known as: 7824 METTETAL STREET, DETROIT, MICHIGAN Parcel ID No.: 01-22059630
Parcel 33:	LOT 42, INCLUDING ONE-HALF VACATED ALLEY AT THERE REAR THEREOF, C.W. HARRAH'S SEVEN MILE ROAD SUBDIVISION, AS RECORDED IN LIBER 57, PAGE 79 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 18495 FAUST AVENUE, DETROIT, MI 48219 Parcel ID No.: 22078796
Parcel 34:	S HAMPSHIRE LOT 39 PARKVIEW MANOR SUB L47 P48 PLATS, W C R 21/703 46.41 IRREG. Commonly known as: 13106 HAMPSHIRE, DETROIT, MI 48213 Parcel ID No.: 01-21005499
Parcel 35:	LAND SITUATED IN THE CITY OF DETROIT, COUNTY OF WAYNE, STATE OF MICHIGAN, MORE PARTICULARLY DESCRIBED AS: LOT 1458 AND 1/2 VACATED ALLEY ADJOINING IN REAR, DRENNAN AND SELDON'S REGENT PARK SUBDIVISION NO. 3, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 59 OF PLATS, PAGE 88, WAYNE COUNTY RECORDS.

	Commonly known as: 14064 ROSSINI DRIVE, DETROIT, MI 48205 Parcel ID No. 21024857004
Parcel 36:	LOT 80, MADAY-ESTATE SUBDIVISION, A SUBDIVISION ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 47 ON PAGE(S) 8 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 8867 SAINT MARYS, DETROIT, MI 48228 Parcel ID No.: 22059350

The following described real estate, situated in the City of Flint, County of Genesee, State of Michigan, to wit:

Parcel 37:	WESTGATE PARK LOT 50, BLK 1; WESTGATE PARK MANOR PART OF OUTLOT BEGINNING AT NWLY CORNER OF LOT 50, BLOCK 1 OF WESTGATE PARK, TH SLY ALG WLY LINE OF 50 LOT, 85 FT TO SWLY CORNER OF 50 LOT; TH SWLY ALG SLY LINE OF 50 LOT EXTENDED SWLY 100 FT; TH NWLY TO A PT, ON NLY LINE OF 50 LOT EXTENDED SWLY 100 FT FROM BEGINNING; TH NELY 100 FT TO POB. Commonly known as: 1919 CARMANBROOK PKWY, FLINT, MI 48507 Parcel Id: 40-24-376-189

The following described real estate, situated in the City of Saginaw, County of Saginaw, State of Michigan, to wit:

Parcel 38:	LOT 20, INCLUDING 1/2 VACATED ALLEY ADJACENT THERETO, BLOCK 30, SAGINAW IMPROVEMENT COMPANY'S ADDITION B, CITY OF SAGINAW, SAGINAW COUNTY, MICHIGAN ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 2, PAGE 15 OF PLATS, SAGINAW COUNTY RECORDS. PIN: 11-0977-00000 Commonly known as: 2322 ROBINWOOD AVENUE, SAGINAW, MICHIGAN 48601 Parcel Id: 11-0977-00000

The following described real estate, situated in the City of Lapeer, County of Lapeer, State of Michigan, to wit:

Parcel 39:	SEC 31 T8N R10E THE N 1/2 PRT OF NW FRL 1/4 SEC 31 BEG AT A PT ON W SEC LINE THAT IS S 1375.95 FT FROM NW CRN OF SEC 31, TH CONTINUING S 200.00 FT ALONG SAID W SEC LINE, TH S 89 DEG 22' E 440.0 FT ALONG N LINE OF S 50 A OF NW FRL 1/4 AS OCCUPIED, TH N 200.0 FT, TH N 89 DEG 22' W 440.0 FT TO POB EXCEPT THE NORTH 1/2 THEREOF, CONTAINS 1.01 A. Commonly known as: 1572 MILLVILLE RD. LAPEER, MICHIGAN 48446 Parcel Id: 014-031-004-10

All that certain parcel of land situated in the City of Ypsilanti, County of Washtenaw and State of Michigan, being known as follows:

Parcel 40:	THE WESTERLY 48 FEET OF THE SOUTHERLY 132 FEET OF LAND LYING AT NORTHEAST CORNER OF ORCHARD AND FREDERICK STREET ON LOT 69, WORDEN GARDENS, UNRECORDED. Commonly known as: 850 FREDERICK ST., YPSILANTI, MI 48197 Parcel Id: 11-11-39-431-009

EXHIBIT B

EXHIBIT B

Amendment to Loan Agreement

Property Address	Tax ID#	CMA Valuation
5231 Marlborough St. Detroit, MI 48224	21059525	$39,923
1717 & 17198 Bailey Street, Lansing, MI 48910	33-01-01-22-354-061	$73,428
9997 Archdale St. Detroit, MI 48227	22072071	$48,815
11470 Indiana St. Detroit, MI 48204	18015529	$45,909
12559 Elmdale St. Detroit, MI 48213	21007368	$39,485
16257 Manning St. Detroit, MI 48205	21023434	$34,647
13881 Saratoga St. Detroit, MI 48205	21019152	$35,361
12845 Jane St. Detroit, MI 48205	21011847-48	$50,216
18611 Carrie St. Detroit, MI 48234	15008511	$44,470
7629 Dacosta Road, Redford, MI 48239	22-116023	$40,597
10431 American Detroit, MI 48204	16024270	$41,478
12338 Northlawn Detroit, MI 48204	16031607	$32,796
13074 Kilbourne St. Detroit, MI 48213	21009931	$34,377
13412 Wade St. Detroit, MI 48213	21006037	$39,156
13641 Pfent, Detroit, MI 48205	21021942	$32,329
14053 Pfent St. Detroit, MI 48205	21021977	$48,527
14295 Wade, Detroit, MI 48213	21006363	$38,193
14870 Lesure Detroit, MI 48227	22032612	$32,653
16028 Lappin, Detroit, MI 48205	21021645	$28,305
17803 Annott Detroit, MI 48205	21035698	$33,751
18846 Sherwood, Detroit, MI 48234	15011985-6	$43,288
19353 Rowe Detroit, MI 48205	21035983	$34,064
19635 Carrie, Detroit, MI 48234	15008433	$37,446
1982 Virginia Park, Detroit, MI 48206	8002022	$29,279
20125 Greely Detroit, MI 48203	9019429	$48,611
3275 Blaine Detroit, MI 48206	12002175	$32,880
5315 Lodewyck St. Detroit, MI 48224	21077928	$31,348
6403 Brace St. Detroit, MI 48228	22081318	$30,476
8190 Bryden Detroit, MI 48204	16024481	$59,556
8338 Carbondale Detroit, MI 48204	16016568	$44,501
16589 Birwood Dr. Detroit, MI 48221	16042468	$48,243
7824 Mettetal St. Detroit, MI 48228	22059630	$38,491
18495 Faust St. Detroit, MI 48219	22078976	$36,870
13106 Hampshire Detroit, MI 48213	21005499	$41,894
14064 Rossini Dr. Detroit, MI 48205	21024857	$36,161
8867 St. Marys Detroit, MI 48228	22059350	$39,624
1919 Carmanbrook Parkway, Flint, MI 48507	40-24-376-189	$41,541
2322 Robinwood Avenue, Saginaw, MI 48601	11-0977-00000	$70,451
1572 Milleville Road, Lapeer, MI 48446	44-014-031-004-10	$120,796
850 Frederick Street, Ypsilanti, MI 48197	11-11-39-431-009	$65,396
Total Value of Collateral Properties		**$1,745,332**

EXHIBIT 5

SIMON PLC
ATTORNEYS & COUNSELORS
37000 WOODWARD AVENUE, SUITE 250
BLOOMFIELD HILLS, MICHIGAN 48304
Telephone 248-720-0290
Facsimile 248-720-0291
www.simonattys.com

Cynthia I. Brody
cbrody@simonattys.com
Admitted to practice in Michigan, only

Offices In:
Phoenix, Arizona
Fort Lauderdale, Florida
Chicago, Illinois
New York, New York
Maumee, Ohio
Dallas, Texas

December 27, 2017

Via Federal Express

Park Street Group Realty Services, LLC
100 W. Long Lake Road, Suite 102
Bloomfield Hills, Michigan 48304
Attn.: Dean L. Groulx

RE: FINANCING ARRANGEMENT BY AND BETWEEN SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC ("LENDER") AND PARK STREET GROUP REALTY SERVICES, LLC ("BORROWER")

Dear Mr. Groulx:

This firm represents the Lender with respect to the above referenced matter. Any and all future communications regarding the above referenced matter should be directed to the undersigned counsel, only. In addition to the contents of this letter, refer to any and all documents, instruments and agreements executed in connection with, or governing, the financing arrangement from the Lender to the Borrower (collectively, the "Loan Documents"). All amounts due from Borrower to Lender, whether now or in the future, contingent, fixed, primary and/or secondary, including, but not limited to, principal, interest, attorneys' fees, inspection fees, costs, expenses and any and all other charges provided for in the Loan Documents shall be known, in the aggregate, as the "Liabilities". All capitalized terms not defined in this letter shall have the meanings stated in the Loan Documents.

The Amended and Restated Mortgage Note dated September 23, 2016 in the original principal amount of $1,000,000.00, matured on September 23, 2017. As of December 26, 2017, Liabilities are past due and owing under the Note as follows:

Principal Balance on Note	$1,029,811.74
Interest through Maturity Date	$34,337.06
Default Interest per day @$715.15	$67,223.82
Payments Due on Sale of Property	$70,000.00
Attorneys' Fees	$6,153.86
Total	**$1,207,526.48**

Be advised that default interest, late fees, and attorneys' fees continue to accrue and shall be immediately due and payable upon the accrual and/or incurrence thereof.

Pursuant to the Note, the Mortgages, the Loan Agreement as amended, and related Loan Documents evidencing the Loan, you made various representations and warranties to the Lender in order to induce the Lender into making the Loan for the acquisition of certain real estate, as set forth in the Loan Documents. Please be advised that you are currently in default under the Loan Documents evidencing the Loan, for reasons including but not limited to the following (collectively referred to as the "Events of Default"):

(i) In addition to the Note having matured, the monthly interest payments for the months of August and September 2017 remain unpaid and there have been additional prior instances of delinquency during the term of the Loan.

(ii) Multiple properties pledged as Collateral for the Loan have been conveyed to third parties in violation of the terms of the Mortgages.

(iii) Borrower has failed to either provide substitute Collateral of a value acceptable to Lender, or, in the alternative, pay down the Loan upon each conveyance referenced above.

(iv) Borrower does not have title to several properties offered as substitute Collateral, in violation of Section 5.2 of the Loan Agreement.

(v) Borrower is in default of Section 9.1 of the Loan Agreement, having failed to provide bi-weekly reports listing residential properties purchased with Loan proceeds and other details pertaining to the value and renovation cost of said properties.

(vi) Borrower is in default of Section 9.2 of the Loan Agreement, having failed to provide notice to Lender of the sale of certain homes constituting the Collateral, and further having failed to make payments to Lender upon such sales as required.

(vii) The values of the Collateral properties as reported by Borrower were not accurate when represented to Lender, in violation of Section 7.1(d) of the Loan Agreement.

As a result of the Events of Default, Lender hereby makes demand upon Borrower for payment in the full amount of the Liabilities inclusive of all interest, fees, costs, and attorneys' fees as provided in the Loan Documents. Please contact this office to receive a final payoff amount. Payment must be in certified funds, payable to "SIMON PLC Attorneys & Counselors", and delivered to the address above no later than close of business on Monday, January 8, 2018.

Be advised that in the event that payment is not made by January 8, 2018 we have been authorized to commence involuntary collection of the Liabilities through all legal means. This includes the initiation of litigation to obtain and enforce a judgment against you, as well as the exercise of all rights and remedies permitted under applicable statutes.

By copy of this letter, demand is also made on the guarantors of the Liabilities, Park Street Group, LLC, a Michigan limited liability company, and Dean L. Groulx, individually.

Very truly yours,

SIMON PLC
ATTORNEYS & COUNSELORS

Cynthia I. Brody

cc: Client
Park Street Group, LLC
Dean L. Groulx, individually as Guarantor

EXHIBIT 6

THE "MORTGAGED PROPERTIES"

The following described real estate, situated in the City of Detroit, County of Wayne, State of Michigan, to wit:

Parcel 1:	W MARLBOUROUGH LOT 89 SEFTON PARK SUB L38 P86 PLATS, WCR 21/478 35 X 126.89A Commonly known as: 5231 MARLBOROUGH, DETROIT, MICHIGAN 48224 Parcel ID No.: 21059525
Parcel 2:	LOT 10, BLOCK 2, ASSESSOR'S PLAT NO 28, L/P 10/33 Commonly known as: 1717 & 17198 BAILEY, LANSING, MICHIGAN 48910 Parcel ID No.: 33-01-01-22354-061
Parcel 3:	W ARCHDALE LOT 2678 FRISCHKORNS GRAND-DALE SUB NO 7 L59 P6 PLATS, WCR 22/591 37.95 X 123 Commonly known as: 9997 ARCHDALE, DETROIT, MI 48227 Parcel ID No.: 22072071
Parcel 4:	E INDIANA LOT 186 WESTLAWN SUB NO 3 L32 P12 PLATS, WCR 18/390 35 X 100 Commonly known as: 11470 INDIANA, DETROIT, MI 48204 Parcel ID No.: 18015529
Parcel 5:	N ELMDALE LOT 463 GRATIOT GARDENS SUB L32 P14 PLATS, WCR 21/455 40 X 150 Commonly known as: 12559 ELMDALE, DETROIT, MI 48213 Parcel ID No.: 21007368
Parcel 6:	THE EAST 16 FEET OF LOT 348 AND THE WEST 25 FEET OF LOT 349, AVALON HEIGHTS SUBDIVISION, AS RECORDED IN LIBER 49, PAGE 100 OF PLATS, WAYNE COUNTY RECORDS Commonly known as: 16257 MANNING, DETROIT, MI 48205 Parcel ID No.: 21023434
Parcel 7:	N SRARATOGA LOT 276 PULCHER ESTATE SUB L44 P76 PLATS, WCR 21/656 35X120 Commonly known as: 13881 SARATOGA STREET, DETROIT, MI, 48205 Parcel ID No.: 21019152
Parcel 8:	N JANE LOT 10 AND LOT 11 DURUSSELL SUB L44 P66 PLATS, WCR 21/664 65.65 IRREG Commonly known as: 12845 JANE ST., DETROIT, MI 48205 Parcel ID No.: 21011847-48

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Parcel 12:	E NORTHLAWN LOT 451 WESTLAWN SUB L31 P68 PLATS, WCR 16/236 35 X 105.01 Commonly known as: 1238 NORTHLAWN, DETROIT, MICHIGAN 48238 Parcel ID No.: 16031607
Parcel 13:	LOT 1061 DAVID TROMBLY ESTATES SUBDIVISION NO. 4, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 48, OF PLATS PAGE(S) 44, WAYNE COUNTY RECORDS. Commonly known as: 13074 KILBOURNE ST., DETROIT, MI 48213 Parcel ID No.: 21009931
Parcel 14:	S WADE LOT 425 DAVID TROMBLYS HARPER AVE SUB NO 1 L51 P24 PLATS, WCR 21/758 35 X 100.60 Commonly known as: 13412 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006037
Parcel 15:	N PFENT LOT 105 MAPLE VIEW PARK SUB L51 P76 PLATS, WCR 21/764 35 X 115 Commonly known as: 13641 PFENT, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021942
Parcel 16:	N PFENT W 35 FT LOT 28 CAROL PARK SUB L43 P23 PLATS, W C R 21/799 35 X 115. Commonly known as: 14053 PFENT, DETROIT, MI 48205 Parcel ID No.: 21021977
Parcel 17:	N WADE LOT 688 RAVENDALE SUB NO2 L49 P96 PLATS, WCR 21/739 35 X 110

	Commonly known as: 14295 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006363
Parcel 18:	E LESURE LOT 204 & W 8 FT VAC ALLEY ADJ HURON HEIGHTS SUB L34 P71 PLATS, WCR 22/62 35 X 112 Commonly known as: 14870 LESURE, DETROIT, MICHIGAN 48227 Parcel ID No.: 22032612
Parcel 19:	S LAPPIN LOT 677 AVALON HEIGHTS SUB L49 P100 PLATS, WCR 21/789 40 X 125 Commonly known as: 16028 LAPPIN, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021645
Parcel 20:	W ANNOTT LOT 2217 DRENNAN & SELDONS LASALLE COLLEGE PARK SUB NO 7 L60 P30 PLATS, W C R 21/934 36 IRREG Commonly known as: 17803 ANNOTT, DETROIT, MI 48205 Parcel ID No.: 21035698
Parcel 21:	E Sherwood N 14.50 FT LOT 27 AND S 22.75 FT LOT 28 WARRENS FORD PACKARD SUB L37 P71 PLATS, W C R 15/221 37.25 X 124. Commonly known as: 18846 SHERWOOD, DETROIT, MI 48234 Parcel ID No.: 15011985-6
Parcel 22:	W ROWE LOT 89 TWIN PINES SUB L43 P58 PLATS, WCR 21/794 40 X 125.75 Commonly known as: 19353 ROWE, DETROIT, MICHIGAN 48205 Parcel ID No.: 21035983
Parcel 23:	W CARRIE LOT 405 PATERSON BROS & CO OUTER DRIVE-VAN DYKE SUB L46 P89 PLATS, WCR 15/260 40x100 Commonly known as: 19635 CARRIE, DETROIT, MICHIGAN 48234 Parcel ID No.: 15008433
Parcel 24:	N VIRGINIA PK LOT 199 MCGREGORS SUB L30 P39 PLATS, WCR 8/116 35 X 134.52A Commonly known as: 1982 VIRGINIA PARK, DETROIT, MI 48206 Parcel ID No.: 8002022
Parcel 25:	W GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L37 P23 PLATS, WCR 9/176 35 x 100 Commonly known as: 20125 GREELEY, DETROIT, MICHIGAN 48203 Parcel ID No.: 9019429
Parcel 26:	S BLAINE LOT 262 DEXTER BLVD SUB L30 P32 PLATS, WCR 12/172 34X105 Commonly known as: 3275 BLAINE, DETROIT, MICHIGAN 48206

	Parcel ID No.: 12002175
Parcel 27:	LOT 30, RIVARD VILLAS SUBDIVISION, AS RECORDED IN LIBER 60 OF PLATS, PAGE 1, WAYNE COUNTY RECORDS. Commonly known as: 5315 LODEWYCK, DETROIT, MI 48224 Parcel ID No.: 21077928
Parcel 28:	LOT 513, AND THE EAST 9 FEET OF THE VACATED ALLEY ADJACENT THERETO, FRISCHKORN'S WARREN AVENUE PARK SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39, OF PLATS PAGE(S) 89, WAYNE COUNTY RECORDS. Commonly known as: 6403 BRACE, DETROIT, MI 48228 Parcel ID No.: 22081318
Parcel 29:	E BRYDEN LOT 279 FRISCHKORNS TIREMAN PARK SUB L34 P43, WCR 16/225 35 X 109 Commonly known as: 8190 BRYDEN, DETROIT, MICHIGAN 48204 Parcel ID No.: 16024481
Parcel 30:	E CARBONDALE LOT 152 SCRIPPS HOLDEN AVE SUB L19 P67 PLATS, WCR 16/210 30 X 94 Commonly known as: 8338 CARBONDALE, DETROIT, MICHIGAN 48204 Parcel ID No.: 16016568
Parcel 31:	ALL THAT CERTAIN PARCEL OF LAND SITUATED IN THE COUNTY OF WAYNE AND STATE OF MICHIGAN AND BEING KNOWN AND DESIGNATED AS FOLLOWS: LOT 153, COLLEGE VIEW SUBDIVISION, WAYNE COUNTY, MICHIGAN, RECORDED LIBER 45, PAGE 49 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 16589 BIRWOOD ST, DETROIT, MI 48221. Parcel ID No.: 16042468
Parcel 32:	LOT 146, MORIN PARK SUBDIVISION NUMBER 1 ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 41, PAGE 94, OF PLATS, WAYNE COUNTY RECORDS MICHIGAN. Commonly known as: 7824 METTETAL STREET, DETROIT, MICHIGAN Parcel ID No.: 01-22059630
Parcel 33:	LOT 42, INCLUDING ONE-HALF VACATED ALLEY AT THERE REAR THEREOF, C.W. HARRAH'S SEVEN MILE ROAD SUBDIVISION, AS RECORDED IN LIBER 57, PAGE 79 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 18495 FAUST AVENUE, DETROIT, MI 48219 Parcel ID No.: 22078796

Parcel 34:	S HAMPSHIRE LOT 39 PARKVIEW MANOR SUB L47 P48 PLATS, W C R 21/703 46.41 IRREG. Commonly known as: 13106 HAMPSHIRE, DETROIT, MI 48213 Parcel ID No.: 01-21005499
Parcel 35:	LAND SITUATED IN THE CITY OF DETROIT, COUNTY OF WAYNE, STATE OF MICHIGAN, MORE PARTICULARLY DESCRIBED AS: LOT 1458 AND 1/2 VACATED ALLEY ADJOINING IN REAR, DRENNAN AND SELDON'S REGENT PARK SUBDIVISION NO. 3, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 59 OF PLATS, PAGE 88, WAYNE COUNTY RECORDS. Commonly known as: 14064 ROSSINI DRIVE, DETROIT, MI 48205 Parcel ID No. 21024857004
Parcel 36:	LOT 80, MADAY-ESTATE SUBDIVISION, A SUBDIVISION ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 47 ON PAGE(S) 8 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 8867 SAINT MARYS, DETROIT, MI 48228 Parcel ID No.: 22059350

The following described real estate, situated in the City of Flint, County of Genesee, State of Michigan, to wit:

Parcel 37:	WESTGATE PARK LOT 50, BLK 1; WESTGATE PARK MANOR PART OF OUTLOT BEGINNING AT NWLY CORNER OF LOT 50, BLOCK 1 OF WESTGATE PARK, TH SLY ALG WLY LINE OF 50 LOT, 85 FT TO SWLY CORNER OF 50 LOT; TH SWLY ALG SLY LINE OF 50 LOT EXTENDED SWLY 100 FT; TH NWLY TO A PT, ON NLY LINE OF 50 LOT EXTENDED SWLY 100 FT FROM BEGINNING; TH NELY 100 FT TO POB. Commonly known as: 1919 CARMANBROOK PKWY, FLINT, MI 48507 Parcel ID No.: 40-24-376-189

The following described real estate, situated in the City of Saginaw, County of Saginaw, State of Michigan, to wit:

Parcel 38:	LOT 20, INCLUDING 1/2 VACATED ALLEY ADJACENT THERETO, BLOCK 30, SAGINAW IMPROVEMENT COMPANY'S ADDITION B, CITY OF SAGINAW, SAGINAW COUNTY, MICHIGAN ACCORDING TO THE PLAT

	THEREOF AS RECORDED IN LIBER 2, PAGE 15 OF PLATS, SAGINAW COUNTY RECORDS. Commonly known as: 2322 ROBINWOOD AVENUE, SAGINAW, MICHIGAN 48601 Parcel ID No.: 11-0977-00000

The following described real estate, situated in the City of Lapeer, County of Lapeer, State of Michigan, to wit:

Parcel 39:	SEC 31 T8N R10E THE N 1/2 PRT OF NW FRL 1/4 SEC 31 BEG AT A PT ON W SEC LINE THAT IS S 1375.95 FT FROM NW CRN OF SEC 31, TH CONTINUING S 200.00 FT ALONG SAID W SEC LINE, TH S 89 DEG 22' E 440.0 FT ALONG N LINE OF S 50 A OF NW FRL 1/4 AS OCCUPIED, TH N 200.0 FT, TH N 89 DEG 22' W 440.0 FT TO POB EXCEPT THE NORTH 1/2 THEREOF, CONTAINS 1.01 A. Commonly known as: 1572 MILLVILLE RD. LAPEER, MICHIGAN 48446 Parcel ID No.: 014-031-004-10

All that certain parcel of land situated in the City of Ypsilanti, County of Washtenaw and State of Michigan, being known as follows:

Parcel 40:	THE WESTERLY 48 FEET OF THE SOUTHERLY 132 FEET OF LAND LYING AT NORTHEAST CORNER OF ORCHARD AND FREDERICK STREET ON LOT 69, WORDEN GARDENS, UNRECORDED. Commonly known as: 850 FREDERICK ST., YPSILANTI, MI 48197 Parcel ID No.: 11-11-39-431-009

EXHIBIT 7

2016356342 L: 53270 P: 575 MTG
09/30/2016 04:37:59 PM Total Pages: 19
Bernard J. Youngblood, Register of Deeds - Wayne County, MI
ELECTRONICALLY RECORDED

MORTGAGE

EFFECTIVE DATE: SEPTEMBER 23 2016

PARTICULAR TERMS - DEFINITIONS

As used herein, the following terms and expressions shall have the respective meanings indicated opposite each of them; where the meaning of any term is stated to be "None," provisions involving the application of that term shall be disregarded:

Mortgagor:	**PARK STREET GROUP, LLC**, a Michigan limited liability company
Address:	**100 W. LONG LAKE RD, SUITE 102** **BLOOMFIELD HILLS, MICHIGAN 48304**
Mortgagee:	**SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,** a Delaware limited liability company
Address:	**335 EAST MAPLE ROAD** **BIRMINGHAM, MICHIGAN 48009**
Note and Guaranty:	Restated Mortgage Note in the amount of One Million and 00/100 Dollars ($1,000,000.00) dated of even date herewith executed by Park Street Group Realty Services, LLC and further secured by the Guaranty of the Mortgagor dated August 12, 2016 and all amendments, extensions, roll-overs and renewals thereof
Loan Agreement:	Loan Agreement dated August 12, 2016 as amended of even date herewith, and all future amendments, modifications, renewals and extensions thereof
Premises:	Land, Premises and Property situated in the City of Detroit, Wayne County, Michigan Described as: See Description of Real Estate attached hereto as Exhibit "A"

THIS MORTGAGE CONSTITUTES A FUTURE ADVANCE MORTGAGE UNDER MICHIGAN LAW. THIS MORTGAGE COVERS FIXTURES AND IS INTENDED FOR FILING WITH THE REGISTER OF DEEDS FOR WAYNE COUNTY, MICHIGAN.

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THIS MORTGAGE CONSTITUTES A CONSTRUCTION MORTGAGE AND SECURITY AGREEMENT AND FIXTURE FILING FOR THE PURPOSES OF ARTICLE 9 OF THE MICHIGAN UNIFORM COMMERCIAL CODE.

THIS MORTGAGE, above-dated, by Mortgagor to Mortgagee (the "Mortgage"), and is made with reference to the Restated Note and Amended Loan Agreement hereinabove referenced, and which shall include all of the foregoing as further amended, modified, extended, restated or renewed from time to time and all substitutions, consolidations or roll-overs thereof, from time to time all of which may be done without amendment of this Mortgage.

WITNESSETH:

To secure the performance of the covenants hereinafter contained, and the repayment of loans and letters of credit, and advances made or issued simultaneously herewith, or hereafter to be made or issued to Mortgagor in the amounts hereinabove described, together with interest thereon, payable in accordance with the terms of the note evidencing such loans and advances, and all extensions and renewals thereof (hereinafter referred to as the "Note") issued pursuant to the terms of the Loan Agreement executed by Mortgagor in favor of Mortgagee, the terms, covenants and conditions of which said Note and Loan Agreement are herein incorporated as covenants and conditions of the Mortgagor, with the same force and effect as though such covenants and conditions were fully set forth herein (the covenants of this Mortgage, the Note, and the Loan Agreement are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages and warrants and grants a security interest to the Mortgagee, its successors and assigns, in and to the Premises, together with the easements, rights, privileges, appurtenances, improvements, buildings, fixtures, tenements, and hereditaments thereunder belonging and which may hereafter attach thereto and all heretofore or hereafter vacated alleys and streets abutting thereto (hereinafter collectively referred to as the "Property"); together with (a) all building materials, goods and personal property on the Premises owned by Borrower, not affixed or incorporated into the Premises, (b) all buildings, improvements, machinery, apparatus, equipment, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon said real estate or any part thereof and used or usable in connection with any present or future operation of said Property and owned by Mortgagor (hereinafter referred to as the "Equipment") and now owned or hereafter acquired or leased by the Mortgagor, and all additions and accessions thereto now or hereafter attached to or used in connection therewith or with the Property, and all proceeds of hazard insurance of all of the foregoing, including, but without limiting the generality of the foregoing, all heating, lighting, laundry, incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing apparatus, electrical apparatus (including, but not limited to all electrical transformers, switches, switch boxes, equipment boxes, cabinets, all whether used in the operation of the Property or any business operated within or upon the Property), lifting, cleaning, fire-prevention, fire-extinguishing, refrigerating, ventilating, and communications apparatus, air-cooling and air-conditioning apparatus, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, attached cabinets, partitions, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors and all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any title retention or security agreement superior in lien to the lien of this Mortgage; (c) all right, title and interest, if any, of the Mortgagor to plans and specifications, engineering drawings, architectural renderings, licenses,

governmental permits and approvals, soil test reports, proposals or other material now or thereafter existing in any way relating to the Property; (d) all rents, issues and profits derived under present or future leases, or otherwise, which are hereby specifically assigned, transferred and set over to Mortgagee; (e) all awards or payments, including any interest thereon, and the right to receive same, which may be made for the account of Mortgagor with respect to the Property as a result of the exercise of the right of eminent domain or condemnation, as hereinafter provided; (f) all oil, gas, mineral and water rights; (g) all rights of the Mortgagor under any purchase agreements, land contracts, options and similar agreements executed with respect to the Property and the proceeds thereof; (h) Mortgagor's right to make all divisions under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967; (i) all federal and state historic tax credits and other tax credits; and (j) all insurance proceeds and proceeds of all of the foregoing. It is understood and agreed that all Equipment is part and parcel of said real estate and appropriated to the use of said real estate and, whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and mortgaged hereby. The Mortgagor agrees to execute, acknowledge and deliver, from time to time, such financing statements or other instruments as may be requested by Mortgagee to confirm, protect and perfect the lien of this Mortgage on any Equipment, under the provisions of the Uniform Commercial Code in effect in Michigan or otherwise, and this Mortgage shall also be considered to be and may be construed as a security agreement with reference to any such Equipment, and upon Mortgagor's default, Mortgagee shall, in addition to all other remedies herein provided, have the remedies provided for under the Uniform Commercial Code, as amended, in effect in Michigan.

And the said Mortgagor, for itself, its heirs, administrators, executors, successors and assigns, does covenant and agree to and with the said Mortgagee, its successors and assigns, as follows:

Performance: The Mortgagor will pay, and otherwise perform, all the terms, conditions and covenants of the Indebtedness.

Title: At the time of the execution and delivery of this instrument, Mortgagor is well and truly seized of the Property in fee simple, free of all liens and encumbrances whatsoever, and will forever warrant and defend the same against any and all claims whatever, and the lien created hereby is and will be kept a lien of the first priority upon said Property and every part thereof, as the same exists as of the date hereof, subject only to the recorded covenants and restrictions described in Exhibit "B" hereto (the "Permitted Encumbrances").

Payment of Taxes and Assessments: Mortgagor shall pay (or cause to be paid) when due, all taxes and assessments that may be levied upon said Property, and shall promptly deliver to Mortgagee receipts showing payment thereof upon the written request of Mortgagee. Mortgagor shall pay when due all water charges and all other amounts which might become a lien upon the Property prior to this Mortgage. Mortgagor shall pay when due all taxes and assessments that may be levied upon or on account of this Mortgage or the Indebtedness secured hereby or upon the interest or estate in said Property created or represented by this Mortgage, whether levied against Mortgagor or otherwise. In the event payment by Mortgagor of any tax referred to in the foregoing sentence would result in the payment of interest in excess of the rate permitted by law, then Mortgagor shall have no obligation to pay the portion of such tax which would result in the payment of such excess; provided, however, in any such event, at any time after the enactment of

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the law providing for such tax, Mortgagee, at its election, may declare the entire principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable ninety (90) days from the date of such declaration by Bank.

Insurance: See Loan Agreement executed August 12, 2016 as amended of even date. Mortgagor will keep all buildings, improvements, fixtures and equipment now or hereafter upon said Property after renovations are completed and a certificate of occupancy are issued, , insured against loss and damage by fire and the perils covered by extended coverage insurance (including public liability insurance), and against such other risks and in such amounts, as may from time to time be required by Mortgagee, and with such insurer(s) as may from time to time be approved by Mortgagee, with proceeds thereof payable to Mortgagee under a standard mortgagee endorsement thereto as set forth in and subject to the terms of the Loan Agreement, and shall contain an agreement by such insurer(s) that such policy(s) shall not be cancelled or materially changed without at least thirty (30) days prior written notice to Mortgagee. If the Property is located in an area which has been identified by the Secretary of Housing and Urban Development as a flood hazard area and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (the Act), as amended, the Mortgagor will keep the Property covered by flood insurance up to the maximum limit of coverage available under the Act, but not in excess of the amount of the Note. The policies of all such insurance and all renewals thereof, together with receipts evidencing payment in full of the premiums thereon, shall be delivered promptly to Mortgagee upon the written request of Mortgagee. In the event of loss or damage, the proceeds of said insurance shall be paid to Mortgagee alone and Mortgagee shall have the right to collect, receive and receipt for such proceeds in the name of Mortgagee and Mortgagor. Should an uncured Event of Default exist beyond any applicable notice and cure period, Mortgagee is authorized to adjust and compromise such loss without the consent of Mortgagor. In the absence of an uncured Event of Default beyond any applicable notice and cure period, Mortgagor is authorized to adjust and compromise such loss with the prior written consent of Mortgagee. Such proceeds shall be applied toward reimbursement of all costs and expenses of Mortgagee in collecting said proceeds, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then be matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor. All of said policies of insurance shall be held by Mortgagee as additional security hereunder and, in the event of sale of the Property on foreclosure, the ownership of all policies of insurance and the right to receive the proceeds of any insurance payable by reason of any loss theretofore or thereafter occurring, shall pass to the purchaser at said sale and Mortgagor hereby appoints Mortgagee its attorney-in-fact, in Mortgagor's name, to assign and transfer all such policies and proceeds to such purchaser. Notwithstanding the foregoing, in the absence of an Event of Default beyond any applicable notice and cure period which is not cured at the time of the casualty or damage and at the time insurance proceeds are to be made available to Mortgagee under this provision, and, if requested by Mortgagor in writing, the Mortgagee agrees to disburse such insurance proceeds to Mortgagor or, to contractors employed by Mortgagor, less actual costs, fees and expenses, including reasonable attorneys' fees, if any, incurred by Mortgagee in connection with the adjustment of the loss or any action taken by Mortgagee in connection with the adjustment of the loss or incurred by Mortgagee in connection with any of the requirements of this Section 4 (the "Net Proceeds"), consistent with customary practices of Mortgagee in the administration of

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construction loans and as set forth in the Loan Agreement, for the purpose of restoration, repair and replacement ("Restoration") of the Property to the condition and character existing prior to such event giving rise to payment of such proceeds, subject to the following:

Mortgagor shall deliver a detailed budget to Mortgagee, approved in writing by Mortgagor's architect or engineer, inclusive of the entire cost of completing the Restoration, on a trade by trade basis;

the Net Proceeds, together with any additional funds deposited by Mortgagor with Mortgagee, are sufficient, as determined by an estimate prepared by an independent appraiser selected by Mortgagee, to pay for the entire cost of the Restoration;

Mortgagor shall commence the Restoration as soon as reasonably practicable, but in no event later than thirty (30) days after such damage or destruction occurs; notwithstanding the foregoing, Mortgagor shall remove debris and otherwise clean and secure the Premises, promptly following any such damage or destruction;

Restoration shall be performed in compliance with all applicable governmental codes, ordinances, statues and requirements (including, without limitation, all applicable Environmental Laws);

From and after the date of the occurrence of the damage or destruction and continuing during the course of the Restoration, Borrower shall continue to timely pay all costs of owning, maintaining and operating the Premises, including all debt service under the Note;

Mortgagor shall comply with the policies and requirements of the Michigan Construction Lien Act and the Restoration will be completed free of any construction liens. Each disbursement of insurance proceeds shall require an endorsement to Mortgagee's title insurance policy insuring the full amount of advances to date.

If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the sole opinion of Mortgagee, be sufficient to pay in full the balance of the costs which are estimated by the Mortgagee to be necessary to complete the Restoration, Mortgagor shall deposit additional funds with Mortgagee in the amount of such deficiency (the "Net Proceeds Deficiency") before any other disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Mortgagee shall be held by Mortgagee and shall be disbursed for costs actually incurred in connection with the restoration of the same conditions applicable to the disbursement of the Net Proceeds and, until so disbursed, shall constitute additional security for the Indebtedness. Any funds held by Mortgagee pursuant to this Section shall be held in a non-interest bearing account and may be commingled with other funds of Mortgagee.

Reserve: Upon the occurrence of an Event of Default, Mortgagor will pay to Mortgagee on dates upon which interest is payable under the Note, such amounts as the Mortgagee from time to time estimates as necessary to create and maintain a reserve fund from which to pay before the same become due, all taxes and assessments, on or against the Property hereby mortgaged. Such reserve fund shall not bear interest. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the Property described herein may benefit thereby. If the funds to be paid to Mortgagee shall be insufficient to enable

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such taxes and assessments to be paid in full thirty (30) days before the due dates thereof, the Mortgagor shall immediately upon written demand therefore, pay to Mortgagee such additional sums as may be required by Mortgagee in order to enable payment of such taxes and assessments in full thirty (30) days before the due date thereof, and if the funds so paid to Mortgagee shall exceed the amount of such taxes and assessments paid by Mortgagee, such excess shall be credited by the Mortgagee to subsequent payments required to be made. Said amounts shall be held by Mortgagee as additional security for the Indebtedness secured hereby. Said amounts shall be applied to the payment of said taxes and assessments when the same become due and payable; provided, however, that Mortgagee shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing herein contained shall in any manner limit the obligation of Mortgagor to pay taxes, assessments, liens, charges, and to maintain insurance as above provided. In the event of an Event of Default, Mortgagee may, at its option, but without any obligation on its part so to do, apply said amounts upon said taxes, assessments and insurance premiums, and/or toward the payment of any amounts payable by Mortgagor to Mortgagee under this Mortgage and/or toward the payment of the Indebtedness secured hereby or any portion thereof, whether or not then due or payable.

Default in Taxes: If default be made in the payment of any of the aforesaid taxes, liens, charges, assessments or in making repairs or replacements or in procuring and maintaining insurance and paying the premiums therefor or in paying any governmental charges levied or assessed against the Property, or in keeping or performing any other covenants of Mortgagor herein, Mortgagee may, at its option, and without any obligation on its part so to do, upon ten (10) calendar days prior notice to Borrower, pay said taxes and assessments, make such repairs and replacements, effect such insurance, pay such premiums or governmental charges, and perform any other covenant of Mortgagor herein. All amounts expended by Mortgagee hereunder shall be secured hereby and shall be due and payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note.

Repair/Replacement/Further Improvements: Mortgagee understands that when Mortgagor purchases subject property the property will need substantial renovation and improvements for marketability. However, once a certificate of occupancy has been obtained from the appropriate governing authority, Mortgagor will abstain from and will not suffer the commission of physical waste on said Property and will keep (or cause to be kept) the buildings, improvements, fixtures and equipment now or hereafter thereon in good repair and will make replacements thereto as and when the same become necessary, so that the efficiency of the Property and every part thereof shall at all times be maintained and the mortgage security shall not in any way be impaired. Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any loss or damage to the Property. Except as may be permitted by terms of the Loan Agreement, after renovations and/or repairs have been completed by Mortgagor on subject property and a certificate of occupancy has been obtained from the proper governing authority, Mortgagor shall not materially alter the buildings, improvements, fixtures or equipment now or hereafter upon said Property, or remove the same therefrom, without the written consent of Mortgagee. Mortgagor will not permit any portion of the Property to be used for any unlawful purposes. Mortgagor will comply promptly with all laws, ordinances, regulations and orders of all public authorities having jurisdiction thereof relating to the Property or the use, occupancy and maintenance thereof, provided that Mortgagor shall have the right to contest the same in good faith if Mortgagor has

complied with the Bank's reasonable requirements in connection with such protest. Mortgagee shall have the right at any time, and from time to time, to enter the Property for the purpose of inspecting the same.

Waste: Failure of the Mortgagor to pay any taxes, assessments or governmental charges levied or assessed against the Property, or any part thereof, or any installment of any such tax, assessment or charge, or any premium upon any such tax, assessment or charge, or any premium upon any policy of insurance covering any part of the Property, at the time or times such taxes, assessments, charges, installments thereof or insurance premiums are due and payable, shall constitute waste, and in accordance with the provisions of Act No. 236 of the Public Acts of Michigan for 1961, as amended shall entitle Mortgagee to exercise the remedies afforded by such Act. Payment by the Mortgagee for and on behalf of the Mortgagor of any such delinquent tax or insurance premium properly payable by Mortgagor under the terms of this Mortgage, shall not cure the default herein described nor shall it in any manner impair the Mortgagee's right to the appointment of a receiver on account thereof. Upon the happening of any such acts of waste and on proper application made therefore by Mortgagee to a court of competent jurisdiction, the Mortgagee shall forthwith be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issues and profits thereof, with such powers as the court making such appointment shall confer; the Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

Reimbursement: In the event that Mortgagee is made a party to any suit or proceedings by reason of the interest of Mortgagee in the Property, other than for Mortgagee's default, Mortgagor shall reimburse Mortgagee for all reasonable costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in connection therewith. All such amounts incurred by Mortgagee hereunder shall be secured hereby and shall be payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note. The Mortgagor hereby assigns to the Mortgagee, in their entirety, all judgments, decrees, and awards for injury or damage to the Property (excluding awards, judgments or decrees due to tenant under the Lease; provided, however, if Mortgagor subsequently receives such awards, judgments or decrees, they shall be immediately assigned to Mortgagee) the Mortgagor authorizes the Mortgagee, at its sole election, to apply the same, or the proceeds thereof, to the Indebtedness hereby secured in such manner as the Mortgagee may elect; and the Mortgagor hereby authorizes the Mortgagee, in the name of the Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree.

Condemnation: In the event of the taking of all or any portion of the Property in any proceedings under the power of eminent domain, the entire award rendered in such proceedings shall be paid to Mortgagee up to the amount of the Indebtedness then outstanding, to be applied toward reimbursement of all costs and expenses of Mortgagee in connection with said proceedings, toward the payment of all amounts payable by Mortgagor to Mortgagee hereunder, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as the Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor.

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Rents/Profits:

As additional security for the payment of the Indebtedness, insurance premiums, taxes and assessments, at the time and in the manner herein agreed, and for the performance of the covenants and agreements herein contained, pursuant to Act 210 of the Public Acts of Michigan of 1953, as amended, the Mortgagor does hereby sell, assign, transfer and set over unto the Mortgagee herein, its successors and assigns, all the rents, profits and income under any lease or leases of the mortgaged property (including any extensions, amendments or renewals thereof), whether due or to become due, including all such leases in existence or coming into existence during the period this Mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor herein or those claiming by, under or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the foreclosure or any other proceedings taken to enforce this Mortgage. In the event of a sale or foreclosure which shall result in a deficiency, this assignment shall stand as security during the redemption period for the payment of such deficiency. This assignment is given as collateral security only and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor contained in any such assigned leases. Notwithstanding anything in this Section to the contrary, Mortgagee may only receive rents, profits and income under the leases if an Event of Default has occurred and any applicable notice and cure periods have expired.

Should an Event of Default exist beyond any applicable notice and cure period as set forth in the Loan Agreement, the Mortgagor shall, upon demand therefor made by the Mortgagee, deliver and surrender possession of the mortgaged Property to the Mortgagee who shall thereafter collect the rents and income therefrom, rent or lease said Property or portion thereof upon such terms and for such time as it may deem commercially reasonable, terminate any tenancy (subject to the terms of a recorded SNDA with respect to the Lease) and maintain proceedings to recover rents or possession of the Property from any tenant or trespasser, and apply the net proceeds of such rent and income to the following purposes:

preservation of Property;

payment of taxes;

payment of insurance premiums; or

payment of installments of interest and principal due under the terms of the Indebtedness.

In the event that the Mortgagor fails, refuses or neglects to deliver or surrender such possession, the Mortgagee shall be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issue and profits thereof, with such powers as the court making such appointment may confer.

Mortgagor agrees to execute and deliver to Mortgagee assignments of rents on all future leases on the mortgaged Property during the term of this Mortgage, such assignments to be in the form and manner satisfactory to Mortgagee. Any default by the Mortgagor under the terms and/or conditions of any such assignment shall be a default under the terms and conditions of this

Mortgage, entitling the Mortgagee to exercise any and all the rights and remedies provided by this Mortgage. If the Mortgagor shall fail to perform and discharge any of the obligations, covenants and agreements required to be performed by it under any such assignment of lease, the Mortgagee may elect to perform the same; any sums which may be so paid out by the Mortgagee, including the cost, expenses and attorneys' fees paid out in any suit affecting the same, shall bear interest at the default rate provided in the Note, from the dates of such payments, shall be paid by Mortgagor to Mortgagee upon demand and shall be deemed a part of the Indebtedness hereby secured and recoverable as such in all respects. Mortgagor shall assign to the Mortgagee, upon request, as further security for the Indebtedness secured hereby, the Mortgagor's interest in all agreements, contracts, licenses and permits affecting the Property, such assignments to be made by instruments in form satisfactory to the Mortgagee; but no such assignment shall be construed as a consent by the Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon the Mortgagee any obligations with respect thereto.

The provisions of this Section 11 are not intended to evidence an additional recordable event, as may be prohibited by Act 459 of the Public Acts of Michigan of 1996, but rather are included in this Mortgage for purposes of complying with applicable requirements of Act 210 of the Public Acts of Michigan of 1953, as amended.

Default: Should an Event of Default exist as set forth in the Loan Agreement, then the Mortgagee may at any time after such Event of Default, and without further notice (subject to express notice and cure provision set forth in the Loan Agreement), declare the principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable immediately. The commencement of proceedings to foreclose this Mortgage shall, in any event, be deemed such declaration.

Title History: Should an Event of Default exist as set forth in the Loan Agreement, Mortgagee may cause its title insurance policy of the aforesaid mortgaged Property to be certified or extended as may be reasonable, or may procure a new title insurance policy, and the money so paid shall be a lien on said Property added to the amount secured by this Mortgage and payable forthwith with interest thereon at the rate at which interest accrues on amounts after the same becomes due under the Note.

Acceleration: If foreclosure proceedings of any mortgage (other than the within Mortgage) or any lien of any kind should be instituted against the Property and such proceedings are not either discontinued or bonded by a company satisfactory to Mortgagee within thirty (30) days, or if any other proceedings which have or may have a material and adverse effect on the Property or the business of the Mortgagor, either voluntary or involuntary, are instituted by or against Mortgagor or its successors in title to enforce payment or liquidation of its outstanding obligations, the Mortgagee may, at its option and without notice, immediately declare its lien and the Indebtedness which it secures due and payable and institute such proceedings as may be necessary to protect its interest in the mortgaged Property.

Disposition of Property:

Power is hereby granted to Mortgagee, if an Event of Default exists, to grant, bargain, sell, release and convey the Property, Equipment, and appurtenances at public auction or venue, and on such sale to execute and deliver to the purchasers, his, her, its or their heirs, successors and assigns, good ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided (said statute being M.C.L.A. Section 600.3201, et seq., or any successor or substitute statute), and to apply the proceeds of such sale in the manner hereinafter provided.

Upon a foreclosure sale of said Property or any part thereof, the proceeds of such sale shall be applied in the following order:

To the payment of all costs of the suit or foreclosure, including a reasonable attorney fee and the cost of title searches and abstracts;

To the payment of all other expenses of Mortgagee, including all monies expended by Mortgagee and all other amounts payable by Mortgagor to Mortgagee hereunder, with interest thereon;

To the payment of the principal and interest of the Indebtedness secured hereby;

To the payment of the surplus, if any, to Mortgagor or to whosoever shall be entitled thereto.

Upon any foreclosure sale of the Property, the same may be sold either as a whole or in parcels, as Mortgagee may elect, and if in parcels, the same may be divided as Mortgagee may elect, and at the election of the Mortgagee may be offered first in parcels and then as a whole, that offer producing the highest price for the entire Property to prevail, any law, statutory or otherwise, to the contrary notwithstanding, and Mortgagor hereby waives the right to require any such sale to be made in parcels or the right to select such parcels.

Future Assurances: At any time and from time to time, upon request of the Mortgagee, the Mortgagor will make, execute and deliver or cause to be made, executed and delivered to the Mortgagee and where appropriate will cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or filed at such time and in such offices and places as shall be reasonably required by the Mortgagee, any and all such other and further mortgages, instruments of further assurance, certificates, financing statements, and other documents as may, in the reasonable opinion of the Mortgagee or its counsel, be necessary or reasonably desirable in order to effectuate, complete and perfect and to continue and preserve the obligation of the Mortgagor under this Mortgage, and the lien of this Mortgage as a lien of the priority herein set forth upon all the Property and Equipment, except at hereinabove stated, whether now owned or hereinafter acquired by the Mortgagor and wheresoever located. Upon any failure by the Mortgagor so to do, the Mortgagee may execute, record, file, re-record and refile any and all such mortgages, instruments, certificates, financing statements, and documents for and in the name of the Mortgagor, and the Mortgagor hereby irrevocably appoints the Mortgagee the agent and attorney-in-fact of the Mortgagor so to do. Any expenses of the Mortgagee in connection therewith shall be added to the Indebtedness of the Mortgagor and shall be secured hereby.

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Cumulative Rights and Remedies: Each and every of the rights, remedies and benefits provided to Mortgagee herein shall be cumulative and shall not be exclusive of any other of said rights, remedies or benefits, or of any other rights, remedies or benefits allowed by law, and may be exercised either successively or concurrently. Any waiver by Mortgagee of any default hereunder or any Event of Default shall not constitute a waiver of any similar or other default or Event of Default.

Alienation: Mortgagee in making the loans evidenced by the Note is relying upon the integrity of Mortgagor and its undertaking to maintain the mortgaged Property. If Mortgagor should sell, transfer, convey, assign or further encumber its interest in the mortgaged Property, or any part thereof, voluntarily or involuntarily, the Mortgagee shall have the right in its sole option thereafter to declare all sums and the Indebtedness secured hereby and then unpaid to be due and payable forthwith although the period limited for the payment thereof shall not then have expired, anything contained to the contrary hereinbefore notwithstanding, and thereupon to exercise all of its rights and remedies under this Mortgage; any transfer, sale, assignment or pledge of any ownership interests in the Mortgagor, resulting in a change in majority ownership and voting control of Mortgagor (a transfer, sale, assignment or pledge as aforesaid, is hereinafter referred to as a "Transfer"), without Mortgagee's prior written consent, shall constitute a Transfer in violation of this provision. If the ownership of the mortgaged Property, or any part thereof, becomes vested in a person/entity other than the Mortgagor, the Mortgagee may deal with such successor or successors in interest with reference to this Mortgage, and the Indebtedness hereby secured, in the same manner as with the Mortgagor, without it in any manner vitiating or discharging the Mortgagor's liability hereby or upon the Indebtedness hereby secured. The Mortgagor shall at all times continue primarily liable on the Indebtedness secured hereby until this Mortgage is fully discharged or Mortgagor is formally released by an instrument in writing duly executed by the Mortgagee.

Future Advances: In addition to securing the repayment of the Indebtedness hereinbefore mentioned, this Mortgage shall also secure the payment of all obligations of the Mortgagor to the Mortgagee, its successors or assigns howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or hereafter existing or due or to become due, including without limitation of the generality of the foregoing, future advances.

Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assigns of Mortgagor, and shall inure to the benefit of the successors and assigns of Mortgagee; any reference herein to "Mortgagee" shall include the successors and assigns of Mortgagee.

Terms: All nouns, pronouns and relative terms relating to Mortgagor shall be deemed to be masculine, feminine or neuter, singular or plural, as the context may indicate. If Mortgagor consists of more than one person, their liability hereunder shall be joint and several.

Power of Sale: WARNING. THIS MORTGAGE CONTAINS A POWER OF SALE, AND, UPON DEFAULT, MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT, NO HEARING IS INVOLVED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE IN A LOCAL NEWSPAPER AND TO POST A COPY OF THE NOTICE ON THE PROPERTY.

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Waiver: IF THIS MORTGAGE IS FORECLOSED BY ADVERTISEMENT, MORTGAGOR HEREBY VOLUNTARILY INTELLIGENTLY AND KNOWINGLY WAIVES ALL RIGHTS, UNDER THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN AND CONSTITUTION AND LAWS OF THE UNITED STATES, TO ALL NOTICE AND A HEARING IN CONNECTION WITH THE ABOVE MENTIONED FORECLOSURE BY ADVERTISEMENT, EXCEPT AS SET FORTH IN THE MICHIGAN STATUTE PROVIDING FOR FORECLOSURE BY ADVERTISEMENT.

Non-Pledge: Mortgagor will not, without the prior written consent of Mortgagee, mortgage or pledge as security for any other loans obtained by Mortgagor, the Property, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Property. If any such mortgage or pledge is entered into without the prior written consent of the Mortgagee, the entire Indebtedness secured hereby, may, at the option of Mortgagee, be declared immediately due and payable without notice. Further, Mortgagor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Property for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Mortgagee's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Property or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Mortgage. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or placed by Mortgagor on the Premises under a security agreement the lien or title of which is superior to the lien created by this Mortgage, all the right, title and interest of Mortgagor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Mortgagor shall nevertheless be and are hereby assigned to Mortgagee and are covered by the lien of this Mortgage.

Indebtedness Secured: This Mortgage secures all Indebtedness as defined in the Loan Agreement.

Security Agreement and Financing Statements: Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) as security for the payment of the Note and all other sums secured by this Mortgage a security interest in all the Equipment and personal property described elsewhere in this Mortgage.

Mortgagor shall execute any and all such documents, including without limitation, financing statements pursuant to the Uniform Commercial Code of the State of Michigan as Mortgagee may request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any reasonable out-of-pocket expenses incurred by any such Mortgagee in connection with the preparation, execution and filing of documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all financing statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. This Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be cumulative and (i) as prescribed herein, or (ii) by general law, or (iii) as to such part of the security which is also reflected in said financing statement by the

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specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Fixture Filing Provisions: If the security agreement described above covers goods which are or are to become fixtures, then this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of the recording hereof. In connection therewith, the addresses of the Mortgagor as debtor and Mortgagee as secured party are as set forth on the first page of this Mortgage. The foregoing address of Mortgagee is also the address from which information concerning the security interest may be obtained by any interested party. The Mortgagor's State of Michigan Identification No. is E83081.

Promissory Note: The repayment terms, interest rate and maturity date are set forth in the Restated Note of even date.

SIGNATURE PAGE FOLLOWS

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IN WITNESS WHEREOF, said Mortgagor has executed this Mortgage the day and year first above written.

"MORTGAGOR"

PARK STREET GROUP, LLC, a Michigan limited liability company

By: Dean J. Groulx
Name: Dean J. Groulx
Its: Sole Member

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 23 day of September, 2016, by Dean J. Groulx, the Sole Member of Park Street Group, LLC, a Michigan limited liability company.

Notary Public, Tricia C. Mink County, Michigan
Acting in Oakland County
My commission expires:
5-27-20

TRICIA C. MINK
Notary Public, State of Michigan
County of Oakland
My Commission Expires May 27, 2020
Acting in the County of Oakland

DRAFTED BY AND WHEN
RECORDED RETURN TO:
Rob Berg
Soaring Pine Capital Real Estate and Debt Fund II, LLC
335 East Maple Road
Birmingham, MI 48009

EXHIBIT "A"

DESCRIPTION OF REAL ESTATE

The following described real estate, situated in the City of Detroit, County of Wayne, State of Michigan, to wit:

Parcel 1:	W MARLBOUROUGH LOT 89 SEFTON PARK SUB L38 P86 PLATS, WCR 21/478 35 X 126.89A Commonly known as: 5231 MARLBOROUGH, DETROIT, MICHIGAN 48224 Tax Parcel Number: 21059525
Parcel 2:	LOT 10, BLOCK 2, ASSESSOR'S PLAT NO 28, L/P 10/33 Commonly known as: 1717 & 17198 BAILEY, LANSING, MICHIGAN 48910 Tax Parcel Number: 33-01-01-22354-061
Parcel 3:	W ARCHDALE LOT 2678 FRISCHKORNS GRAND-DALE SUB NO 7 L59 P6 PLATS, WCR 22/591 37.95 X 123 Commonly known as: 9997 ARCHDALE, DETROIT, MI 48227 Tax Parcel Number: 22072071
Parcel 4:	E INDIANA LOT 186 WESTLAWN SUB NO 3 L32 P12 PLATS, WCR 18/390 35 X 100 Commonly known as: 11470 INDIANA, DETROIT, MI 48204 Tax Parcel Number: 18015529
Parcel 5:	N ELMDALE LOT 463 GRATIOT GARDENS SUB L32 P14 PLATS, WCR 21/455 40 X 150 Commonly known as: 12559 ELMDALE, DETROIT, MI 48213 Tax Parcel Number: 21007368
Parcel 6:	THE EAST 16 FEET OF LOT 348 AND THE WEST 25 FEET OF LOT 349, AVALON HEIGHTS SUBDIVISION, AS RECORDED IN LIBER 49, PAGE 100 OF PLATS, WAYNE COUNTY RECORDS Commonly known as: 16257 MANNING, DETROIT, MI 48205 Tax Parcel Number: 21023434
Parcel 7:	N SRARATOGA LOT 276 PULCHER ESTATE SUB L44 P76 PLATS, WCR 21/656 35X120 Commonly known as: 13881 Saratoga St., Detroit, MI 48205 Tax Parcel Number: 21019152
Parcel 8:	N JANE LOT 10 AND LOT 11 DURUSSELL SUB L44 P66 PLATS, WCR 21/664 65.65 IRREG Commonly known as: 12845 JANE ST., DETROIT, MI 48205 Tax Parcel Number: 21011847-48

Parcel 9:	W CARRIE LOT 42 HUTTON & PITCHERS 7 MILE DR SUB L 42 P 32 PLATS, WCR 15/226 35 X 126 Commonly known as: 18611 CARRIE, DETROIT, MICHIGAN 48234 Tax Parcel Number: 15008511
Parcel 10:	NORTH 20.0 FEET OF LOT 488 AND ALL OF LOT 489, INCLUDING 1/2 VACATED ALLEY AT THE REAR, FRISCHKORN'S PARK VIEW SUBDIVISION. ACCORDING TO THE RECORDED PLAT THEREOF, AS RECORDED IN LIBER 41, PAGE 95, OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 7629 DACOSTA, REDFORD, MICHIGAN 48239 Parcel Id No. : 22-116023-4/22-1116023
Parcel 11:	W AMERICAN LOT 37 MERRITT M WILLMARTHS SUB L21 P 87 PLATS, WCR 16/199 30 X 100 Commonly known as: 10431 AMERICAN, DETROIT, MICHIGAN 48204 Tax ID No.: 16024270
Parcel 12:	E NORTHLAWN LOT 451 WESTLAWN SUB L31 P68 PLATS, WCR 16/236 35 X 105.01 Commonly known as: 1238 NORTHLAWN, DETROIT, MICHIGAN 48238 Parcel ID No.: 16031607
Parcel 13:	LOT 1061 DAVID TROMBLY ESTATES SUBDIVISION NO. 4, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 48, OF PLATS PAGE(S) 44, WAYNE COUNTY RECORDS. Commonly known as: 13074 KILBOURNE ST., DETROIT, MI 48213 Tax ID No.: 21009931
Parcel 14:	S WADE LOT 425 DAVID TROMBLYS HARPER AVE SUB NO 1 L51 P24 PLATS, WCR 21/758 35 X 100.60 Commonly known as: 13412 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006037
Parcel 15:	N PFENT LOT 105 MAPLE VIEW PARK SUB L51 P76 PLATS, WCR 21/764 35 X 115 Commonly known as: 13641 PFENT, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021942
Parcel 16:	N PFENT W 35 FT LOT 28 CAROL PARK SUB L43 P23 PLATS, W C R 21/799 35 X 115. Commonly known as: 14053 PFENT, DETROIT, MI 48205 Parcel ID No.: 21021977
Parcel 17:	N WADE LOT 688 RAVENDALE SUB NO2 L49 P96 PLATS, WCR 21/739 35 X 110 Commonly known as: 14295 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006363

Parcel 18:	E LESURE LOT 204 & W 8 FT VAC ALLEY ADJ HURON HEIGHTS SUB L34 P71 PLATS, WCR 22/62 35 X 112 Commonly known as: 14870 LESURE, DETROIT, MICHIGAN 48227 Parcel ID No.: 22032612
Parcel 19:	S LAPPIN LOT 677 AVALON HEIGHTS SUB L49 P100 PLATS, WCR 21/789 40 X 125 Commonly known as: 16028 LAPPIN, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021645
Parcel 20:	W ANNOTT LOT 2217 DRENNAN & SELDONS LASALLE COLLEGE PARK SUB NO 7 L60 P30 PLATS, W C R 21/934 36 IRREG Commonly known as: 17803 ANNOTT, DETROIT, MI 48205 Parcel ID No.: 21035698
Parcel 21:	E Sherwood N 14.50 FT LOT 27 AND S 22.75 FT LOT 28 WARRENS FORD PACKARD SUB L37 P71 PLATS, W C R 15/221 37.25 X 124. Commonly known as: 18846 SHERWOOD, DETROIT, MI 48234 Parcel ID No.: 15011985-6
Parcel 22:	W ROWE LOT 89 TWIN PINES SUB L43 P58 PLATS, WCR 21/794 40 X 125.75 Commonly known as: 19353 ROWE, DETROIT, MICHIGAN 48205 Parcel ID No.: 21035983
Parcel 23:	W CARRIE LOT 405 PATERSON BROS & CO OUTER DRIVE-VAN DYKE SUB L46 P89 PLATS, WCR 15/260 40x100 Commonly known as: 19635 CARRIE, DETROIT, MICHIGAN 48234 Parcel ID No.: 15008433
Parcel 24:	N VIRGINIA PK LOT 199 MCGREGORS SUB L30 P39 PLATS, WCR 8/116 35 X 134.52A Commonly known as: 1982 VIRGINIA PARK, DETROIT, MI 48206 Parcel ID No.: 8002022
Parcel 25:	W GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L37 P23 PLATS, WCR 9/176 35 x 100 Commonly known as: 20125 GREELEY, DETROIT, MICHIGAN 48203 Parcel ID No.: 9019429
Parcel 26:	S BLAINE LOT 262 DEXTER BLVD SUB L30 P32 PLATS, WCR 12/172 34X105 Commonly known as: 3275 BLAINE, DETROIT, MICHIGAN 48206 Parcel ID No.: 12002175
Parcel 27:	LOT 30, RIVARD VILLAS SUBDIVISION, AS RECORDED IN LIBER 60 OF PLATS, PAGE 1, WAYNE COUNTY RECORDS. Commonly known as: 5315 LODEWYCK, DETROIT, MI 48224 Parcel ID No.: 21077928

Parcel 28:	LOT 513, AND THE EAST 9 FEET OF THE VACATED ALLEY ADJACENT THERETO, FRISCHKORN'S WARREN AVENUE PARK SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39, OF PLATS PAGE(S) 89, WAYNE COUNTY RECORDS. Commonly known as: 6403 BRACE, DETROIT, MI 48228 Parcel ID No.: 22081318
Parcel 29:	E BRYDEN LOT 279 FRISCHKORNS TIREMAN PARK SUB L34 P43, WCR 16/225 35 X 109 Commonly known as: 8190 BRYDEN, DETROIT, MICHIGAN 48204 Parcel ID No.: 16024481
Parcel 30:	E CARBONDALE LOT 152 SCRIPPS HOLDEN AVE SUB L19 P67 PLATS, WCR 16/210 30 X 94 Commonly known as: 8338 CARBONDALE, DETROIT, MICHIGAN 48204 Parcel ID No.: 16016568
Parcel 31:	ALL THAT CERTAIN PARCEL OF LAND SITUATED IN THE COUNTY OF WAYNE AND STATE OF MICHIGAN AND BEING KNOWN AND DESIGNATED AS FOLLOWS: LOT 153, COLLEGE VIEW SUBDIVISION, WAYNE COUNTY, MICHIGAN, RECORDED LIBER 45, PAGE 49 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 16589 BIRWOOD ST, DETROIT, MI 48221. Parcel ID No.: 16042468
Parcel 32:	LOT 146, MORIN PARK SUBDIVISION NUMBER 1 ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 41, PAGE 94, OF PLATS, WAYNE COUNTY RECORDS MICHIGAN. Commonly known as: 7824 METTETAL STREET, DETROIT, MICHIGAN Parcel ID No.: 01-22059630
Parcel 33:	LOT 42, INCLUDING ONE-HALF VACATED ALLEY AT THERE REAR THEREOF, C.W. HARRAH'S SEVEN MILE ROAD SUBDIVISION, AS RECORDED IN LIBER 57, PAGE 79 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 18495 FAUST AVENUE, DETROIT, MI 48219 Parcel ID No.: 22078796
Parcel 34:	S HAMPSHIRE LOT 39 PARKVIEW MANOR SUB L47 P48 PLATS, W C R 21/703 46.41 IRREG. Commonly known as: 13106 HAMPSHIRE, DETROIT, MI 48213 Parcel ID No.: 01-21005499
Parcel 35:	LAND SITUATED IN THE CITY OF DETROIT, COUNTY OF WAYNE, STATE OF MICHIGAN, MORE PARTICULARLY DESCRIBED AS: LOT 1458 AND 1/2 VACATED ALLEY ADJOINING IN REAR, DRENNAN AND SELDON'S REGENT PARK SUBDIVISION NO. 3, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 59 OF PLATS, PAGE 88, WAYNE COUNTY RECORDS.

	Commonly known as: 14064 ROSSINI DRIVE, DETROIT, MI 48205 Parcel ID No. 21024857004
Parcel 36:	LOT 80, MADAY-ESTATE SUBDIVISION, A SUBDIVISION ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 47 ON PAGE(S) 8 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 8867 SAINT MARYS, DETROIT, MI 48228 Parcel ID No.: 22059350

EXHIBIT 8

6339456 L: 5172 P: 816 M
Total Pages: 15 10/05/2016 01:10 PM
Lawrence Kestenbaum
Washtenaw County, Michigan

MORTGAGE

EFFECTIVE DATE: AUGUST 12, 2016

PARTICULAR TERMS - DEFINITIONS

As used herein, the following terms and expressions shall have the respective meanings indicated opposite each of them; where the meaning of any term is stated to be "None," provisions involving the application of that term shall be disregarded:

Mortgagor:	**PARK STREET GROUP, LLC**, a Michigan limited liability company
Address:	**100 W. LONG LAKE RD, SUITE 102** **BLOOMFIELD HILLS, MICHIGAN 48304**
Mortgagee:	**SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,** a Delaware limited liability company
Address:	**335 EAST MAPLE ROAD** **BIRMINGHAM, MICHIGAN 48009**
Note and Guaranty:	Mortgage Note in the amount of Five Hundred Thousand and 00/100 Dollars ($500,000.00) dated of even date herewith executed by Park Street Group Realty Services, LLC and further secured by the Guaranty of the Mortgagor and all amendments, extensions, roll-overs and renewals thereof
Loan Agreement:	Loan Agreement dated of even date herewith, and all amendments, modifications, renewals and extensions thereof
Premises:	Land, Premises and Property situated in the City of Ypsilanti, Washtenaw County, Michigan Described as: See Description of Real Estate attached hereto as Exhibit "A"

THIS MORTGAGE CONSTITUTES A FUTURE ADVANCE MORTGAGE UNDER MICHIGAN LAW. THIS MORTGAGE COVERS REAL PROPERTY AND IS INTENDED FOR FILING WITH THE REGISTER OF DEEDS FOR WASHTENAW COUNTY, MICHIGAN.

THIS MORTGAGE CONSTITUTES A CONSTRUCTION MORTGAGE AND SECURITY AGREEMENT FOR THE PURPOSES OF ARTICLE 9 OF THE MICHIGAN UNIFORM COMMERCIAL CODE.

THIS MORTGAGE, above-dated, by Mortgagor to Mortgagee (the "Mortgage"), and is made with reference to the Note and Loan Agreement hereinabove referenced, and which shall include all of the foregoing as amended, modified, extended, restated or renewed from time to time and all substitutions, consolidations or roll-overs thereof, from time to time all of which may be done without amendment of this Mortgage.

WITNESSETH:

To secure the performance of the covenants hereinafter contained, and the repayment of loans and letters of credit, and advances made or issued simultaneously herewith, or hereafter to be made or issued to Mortgagor in the amounts hereinabove described, together with interest thereon, payable in accordance with the terms of the note evidencing such loans and advances, and all extensions and renewals thereof (hereinafter referred to as the "Note") issued pursuant to the terms of the Loan Agreement executed by Mortgagor in favor of Mortgagee, the terms, covenants and conditions of which said Note and Loan Agreement are herein incorporated as covenants and conditions of the Mortgagor, with the same force and effect as though such covenants and conditions were fully set forth herein (the covenants of this Mortgage, the Note, and the Loan Agreement are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages and warrants and grants a security interest to the Mortgagee, its successors and assigns, in and to the Premises, together with the easements, rights, privileges, appurtenances, improvements, buildings, fixtures, tenements, and hereditaments thereunder belonging and which may hereafter attach thereto and all heretofore or hereafter vacated alleys and streets abutting thereto (hereinafter collectively referred to as the "Property"); together with (a) all building materials, goods and personal property on the Premises owned by Borrower, not affixed or incorporated into the Premises, (b) all buildings, improvements, machinery, apparatus, equipment, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon said real estate or any part thereof and used or usable in connection with any present or future operation of said Property and owned by Mortgagor (hereinafter referred to as the "Equipment") and now owned or hereafter acquired or leased by the Mortgagor, and all additions and accessions thereto now or hereafter attached to or used in connection therewith or with the Property, and all proceeds of hazard insurance of all of the foregoing, including, but without limiting the generality of the foregoing, all heating, lighting, laundry, incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing apparatus, electrical apparatus (including, but not limited to all electrical transformers, switches, switch boxes, equipment boxes, cabinets, all whether used in the operation of the Property or any business operated within or upon the Property), lifting, cleaning, fire-prevention, fire-extinguishing, refrigerating, ventilating, and communications apparatus, air-cooling and air-conditioning apparatus, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, attached cabinets, partitions, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors and all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any title retention or security agreement superior in lien to the lien of this Mortgage; (c) all right, title and interest, if any, of the Mortgagor to plans and specifications, engineering drawings, architectural renderings, licenses,

governmental permits and approvals, soil test reports, proposals or other material now or thereafter existing in any way relating to the Property; (d) all rents, issues and profits derived under present or future leases, or otherwise, which are hereby specifically assigned, transferred and set over to Mortgagee; (e) all awards or payments, including any interest thereon, and the right to receive same, which may be made for the account of Mortgagor with respect to the Property as a result of the exercise of the right of eminent domain or condemnation, as hereinafter provided; (f) all oil, gas, mineral and water rights; (g) all rights of the Mortgagor under any purchase agreements, land contracts, options and similar agreements executed with respect to the Property and the proceeds thereof; (h) Mortgagor's right to make all divisions under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967; (i) all federal and state historic tax credits and other tax credits; and (j) all insurance proceeds and proceeds of all of the foregoing. It is understood and agreed that all Equipment is part and parcel of said real estate and appropriated to the use of said real estate and, whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and mortgaged hereby. The Mortgagor agrees to execute, acknowledge and deliver, from time to time, such financing statements or other instruments as may be requested by Mortgagee to confirm, protect and perfect the lien of this Mortgage on any Equipment, under the provisions of the Uniform Commercial Code in effect in Michigan or otherwise, and this Mortgage shall also be considered to be and may be construed as a security agreement with reference to any such Equipment, and upon Mortgagor's default, Mortgagee shall, in addition to all other remedies herein provided, have the remedies provided for under the Uniform Commercial Code, as amended, in effect in Michigan.

And the said Mortgagor, for itself, its heirs, administrators, executors, successors and assigns, does covenant and agree to and with the said Mortgagee, its successors and assigns, as follows:

Performance: The Mortgagor will pay, and otherwise perform, all the terms, conditions and covenants of the Indebtedness.

Title: At the time of the execution and delivery of this instrument, Mortgagor is well and truly seized of the Property in fee simple, free of all liens and encumbrances whatsoever, and will forever warrant and defend the same against any and all claims whatever, and the lien created hereby is and will be kept a lien of the first priority upon said Property and every part thereof, as the same exists as of the date hereof, subject only to the recorded covenants and restrictions described in Exhibit "B" hereto (the "Permitted Encumbrances").

Payment of Taxes and Assessments: Mortgagor shall pay (or cause to be paid) when due, all taxes and assessments that may be levied upon said Property, and shall promptly deliver to Mortgagee receipts showing payment thereof upon the written request of Mortgagee. Mortgagor shall pay when due all water charges and all other amounts which might become a lien upon the Property prior to this Mortgage. Mortgagor shall pay when due all taxes and assessments that may be levied upon or on account of this Mortgage or the Indebtedness secured hereby or upon the interest or estate in said Property created or represented by this Mortgage, whether levied against Mortgagor or otherwise. In the event payment by Mortgagor of any tax referred to in the foregoing sentence would result in the payment of interest in excess of the rate permitted by law, then Mortgagor shall have no obligation to pay the portion of such tax which would result in the payment of such excess; provided, however, in any such event, at any time after the enactment of

the law providing for such tax, Mortgagee, at its election, may declare the entire principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable ninety (90) days from the date of such declaration by Bank.

Insurance: See Loan Agreement executed of even date. Mortgagor will keep all buildings, improvements, fixtures and equipment now or hereafter upon said Property after renovations are completed and a certificate of occupancy are issued, , insured against loss and damage by fire and the perils covered by extended coverage insurance (including public liability insurance), and against such other risks and in such amounts, as may from time to time be required by Mortgagee, and with such insurer(s) as may from time to time be approved by Mortgagee, with proceeds thereof payable to Mortgagee under a standard mortgagee endorsement thereto as set forth in and subject to the terms of the Loan Agreement, and shall contain an agreement by such insurer(s) that such policy(s) shall not be cancelled or materially changed without at least thirty (30) days prior written notice to Mortgagee. If the Property is located in an area which has been identified by the Secretary of Housing and Urban Development as a flood hazard area and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (the Act), as amended, the Mortgagor will keep the Property covered by flood insurance up to the maximum limit of coverage available under the Act, but not in excess of the amount of the Note. The policies of all such insurance and all renewals thereof, together with receipts evidencing payment in full of the premiums thereon, shall be delivered promptly to Mortgagee upon the written request of Mortgagee. In the event of loss or damage, the proceeds of said insurance shall be paid to Mortgagee alone and Mortgagee shall have the right to collect, receive and receipt for such proceeds in the name of Mortgagee and Mortgagor. Should an uncured Event of Default exist beyond any applicable notice and cure period, Mortgagee is authorized to adjust and compromise such loss without the consent of Mortgagor. In the absence of an uncured Event of Default beyond any applicable notice and cure period, Mortgagor is authorized to adjust and compromise such loss with the prior written consent of Mortgagee. Such proceeds shall be applied toward reimbursement of all costs and expenses of Mortgagee in collecting said proceeds, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then be matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor. All of said policies of insurance shall be held by Mortgagee as additional security hereunder and, in the event of sale of the Property on foreclosure, the ownership of all policies of insurance and the right to receive the proceeds of any insurance payable by reason of any loss theretofore or thereafter occurring, shall pass to the purchaser at said sale and Mortgagor hereby appoints Mortgagee its attorney-in-fact, in Mortgagor's name, to assign and transfer all such policies and proceeds to such purchaser. Notwithstanding the foregoing, in the absence of an Event of Default beyond any applicable notice and cure period which is not cured at the time of the casualty or damage and at the time insurance proceeds are to be made available to Mortgagee under this provision, and, if requested by Mortgagor in writing, the Mortgagee agrees to disburse such insurance proceeds to Mortgagor or, to contractors employed by Mortgagor, less actual costs, fees and expenses, including reasonable attorneys' fees, if any, incurred by Mortgagee in connection with the adjustment of the loss or any action taken by Mortgagee in connection with the adjustment of the loss or incurred by Mortgagee in connection with any of the requirements of this Section 4 (the "Net Proceeds"), consistent with customary practices of Mortgagee in the administration of construction loans and as set forth in

the Loan Agreement, for the purpose of restoration, repair and replacement ("Restoration") of the Property to the condition and character existing prior to such event giving rise to payment of such proceeds, subject to the following:

Mortgagor shall deliver a detailed budget to Mortgagee, approved in writing by Mortgagor's architect or engineer, inclusive of the entire cost of completing the Restoration, on a trade by trade basis;

the Net Proceeds, together with any additional funds deposited by Mortgagor with Mortgagee, are sufficient, as determined by an estimate prepared by an independent appraiser selected by Mortgagee, to pay for the entire cost of the Restoration;

Mortgagor shall commence the Restoration as soon as reasonably practicable, but in no event later than thirty (30) days after such damage or destruction occurs; notwithstanding the foregoing, Mortgagor shall remove debris and otherwise clean and secure the Premises, promptly following any such damage or destruction;

Restoration shall be performed in compliance with all applicable governmental codes, ordinances, statues and requirements (including, without limitation, all applicable Environmental Laws);

From and after the date of the occurrence of the damage or destruction and continuing during the course of the Restoration, Borrower shall continue to timely pay all costs of owning, maintaining and operating the Premises, including all debt service under the Note;

Mortgagor shall comply with the policies and requirements of the Michigan Construction Lien Act and the Restoration will be completed free of any construction liens. Each disbursement of insurance proceeds shall require an endorsement to Mortgagee's title insurance policy insuring the full amount of advances to date.

If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the sole opinion of Mortgagee, be sufficient to pay in full the balance of the costs which are estimated by the Mortgagee to be necessary to complete the Restoration, Mortgagor shall deposit additional funds with Mortgagee in the amount of such deficiency (the "Net Proceeds Deficiency") before any other disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Mortgagee shall be held by Mortgagee and shall be disbursed for costs actually incurred in connection with the restoration of the same conditions applicable to the disbursement of the Net Proceeds and, until so disbursed, shall constitute additional security for the Indebtedness. Any funds held by Mortgagee pursuant to this Section shall be held in a non-interest bearing account and may be commingled with other funds of Mortgagee.

Reserve: Upon the occurrence of an Event of Default, Mortgagor will pay to Mortgagee on dates upon which interest is payable under the Note, such amounts as the Mortgagee from time to time estimates as necessary to create and maintain a reserve fund from which to pay before the same become due, all taxes and assessments, on or against the Property hereby mortgaged. Such reserve fund shall not bear interest. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the Property described herein may benefit thereby. If the funds to be paid to Mortgagee shall be insufficient to enable

such taxes and assessments to be paid in full thirty (30) days before the due dates thereof, the Mortgagor shall immediately upon written demand therefore, pay to Mortgagee such additional sums as may be required by Mortgagee in order to enable payment of such taxes and assessments in full thirty (30) days before the due date thereof, and if the funds so paid to Mortgagee shall exceed the amount of such taxes and assessments paid by Mortgagee, such excess shall be credited by the Mortgagee to subsequent payments required to be made. Said amounts shall be held by Mortgagee as additional security for the Indebtedness secured hereby. Said amounts shall be applied to the payment of said taxes and assessments when the same become due and payable; provided, however, that Mortgagee shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing herein contained shall in any manner limit the obligation of Mortgagor to pay taxes, assessments, liens, charges, and to maintain insurance as above provided. In the event of an Event of Default, Mortgagee may, at its option, but without any obligation on its part so to do, apply said amounts upon said taxes, assessments and insurance premiums, and/or toward the payment of any amounts payable by Mortgagor to Mortgagee under this Mortgage and/or toward the payment of the Indebtedness secured hereby or any portion thereof, whether or not then due or payable.

Default in Taxes: If default be made in the payment of any of the aforesaid taxes, liens, charges, assessments or in making repairs or replacements or in procuring and maintaining insurance and paying the premiums therefor or in paying any governmental charges levied or assessed against the Property, or in keeping or performing any other covenants of Mortgagor herein, Mortgagee may, at its option, and without any obligation on its part so to do, upon ten (10) calendar days prior notice to Borrower, pay said taxes and assessments, make such repairs and replacements, effect such insurance, pay such premiums or governmental charges, and perform any other covenant of Mortgagor herein. All amounts expended by Mortgagee hereunder shall be secured hereby and shall be due and payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note.

Repair/Replacement/Further Improvements: Mortgagee understands that when Mortgagor purchases subject property the property will need substantial renovation and improvements for marketability. However, once a certificate of occupancy has been obtained from the appropriate governing authority, Mortgagor will abstain from and will not suffer the commission of physical waste on said Property and will keep (or cause to be kept) the buildings, improvements, fixtures and equipment now or hereafter thereon in good repair and will make replacements thereto as and when the same become necessary, so that the efficiency of the Property and every part thereof shall at all times be maintained and the mortgage security shall not in any way be impaired. Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any loss or damage to the Property. Except as may be permitted by terms of the Loan Agreement, after renovations and/or repairs have been completed by Mortgagor on subject property and a certificate of occupancy has been obtained from the proper governing authority, Mortgagor shall not materially alter the buildings, improvements, fixtures or equipment now or hereafter upon said Property, or remove the same therefrom, without the written consent of Mortgagee. Mortgagor will not permit any portion of the Property to be used for any unlawful purposes. Mortgagor will comply promptly with all laws, ordinances, regulations and orders of all public authorities having jurisdiction thereof relating to the Property or the use, occupancy and maintenance thereof, provided that Mortgagor shall have the right to contest the same in good faith if Mortgagor has

complied with the Bank's reasonable requirements in connection with such protest. Mortgagee shall have the right at any time, and from time to time, to enter the Property for the purpose of inspecting the same.

Waste: Failure of the Mortgagor to pay any taxes, assessments or governmental charges levied or assessed against the Property, or any part thereof, or any installment of any such tax, assessment or charge, or any premium upon any such tax, assessment or charge, or any premium upon any policy of insurance covering any part of the Property, at the time or times such taxes, assessments, charges, installments thereof or insurance premiums are due and payable, shall constitute waste, and in accordance with the provisions of Act No. 236 of the Public Acts of Michigan for 1961, as amended shall entitle Mortgagee to exercise the remedies afforded by such Act. Payment by the Mortgagee for and on behalf of the Mortgagor of any such delinquent tax or insurance premium properly payable by Mortgagor under the terms of this Mortgage, shall not cure the default herein described nor shall it in any manner impair the Mortgagee's right to the appointment of a receiver on account thereof. Upon the happening of any such acts of waste and on proper application made therefore by Mortgagee to a court of competent jurisdiction, the Mortgagee shall forthwith be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issues and profits thereof, with such powers as the court making such appointment shall confer; the Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

Reimbursement: In the event that Mortgagee is made a party to any suit or proceedings by reason of the interest of Mortgagee in the Property, other than for Mortgagee's default, Mortgagor shall reimburse Mortgagee for all reasonable costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in connection therewith. All such amounts incurred by Mortgagee hereunder shall be secured hereby and shall be payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note. The Mortgagor hereby assigns to the Mortgagee, in their entirety, all judgments, decrees, and awards for injury or damage to the Property (excluding awards, judgments or decrees due to tenant under the Lease; provided, however, if Mortgagor subsequently receives such awards, judgments or decrees, they shall be immediately assigned to Mortgagee) the Mortgagor authorizes the Mortgagee, at its sole election, to apply the same, or the proceeds thereof, to the Indebtedness hereby secured in such manner as the Mortgagee may elect; and the Mortgagor hereby authorizes the Mortgagee, in the name of the Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree.

Condemnation: In the event of the taking of all or any portion of the Property in any proceedings under the power of eminent domain, the entire award rendered in such proceedings shall be paid to Mortgagee up to the amount of the Indebtedness then outstanding, to be applied toward reimbursement of all costs and expenses of Mortgagee in connection with said proceedings, toward the payment of all amounts payable by Mortgagor to Mortgagee hereunder, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as the Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor.

Rents/Profits:

As additional security for the payment of the Indebtedness, insurance premiums, taxes and assessments, at the time and in the manner herein agreed, and for the performance of the covenants and agreements herein contained, pursuant to Act 210 of the Public Acts of Michigan of 1953, as amended, the Mortgagor does hereby sell, assign, transfer and set over unto the Mortgagee herein, its successors and assigns, all the rents, profits and income under any lease or leases of the mortgaged property (including any extensions, amendments or renewals thereof), whether due or to become due, including all such leases in existence or coming into existence during the period this Mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor herein or those claiming by, under or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the foreclosure or any other proceedings taken to enforce this Mortgage. In the event of a sale or foreclosure which shall result in a deficiency, this assignment shall stand as security during the redemption period for the payment of such deficiency. This assignment is given as collateral security only and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor contained in any such assigned leases. Notwithstanding anything in this Section to the contrary, Mortgagee may only receive rents, profits and income under the leases if an Event of Default has occurred and any applicable notice and cure periods have expired.

Should an Event of Default exist beyond any applicable notice and cure period as set forth in the Loan Agreement, the Mortgagor shall, upon demand therefor made by the Mortgagee, deliver and surrender possession of the mortgaged Property to the Mortgagee who shall thereafter collect the rents and income therefrom, rent or lease said Property or portion thereof upon such terms and for such time as it may deem commercially reasonable, terminate any tenancy (subject to the terms of a recorded SNDA with respect to the Lease) and maintain proceedings to recover rents or possession of the Property from any tenant or trespasser, and apply the net proceeds of such rent and income to the following purposes:

preservation of Property;

payment of taxes;

payment of insurance premiums; or

payment of installments of interest and principal due under the terms of the Indebtedness.

In the event that the Mortgagor fails, refuses or neglects to deliver or surrender such possession, the Mortgagee shall be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issue and profits thereof, with such powers as the court making such appointment may confer.

Mortgagor agrees to execute and deliver to Mortgagee assignments of rents on all future leases on the mortgaged Property during the term of this Mortgage, such assignments to be in the form and manner satisfactory to Mortgagee. Any default by the Mortgagor under the terms and/or conditions of any such assignment shall be a default under the terms and conditions of this

Mortgage, entitling the Mortgagee to exercise any and all the rights and remedies provided by this Mortgage. If the Mortgagor shall fail to perform and discharge any of the obligations, covenants and agreements required to be performed by it under any such assignment of lease, the Mortgagee may elect to perform the same; any sums which may be so paid out by the Mortgagee, including the cost, expenses and attorneys' fees paid out in any suit affecting the same, shall bear interest at the default rate provided in the Note, from the dates of such payments, shall be paid by Mortgagor to Mortgagee upon demand and shall be deemed a part of the Indebtedness hereby secured and recoverable as such in all respects. Mortgagor shall assign to the Mortgagee, upon request, as further security for the Indebtedness secured hereby, the Mortgagor's interest in all agreements, contracts, licenses and permits affecting the Property, such assignments to be made by instruments in form satisfactory to the Mortgagee; but no such assignment shall be construed as a consent by the Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon the Mortgagee any obligations with respect thereto.

The provisions of this Section 11 are not intended to evidence an additional recordable event, as may be prohibited by Act 459 of the Public Acts of Michigan of 1996, but rather are included in this Mortgage for purposes of complying with applicable requirements of Act 210 of the Public Acts of Michigan of 1953, as amended.

Default: Should an Event of Default exist as set forth in the Loan Agreement, then the Mortgagee may at any time after such Event of Default, and without further notice (subject to express notice and cure provision set forth in the Loan Agreement), declare the principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable immediately. The commencement of proceedings to foreclose this Mortgage shall, in any event, be deemed such declaration.

Title History: Should an Event of Default exist as set forth in the Loan Agreement, Mortgagee may cause its title insurance policy of the aforesaid mortgaged Property to be certified or extended as may be reasonable, or may procure a new title insurance policy, and the money so paid shall be a lien on said Property added to the amount secured by this Mortgage and payable forthwith with interest thereon at the rate at which interest accrues on amounts after the same becomes due under the Note.

Acceleration: If foreclosure proceedings of any mortgage (other than the within Mortgage) or any lien of any kind should be instituted against the Property and such proceedings are not either discontinued or bonded by a company satisfactory to Mortgagee within thirty (30) days, or if any other proceedings which have or may have a material and adverse effect on the Property or the business of the Mortgagor, either voluntary or involuntary, are instituted by or against Mortgagor or its successors in title to enforce payment or liquidation of its outstanding obligations, the Mortgagee may, at its option and without notice, immediately declare its lien and the Indebtedness which it secures due and payable and institute such proceedings as may be necessary to protect its interest in the mortgaged Property.

Disposition of Property:

Power is hereby granted to Mortgagee, if an Event of Default exists, to grant, bargain, sell, release and convey the Property, Equipment, and appurtenances at public auction or venue, and on such sale to execute and deliver to the purchasers, his, her, its or their heirs, successors and assigns, good ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided (said statute being M.C.L.A. Section 600.3201, et seq., or any successor or substitute statute), and to apply the proceeds of such sale in the manner hereinafter provided.

Upon a foreclosure sale of said Property or any part thereof, the proceeds of such sale shall be applied in the following order:

To the payment of all costs of the suit or foreclosure, including a reasonable attorney fee and the cost of title searches and abstracts;

To the payment of all other expenses of Mortgagee, including all monies expended by Mortgagee and all other amounts payable by Mortgagor to Mortgagee hereunder, with interest thereon;

To the payment of the principal and interest of the Indebtedness secured hereby;

To the payment of the surplus, if any, to Mortgagor or to whosoever shall be entitled thereto.

Upon any foreclosure sale of the Property, the same may be sold either as a whole or in parcels, as Mortgagee may elect, and if in parcels, the same may be divided as Mortgagee may elect, and at the election of the Mortgagee may be offered first in parcels and then as a whole, that offer producing the highest price for the entire Property to prevail, any law, statutory or otherwise, to the contrary notwithstanding, and Mortgagor hereby waives the right to require any such sale to be made in parcels or the right to select such parcels.

Future Assurances: At any time and from time to time, upon request of the Mortgagee, the Mortgagor will make, execute and deliver or cause to be made, executed and delivered to the Mortgagee and where appropriate will cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or filed at such time and in such offices and places as shall be reasonably required by the Mortgagee, any and all such other and further mortgages, instruments of further assurance, certificates, financing statements, and other documents as may, in the reasonable opinion of the Mortgagee or its counsel, be necessary or reasonably desirable in order to effectuate, complete and perfect and to continue and preserve the obligation of the Mortgagor under this Mortgage, and the lien of this Mortgage as a lien of the priority herein set forth upon all the Property and Equipment, except at hereinabove stated, whether now owned or hereinafter acquired by the Mortgagor and wheresoever located. Upon any failure by the Mortgagor so to do, the Mortgagee may execute, record, file, re-record and refile any and all such mortgages, instruments, certificates, financing statements, and documents for and in the name of the Mortgagor, and the Mortgagor hereby irrevocably appoints the Mortgagee the agent and attorney-in-fact of the Mortgagor so to do. Any expenses of the Mortgagee in connection therewith shall be added to the Indebtedness of the Mortgagor and shall be secured hereby.

Cumulative Rights and Remedies: Each and every of the rights, remedies and benefits provided to Mortgagee herein shall be cumulative and shall not be exclusive of any other of said rights, remedies or benefits, or of any other rights, remedies or benefits allowed by law, and may be exercised either successively or concurrently. Any waiver by Mortgagee of any default hereunder or any Event of Default shall not constitute a waiver of any similar or other default or Event of Default.

Alienation: Mortgagee in making the loans evidenced by the Note is relying upon the integrity of Mortgagor and its undertaking to maintain the mortgaged Property. If Mortgagor should sell, transfer, convey, assign or further encumber its interest in the mortgaged Property, or any part thereof, voluntarily or involuntarily, the Mortgagee shall have the right in its sole option thereafter to declare all sums and the Indebtedness secured hereby and then unpaid to be due and payable forthwith although the period limited for the payment thereof shall not then have expired, anything contained to the contrary hereinbefore notwithstanding, and thereupon to exercise all of its rights and remedies under this Mortgage; any transfer, sale, assignment or pledge of any ownership interests in the Mortgagor, resulting in a change in majority ownership and voting control of Mortgagor (a transfer, sale, assignment or pledge as aforesaid, is hereinafter referred to as a "Transfer"), without Mortgagee's prior written consent, shall constitute a Transfer in violation of this provision. If the ownership of the mortgaged Property, or any part thereof, becomes vested in a person/entity other than the Mortgagor, the Mortgagee may deal with such successor or successors in interest with reference to this Mortgage, and the Indebtedness hereby secured, in the same manner as with the Mortgagor, without it in any manner vitiating or discharging the Mortgagor's liability hereby or upon the Indebtedness hereby secured. The Mortgagor shall at all times continue primarily liable on the Indebtedness secured hereby until this Mortgage is fully discharged or Mortgagor is formally released by an instrument in writing duly executed by the Mortgagee.

Future Advances: In addition to securing the repayment of the Indebtedness hereinbefore mentioned, this Mortgage shall also secure the payment of all obligations of the Mortgagor to the Mortgagee, its successors or assigns howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or hereafter existing or due or to become due, including without limitation of the generality of the foregoing, future advances.

Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assigns of Mortgagor, and shall inure to the benefit of the successors and assigns of Mortgagee; any reference herein to "Mortgagee" shall include the successors and assigns of Mortgagee.

Terms: All nouns, pronouns and relative terms relating to Mortgagor shall be deemed to be masculine, feminine or neuter, singular or plural, as the context may indicate. If Mortgagor consists of more than one person, their liability hereunder shall be joint and several.

Power of Sale: WARNING. THIS MORTGAGE CONTAINS A POWER OF SALE, AND, UPON DEFAULT, MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT, NO HEARING IS INVOLVED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE IN A LOCAL NEWSPAPER AND TO POST A COPY OF THE NOTICE ON THE PROPERTY.

Waiver: IF THIS MORTGAGE IS FORECLOSED BY ADVERTISEMENT, MORTGAGOR HEREBY VOLUNTARILY INTELLIGENTLY AND KNOWINGLY WAIVES ALL RIGHTS, UNDER THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN AND CONSTITUTION AND LAWS OF THE UNITED STATES, TO ALL NOTICE AND A HEARING IN CONNECTION WITH THE ABOVE MENTIONED FORECLOSURE BY ADVERTISEMENT, EXCEPT AS SET FORTH IN THE MICHIGAN STATUTE PROVIDING FOR FORECLOSURE BY ADVERTISEMENT.

Non-Pledge: Mortgagor will not, without the prior written consent of Mortgagee, mortgage or pledge as security for any other loans obtained by Mortgagor, the Property, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Property. If any such mortgage or pledge is entered into without the prior written consent of the Mortgagee, the entire Indebtedness secured hereby, may, at the option of Mortgagee, be declared immediately due and payable without notice. Further, Mortgagor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Property for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Mortgagee's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Property or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Mortgage. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or placed by Mortgagor on the Premises under a security agreement the lien or title of which is superior to the lien created by this Mortgage, all the right, title and interest of Mortgagor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Mortgagor shall nevertheless be and are hereby assigned to Mortgagee and are covered by the lien of this Mortgage.

Indebtedness Secured: This Mortgage secures all Indebtedness as defined in the Loan Agreement.

Security Agreement and Financing Statements: Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) as security for the payment of the Note and all other sums secured by this Mortgage a security interest in all the Equipment and personal property described elsewhere in this Mortgage.

Mortgagor shall execute any and all such documents, including without limitation, financing statements pursuant to the Uniform Commercial Code of the State of Michigan as Mortgagee may request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any reasonable out-of-pocket expenses incurred by any such Mortgagee in connection with the preparation, execution and filing of documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all financing statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. This Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be cumulative and (i) as prescribed herein, or (ii) by general law, or (iii) as to such part of the security which is also reflected in said financing statement by the

specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Promissory Note: The repayment terms, interest rate and maturity date are set forth in the Note.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, said Mortgagor has executed this Mortgage the day and year first above written.

"MORTGAGOR"

PARK STREET GROUP, LLC, a Michigan limited liability company

By: _____
Name: Dean J. Groulx
Its: Sole Member

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 12 day of August, 2016, by Dean J. Groulx, the Sole Member of Park Street Group, LLC, a Michigan limited liability company.

_____
Notary Public, Oakland County, Michigan
Acting in Oakland County
My commission expires: 5/27/2020
Tricia C. Mink

DRAFTED BY AND WHEN
RECORDED RETURN TO:
Rob Berg- Simon, PLC
Soaring Pine Capital Real Estate and Debt Fund II, LLC
335 East Maple Road
Birmingham, MI 48009

216220946
850 Frederick Street
Ypsilanti, MI 48197
To Be Determined - Entity to be formed

EXHIBIT A

Legal Description

The following premises situated in the City of Ypsilanti, County of Washtenaw and State of Michigan more particularly described and commonly known as:

The Westerly 48 feet of the Southerly 132 feet of land lying at Northeast corner of Orchard and Frederick Streets on Lot 69, Worden Gardens, unrecorded.

Title to the above described property conveyed to Fannie Mae from Chase Home Finance LLC by Quit Claim Deed dated August 6, 2010 and recorded October 12, 2010 in Book 4810, Page 857 or Instrument No. 5977511.

EXHIBIT 9

RECORDED ON
09/27/2016 3:25:43 PM
MELISSA R. DEVAUGH
LAPEER COUNTY REGISTER OF DEEDS

RECEIPT# 5274, STATION 5E
$56.00 MORTGAGE

Return to:
Equity National Title
50 Jordan Street, Suite 100
East Providence, RI 02914-1214

MORTGAGE

EFFECTIVE DATE: AUGUST 12, 2016

PARTICULAR TERMS - DEFINITIONS

As used herein, the following terms and expressions shall have the respective meanings indicated opposite each of them; where the meaning of any term is stated to be "None," provisions involving the application of that term shall be disregarded:

Mortgagor:	**PARK STREET GROUP, LLC**, a Michigan limited liability company
Address:	**100 W. LONG LAKE RD, SUITE 102** **BLOOMFIELD HILLS, MICHIGAN 48304**
Mortgagee:	**SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,** a Delaware limited liability company
Address:	**335 EAST MAPLE ROAD** **BIRMINGHAM, MICHIGAN 48009**
Note and Guaranty:	Mortgage Note in the amount of Five Hundred Thousand and 00/100 Dollars ($500,000.00) dated of even date herewith executed by Park Street Group Realty Services, LLC and further secured by the Guaranty of the Mortgagor and all amendments, extensions, roll-overs and renewals thereof
Loan Agreement:	Loan Agreement dated of even date herewith, and all amendments, modifications, renewals and extensions thereof
Premises:	Land, Premises and Property situated in the City of Detroit, Wayne County, Michigan Described as: See Description of Real Estate attached hereto as Exhibit "A"

THIS MORTGAGE CONSTITUTES A FUTURE ADVANCE MORTGAGE UNDER MICHIGAN LAW. THIS MORTGAGE COVERS FIXTURES AND IS INTENDED FOR FILING WITH THE REGISTER OF DEEDS FOR WAYNE COUNTY, MICHIGAN.

THIS MORTGAGE CONSTITUTES A CONSTRUCTION MORTGAGE AND SECURITY AGREEMENT AND FIXTURE FILING FOR THE PURPOSES OF ARTICLE 9 OF THE MICHIGAN UNIFORM COMMERCIAL CODE.

THIS MORTGAGE, above-dated, by Mortgagor to Mortgagee (the "Mortgage"), and is made with reference to the Note and Loan Agreement hereinabove referenced, and which shall include all of the foregoing as amended, modified, extended, restated or renewed from time to time and all substitutions, consolidations or roll-overs thereof, from time to time all of which may be done without amendment of this Mortgage.

WITNESSETH:

To secure the performance of the covenants hereinafter contained, and the repayment of loans and letters of credit, and advances made or issued simultaneously herewith, or hereafter to be made or issued to Mortgagor in the amounts hereinabove described, together with interest thereon, payable in accordance with the terms of the note evidencing such loans and advances, and all extensions and renewals thereof (hereinafter referred to as the "Note") issued pursuant to the terms of the Loan Agreement executed by Mortgagor in favor of Mortgagee, the terms, covenants and conditions of which said Note and Loan Agreement are herein incorporated as covenants and conditions of the Mortgagor, with the same force and effect as though such covenants and conditions were fully set forth herein (the covenants of this Mortgage, the Note, and the Loan Agreement are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages and warrants and grants a security interest to the Mortgagee, its successors and assigns, in and to the Premises, together with the easements, rights, privileges, appurtenances, improvements, buildings, fixtures, tenements, and hereditaments thereunder belonging and which may hereafter attach thereto and all heretofore or hereafter vacated alleys and streets abutting thereto (hereinafter collectively referred to as the "Property"); together with (a) all building materials, goods and personal property on the Premises owned by Borrower, not affixed or incorporated into the Premises, (b) all buildings, improvements, machinery, apparatus, equipment, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon said real estate or any part thereof and used or usable in connection with any present or future operation of said Property and owned by Mortgagor (hereinafter referred to as the "Equipment") and now owned or hereafter acquired or leased by the Mortgagor, and all additions and accessions thereto now or hereafter attached to or used in connection therewith or with the Property, and all proceeds of hazard insurance of all of the foregoing, including, but without limiting the generality of the foregoing, all heating, lighting, laundry, incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing apparatus, electrical apparatus (including, but not limited to all electrical transformers, switches, switch boxes, equipment boxes, cabinets, all whether used in the operation of the Property or any business operated within or upon the Property), lifting, cleaning, fire-prevention, fire-extinguishing, refrigerating, ventilating, and communications apparatus, air-cooling and air-conditioning apparatus, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, attached cabinets, partitions, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors and all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any title retention or security agreement superior in lien to the lien of this Mortgage; (c) all right, title and interest, if any, of the Mortgagor to plans and specifications, engineering drawings, architectural renderings, licenses,

governmental permits and approvals, soil test reports, proposals or other material now or thereafter existing in any way relating to the Property; (d) all rents, issues and profits derived under present or future leases, or otherwise, which are hereby specifically assigned, transferred and set over to Mortgagee; (e) all awards or payments, including any interest thereon, and the right to receive same, which may be made for the account of Mortgagor with respect to the Property as a result of the exercise of the right of eminent domain or condemnation, as hereinafter provided; (f) all oil, gas, mineral and water rights; (g) all rights of the Mortgagor under any purchase agreements, land contracts, options and similar agreements executed with respect to the Property and the proceeds thereof; (h) Mortgagor's right to make all divisions under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967; (i) all federal and state historic tax credits and other tax credits; and (j) all insurance proceeds and proceeds of all of the foregoing. It is understood and agreed that all Equipment is part and parcel of said real estate and appropriated to the use of said real estate and, whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and mortgaged hereby. The Mortgagor agrees to execute, acknowledge and deliver, from time to time, such financing statements or other instruments as may be requested by Mortgagee to confirm, protect and perfect the lien of this Mortgage on any Equipment, under the provisions of the Uniform Commercial Code in effect in Michigan or otherwise, and this Mortgage shall also be considered to be and may be construed as a security agreement with reference to any such Equipment, and upon Mortgagor's default, Mortgagee shall, in addition to all other remedies herein provided, have the remedies provided for under the Uniform Commercial Code, as amended, in effect in Michigan.

And the said Mortgagor, for itself, its heirs, administrators, executors, successors and assigns, does covenant and agree to and with the said Mortgagee, its successors and assigns, as follows:

Performance: The Mortgagor will pay, and otherwise perform, all the terms, conditions and covenants of the Indebtedness.

Title: At the time of the execution and delivery of this instrument, Mortgagor is well and truly seized of the Property in fee simple, free of all liens and encumbrances whatsoever, and will forever warrant and defend the same against any and all claims whatever, and the lien created hereby is and will be kept a lien of the first priority upon said Property and every part thereof, as the same exists as of the date hereof, subject only to the recorded covenants and restrictions described in Exhibit "B" hereto (the "Permitted Encumbrances").

Payment of Taxes and Assessments: Mortgagor shall pay (or cause to be paid) when due, all taxes and assessments that may be levied upon said Property, and shall promptly deliver to Mortgagee receipts showing payment thereof upon the written request of Mortgagee. Mortgagor shall pay when due all water charges and all other amounts which might become a lien upon the Property prior to this Mortgage. Mortgagor shall pay when due all taxes and assessments that may be levied upon or on account of this Mortgage or the Indebtedness secured hereby or upon the interest or estate in said Property created or represented by this Mortgage, whether levied against Mortgagor or otherwise. In the event payment by Mortgagor of any tax referred to in the foregoing sentence would result in the payment of interest in excess of the rate permitted by law, then Mortgagor shall have no obligation to pay the portion of such tax which would result in the payment of such excess; provided, however, in any such event, at any time after the enactment of

the law providing for such tax, Mortgagee, at its election, may declare the entire principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable ninety (90) days from the date of such declaration by Bank.

Insurance: See Loan Agreement executed of even date. Mortgagor will keep all buildings, improvements, fixtures and equipment now or hereafter upon said Property after renovations are completed and a certificate of occupancy are issued, , insured against loss and damage by fire and the perils covered by extended coverage insurance (including public liability insurance), and against such other risks and in such amounts, as may from time to time be required by Mortgagee, and with such insurer(s) as may from time to time be approved by Mortgagee, with proceeds thereof payable to Mortgagee under a standard mortgagee endorsement thereto as set forth in and subject to the terms of the Loan Agreement, and shall contain an agreement by such insurer(s) that such policy(s) shall not be cancelled or materially changed without at least thirty (30) days prior written notice to Mortgagee. If the Property is located in an area which has been identified by the Secretary of Housing and Urban Development as a flood hazard area and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (the Act), as amended, the Mortgagor will keep the Property covered by flood insurance up to the maximum limit of coverage available under the Act, but not in excess of the amount of the Note. The policies of all such insurance and all renewals thereof, together with receipts evidencing payment in full of the premiums thereon, shall be delivered promptly to Mortgagee upon the written request of Mortgagee. In the event of loss or damage, the proceeds of said insurance shall be paid to Mortgagee alone and Mortgagee shall have the right to collect, receive and receipt for such proceeds in the name of Mortgagee and Mortgagor. Should an uncured Event of Default exist beyond any applicable notice and cure period, Mortgagee is authorized to adjust and compromise such loss without the consent of Mortgagor. In the absence of an uncured Event of Default beyond any applicable notice and cure period, Mortgagor is authorized to adjust and compromise such loss with the prior written consent of Mortgagee. Such proceeds shall be applied toward reimbursement of all costs and expenses of Mortgagee in collecting said proceeds, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then be matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor. All of said policies of insurance shall be held by Mortgagee as additional security hereunder and, in the event of sale of the Property on foreclosure, the ownership of all policies of insurance and the right to receive the proceeds of any insurance payable by reason of any loss theretofore or thereafter occurring, shall pass to the purchaser at said sale and Mortgagor hereby appoints Mortgagee its attorney-in-fact, in Mortgagor's name, to assign and transfer all such policies and proceeds to such purchaser. Notwithstanding the foregoing, in the absence of an Event of Default beyond any applicable notice and cure period which is not cured at the time of the casualty or damage and at the time insurance proceeds are to be made available to Mortgagee under this provision, and, if requested by Mortgagor in writing, the Mortgagee agrees to disburse such insurance proceeds to Mortgagor or, to contractors employed by Mortgagor, less actual costs, fees and expenses, including reasonable attorneys' fees, if any, incurred by Mortgagee in connection with the adjustment of the loss or any action taken by Mortgagee in connection with the adjustment of the loss or incurred by Mortgagee in connection with any of the requirements of this Section 4 (the "Net Proceeds"), consistent with customary practices of Mortgagee in the administration of construction loans and as set forth in

the Loan Agreement, for the purpose of restoration, repair and replacement ("Restoration") of the Property to the condition and character existing prior to such event giving rise to payment of such proceeds, subject to the following:

Mortgagor shall deliver a detailed budget to Mortgagee, approved in writing by Mortgagor's architect or engineer, inclusive of the entire cost of completing the Restoration, on a trade by trade basis;

the Net Proceeds, together with any additional funds deposited by Mortgagor with Mortgagee, are sufficient, as determined by an estimate prepared by an independent appraiser selected by Mortgagee, to pay for the entire cost of the Restoration;

Mortgagor shall commence the Restoration as soon as reasonably practicable, but in no event later than thirty (30) days after such damage or destruction occurs; notwithstanding the foregoing, Mortgagor shall remove debris and otherwise clean and secure the Premises, promptly following any such damage or destruction;

Restoration shall be performed in compliance with all applicable governmental codes, ordinances, statues and requirements (including, without limitation, all applicable Environmental Laws);

From and after the date of the occurrence of the damage or destruction and continuing during the course of the Restoration, Borrower shall continue to timely pay all costs of owning, maintaining and operating the Premises, including all debt service under the Note;

Mortgagor shall comply with the policies and requirements of the Michigan Construction Lien Act and the Restoration will be completed free of any construction liens. Each disbursement of insurance proceeds shall require an endorsement to Mortgagee's title insurance policy insuring the full amount of advances to date.

If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the sole opinion of Mortgagee, be sufficient to pay in full the balance of the costs which are estimated by the Mortgagee to be necessary to complete the Restoration, Mortgagor shall deposit additional funds with Mortgagee in the amount of such deficiency (the "Net Proceeds Deficiency") before any other disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Mortgagee shall be held by Mortgagee and shall be disbursed for costs actually incurred in connection with the restoration of the same conditions applicable to the disbursement of the Net Proceeds and, until so disbursed, shall constitute additional security for the Indebtedness. Any funds held by Mortgagee pursuant to this Section shall be held in a non-interest bearing account and may be commingled with other funds of Mortgagee.

Reserve: Upon the occurrence of an Event of Default, Mortgagor will pay to Mortgagee on dates upon which interest is payable under the Note, such amounts as the Mortgagee from time to time estimates as necessary to create and maintain a reserve fund from which to pay before the same become due, all taxes and assessments, on or against the Property hereby mortgaged. Such reserve fund shall not bear interest. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the Property described herein may benefit thereby. If the funds to be paid to Mortgagee shall be insufficient to enable

such taxes and assessments to be paid in full thirty (30) days before the due dates thereof, the Mortgagor shall immediately upon written demand therefore, pay to Mortgagee such additional sums as may be required by Mortgagee in order to enable payment of such taxes and assessments in full thirty (30) days before the due date thereof, and if the funds so paid to Mortgagee shall exceed the amount of such taxes and assessments paid by Mortgagee, such excess shall be credited by the Mortgagee to subsequent payments required to be made. Said amounts shall be held by Mortgagee as additional security for the Indebtedness secured hereby. Said amounts shall be applied to the payment of said taxes and assessments when the same become due and payable; provided, however, that Mortgagee shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing herein contained shall in any manner limit the obligation of Mortgagor to pay taxes, assessments, liens, charges, and to maintain insurance as above provided. In the event of an Event of Default, Mortgagee may, at its option, but without any obligation on its part so to do, apply said amounts upon said taxes, assessments and insurance premiums, and/or toward the payment of any amounts payable by Mortgagor to Mortgagee under this Mortgage and/or toward the payment of the Indebtedness secured hereby or any portion thereof, whether or not then due or payable.

Default in Taxes: If default be made in the payment of any of the aforesaid taxes, liens, charges, assessments or in making repairs or replacements or in procuring and maintaining insurance and paying the premiums therefor or in paying any governmental charges levied or assessed against the Property, or in keeping or performing any other covenants of Mortgagor herein, Mortgagee may, at its option, and without any obligation on its part so to do, upon ten (10) calendar days prior notice to Borrower, pay said taxes and assessments, make such repairs and replacements, effect such insurance, pay such premiums or governmental charges, and perform any other covenant of Mortgagor herein. All amounts expended by Mortgagee hereunder shall be secured hereby and shall be due and payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note.

Repair/Replacement/Further Improvements: Mortgagee understands that when Mortgagor purchases subject property the property will need substantial renovation and improvements for marketability. However, once a certificate of occupancy has been obtained from the appropriate governing authority, Mortgagor will abstain from and will not suffer the commission of physical waste on said Property and will keep (or cause to be kept) the buildings, improvements, fixtures and equipment now or hereafter thereon in good repair and will make replacements thereto as and when the same become necessary, so that the efficiency of the Property and every part thereof shall at all times be maintained and the mortgage security shall not in any way be impaired. Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any loss or damage to the Property. Except as may be permitted by terms of the Loan Agreement, after renovations and/or repairs have been completed by Mortgagor on subject property and a certificate of occupancy has been obtained from the proper governing authority, Mortgagor shall not materially alter the buildings, improvements, fixtures or equipment now or hereafter upon said Property, or remove the same therefrom, without the written consent of Mortgagee. Mortgagor will not permit any portion of the Property to be used for any unlawful purposes. Mortgagor will comply promptly with all laws, ordinances, regulations and orders of all public authorities having jurisdiction thereof relating to the Property or the use, occupancy and maintenance thereof, provided that Mortgagor shall have the right to contest the same in good faith if Mortgagor has

complied with the Bank's reasonable requirements in connection with such protest. Mortgagee shall have the right at any time, and from time to time, to enter the Property for the purpose of inspecting the same.

Waste: Failure of the Mortgagor to pay any taxes, assessments or governmental charges levied or assessed against the Property, or any part thereof, or any installment of any such tax, assessment or charge, or any premium upon any such tax, assessment or charge, or any premium upon any policy of insurance covering any part of the Property, at the time or times such taxes, assessments, charges, installments thereof or insurance premiums are due and payable, shall constitute waste, and in accordance with the provisions of Act No. 236 of the Public Acts of Michigan for 1961, as amended shall entitle Mortgagee to exercise the remedies afforded by such Act. Payment by the Mortgagee for and on behalf of the Mortgagor of any such delinquent tax or insurance premium properly payable by Mortgagor under the terms of this Mortgage, shall not cure the default herein described nor shall it in any manner impair the Mortgagee's right to the appointment of a receiver on account thereof. Upon the happening of any such acts of waste and on proper application made therefore by Mortgagee to a court of competent jurisdiction, the Mortgagee shall forthwith be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issues and profits thereof, with such powers as the court making such appointment shall confer; the Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

Reimbursement: In the event that Mortgagee is made a party to any suit or proceedings by reason of the interest of Mortgagee in the Property, other than for Mortgagee's default, Mortgagor shall reimburse Mortgagee for all reasonable costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in connection therewith. All such amounts incurred by Mortgagee hereunder shall be secured hereby and shall be payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note. The Mortgagor hereby assigns to the Mortgagee, in their entirety, all judgments, decrees, and awards for injury or damage to the Property (excluding awards, judgments or decrees due to tenant under the Lease; provided, however, if Mortgagor subsequently receives such awards, judgments or decrees, they shall be immediately assigned to Mortgagee) the Mortgagor authorizes the Mortgagee, at its sole election, to apply the same, or the proceeds thereof, to the Indebtedness hereby secured in such manner as the Mortgagee may elect; and the Mortgagor hereby authorizes the Mortgagee, in the name of the Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree.

Condemnation: In the event of the taking of all or any portion of the Property in any proceedings under the power of eminent domain, the entire award rendered in such proceedings shall be paid to Mortgagee up to the amount of the Indebtedness then outstanding, to be applied toward reimbursement of all costs and expenses of Mortgagee in connection with said proceedings, toward the payment of all amounts payable by Mortgagor to Mortgagee hereunder, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as the Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor.

Rents/Profits:

As additional security for the payment of the Indebtedness, insurance premiums, taxes and assessments, at the time and in the manner herein agreed, and for the performance of the covenants and agreements herein contained, pursuant to Act 210 of the Public Acts of Michigan of 1953, as amended, the Mortgagor does hereby sell, assign, transfer and set over unto the Mortgagee herein, its successors and assigns, all the rents, profits and income under any lease or leases of the mortgaged property (including any extensions, amendments or renewals thereof), whether due or to become due, including all such leases in existence or coming into existence during the period this Mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor herein or those claiming by, under or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the foreclosure or any other proceedings taken to enforce this Mortgage. In the event of a sale or foreclosure which shall result in a deficiency, this assignment shall stand as security during the redemption period for the payment of such deficiency. This assignment is given as collateral security only and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor contained in any such assigned leases. Notwithstanding anything in this Section to the contrary, Mortgagee may only receive rents, profits and income under the leases if an Event of Default has occurred and any applicable notice and cure periods have expired.

Should an Event of Default exist beyond any applicable notice and cure period as set forth in the Loan Agreement, the Mortgagor shall, upon demand therefor made by the Mortgagee, deliver and surrender possession of the mortgaged Property to the Mortgagee who shall thereafter collect the rents and income therefrom, rent or lease said Property or portion thereof upon such terms and for such time as it may deem commercially reasonable, terminate any tenancy (subject to the terms of a recorded SNDA with respect to the Lease) and maintain proceedings to recover rents or possession of the Property from any tenant or trespasser, and apply the net proceeds of such rent and income to the following purposes:

preservation of Property;

payment of taxes;

payment of insurance premiums; or

payment of installments of interest and principal due under the terms of the Indebtedness.

In the event that the Mortgagor fails, refuses or neglects to deliver or surrender such possession, the Mortgagee shall be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issue and profits thereof, with such powers as the court making such appointment may confer.

Mortgagor agrees to execute and deliver to Mortgagee assignments of rents on all future leases on the mortgaged Property during the term of this Mortgage, such assignments to be in the form and manner satisfactory to Mortgagee. Any default by the Mortgagor under the terms and/or conditions of any such assignment shall be a default under the terms and conditions of this

Mortgage, entitling the Mortgagee to exercise any and all the rights and remedies provided by this Mortgage. If the Mortgagor shall fail to perform and discharge any of the obligations, covenants and agreements required to be performed by it under any such assignment of lease, the Mortgagee may elect to perform the same; any sums which may be so paid out by the Mortgagee, including the cost, expenses and attorneys' fees paid out in any suit affecting the same, shall bear interest at the default rate provided in the Note, from the dates of such payments, shall be paid by Mortgagor to Mortgagee upon demand and shall be deemed a part of the Indebtedness hereby secured and recoverable as such in all respects. Mortgagor shall assign to the Mortgagee, upon request, as further security for the Indebtedness secured hereby, the Mortgagor's interest in all agreements, contracts, licenses and permits affecting the Property, such assignments to be made by instruments in form satisfactory to the Mortgagee; but no such assignment shall be construed as a consent by the Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon the Mortgagee any obligations with respect thereto.

The provisions of this Section 11 are not intended to evidence an additional recordable event, as may be prohibited by Act 459 of the Public Acts of Michigan of 1996, but rather are included in this Mortgage for purposes of complying with applicable requirements of Act 210 of the Public Acts of Michigan of 1953, as amended.

Default: Should an Event of Default exist as set forth in the Loan Agreement, then the Mortgagee may at any time after such Event of Default, and without further notice (subject to express notice and cure provision set forth in the Loan Agreement), declare the principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable immediately. The commencement of proceedings to foreclose this Mortgage shall, in any event, be deemed such declaration.

Title History: Should an Event of Default exist as set forth in the Loan Agreement, Mortgagee may cause its title insurance policy of the aforesaid mortgaged Property to be certified or extended as may be reasonable, or may procure a new title insurance policy, and the money so paid shall be a lien on said Property added to the amount secured by this Mortgage and payable forthwith with interest thereon at the rate at which interest accrues on amounts after the same becomes due under the Note.

Acceleration: If foreclosure proceedings of any mortgage (other than the within Mortgage) or any lien of any kind should be instituted against the Property and such proceedings are not either discontinued or bonded by a company satisfactory to Mortgagee within thirty (30) days, or if any other proceedings which have or may have a material and adverse effect on the Property or the business of the Mortgagor, either voluntary or involuntary, are instituted by or against Mortgagor or its successors in title to enforce payment or liquidation of its outstanding obligations, the Mortgagee may, at its option and without notice, immediately declare its lien and the Indebtedness which it secures due and payable and institute such proceedings as may be necessary to protect its interest in the mortgaged Property.

Disposition of Property:

Power is hereby granted to Mortgagee, if an Event of Default exists, to grant, bargain, sell, release and convey the Property, Equipment, and appurtenances at public auction or venue, and on such sale to execute and deliver to the purchasers, his, her, its or their heirs, successors and assigns, good ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided (said statute being M.C.L.A. Section 600.3201, et seq., or any successor or substitute statute), and to apply the proceeds of such sale in the manner hereinafter provided.

Upon a foreclosure sale of said Property or any part thereof, the proceeds of such sale shall be applied in the following order:

To the payment of all costs of the suit or foreclosure, including a reasonable attorney fee and the cost of title searches and abstracts;

To the payment of all other expenses of Mortgagee, including all monies expended by Mortgagee and all other amounts payable by Mortgagor to Mortgagee hereunder, with interest thereon;

To the payment of the principal and interest of the Indebtedness secured hereby;

To the payment of the surplus, if any, to Mortgagor or to whosoever shall be entitled thereto.

Upon any foreclosure sale of the Property, the same may be sold either as a whole or in parcels, as Mortgagee may elect, and if in parcels, the same may be divided as Mortgagee may elect, and at the election of the Mortgagee may be offered first in parcels and then as a whole, that offer producing the highest price for the entire Property to prevail, any law, statutory or otherwise, to the contrary notwithstanding, and Mortgagor hereby waives the right to require any such sale to be made in parcels or the right to select such parcels.

Future Assurances: At any time and from time to time, upon request of the Mortgagee, the Mortgagor will make, execute and deliver or cause to be made, executed and delivered to the Mortgagee and where appropriate will cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or filed at such time and in such offices and places as shall be reasonably required by the Mortgagee, any and all such other and further mortgages, instruments of further assurance, certificates, financing statements, and other documents as may, in the reasonable opinion of the Mortgagee or its counsel, be necessary or reasonably desirable in order to effectuate, complete and perfect and to continue and preserve the obligation of the Mortgagor under this Mortgage, and the lien of this Mortgage as a lien of the priority herein set forth upon all the Property and Equipment, except at hereinabove stated, whether now owned or hereinafter acquired by the Mortgagor and wheresoever located. Upon any failure by the Mortgagor so to do, the Mortgagee may execute, record, file, re-record and refile any and all such mortgages, instruments, certificates, financing statements, and documents for and in the name of the Mortgagor, and the Mortgagor hereby irrevocably appoints the Mortgagee the agent and attorney-in-fact of the Mortgagor so to do. Any expenses of the Mortgagee in connection therewith shall be added to the Indebtedness of the Mortgagor and shall be secured hereby.

Cumulative Rights and Remedies: Each and every of the rights, remedies and benefits provided to Mortgagee herein shall be cumulative and shall not be exclusive of any other of said rights, remedies or benefits, or of any other rights, remedies or benefits allowed by law, and may be exercised either successively or concurrently. Any waiver by Mortgagee of any default hereunder or any Event of Default shall not constitute a waiver of any similar or other default or Event of Default.

Alienation: Mortgagee in making the loans evidenced by the Note is relying upon the integrity of Mortgagor and its undertaking to maintain the mortgaged Property. If Mortgagor should sell, transfer, convey, assign or further encumber its interest in the mortgaged Property, or any part thereof, voluntarily or involuntarily, the Mortgagee shall have the right in its sole option thereafter to declare all sums and the Indebtedness secured hereby and then unpaid to be due and payable forthwith although the period limited for the payment thereof shall not then have expired, anything contained to the contrary hereinbefore notwithstanding, and thereupon to exercise all of its rights and remedies under this Mortgage; any transfer, sale, assignment or pledge of any ownership interests in the Mortgagor, resulting in a change in majority ownership and voting control of Mortgagor (a transfer, sale, assignment or pledge as aforesaid, is hereinafter referred to as a "Transfer"), without Mortgagee's prior written consent, shall constitute a Transfer in violation of this provision. If the ownership of the mortgaged Property, or any part thereof, becomes vested in a person/entity other than the Mortgagor, the Mortgagee may deal with such successor or successors in interest with reference to this Mortgage, and the Indebtedness hereby secured, in the same manner as with the Mortgagor, without it in any manner vitiating or discharging the Mortgagor's liability hereby or upon the Indebtedness hereby secured. The Mortgagor shall at all times continue primarily liable on the Indebtedness secured hereby until this Mortgage is fully discharged or Mortgagor is formally released by an instrument in writing duly executed by the Mortgagee.

Future Advances: In addition to securing the repayment of the Indebtedness hereinbefore mentioned, this Mortgage shall also secure the payment of all obligations of the Mortgagor to the Mortgagee, its successors or assigns howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or hereafter existing or due or to become due, including without limitation of the generality of the foregoing, future advances.

Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assigns of Mortgagor, and shall inure to the benefit of the successors and assigns of Mortgagee; any reference herein to "Mortgagee" shall include the successors and assigns of Mortgagee.

Terms: All nouns, pronouns and relative terms relating to Mortgagor shall be deemed to be masculine, feminine or neuter, singular or plural, as the context may indicate. If Mortgagor consists of more than one person, their liability hereunder shall be joint and several.

Power of Sale: WARNING. THIS MORTGAGE CONTAINS A POWER OF SALE, AND, UPON DEFAULT, MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT, NO HEARING IS INVOLVED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE IN A LOCAL NEWSPAPER AND TO POST A COPY OF THE NOTICE ON THE PROPERTY.

Waiver: IF THIS MORTGAGE IS FORECLOSED BY ADVERTISEMENT, MORTGAGOR HEREBY VOLUNTARILY INTELLIGENTLY AND KNOWINGLY WAIVES ALL RIGHTS, UNDER THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN AND CONSTITUTION AND LAWS OF THE UNITED STATES, TO ALL NOTICE AND A HEARING IN CONNECTION WITH THE ABOVE MENTIONED FORECLOSURE BY ADVERTISEMENT, EXCEPT AS SET FORTH IN THE MICHIGAN STATUTE PROVIDING FOR FORECLOSURE BY ADVERTISEMENT.

Non-Pledge: Mortgagor will not, without the prior written consent of Mortgagee, mortgage or pledge as security for any other loans obtained by Mortgagor, the Property, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Property. If any such mortgage or pledge is entered into without the prior written consent of the Mortgagee, the entire Indebtedness secured hereby, may, at the option of Mortgagee, be declared immediately due and payable without notice. Further, Mortgagor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Property for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Mortgagee's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Property or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Mortgage. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or placed by Mortgagor on the Premises under a security agreement the lien or title of which is superior to the lien created by this Mortgage, all the right, title and interest of Mortgagor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Mortgagor shall nevertheless be and are hereby assigned to Mortgagee and are covered by the lien of this Mortgage.

Indebtedness Secured: This Mortgage secures all Indebtedness as defined in the Loan Agreement.

Security Agreement and Financing Statements: Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) as security for the payment of the Note and all other sums secured by this Mortgage a security interest in all the Equipment and personal property described elsewhere in this Mortgage.

Mortgagor shall execute any and all such documents, including without limitation, financing statements pursuant to the Uniform Commercial Code of the State of Michigan as Mortgagee may request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any reasonable out-of-pocket expenses incurred by any such Mortgagee in connection with the preparation, execution and filing of documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all financing statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. This Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be cumulative and (i) as prescribed herein, or (ii) by general law, or (iii) as to such part of the security which is also reflected in said financing statement by the

specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Fixture Filing Provisions: If the security agreement described above covers goods which are or are to become fixtures, then this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of the recording hereof. In connection therewith, the addresses of the Mortgagor as debtor and Mortgagee as secured party are as set forth on the first page of this Mortgage. The foregoing address of Mortgagee is also the address from which information concerning the security interest may be obtained by any interested party. The Mortgagor's State of Michigan Identification No. is E83081.

Promissory Note: The repayment terms, interest rate and maturity date are set forth in the Note.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, said Mortgagor has executed this Mortgage the day and year first above written.

"MORTGAGOR"

PARK STREET GROUP, LLC, a Michigan limited liability company

By: _____
Name: Dean J. Groulx
Its: Sole Member

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 12 day of August, 2016, by Dean J. Groulx, the Sole Member of Park Street Group, LLC, a Michigan limited liability company.

_____
Notary Public, Oakland County, Michigan
Acting in Oakland County
My commission expires: 5/27/2020

Tricia C. Mink

DRAFTED BY ~~AND WHEN RECORDED RETURN TO:~~
Rob Berg-Simon, PLC
Soaring Pine Capital Real Estate and Debt Fund II, LLC
335 East Maple Road
Birmingham, MI 48009

216220947
1572 Millville Road
Lapeer, MI 48446
Entity to be formed

EXHIBIT A

Legal Description

SAID LANDS AND TENEMENTS ARE SITUATED IN THE TOWNSHIP OF MAYFIELD, LAPEER COUNTY, MICHIGAN, AND ARE MORE PARTICULARLY DESCRIBED AS:

PART OF THE NORTH 70 ACRES OF THE NORTHWEST FRACTIONAL 1/4 OF SECTION 31, TOWN 8 NORTH, RANGE 10 EAST, MAYFIELD TOWNSHIP LAPEER COUNTY, MICHIGAN, BEGINNING AT A POINT ON THE POINT ON THE SECTION LINE THAT IS SOUTH 1375.95 FEET FROM THE NORTHWEST CORNER OF SECTION 31; THENCE CONTINUING SOUTH 200.0 FEET ALONG SAID WEST SECTION LINE; THENCE SOUTH 89 DEGREES 22 MINUTES EAST, 440.0 FEET ALONG THE NORTH LINE OF THE SOUTH 50 ACRES OF THE NORTHWEST FRACTIONAL 1/4 AS OCCUPIED; THENCE NORTH 200.0 FEET; THENCE NORTH 89 DEGREES 22 MINUTES WEST, 440.0 FEET TO THE POINT OF BEGINNING.

BEING PARCEL DESCRIBED IN SURVEY LIBER 6, PAGE 107, LAPEER COUNTY RECORD, EXCEPT THE NORTH 1/2 OF ABOVE DESCRIBED PROPERTY.

014-031-004-10

Title to the above described property conveyed to Rocktop Partners I, LP from Harbour Portfolio VI, LP by Covenant Deed dated November 6, 2014 and recorded May 22, 2015 in Book 2766, Page 971 or Instrument No. N/A.

EXHIBIT 10

2016025977
B: 2873 P: 2466
PAGE 1 OF 15
MORTGAGE
OFFICIAL SEAL, Saginaw County MI
Mildred M. Dodak Register of Deeds
09/30/2016 2:34:13 PM

Return to:
Equity National Title
50 Jordan Street, Suite 100
East Providence, RI 02914-1214

MORTGAGE

EFFECTIVE DATE: AUGUST 12, 2016

PARTICULAR TERMS - DEFINITIONS

As used herein, the following terms and expressions shall have the respective meanings indicated opposite each of them; where the meaning of any term is stated to be "None," provisions involving the application of that term shall be disregarded:

Mortgagor:	**PARK STREET GROUP, LLC,** a Michigan limited liability company
Address:	**100 W. LONG LAKE RD, SUITE 102** **BLOOMFIELD HILLS, MICHIGAN 48304**
Mortgagee:	**SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,** a Delaware limited liability company
Address:	**335 EAST MAPLE ROAD** **BIRMINGHAM, MICHIGAN 48009**
Note and Guaranty:	Mortgage Note in the amount of Five Hundred Thousand and 00/100 Dollars ($500,000.00) dated of even date herewith executed by Park Street Group Realty Services, LLC and further secured by the Guaranty of the Mortgagor and all amendments, extensions, roll-overs and renewals thereof
Loan Agreement:	Loan Agreement dated of even date herewith, and all amendments, modifications, renewals and extensions thereof
Premises:	Land, Premises and Property situated in the City of Detroit, Wayne County, Michigan Described as: See Description of Real Estate attached hereto as Exhibit "A"

THIS MORTGAGE CONSTITUTES A FUTURE ADVANCE MORTGAGE UNDER MICHIGAN LAW. THIS MORTGAGE COVERS FIXTURES AND IS INTENDED FOR FILING WITH THE REGISTER OF DEEDS FOR WAYNE COUNTY, MICHIGAN.

SEP 2 '16 AM 9:34
SEP 8 '16 AM 8:36
SEP 30 '16 AM 8:52
SEP 13 '16 AM 10:02

15 pgs 56 as

Equity Natl. env

THIS MORTGAGE CONSTITUTES A CONSTRUCTION MORTGAGE AND SECURITY AGREEMENT AND FIXTURE FILING FOR THE PURPOSES OF ARTICLE 9 OF THE MICHIGAN UNIFORM COMMERCIAL CODE.

THIS MORTGAGE, above-dated, by Mortgagor to Mortgagee (the "Mortgage"), and is made with reference to the Note and Loan Agreement hereinabove referenced, and which shall include all of the foregoing as amended, modified, extended, restated or renewed from time to time and all substitutions, consolidations or roll-overs thereof, from time to time all of which may be done without amendment of this Mortgage.

WITNESSETH:

To secure the performance of the covenants hereinafter contained, and the repayment of loans and letters of credit, and advances made or issued simultaneously herewith, or hereafter to be made or issued to Mortgagor in the amounts hereinabove described, together with interest thereon, payable in accordance with the terms of the note evidencing such loans and advances, and all extensions and renewals thereof (hereinafter referred to as the "Note") issued pursuant to the terms of the Loan Agreement executed by Mortgagor in favor of Mortgagee, the terms, covenants and conditions of which said Note and Loan Agreement are herein incorporated as covenants and conditions of the Mortgagor, with the same force and effect as though such covenants and conditions were fully set forth herein (the covenants of this Mortgage, the Note, and the Loan Agreement are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages and warrants and grants a security interest to the Mortgagee, its successors and assigns, in and to the Premises, together with the easements, rights, privileges, appurtenances, improvements, buildings, fixtures, tenements, and hereditaments thereunder belonging and which may hereafter attach thereto and all heretofore or hereafter vacated alleys and streets abutting thereto (hereinafter collectively referred to as the "Property"); together with (a) all building materials, goods and personal property on the Premises owned by Borrower, not affixed or incorporated into the Premises, (b) all buildings, improvements, machinery, apparatus, equipment, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon said real estate or any part thereof and used or usable in connection with any present or future operation of said Property and owned by Mortgagor (hereinafter referred to as the "Equipment") and now owned or hereafter acquired or leased by the Mortgagor, and all additions and accessions thereto now or hereafter attached to or used in connection therewith or with the Property, and all proceeds of hazard insurance of all of the foregoing, including, but without limiting the generality of the foregoing, all heating, lighting, laundry, incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing apparatus, electrical apparatus (including, but not limited to all electrical transformers, switches, switch boxes, equipment boxes, cabinets, all whether used in the operation of the Property or any business operated within or upon the Property), lifting, cleaning, fire-prevention, fire-extinguishing, refrigerating, ventilating, and communications apparatus, air-cooling and air-conditioning apparatus, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, attached cabinets, partitions, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors and all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any title retention or security agreement superior in lien to the lien of this Mortgage; (c) all right, title and interest, if any, of the Mortgagor to plans and specifications, engineering drawings, architectural renderings, licenses,

governmental permits and approvals, soil test reports, proposals or other material now or thereafter existing in any way relating to the Property; (d) all rents, issues and profits derived under present or future leases, or otherwise, which are hereby specifically assigned, transferred and set over to Mortgagee; (e) all awards or payments, including any interest thereon, and the right to receive same, which may be made for the account of Mortgagor with respect to the Property as a result of the exercise of the right of eminent domain or condemnation, as hereinafter provided; (f) all oil, gas, mineral and water rights; (g) all rights of the Mortgagor under any purchase agreements, land contracts, options and similar agreements executed with respect to the Property and the proceeds thereof; (h) Mortgagor's right to make all divisions under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967; (i) all federal and state historic tax credits and other tax credits; and (j) all insurance proceeds and proceeds of all of the foregoing. It is understood and agreed that all Equipment is part and parcel of said real estate and appropriated to the use of said real estate and, whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and mortgaged hereby. The Mortgagor agrees to execute, acknowledge and deliver, from time to time, such financing statements or other instruments as may be requested by Mortgagee to confirm, protect and perfect the lien of this Mortgage on any Equipment, under the provisions of the Uniform Commercial Code in effect in Michigan or otherwise, and this Mortgage shall also be considered to be and may be construed as a security agreement with reference to any such Equipment, and upon Mortgagor's default, Mortgagee shall, in addition to all other remedies herein provided, have the remedies provided for under the Uniform Commercial Code, as amended, in effect in Michigan.

And the said Mortgagor, for itself, its heirs, administrators, executors, successors and assigns, does covenant and agree to and with the said Mortgagee, its successors and assigns, as follows:

Performance: The Mortgagor will pay, and otherwise perform, all the terms, conditions and covenants of the Indebtedness.

Title: At the time of the execution and delivery of this instrument, Mortgagor is well and truly seized of the Property in fee simple, free of all liens and encumbrances whatsoever, and will forever warrant and defend the same against any and all claims whatever, and the lien created hereby is and will be kept a lien of the first priority upon said Property and every part thereof, as the same exists as of the date hereof, subject only to the recorded covenants and restrictions described in Exhibit "B" hereto (the "Permitted Encumbrances").

Payment of Taxes and Assessments: Mortgagor shall pay (or cause to be paid) when due, all taxes and assessments that may be levied upon said Property, and shall promptly deliver to Mortgagee receipts showing payment thereof upon the written request of Mortgagee. Mortgagor shall pay when due all water charges and all other amounts which might become a lien upon the Property prior to this Mortgage. Mortgagor shall pay when due all taxes and assessments that may be levied upon or on account of this Mortgage or the Indebtedness secured hereby or upon the interest or estate in said Property created or represented by this Mortgage, whether levied against Mortgagor or otherwise. In the event payment by Mortgagor of any tax referred to in the foregoing sentence would result in the payment of interest in excess of the rate permitted by law, then Mortgagor shall have no obligation to pay the portion of such tax which would result in the payment of such excess; provided, however, in any such event, at any time after the enactment of

the law providing for such tax, Mortgagee, at its election, may declare the entire principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable ninety (90) days from the date of such declaration by Bank.

Insurance: See Loan Agreement executed of even date. Mortgagor will keep all buildings, improvements, fixtures and equipment now or hereafter upon said Property after renovations are completed and a certificate of occupancy are issued, , insured against loss and damage by fire and the perils covered by extended coverage insurance (including public liability insurance), and against such other risks and in such amounts, as may from time to time be required by Mortgagee, and with such insurer(s) as may from time to time be approved by Mortgagee, with proceeds thereof payable to Mortgagee under a standard mortgagee endorsement thereto as set forth in and subject to the terms of the Loan Agreement, and shall contain an agreement by such insurer(s) that such policy(s) shall not be cancelled or materially changed without at least thirty (30) days prior written notice to Mortgagee. If the Property is located in an area which has been identified by the Secretary of Housing and Urban Development as a flood hazard area and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (the Act), as amended, the Mortgagor will keep the Property covered by flood insurance up to the maximum limit of coverage available under the Act, but not in excess of the amount of the Note. The policies of all such insurance and all renewals thereof, together with receipts evidencing payment in full of the premiums thereon, shall be delivered promptly to Mortgagee upon the written request of Mortgagee. In the event of loss or damage, the proceeds of said insurance shall be paid to Mortgagee alone and Mortgagee shall have the right to collect, receive and receipt for such proceeds in the name of Mortgagee and Mortgagor. Should an uncured Event of Default exist beyond any applicable notice and cure period, Mortgagee is authorized to adjust and compromise such loss without the consent of Mortgagor. In the absence of an uncured Event of Default beyond any applicable notice and cure period, Mortgagor is authorized to adjust and compromise such loss with the prior written consent of Mortgagee. Such proceeds shall be applied toward reimbursement of all costs and expenses of Mortgagee in collecting said proceeds, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then be matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor. All of said policies of insurance shall be held by Mortgagee as additional security hereunder and, in the event of sale of the Property on foreclosure, the ownership of all policies of insurance and the right to receive the proceeds of any insurance payable by reason of any loss theretofore or thereafter occurring, shall pass to the purchaser at said sale and Mortgagor hereby appoints Mortgagee its attorney-in-fact, in Mortgagor's name, to assign and transfer all such policies and proceeds to such purchaser. Notwithstanding the foregoing, in the absence of an Event of Default beyond any applicable notice and cure period which is not cured at the time of the casualty or damage and at the time insurance proceeds are to be made available to Mortgagee under this provision, and, if requested by Mortgagor in writing, the Mortgagee agrees to disburse such insurance proceeds to Mortgagor or, to contractors employed by Mortgagor, less actual costs, fees and expenses, including reasonable attorneys' fees, if any, incurred by Mortgagee in connection with the adjustment of the loss or any action taken by Mortgagee in connection with the adjustment of the loss or incurred by Mortgagee in connection with any of the requirements of this Section 4 (the "Net Proceeds"), consistent with customary practices of Mortgagee in the administration of construction loans and as set forth in

the Loan Agreement, for the purpose of restoration, repair and replacement ("Restoration") of the Property to the condition and character existing prior to such event giving rise to payment of such proceeds, subject to the following:

Mortgagor shall deliver a detailed budget to Mortgagee, approved in writing by Mortgagor's architect or engineer, inclusive of the entire cost of completing the Restoration, on a trade by trade basis;

the Net Proceeds, together with any additional funds deposited by Mortgagor with Mortgagee, are sufficient, as determined by an estimate prepared by an independent appraiser selected by Mortgagee, to pay for the entire cost of the Restoration;

Mortgagor shall commence the Restoration as soon as reasonably practicable, but in no event later than thirty (30) days after such damage or destruction occurs; notwithstanding the foregoing, Mortgagor shall remove debris and otherwise clean and secure the Premises, promptly following any such damage or destruction;

Restoration shall be performed in compliance with all applicable governmental codes, ordinances, statues and requirements (including, without limitation, all applicable Environmental Laws);

From and after the date of the occurrence of the damage or destruction and continuing during the course of the Restoration, Borrower shall continue to timely pay all costs of owning, maintaining and operating the Premises, including all debt service under the Note;

Mortgagor shall comply with the policies and requirements of the Michigan Construction Lien Act and the Restoration will be completed free of any construction liens. Each disbursement of insurance proceeds shall require an endorsement to Mortgagee's title insurance policy insuring the full amount of advances to date.

If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the sole opinion of Mortgagee, be sufficient to pay in full the balance of the costs which are estimated by the Mortgagee to be necessary to complete the Restoration, Mortgagor shall deposit additional funds with Mortgagee in the amount of such deficiency (the "Net Proceeds Deficiency") before any other disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Mortgagee shall be held by Mortgagee and shall be disbursed for costs actually incurred in connection with the restoration of the same conditions applicable to the disbursement of the Net Proceeds and, until so disbursed, shall constitute additional security for the Indebtedness. Any funds held by Mortgagee pursuant to this Section shall be held in a non-interest bearing account and may be commingled with other funds of Mortgagee.

Reserve: Upon the occurrence of an Event of Default, Mortgagor will pay to Mortgagee on dates upon which interest is payable under the Note, such amounts as the Mortgagee from time to time estimates as necessary to create and maintain a reserve fund from which to pay before the same become due, all taxes and assessments, on or against the Property hereby mortgaged. Such reserve fund shall not bear interest. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the Property described herein may benefit thereby. If the funds to be paid to Mortgagee shall be insufficient to enable

such taxes and assessments to be paid in full thirty (30) days before the due dates thereof, the Mortgagor shall immediately upon written demand therefore, pay to Mortgagee such additional sums as may be required by Mortgagee in order to enable payment of such taxes and assessments in full thirty (30) days before the due date thereof, and if the funds so paid to Mortgagee shall exceed the amount of such taxes and assessments paid by Mortgagee, such excess shall be credited by the Mortgagee to subsequent payments required to be made. Said amounts shall be held by Mortgagee as additional security for the Indebtedness secured hereby. Said amounts shall be applied to the payment of said taxes and assessments when the same become due and payable; provided, however, that Mortgagee shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing herein contained shall in any manner limit the obligation of Mortgagor to pay taxes, assessments, liens, charges, and to maintain insurance as above provided. In the event of an Event of Default, Mortgagee may, at its option, but without any obligation on its part so to do, apply said amounts upon said taxes, assessments and insurance premiums, and/or toward the payment of any amounts payable by Mortgagor to Mortgagee under this Mortgage and/or toward the payment of the Indebtedness secured hereby or any portion thereof, whether or not then due or payable.

Default in Taxes: If default be made in the payment of any of the aforesaid taxes, liens, charges, assessments or in making repairs or replacements or in procuring and maintaining insurance and paying the premiums therefor or in paying any governmental charges levied or assessed against the Property, or in keeping or performing any other covenants of Mortgagor herein, Mortgagee may, at its option, and without any obligation on its part so to do, upon ten (10) calendar days prior notice to Borrower, pay said taxes and assessments, make such repairs and replacements, effect such insurance, pay such premiums or governmental charges, and perform any other covenant of Mortgagor herein. All amounts expended by Mortgagee hereunder shall be secured hereby and shall be due and payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note.

Repair/Replacement/Further Improvements: Mortgagee understands that when Mortgagor purchases subject property the property will need substantial renovation and improvements for marketability. However, once a certificate of occupancy has been obtained from the appropriate governing authority, Mortgagor will abstain from and will not suffer the commission of physical waste on said Property and will keep (or cause to be kept) the buildings, improvements, fixtures and equipment now or hereafter thereon in good repair and will make replacements thereto as and when the same become necessary, so that the efficiency of the Property and every part thereof shall at all times be maintained and the mortgage security shall not in any way be impaired. Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any loss or damage to the Property. Except as may be permitted by terms of the Loan Agreement, after renovations and/or repairs have been completed by Mortgagor on subject property and a certificate of occupancy has been obtained from the proper governing authority, Mortgagor shall not materially alter the buildings, improvements, fixtures or equipment now or hereafter upon said Property, or remove the same therefrom, without the written consent of Mortgagee. Mortgagor will not permit any portion of the Property to be used for any unlawful purposes. Mortgagor will comply promptly with all laws, ordinances, regulations and orders of all public authorities having jurisdiction thereof relating to the Property or the use, occupancy and maintenance thereof, provided that Mortgagor shall have the right to contest the same in good faith if Mortgagor has

complied with the Bank's reasonable requirements in connection with such protest. Mortgagee shall have the right at any time, and from time to time, to enter the Property for the purpose of inspecting the same.

Waste: Failure of the Mortgagor to pay any taxes, assessments or governmental charges levied or assessed against the Property, or any part thereof, or any installment of any such tax, assessment or charge, or any premium upon any such tax, assessment or charge, or any premium upon any policy of insurance covering any part of the Property, at the time or times such taxes, assessments, charges, installments thereof or insurance premiums are due and payable, shall constitute waste, and in accordance with the provisions of Act No. 236 of the Public Acts of Michigan for 1961, as amended shall entitle Mortgagee to exercise the remedies afforded by such Act. Payment by the Mortgagee for and on behalf of the Mortgagor of any such delinquent tax or insurance premium properly payable by Mortgagor under the terms of this Mortgage, shall not cure the default herein described nor shall it in any manner impair the Mortgagee's right to the appointment of a receiver on account thereof. Upon the happening of any such acts of waste and on proper application made therefore by Mortgagee to a court of competent jurisdiction, the Mortgagee shall forthwith be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issues and profits thereof, with such powers as the court making such appointment shall confer; the Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

Reimbursement: In the event that Mortgagee is made a party to any suit or proceedings by reason of the interest of Mortgagee in the Property, other than for Mortgagee's default, Mortgagor shall reimburse Mortgagee for all reasonable costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in connection therewith. All such amounts incurred by Mortgagee hereunder shall be secured hereby and shall be payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note. The Mortgagor hereby assigns to the Mortgagee, in their entirety, all judgments, decrees, and awards for injury or damage to the Property (excluding awards, judgments or decrees due to tenant under the Lease; provided, however, if Mortgagor subsequently receives such awards, judgments or decrees, they shall be immediately assigned to Mortgagee) the Mortgagor authorizes the Mortgagee, at its sole election, to apply the same, or the proceeds thereof, to the Indebtedness hereby secured in such manner as the Mortgagee may elect; and the Mortgagor hereby authorizes the Mortgagee, in the name of the Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree.

Condemnation: In the event of the taking of all or any portion of the Property in any proceedings under the power of eminent domain, the entire award rendered in such proceedings shall be paid to Mortgagee up to the amount of the Indebtedness then outstanding, to be applied toward reimbursement of all costs and expenses of Mortgagee in connection with said proceedings, toward the payment of all amounts payable by Mortgagor to Mortgagee hereunder, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as the Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor.

Rents/Profits:

As additional security for the payment of the Indebtedness, insurance premiums, taxes and assessments, at the time and in the manner herein agreed, and for the performance of the covenants and agreements herein contained, pursuant to Act 210 of the Public Acts of Michigan of 1953, as amended, the Mortgagor does hereby sell, assign, transfer and set over unto the Mortgagee herein, its successors and assigns, all the rents, profits and income under any lease or leases of the mortgaged property (including any extensions, amendments or renewals thereof), whether due or to become due, including all such leases in existence or coming into existence during the period this Mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor herein or those claiming by, under or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the foreclosure or any other proceedings taken to enforce this Mortgage. In the event of a sale or foreclosure which shall result in a deficiency, this assignment shall stand as security during the redemption period for the payment of such deficiency. This assignment is given as collateral security only and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor contained in any such assigned leases. Notwithstanding anything in this Section to the contrary, Mortgagee may only receive rents, profits and income under the leases if an Event of Default has occurred and any applicable notice and cure periods have expired.

Should an Event of Default exist beyond any applicable notice and cure period as set forth in the Loan Agreement, the Mortgagor shall, upon demand therefor made by the Mortgagee, deliver and surrender possession of the mortgaged Property to the Mortgagee who shall thereafter collect the rents and income therefrom, rent or lease said Property or portion thereof upon such terms and for such time as it may deem commercially reasonable, terminate any tenancy (subject to the terms of a recorded SNDA with respect to the Lease) and maintain proceedings to recover rents or possession of the Property from any tenant or trespasser, and apply the net proceeds of such rent and income to the following purposes:

preservation of Property;

payment of taxes;

payment of insurance premiums; or

payment of installments of interest and principal due under the terms of the Indebtedness.

In the event that the Mortgagor fails, refuses or neglects to deliver or surrender such possession, the Mortgagee shall be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issue and profits thereof, with such powers as the court making such appointment may confer.

Mortgagor agrees to execute and deliver to Mortgagee assignments of rents on all future leases on the mortgaged Property during the term of this Mortgage, such assignments to be in the form and manner satisfactory to Mortgagee. Any default by the Mortgagor under the terms and/or conditions of any such assignment shall be a default under the terms and conditions of this

Mortgage, entitling the Mortgagee to exercise any and all the rights and remedies provided by this Mortgage. If the Mortgagor shall fail to perform and discharge any of the obligations, covenants and agreements required to be performed by it under any such assignment of lease, the Mortgagee may elect to perform the same; any sums which may be so paid out by the Mortgagee, including the cost, expenses and attorneys' fees paid out in any suit affecting the same, shall bear interest at the default rate provided in the Note, from the dates of such payments, shall be paid by Mortgagor to Mortgagee upon demand and shall be deemed a part of the Indebtedness hereby secured and recoverable as such in all respects. Mortgagor shall assign to the Mortgagee, upon request, as further security for the Indebtedness secured hereby, the Mortgagor's interest in all agreements, contracts, licenses and permits affecting the Property, such assignments to be made by instruments in form satisfactory to the Mortgagee; but no such assignment shall be construed as a consent by the Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon the Mortgagee any obligations with respect thereto.

The provisions of this Section 11 are not intended to evidence an additional recordable event, as may be prohibited by Act 459 of the Public Acts of Michigan of 1996, but rather are included in this Mortgage for purposes of complying with applicable requirements of Act 210 of the Public Acts of Michigan of 1953, as amended.

Default: Should an Event of Default exist as set forth in the Loan Agreement, then the Mortgagee may at any time after such Event of Default, and without further notice (subject to express notice and cure provision set forth in the Loan Agreement), declare the principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable immediately. The commencement of proceedings to foreclose this Mortgage shall, in any event, be deemed such declaration.

Title History: Should an Event of Default exist as set forth in the Loan Agreement, Mortgagee may cause its title insurance policy of the aforesaid mortgaged Property to be certified or extended as may be reasonable, or may procure a new title insurance policy, and the money so paid shall be a lien on said Property added to the amount secured by this Mortgage and payable forthwith with interest thereon at the rate at which interest accrues on amounts after the same becomes due under the Note.

Acceleration: If foreclosure proceedings of any mortgage (other than the within Mortgage) or any lien of any kind should be instituted against the Property and such proceedings are not either discontinued or bonded by a company satisfactory to Mortgagee within thirty (30) days, or if any other proceedings which have or may have a material and adverse effect on the Property or the business of the Mortgagor, either voluntary or involuntary, are instituted by or against Mortgagor or its successors in title to enforce payment or liquidation of its outstanding obligations, the Mortgagee may, at its option and without notice, immediately declare its lien and the Indebtedness which it secures due and payable and institute such proceedings as may be necessary to protect its interest in the mortgaged Property.

Disposition of Property:

Power is hereby granted to Mortgagee, if an Event of Default exists, to grant, bargain, sell, release and convey the Property, Equipment, and appurtenances at public auction or venue, and on such sale to execute and deliver to the purchasers, his, her, its or their heirs, successors and assigns, good ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided (said statute being M.C.L.A. Section 600.3201, et seq., or any successor or substitute statute), and to apply the proceeds of such sale in the manner hereinafter provided.

Upon a foreclosure sale of said Property or any part thereof, the proceeds of such sale shall be applied in the following order:

To the payment of all costs of the suit or foreclosure, including a reasonable attorney fee and the cost of title searches and abstracts;

To the payment of all other expenses of Mortgagee, including all monies expended by Mortgagee and all other amounts payable by Mortgagor to Mortgagee hereunder, with interest thereon;

To the payment of the principal and interest of the Indebtedness secured hereby;

To the payment of the surplus, if any, to Mortgagor or to whosoever shall be entitled thereto.

Upon any foreclosure sale of the Property, the same may be sold either as a whole or in parcels, as Mortgagee may elect, and if in parcels, the same may be divided as Mortgagee may elect, and at the election of the Mortgagee may be offered first in parcels and then as a whole, that offer producing the highest price for the entire Property to prevail, any law, statutory or otherwise, to the contrary notwithstanding, and Mortgagor hereby waives the right to require any such sale to be made in parcels or the right to select such parcels.

Future Assurances: At any time and from time to time, upon request of the Mortgagee, the Mortgagor will make, execute and deliver or cause to be made, executed and delivered to the Mortgagee and where appropriate will cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or filed at such time and in such offices and places as shall be reasonably required by the Mortgagee, any and all such other and further mortgages, instruments of further assurance, certificates, financing statements, and other documents as may, in the reasonable opinion of the Mortgagee or its counsel, be necessary or reasonably desirable in order to effectuate, complete and perfect and to continue and preserve the obligation of the Mortgagor under this Mortgage, and the lien of this Mortgage as a lien of the priority herein set forth upon all the Property and Equipment, except at hereinabove stated, whether now owned or hereinafter acquired by the Mortgagor and wheresoever located. Upon any failure by the Mortgagor so to do, the Mortgagee may execute, record, file, re-record and refile any and all such mortgages, instruments, certificates, financing statements, and documents for and in the name of the Mortgagor, and the Mortgagor hereby irrevocably appoints the Mortgagee the agent and attorney-in-fact of the Mortgagor so to do. Any expenses of the Mortgagee in connection therewith shall be added to the Indebtedness of the Mortgagor and shall be secured hereby.

Cumulative Rights and Remedies: Each and every of the rights, remedies and benefits provided to Mortgagee herein shall be cumulative and shall not be exclusive of any other of said rights, remedies or benefits, or of any other rights, remedies or benefits allowed by law, and may be exercised either successively or concurrently. Any waiver by Mortgagee of any default hereunder or any Event of Default shall not constitute a waiver of any similar or other default or Event of Default.

Alienation: Mortgagee in making the loans evidenced by the Note is relying upon the integrity of Mortgagor and its undertaking to maintain the mortgaged Property. If Mortgagor should sell, transfer, convey, assign or further encumber its interest in the mortgaged Property, or any part thereof, voluntarily or involuntarily, the Mortgagee shall have the right in its sole option thereafter to declare all sums and the Indebtedness secured hereby and then unpaid to be due and payable forthwith although the period limited for the payment thereof shall not then have expired, anything contained to the contrary hereinbefore notwithstanding, and thereupon to exercise all of its rights and remedies under this Mortgage; any transfer, sale, assignment or pledge of any ownership interests in the Mortgagor, resulting in a change in majority ownership and voting control of Mortgagor (a transfer, sale, assignment or pledge as aforesaid, is hereinafter referred to as a "Transfer"), without Mortgagee's prior written consent, shall constitute a Transfer in violation of this provision. If the ownership of the mortgaged Property, or any part thereof, becomes vested in a person/entity other than the Mortgagor, the Mortgagee may deal with such successor or successors in interest with reference to this Mortgage, and the Indebtedness hereby secured, in the same manner as with the Mortgagor, without it in any manner vitiating or discharging the Mortgagor's liability hereby or upon the Indebtedness hereby secured. The Mortgagor shall at all times continue primarily liable on the Indebtedness secured hereby until this Mortgage is fully discharged or Mortgagor is formally released by an instrument in writing duly executed by the Mortgagee.

Future Advances: In addition to securing the repayment of the Indebtedness hereinbefore mentioned, this Mortgage shall also secure the payment of all obligations of the Mortgagor to the Mortgagee, its successors or assigns howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or hereafter existing or due or to become due, including without limitation of the generality of the foregoing, future advances.

Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assigns of Mortgagor, and shall inure to the benefit of the successors and assigns of Mortgagee; any reference herein to "Mortgagee" shall include the successors and assigns of Mortgagee.

Terms: All nouns, pronouns and relative terms relating to Mortgagor shall be deemed to be masculine, feminine or neuter, singular or plural, as the context may indicate. If Mortgagor consists of more than one person, their liability hereunder shall be joint and several.

Power of Sale: WARNING. THIS MORTGAGE CONTAINS A POWER OF SALE, AND, UPON DEFAULT, MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT, NO HEARING IS INVOLVED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE IN A LOCAL NEWSPAPER AND TO POST A COPY OF THE NOTICE ON THE PROPERTY.

Waiver: IF THIS MORTGAGE IS FORECLOSED BY ADVERTISEMENT, MORTGAGOR HEREBY VOLUNTARILY INTELLIGENTLY AND KNOWINGLY WAIVES ALL RIGHTS, UNDER THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN AND CONSTITUTION AND LAWS OF THE UNITED STATES, TO ALL NOTICE AND A HEARING IN CONNECTION WITH THE ABOVE MENTIONED FORECLOSURE BY ADVERTISEMENT, EXCEPT AS SET FORTH IN THE MICHIGAN STATUTE PROVIDING FOR FORECLOSURE BY ADVERTISEMENT.

Non-Pledge: Mortgagor will not, without the prior written consent of Mortgagee, mortgage or pledge as security for any other loans obtained by Mortgagor, the Property, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Property. If any such mortgage or pledge is entered into without the prior written consent of the Mortgagee, the entire Indebtedness secured hereby, may, at the option of Mortgagee, be declared immediately due and payable without notice. Further, Mortgagor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Property for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Mortgagee's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Property or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Mortgage. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or placed by Mortgagor on the Premises under a security agreement the lien or title of which is superior to the lien created by this Mortgage, all the right, title and interest of Mortgagor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Mortgagor shall nevertheless be and are hereby assigned to Mortgagee and are covered by the lien of this Mortgage.

Indebtedness Secured: This Mortgage secures all Indebtedness as defined in the Loan Agreement.

Security Agreement and Financing Statements: Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) as security for the payment of the Note and all other sums secured by this Mortgage a security interest in all the Equipment and personal property described elsewhere in this Mortgage.

Mortgagor shall execute any and all such documents, including without limitation, financing statements pursuant to the Uniform Commercial Code of the State of Michigan as Mortgagee may request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any reasonable out-of-pocket expenses incurred by any such Mortgagee in connection with the preparation, execution and filing of documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all financing statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. This Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be cumulative and (i) as prescribed herein, or (ii) by general law, or (iii) as to such part of the security which is also reflected in said financing statement by the

specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Fixture Filing Provisions: If the security agreement described above covers goods which are or are to become fixtures, then this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of the recording hereof. In connection therewith, the addresses of the Mortgagor as debtor and Mortgagee as secured party are as set forth on the first page of this Mortgage. The foregoing address of Mortgagee is also the address from which information concerning the security interest may be obtained by any interested party. The Mortgagor's State of Michigan Identification No. is E83081.

Promissory Note: The repayment terms, interest rate and maturity date are set forth in the Note.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, said Mortgagor has executed this Mortgage the day and year first above written.

"MORTGAGOR"

PARK STREET GROUP, LLC, a
Michigan limited liability company

By: Dean J. Groulx
Name: Dean J. Groulx
Its: Sole Member

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 12 day of August, 2016, by Dean J. Groulx, the Sole Member of Park Street Group, LLC, a Michigan limited liability company.

Tricia C. Mink
Notary Public, Oakland County, Michigan
Acting in Oakland County
My commission expires: 5/27/2020
Tricia C. Mink

DRAFTED BY AND WHEN
RECORDED RETURN TO:
Rob Bergsimon, PLC
Soaring Pine Capital Real Estate and Debt Fund II, LLC
335 East Maple Road
Birmingham, MI 48009

216221470
2322 Robinwood Avenue
Saginaw, MI 48601
To be formed

EXHIBIT A

Legal Description

The following described real estate situated in the City of Saginaw, Saginaw County, State of Michigan, described as follows: Lot 20, including 1/2 vacated alley adjacent thereto, Block 30, Saginaw Improvement Company's Addition B, City of Saginaw, Saginaw County, Michigan according to the plat thereof a recorded in Liber 2, Page 15 of Plats, Saginaw County Records.

Title to the above described property conveyed to Harbour High Yield Fund, LLC from Shaun Donovan, Secretary of Housing and Urban Development by Other dated and recorded in or Instrument No. .

EXHIBIT 11

GENESEE COUNTY REGISTER OF DEEDS
RECEIVED: 9-29-16
REJECTED: 9-1-16

201610070069744 P:15 F:$56.00
Received: 9/27/2016 10:32 AM
Recorded: 10/7/2016 10:44 AM
John J. Gleason T20160046158
Genesee County Register ENV

GENESEE COUNTY REGISTER OF DEEDS
RECEIVED: 9-8-16
REJECTED: 9-20-16

Return to:
Equity National Title
50 Jordan Street, Suite 100
East Providence, RI 02914-1214

56 env

MORTGAGE

EFFECTIVE DATE: AUGUST 12, 2016

PARTICULAR TERMS - DEFINITIONS

As used herein, the following terms and expressions shall have the respective meanings indicated opposite each of them; where the meaning of any term is stated to be "None," provisions involving the application of that term shall be disregarded:

Mortgagor:	**PARK STREET GROUP, LLC**, a Michigan limited liability company
Address:	**100 W. LONG LAKE RD, SUITE 102** **BLOOMFIELD HILLS, MICHIGAN 48304**
Mortgagee:	**SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,** a Delaware limited liability company
Address:	**335 EAST MAPLE ROAD** **BIRMINGHAM, MICHIGAN 48009**
Note and Guaranty:	Mortgage Note in the amount of Five Hundred Thousand and 00/100 Dollars ($500,000.00) dated of even date herewith executed by Park Street Group Realty Services, LLC and further secured by the Guaranty of the Mortgagor and all amendments, extensions, roll-overs and renewals thereof
Loan Agreement:	Loan Agreement dated of even date herewith, and all amendments, modifications, renewals and extensions thereof
Premises:	Land, Premises and Property situated in the City of Detroit, Wayne County, Michigan Described as: See Description of Real Estate attached hereto as Exhibit "A"

THIS MORTGAGE CONSTITUTES A FUTURE ADVANCE MORTGAGE UNDER MICHIGAN LAW. THIS MORTGAGE COVERS FIXTURES AND IS INTENDED FOR FILING WITH THE REGISTER OF DEEDS FOR WAYNE COUNTY, MICHIGAN.

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14
15

THIS MORTGAGE CONSTITUTES A CONSTRUCTION MORTGAGE AND SECURITY AGREEMENT AND FIXTURE FILING FOR THE PURPOSES OF ARTICLE 9 OF THE MICHIGAN UNIFORM COMMERCIAL CODE.

THIS MORTGAGE, above-dated, by Mortgagor to Mortgagee (the "Mortgage"), and is made with reference to the Note and Loan Agreement hereinabove referenced, and which shall include all of the foregoing as amended, modified, extended, restated or renewed from time to time and all substitutions, consolidations or roll-overs thereof, from time to time all of which may be done without amendment of this Mortgage.

WITNESSETH:

To secure the performance of the covenants hereinafter contained, and the repayment of loans and letters of credit, and advances made or issued simultaneously herewith, or hereafter to be made or issued to Mortgagor in the amounts hereinabove described, together with interest thereon, payable in accordance with the terms of the note evidencing such loans and advances, and all extensions and renewals thereof (hereinafter referred to as the "Note") issued pursuant to the terms of the Loan Agreement executed by Mortgagor in favor of Mortgagee, the terms, covenants and conditions of which said Note and Loan Agreement are herein incorporated as covenants and conditions of the Mortgagor, with the same force and effect as though such covenants and conditions were fully set forth herein (the covenants of this Mortgage, the Note, and the Loan Agreement are hereinafter collectively referred to as the "Indebtedness"), the Mortgagor hereby mortgages and warrants and grants a security interest to the Mortgagee, its successors and assigns, in and to the Premises, together with the easements, rights, privileges, appurtenances, improvements, buildings, fixtures, tenements, and hereditaments thereunder belonging and which may hereafter attach thereto and all heretofore or hereafter vacated alleys and streets abutting thereto (hereinafter collectively referred to as the "Property"); together with (a) all building materials, goods and personal property on the Premises owned by Borrower, not affixed or incorporated into the Premises, (b) all buildings, improvements, machinery, apparatus, equipment, fittings, fixtures and articles of personal property of every kind and nature whatsoever, other than consumable goods, now or hereafter located in or upon said real estate or any part thereof and used or usable in connection with any present or future operation of said Property and owned by Mortgagor (hereinafter referred to as the "Equipment") and now owned or hereafter acquired or leased by the Mortgagor, and all additions and accessions thereto now or hereafter attached to or used in connection therewith or with the Property, and all proceeds of hazard insurance of all of the foregoing, including, but without limiting the generality of the foregoing, all heating, lighting, laundry, incinerating and power equipment, engines, pipes, pumps, tanks, motors, conduits, switchboards, plumbing apparatus, electrical apparatus (including, but not limited to all electrical transformers, switches, switch boxes, equipment boxes, cabinets, all whether used in the operation of the Property or any business operated within or upon the Property), lifting, cleaning, fire-prevention, fire-extinguishing, refrigerating, ventilating, and communications apparatus, air-cooling and air-conditioning apparatus, elevators, escalators, shades, awnings, screens, storm doors and windows, stoves, attached cabinets, partitions, carpeting, plants and shrubbery, ground maintenance equipment, ducts and compressors and all of the right, title and interest of the Mortgagor in and to any equipment which may be subject to any title retention or security agreement superior in lien to the lien of this Mortgage; (c) all right, title and interest, if any, of the Mortgagor to plans and specifications, engineering drawings, architectural renderings, licenses,

governmental permits and approvals, soil test reports, proposals or other material now or thereafter existing in any way relating to the Property; (d) all rents, issues and profits derived under present or future leases, or otherwise, which are hereby specifically assigned, transferred and set over to Mortgagee; (e) all awards or payments, including any interest thereon, and the right to receive same, which may be made for the account of Mortgagor with respect to the Property as a result of the exercise of the right of eminent domain or condemnation, as hereinafter provided; (f) all oil, gas, mineral and water rights; (g) all rights of the Mortgagor under any purchase agreements, land contracts, options and similar agreements executed with respect to the Property and the proceeds thereof; (h) Mortgagor's right to make all divisions under Section 108 of the Land Division Act, Act No. 288 of the Public Acts of 1967; (i) all federal and state historic tax credits and other tax credits; and (j) all insurance proceeds and proceeds of all of the foregoing. It is understood and agreed that all Equipment is part and parcel of said real estate and appropriated to the use of said real estate and, whether affixed or annexed or not, shall for the purpose of this Mortgage be deemed conclusively to be real estate and mortgaged hereby. The Mortgagor agrees to execute, acknowledge and deliver, from time to time, such financing statements or other instruments as may be requested by Mortgagee to confirm, protect and perfect the lien of this Mortgage on any Equipment, under the provisions of the Uniform Commercial Code in effect in Michigan or otherwise, and this Mortgage shall also be considered to be and may be construed as a security agreement with reference to any such Equipment, and upon Mortgagor's default, Mortgagee shall, in addition to all other remedies herein provided, have the remedies provided for under the Uniform Commercial Code, as amended, in effect in Michigan.

And the said Mortgagor, for itself, its heirs, administrators, executors, successors and assigns, does covenant and agree to and with the said Mortgagee, its successors and assigns, as follows:

Performance: The Mortgagor will pay, and otherwise perform, all the terms, conditions and covenants of the Indebtedness.

Title: At the time of the execution and delivery of this instrument, Mortgagor is well and truly seized of the Property in fee simple, free of all liens and encumbrances whatsoever, and will forever warrant and defend the same against any and all claims whatever, and the lien created hereby is and will be kept a lien of the first priority upon said Property and every part thereof, as the same exists as of the date hereof, subject only to the recorded covenants and restrictions described in Exhibit "B" hereto (the "Permitted Encumbrances").

Payment of Taxes and Assessments: Mortgagor shall pay (or cause to be paid) when due, all taxes and assessments that may be levied upon said Property, and shall promptly deliver to Mortgagee receipts showing payment thereof upon the written request of Mortgagee. Mortgagor shall pay when due all water charges and all other amounts which might become a lien upon the Property prior to this Mortgage. Mortgagor shall pay when due all taxes and assessments that may be levied upon or on account of this Mortgage or the Indebtedness secured hereby or upon the interest or estate in said Property created or represented by this Mortgage, whether levied against Mortgagor or otherwise. In the event payment by Mortgagor of any tax referred to in the foregoing sentence would result in the payment of interest in excess of the rate permitted by law, then Mortgagor shall have no obligation to pay the portion of such tax which would result in the payment of such excess; provided, however, in any such event, at any time after the enactment of

the law providing for such tax, Mortgagee, at its election, may declare the entire principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable ninety (90) days from the date of such declaration by Bank.

Insurance: See Loan Agreement executed of even date. Mortgagor will keep all buildings, improvements, fixtures and equipment now or hereafter upon said Property after renovations are completed and a certificate of occupancy are issued, , insured against loss and damage by fire and the perils covered by extended coverage insurance (including public liability insurance), and against such other risks and in such amounts, as may from time to time be required by Mortgagee, and with such insurer(s) as may from time to time be approved by Mortgagee, with proceeds thereof payable to Mortgagee under a standard mortgagee endorsement thereto as set forth in and subject to the terms of the Loan Agreement, and shall contain an agreement by such insurer(s) that such policy(s) shall not be cancelled or materially changed without at least thirty (30) days prior written notice to Mortgagee. If the Property is located in an area which has been identified by the Secretary of Housing and Urban Development as a flood hazard area and in which flood insurance has been made available under the National Flood Insurance Act of 1968 (the Act), as amended, the Mortgagor will keep the Property covered by flood insurance up to the maximum limit of coverage available under the Act, but not in excess of the amount of the Note. The policies of all such insurance and all renewals thereof, together with receipts evidencing payment in full of the premiums thereon, shall be delivered promptly to Mortgagee upon the written request of Mortgagee. In the event of loss or damage, the proceeds of said insurance shall be paid to Mortgagee alone and Mortgagee shall have the right to collect, receive and receipt for such proceeds in the name of Mortgagee and Mortgagor. Should an uncured Event of Default exist beyond any applicable notice and cure period, Mortgagee is authorized to adjust and compromise such loss without the consent of Mortgagor. In the absence of an uncured Event of Default beyond any applicable notice and cure period, Mortgagor is authorized to adjust and compromise such loss with the prior written consent of Mortgagee. Such proceeds shall be applied toward reimbursement of all costs and expenses of Mortgagee in collecting said proceeds, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then be matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor. All of said policies of insurance shall be held by Mortgagee as additional security hereunder and, in the event of sale of the Property on foreclosure, the ownership of all policies of insurance and the right to receive the proceeds of any insurance payable by reason of any loss theretofore or thereafter occurring, shall pass to the purchaser at said sale and Mortgagor hereby appoints Mortgagee its attorney-in-fact, in Mortgagor's name, to assign and transfer all such policies and proceeds to such purchaser. Notwithstanding the foregoing, in the absence of an Event of Default beyond any applicable notice and cure period which is not cured at the time of the casualty or damage and at the time insurance proceeds are to be made available to Mortgagee under this provision, and, if requested by Mortgagor in writing, the Mortgagee agrees to disburse such insurance proceeds to Mortgagor or, to contractors employed by Mortgagor, less actual costs, fees and expenses, including reasonable attorneys' fees, if any, incurred by Mortgagee in connection with the adjustment of the loss or any action taken by Mortgagee in connection with the adjustment of the loss or incurred by Mortgagee in connection with any of the requirements of this Section 4 (the "Net Proceeds"), consistent with customary practices of Mortgagee in the administration of construction loans and as set forth in

the Loan Agreement, for the purpose of restoration, repair and replacement ("Restoration") of the Property to the condition and character existing prior to such event giving rise to payment of such proceeds, subject to the following:

Mortgagor shall deliver a detailed budget to Mortgagee, approved in writing by Mortgagor's architect or engineer, inclusive of the entire cost of completing the Restoration, on a trade by trade basis;

the Net Proceeds, together with any additional funds deposited by Mortgagor with Mortgagee, are sufficient, as determined by an estimate prepared by an independent appraiser selected by Mortgagee, to pay for the entire cost of the Restoration;

Mortgagor shall commence the Restoration as soon as reasonably practicable, but in no event later than thirty (30) days after such damage or destruction occurs; notwithstanding the foregoing, Mortgagor shall remove debris and otherwise clean and secure the Premises, promptly following any such damage or destruction;

Restoration shall be performed in compliance with all applicable governmental codes, ordinances, statues and requirements (including, without limitation, all applicable Environmental Laws);

From and after the date of the occurrence of the damage or destruction and continuing during the course of the Restoration, Borrower shall continue to timely pay all costs of owning, maintaining and operating the Premises, including all debt service under the Note;

Mortgagor shall comply with the policies and requirements of the Michigan Construction Lien Act and the Restoration will be completed free of any construction liens. Each disbursement of insurance proceeds shall require an endorsement to Mortgagee's title insurance policy insuring the full amount of advances to date.

If at any time the Net Proceeds or the undisbursed balance thereof shall not, in the sole opinion of Mortgagee, be sufficient to pay in full the balance of the costs which are estimated by the Mortgagee to be necessary to complete the Restoration, Mortgagor shall deposit additional funds with Mortgagee in the amount of such deficiency (the "Net Proceeds Deficiency") before any other disbursement of the Net Proceeds shall be made. The Net Proceeds Deficiency deposited with Mortgagee shall be held by Mortgagee and shall be disbursed for costs actually incurred in connection with the restoration of the same conditions applicable to the disbursement of the Net Proceeds and, until so disbursed, shall constitute additional security for the Indebtedness. Any funds held by Mortgagee pursuant to this Section shall be held in a non-interest bearing account and may be commingled with other funds of Mortgagee.

Reserve: Upon the occurrence of an Event of Default, Mortgagor will pay to Mortgagee on dates upon which interest is payable under the Note, such amounts as the Mortgagee from time to time estimates as necessary to create and maintain a reserve fund from which to pay before the same become due, all taxes and assessments, on or against the Property hereby mortgaged. Such reserve fund shall not bear interest. Payments from said reserve fund for said purposes may be made by the Mortgagee at its discretion even though subsequent owners of the Property described herein may benefit thereby. If the funds to be paid to Mortgagee shall be insufficient to enable

such taxes and assessments to be paid in full thirty (30) days before the due dates thereof, the Mortgagor shall immediately upon written demand therefore, pay to Mortgagee such additional sums as may be required by Mortgagee in order to enable payment of such taxes and assessments in full thirty (30) days before the due date thereof, and if the funds so paid to Mortgagee shall exceed the amount of such taxes and assessments paid by Mortgagee, such excess shall be credited by the Mortgagee to subsequent payments required to be made. Said amounts shall be held by Mortgagee as additional security for the Indebtedness secured hereby. Said amounts shall be applied to the payment of said taxes and assessments when the same become due and payable; provided, however, that Mortgagee shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing herein contained shall in any manner limit the obligation of Mortgagor to pay taxes, assessments, liens, charges, and to maintain insurance as above provided. In the event of an Event of Default, Mortgagee may, at its option, but without any obligation on its part so to do, apply said amounts upon said taxes, assessments and insurance premiums, and/or toward the payment of any amounts payable by Mortgagor to Mortgagee under this Mortgage and/or toward the payment of the Indebtedness secured hereby or any portion thereof, whether or not then due or payable.

Default in Taxes: If default be made in the payment of any of the aforesaid taxes, liens, charges, assessments or in making repairs or replacements or in procuring and maintaining insurance and paying the premiums therefor or in paying any governmental charges levied or assessed against the Property, or in keeping or performing any other covenants of Mortgagor herein, Mortgagee may, at its option, and without any obligation on its part so to do, upon ten (10) calendar days prior notice to Borrower, pay said taxes and assessments, make such repairs and replacements, effect such insurance, pay such premiums or governmental charges, and perform any other covenant of Mortgagor herein. All amounts expended by Mortgagee hereunder shall be secured hereby and shall be due and payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note.

Repair/Replacement/Further Improvements: Mortgagee understands that when Mortgagor purchases subject property the property will need substantial renovation and improvements for marketability. However, once a certificate of occupancy has been obtained from the appropriate governing authority, Mortgagor will abstain from and will not suffer the commission of physical waste on said Property and will keep (or cause to be kept) the buildings, improvements, fixtures and equipment now or hereafter thereon in good repair and will make replacements thereto as and when the same become necessary, so that the efficiency of the Property and every part thereof shall at all times be maintained and the mortgage security shall not in any way be impaired. Mortgagor shall promptly notify Mortgagee in writing of the occurrence of any loss or damage to the Property. Except as may be permitted by terms of the Loan Agreement, after renovations and/or repairs have been completed by Mortgagor on subject property and a certificate of occupancy has been obtained from the proper governing authority, Mortgagor shall not materially alter the buildings, improvements, fixtures or equipment now or hereafter upon said Property, or remove the same therefrom, without the written consent of Mortgagee. Mortgagor will not permit any portion of the Property to be used for any unlawful purposes. Mortgagor will comply promptly with all laws, ordinances, regulations and orders of all public authorities having jurisdiction thereof relating to the Property or the use, occupancy and maintenance thereof, provided that Mortgagor shall have the right to contest the same in good faith if Mortgagor has

complied with the Bank's reasonable requirements in connection with such protest. Mortgagee shall have the right at any time, and from time to time, to enter the Property for the purpose of inspecting the same.

Waste: Failure of the Mortgagor to pay any taxes, assessments or governmental charges levied or assessed against the Property, or any part thereof, or any installment of any such tax, assessment or charge, or any premium upon any such tax, assessment or charge, or any premium upon any policy of insurance covering any part of the Property, at the time or times such taxes, assessments, charges, installments thereof or insurance premiums are due and payable, shall constitute waste, and in accordance with the provisions of Act No. 236 of the Public Acts of Michigan for 1961, as amended shall entitle Mortgagee to exercise the remedies afforded by such Act. Payment by the Mortgagee for and on behalf of the Mortgagor of any such delinquent tax or insurance premium properly payable by Mortgagor under the terms of this Mortgage, shall not cure the default herein described nor shall it in any manner impair the Mortgagee's right to the appointment of a receiver on account thereof. Upon the happening of any such acts of waste and on proper application made therefore by Mortgagee to a court of competent jurisdiction, the Mortgagee shall forthwith be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issues and profits thereof, with such powers as the court making such appointment shall confer; the Mortgagor hereby irrevocably consents to such appointment and waives notice of any application therefor.

Reimbursement: In the event that Mortgagee is made a party to any suit or proceedings by reason of the interest of Mortgagee in the Property, other than for Mortgagee's default, Mortgagor shall reimburse Mortgagee for all reasonable costs and expenses, including reasonable attorneys' fees, incurred by Mortgagee in connection therewith. All such amounts incurred by Mortgagee hereunder shall be secured hereby and shall be payable by Mortgagor to Mortgagee forthwith on demand, with interest thereon at the rate at which interest accrues on amounts after the same become due under the Note. The Mortgagor hereby assigns to the Mortgagee, in their entirety, all judgments, decrees, and awards for injury or damage to the Property (excluding awards, judgments or decrees due to tenant under the Lease; provided, however, if Mortgagor subsequently receives such awards, judgments or decrees, they shall be immediately assigned to Mortgagee) the Mortgagor authorizes the Mortgagee, at its sole election, to apply the same, or the proceeds thereof, to the Indebtedness hereby secured in such manner as the Mortgagee may elect; and the Mortgagor hereby authorizes the Mortgagee, in the name of the Mortgagor, to execute and deliver valid acquittances for, and to appeal from, any such award, judgment or decree.

Condemnation: In the event of the taking of all or any portion of the Property in any proceedings under the power of eminent domain, the entire award rendered in such proceedings shall be paid to Mortgagee up to the amount of the Indebtedness then outstanding, to be applied toward reimbursement of all costs and expenses of Mortgagee in connection with said proceedings, toward the payment of all amounts payable by Mortgagor to Mortgagee hereunder, and at the Mortgagee's election, used in any one or more of the following ways: (a) apply the same or any part thereof upon the Indebtedness secured hereby, whether such Indebtedness then matured or unmatured, (b) use the same or any part thereof to fulfill any of the covenants contained herein as the Mortgagee may determine, (c) use the same or any part thereof to replace or restore the Property to a condition satisfactory to the Mortgagee, or (d) release the same to the Mortgagor.

Rents/Profits:

As additional security for the payment of the Indebtedness, insurance premiums, taxes and assessments, at the time and in the manner herein agreed, and for the performance of the covenants and agreements herein contained, pursuant to Act 210 of the Public Acts of Michigan of 1953, as amended, the Mortgagor does hereby sell, assign, transfer and set over unto the Mortgagee herein, its successors and assigns, all the rents, profits and income under any lease or leases of the mortgaged property (including any extensions, amendments or renewals thereof), whether due or to become due, including all such leases in existence or coming into existence during the period this Mortgage is in effect. This assignment of rents shall run with the land and be good and valid as against the Mortgagor herein or those claiming by, under or through the Mortgagor, from the date of the recording of this instrument. This assignment shall continue to be operative during the foreclosure or any other proceedings taken to enforce this Mortgage. In the event of a sale or foreclosure which shall result in a deficiency, this assignment shall stand as security during the redemption period for the payment of such deficiency. This assignment is given as collateral security only and shall not be construed as obligating Mortgagee to perform any of the covenants or undertakings required to be performed by Mortgagor contained in any such assigned leases. Notwithstanding anything in this Section to the contrary, Mortgagee may only receive rents, profits and income under the leases if an Event of Default has occurred and any applicable notice and cure periods have expired.

Should an Event of Default exist beyond any applicable notice and cure period as set forth in the Loan Agreement, the Mortgagor shall, upon demand therefor made by the Mortgagee, deliver and surrender possession of the mortgaged Property to the Mortgagee who shall thereafter collect the rents and income therefrom, rent or lease said Property or portion thereof upon such terms and for such time as it may deem commercially reasonable, terminate any tenancy (subject to the terms of a recorded SNDA with respect to the Lease) and maintain proceedings to recover rents or possession of the Property from any tenant or trespasser, and apply the net proceeds of such rent and income to the following purposes:

preservation of Property;

payment of taxes;

payment of insurance premiums; or

payment of installments of interest and principal due under the terms of the Indebtedness.

In the event that the Mortgagor fails, refuses or neglects to deliver or surrender such possession, the Mortgagee shall be entitled to the appointment of a receiver of the Property hereby mortgaged and of the earnings, income, issue and profits thereof, with such powers as the court making such appointment may confer.

Mortgagor agrees to execute and deliver to Mortgagee assignments of rents on all future leases on the mortgaged Property during the term of this Mortgage, such assignments to be in the form and manner satisfactory to Mortgagee. Any default by the Mortgagor under the terms and/or conditions of any such assignment shall be a default under the terms and conditions of this

Mortgage, entitling the Mortgagee to exercise any and all the rights and remedies provided by this Mortgage. If the Mortgagor shall fail to perform and discharge any of the obligations, covenants and agreements required to be performed by it under any such assignment of lease, the Mortgagee may elect to perform the same; any sums which may be so paid out by the Mortgagee, including the cost, expenses and attorneys' fees paid out in any suit affecting the same, shall bear interest at the default rate provided in the Note, from the dates of such payments, shall be paid by Mortgagor to Mortgagee upon demand and shall be deemed a part of the Indebtedness hereby secured and recoverable as such in all respects. Mortgagor shall assign to the Mortgagee, upon request, as further security for the Indebtedness secured hereby, the Mortgagor's interest in all agreements, contracts, licenses and permits affecting the Property, such assignments to be made by instruments in form satisfactory to the Mortgagee; but no such assignment shall be construed as a consent by the Mortgagee to any agreement, contract, license or permit so assigned, or to impose upon the Mortgagee any obligations with respect thereto.

The provisions of this Section 11 are not intended to evidence an additional recordable event, as may be prohibited by Act 459 of the Public Acts of Michigan of 1996, but rather are included in this Mortgage for purposes of complying with applicable requirements of Act 210 of the Public Acts of Michigan of 1953, as amended.

Default: Should an Event of Default exist as set forth in the Loan Agreement, then the Mortgagee may at any time after such Event of Default, and without further notice (subject to express notice and cure provision set forth in the Loan Agreement), declare the principal balance of the Indebtedness secured hereby, together with interest thereon, to be due and payable immediately. The commencement of proceedings to foreclose this Mortgage shall, in any event, be deemed such declaration.

Title History: Should an Event of Default exist as set forth in the Loan Agreement, Mortgagee may cause its title insurance policy of the aforesaid mortgaged Property to be certified or extended as may be reasonable, or may procure a new title insurance policy, and the money so paid shall be a lien on said Property added to the amount secured by this Mortgage and payable forthwith with interest thereon at the rate at which interest accrues on amounts after the same becomes due under the Note.

Acceleration: If foreclosure proceedings of any mortgage (other than the within Mortgage) or any lien of any kind should be instituted against the Property and such proceedings are not either discontinued or bonded by a company satisfactory to Mortgagee within thirty (30) days, or if any other proceedings which have or may have a material and adverse effect on the Property or the business of the Mortgagor, either voluntary or involuntary, are instituted by or against Mortgagor or its successors in title to enforce payment or liquidation of its outstanding obligations, the Mortgagee may, at its option and without notice, immediately declare its lien and the Indebtedness which it secures due and payable and institute such proceedings as may be necessary to protect its interest in the mortgaged Property.

Disposition of Property:

Power is hereby granted to Mortgagee, if an Event of Default exists, to grant, bargain, sell, release and convey the Property, Equipment, and appurtenances at public auction or venue, and on such sale to execute and deliver to the purchasers, his, her, its or their heirs, successors and assigns, good ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided (said statute being M.C.L.A. Section 600.3201, et seq., or any successor or substitute statute), and to apply the proceeds of such sale in the manner hereinafter provided.

Upon a foreclosure sale of said Property or any part thereof, the proceeds of such sale shall be applied in the following order:

To the payment of all costs of the suit or foreclosure, including a reasonable attorney fee and the cost of title searches and abstracts;

To the payment of all other expenses of Mortgagee, including all monies expended by Mortgagee and all other amounts payable by Mortgagor to Mortgagee hereunder, with interest thereon;

To the payment of the principal and interest of the Indebtedness secured hereby;

To the payment of the surplus, if any, to Mortgagor or to whosoever shall be entitled thereto.

Upon any foreclosure sale of the Property, the same may be sold either as a whole or in parcels, as Mortgagee may elect, and if in parcels, the same may be divided as Mortgagee may elect, and at the election of the Mortgagee may be offered first in parcels and then as a whole, that offer producing the highest price for the entire Property to prevail, any law, statutory or otherwise, to the contrary notwithstanding, and Mortgagor hereby waives the right to require any such sale to be made in parcels or the right to select such parcels.

Future Assurances: At any time and from time to time, upon request of the Mortgagee, the Mortgagor will make, execute and deliver or cause to be made, executed and delivered to the Mortgagee and where appropriate will cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or filed at such time and in such offices and places as shall be reasonably required by the Mortgagee, any and all such other and further mortgages, instruments of further assurance, certificates, financing statements, and other documents as may, in the reasonable opinion of the Mortgagee or its counsel, be necessary or reasonably desirable in order to effectuate, complete and perfect and to continue and preserve the obligation of the Mortgagor under this Mortgage, and the lien of this Mortgage as a lien of the priority herein set forth upon all the Property and Equipment, except at hereinabove stated, whether now owned or hereinafter acquired by the Mortgagor and wheresoever located. Upon any failure by the Mortgagor so to do, the Mortgagee may execute, record, file, re-record and refile any and all such mortgages, instruments, certificates, financing statements, and documents for and in the name of the Mortgagor, and the Mortgagor hereby irrevocably appoints the Mortgagee the agent and attorney-in-fact of the Mortgagor so to do. Any expenses of the Mortgagee in connection therewith shall be added to the Indebtedness of the Mortgagor and shall be secured hereby.

Cumulative Rights and Remedies: Each and every of the rights, remedies and benefits provided to Mortgagee herein shall be cumulative and shall not be exclusive of any other of said rights, remedies or benefits, or of any other rights, remedies or benefits allowed by law, and may be exercised either successively or concurrently. Any waiver by Mortgagee of any default hereunder or any Event of Default shall not constitute a waiver of any similar or other default or Event of Default.

Alienation: Mortgagee in making the loans evidenced by the Note is relying upon the integrity of Mortgagor and its undertaking to maintain the mortgaged Property. If Mortgagor should sell, transfer, convey, assign or further encumber its interest in the mortgaged Property, or any part thereof, voluntarily or involuntarily, the Mortgagee shall have the right in its sole option thereafter to declare all sums and the Indebtedness secured hereby and then unpaid to be due and payable forthwith although the period limited for the payment thereof shall not then have expired, anything contained to the contrary hereinbefore notwithstanding, and thereupon to exercise all of its rights and remedies under this Mortgage; any transfer, sale, assignment or pledge of any ownership interests in the Mortgagor, resulting in a change in majority ownership and voting control of Mortgagor (a transfer, sale, assignment or pledge as aforesaid, is hereinafter referred to as a "Transfer"), without Mortgagee's prior written consent, shall constitute a Transfer in violation of this provision. If the ownership of the mortgaged Property, or any part thereof, becomes vested in a person/entity other than the Mortgagor, the Mortgagee may deal with such successor or successors in interest with reference to this Mortgage, and the Indebtedness hereby secured, in the same manner as with the Mortgagor, without it in any manner vitiating or discharging the Mortgagor's liability hereby or upon the Indebtedness hereby secured. The Mortgagor shall at all times continue primarily liable on the Indebtedness secured hereby until this Mortgage is fully discharged or Mortgagor is formally released by an instrument in writing duly executed by the Mortgagee.

Future Advances: In addition to securing the repayment of the Indebtedness hereinbefore mentioned, this Mortgage shall also secure the payment of all obligations of the Mortgagor to the Mortgagee, its successors or assigns howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent or now or hereafter existing or due or to become due, including without limitation of the generality of the foregoing, future advances.

Binding Effect: All of the covenants and conditions hereof shall run with the land and shall be binding upon the successors and assigns of Mortgagor, and shall inure to the benefit of the successors and assigns of Mortgagee; any reference herein to "Mortgagee" shall include the successors and assigns of Mortgagee.

Terms: All nouns, pronouns and relative terms relating to Mortgagor shall be deemed to be masculine, feminine or neuter, singular or plural, as the context may indicate. If Mortgagor consists of more than one person, their liability hereunder shall be joint and several.

Power of Sale: WARNING. THIS MORTGAGE CONTAINS A POWER OF SALE, AND, UPON DEFAULT, MAY BE FORECLOSED BY ADVERTISEMENT. IN FORECLOSURE BY ADVERTISEMENT, NO HEARING IS INVOLVED AND THE ONLY NOTICE REQUIRED IS TO PUBLISH NOTICE IN A LOCAL NEWSPAPER AND TO POST A COPY OF THE NOTICE ON THE PROPERTY.

Waiver: IF THIS MORTGAGE IS FORECLOSED BY ADVERTISEMENT, MORTGAGOR HEREBY VOLUNTARILY INTELLIGENTLY AND KNOWINGLY WAIVES ALL RIGHTS, UNDER THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN AND CONSTITUTION AND LAWS OF THE UNITED STATES, TO ALL NOTICE AND A HEARING IN CONNECTION WITH THE ABOVE MENTIONED FORECLOSURE BY ADVERTISEMENT, EXCEPT AS SET FORTH IN THE MICHIGAN STATUTE PROVIDING FOR FORECLOSURE BY ADVERTISEMENT.

Non-Pledge: Mortgagor will not, without the prior written consent of Mortgagee, mortgage or pledge as security for any other loans obtained by Mortgagor, the Property, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Property. If any such mortgage or pledge is entered into without the prior written consent of the Mortgagee, the entire Indebtedness secured hereby, may, at the option of Mortgagee, be declared immediately due and payable without notice. Further, Mortgagor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Property for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Mortgagee's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Property or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Mortgage. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or placed by Mortgagor on the Premises under a security agreement the lien or title of which is superior to the lien created by this Mortgage, all the right, title and interest of Mortgagor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Mortgagor shall nevertheless be and are hereby assigned to Mortgagee and are covered by the lien of this Mortgage.

Indebtedness Secured: This Mortgage secures all Indebtedness as defined in the Loan Agreement.

Security Agreement and Financing Statements: Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) as security for the payment of the Note and all other sums secured by this Mortgage a security interest in all the Equipment and personal property described elsewhere in this Mortgage.

Mortgagor shall execute any and all such documents, including without limitation, financing statements pursuant to the Uniform Commercial Code of the State of Michigan as Mortgagee may request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any reasonable out-of-pocket expenses incurred by any such Mortgagee in connection with the preparation, execution and filing of documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all financing statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. This Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be cumulative and (i) as prescribed herein, or (ii) by general law, or (iii) as to such part of the security which is also reflected in said financing statement by the

specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Fixture Filing Provisions: If the security agreement described above covers goods which are or are to become fixtures, then this Mortgage shall be effective as a financing statement filed as a fixture filing from the date of the recording hereof. In connection therewith, the addresses of the Mortgagor as debtor and Mortgagee as secured party are as set forth on the first page of this Mortgage. The foregoing address of Mortgagee is also the address from which information concerning the security interest may be obtained by any interested party. The Mortgagor's State of Michigan Identification No. is E83081.

Promissory Note: The repayment terms, interest rate and maturity date are set forth in the Note.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, said Mortgagor has executed this Mortgage the day and year first above written.

"MORTGAGOR"

PARK STREET GROUP, LLC, a Michigan limited liability company

By: Dean J. Groulx
Name: Dean J. Groulx
Its: Sole Member

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 12 day of August, 2016, by Dean J. Groulx, the Sole Member of Park Street Group, LLC, a Michigan limited liability company.

Tricia C Mink
Notary Public, Oakland County, Michigan
Acting in Oakland County
My commission expires: 5/27/2020
Tricia C Mink

DRAFTED BY ~~AND WHEN RECORDED RETURN TO:~~
Rob Berg Simon, PLC
Soaring Pine Capital Real Estate and Debt Fund II, LLC
335 East Maple Road
Birmingham, MI 48009

216220951
1919 Carmanbrook Parkway
Flint, MI 48507
Entity to be formed

EXHIBIT A

Legal Description

The following described premises, situated in Flint, County of Genesee, State of Michigan:

Description: Westgate Park Lot 50, BLK 1; also Westgate Park manor part of outlot beginning at NWLY corner of lot 50, Block 1 of Westgate Park; Th SLY ALG WLY Line of 50 lot, 85ft to SWLY corner of 50 lot; TH SWLY ALG SLY Line of 50 lot extended SWLY 100ft; Th NWLY to a pt. on NLY line of 50 lot extended SWLY 100ft from beginning; Th NELY 100ft to POB.

Title to the above described property conveyed to Park Street Group, LLC from Rocktop Partners I, LP by Covenant Deed dated July 24, 2015 and recorded December 4, 2015 in or Instrument No. 201512040085156.

EXHIBIT 12

CONTINUING UNLIMITED GUARANTY

THIS CONTINUING UNLIMITED GUARANTY dated as of August 12, 2016 (the "Guaranty"), is executed by Park Street Group, LLC, a Michigan limited liability company, (the "Guarantor"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304, to and for the benefit of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), whose address is 335 East Maple Road, Birmingham, Michigan 48009.

RECITALS:

A. Park Street Group Realty Services, LLC, a Michigan limited liability company, (the "Borrower"), desire or may desire at some time and/or from time to time to borrow funds and obtain other financial accommodations from the Lender (the "Loan").

B. Guarantor is directly or indirectly financially interested in the Borrower and desires the Lender to extend or continue the extension of credit to the Borrower and the Lender has required that Guarantor execute and deliver this Guaranty to the Lender as a condition to the extension and continuation of credit by the Lender.

C. The extension or continued extension of credit by the Lender is necessary and desirable to the conduct and operation of the business of the Borrower and will inure to the financial benefit of the Guarantor.

NOW, THEREFORE, FOR VALUE RECEIVED, it is agreed that the preceding provisions and recitals are an integral part hereof and that this Guaranty shall be construed in light thereof, and in consideration of advances, credit or other financial accommodation heretofore afforded, concurrently herewith being afforded or hereafter to be afforded to the Borrower by the Lender, the Guarantor, hereby unconditionally and absolutely guarantees to the Lender or other person paying or incurring the same, irrespective of the validity, regularity or enforceability of any instrument, writing, arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of: (a) any and all indebtedness, obligations and liabilities of every kind and nature of the Borrower to the Lender, howsoever evidenced, whether now existing or hereafter created or arising, direct or indirect, primary or secondary, absolute or contingent, due or to become due, joint, several or joint and several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise, including without limitation any sums due in connection with that certain Loan Agreement by and between Lender and Borrower of even date (the "Loan Agreement") plus (b) all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Lender, its parent or affiliates), paid or incurred by the Lender in endeavoring to collect all or any part of the foregoing indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing this Guaranty, or in defending against any defense, counterclaim, setoff or cross-claim based on any act of commission or omission by the Lender with respect to the foregoing indebtedness, any collateral therefor, or in connection with any Repayment Claim (as hereinafter defined) (the Borrower's obligations referred to above are hereinafter collectively referred to as

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the "Borrower's Obligations") (the Guarantor's obligations undertaken hereunder are collectively referred to as the "Guaranteed Debt"). In addition, the Guarantor hereby unconditionally and absolutely guarantees to the Lender the prompt, full and faithful performance and discharge by the Borrower of each of the terms, conditions, agreements, representations and warranties on the part of the Borrower contained in any agreement, or in any modification or addenda thereto or substitution thereof in connection with any of the Guaranteed Debt (the "Guarantor Performance Obligations").

Upon an event of default under the Borrower's Obligations, beyond any applicable notice and cure periods, or in case of the death of the Guarantor or any bankruptcy, reorganization, debt arrangement or other proceeding under any bankruptcy or insolvency law, any dissolution, liquidation or receivership proceeding is instituted by or against the Guarantor, or any default by the Guarantor of any of the covenants, terms and conditions set forth herein, all of the Guaranteed Debt shall, without notice to anyone, immediately become due and all amounts due hereunder shall be payable by the Guarantor. The Guarantor hereby expressly and irrevocably: (a) waives, to the fullest extent possible, on behalf of itself and its successors and assigns (including any surety) and any other person, any and all rights at law or in equity to subrogation, reimbursement, exoneration, contribution, indemnification, set off or to any other rights that could accrue to a guarantor or to the holder of a claim against any person, and which the Guarantor may have or hereafter acquire against any person in connection with or as a result of the Guarantor's execution, delivery and/or performance of this Guaranty, or any other documents to which the Guarantor is a party or otherwise; provided, however, nothing in this Guaranty shall prohibit Guarantor form pursuing such claims after the Indebtedness is paid in full; (b) waives any "claim" (as such term is defined in the United States Bankruptcy Code) of any kind against the Borrower while the indebtedness has not been paid in full, and further agrees that it shall not have or assert any such rights against any person (including any surety), either directly or as an attempted set off to any action commenced against the Guarantor by the Lender or any other person; and (c) acknowledges and agrees (i) the foregoing waivers are intended to benefit the Lender and shall not limit or otherwise affect the Guarantor's liability hereunder or the enforceability of this Guaranty, (ii) the Borrower and its successors and assigns are intended third party beneficiaries of the foregoing waivers, and (iii) the agreements set forth in this paragraph and the Lender's rights under this paragraph shall survive payment in full of the Guaranteed Debt. Notwithstanding anything to the contrary herein, upon the death of any Guarantor, this Guaranty shall be binding upon such Guarantor's estate. In such event, the liability of such Guarantor under this Guaranty shall continue in effect against such Guarantor's estate and notice of such Guarantor's death shall be given to Lender no later than thirty (30) days after the date of such death. No later than the earlier to occur of (a) ninety (90) days after the date of such Guarantor's death or (b) the date on which any distribution of assets to any devisee, heir, or other beneficiary from such Guarantor's estate, a substitute guarantor acceptable to Lender, in its sole discretion, shall have executed a Guaranty in the form executed by Guarantor. Failure to comply with the terms hereof shall constitute an Event of Default under the terms of the Note and other loan documents and shall entitle Lender to exercise all remedies available to it thereunder.

Following an Event of Default (as defined in the Loan Agreement of even date), all dividends or other payments received by the Lender on account of the Borrower's Obligations, from whatever source derived, shall be taken and applied by the Lender toward the payment of the Borrower's Obligations and in such order of application as the Lender may, in its sole discretion, from time to time elect. The Lender shall have the exclusive right to determine how, when and

what application of payments and credits, if any, whether derived from the Borrower or any other source, shall be made on the Borrower's Obligations and such determination shall be conclusive upon the Guarantor.

This Guaranty shall in all respects be continuing, absolute and unconditional, and shall remain in full force and effect with respect to the Guarantor until: (i) written notice from the Lender to the Guarantor by United States certified mail of its discontinuance as to the Guarantor; or (ii) until all Guaranteed Debt created or existing before receipt of either such notice shall have been fully paid. If there is more than one Guarantor party hereto and if this Guaranty is discontinued as to any Guarantor, this Guaranty shall nevertheless continue and remain in force against any other guarantor until discontinued as to all other Guarantors. In the event of the death, incompetency or dissolution of the Guarantor, this Guaranty shall continue as to all of the Guaranteed Debt theretofore incurred by the Borrower even though the Borrower's Obligations are renewed or the time of maturity of the Borrower's Obligations is extended without the consent of the successors or assigns of the Guarantor.

No compromise, settlement, release or discharge of, or indulgence with respect to, or failure, neglect or omission to enforce or exercise any right against any other guarantor shall release or discharge the Guarantor.

The Guarantor's liability under this Guaranty shall in no way be modified, affected, impaired, reduced, released or discharged by any of the following (any or all of which may be done or omitted by the Lender in its sole discretion, without notice to anyone and irrespective of whether the Borrower's Obligations shall be increased or decreased thereby): (a) any acceptance by the Lender of any new or renewal note or notes of the Borrower, or of any security or collateral for, or other guarantors or obligors upon, any of the Borrower's Obligations; (b) any compromise, settlement, surrender, release, discharge, renewal, refinancing, extension, alteration, exchange, sale, pledge or election with respect to the Borrower's Obligations, or any note by the Borrower, or with respect to any collateral under Section 1111 or any action under Section 364, or any other section of the United States Bankruptcy Code, now existing or hereafter amended, or other disposition of, or substitution for, or indulgence with respect to, or failure, neglect or omission to realize upon, or to enforce or exercise any liens or rights of appropriation or other rights with respect to, the Borrower's Obligations or any security or collateral therefor or any claims against any person or persons primarily or secondarily liable thereon; (c) any failure, neglect or omission to perfect, protect, secure or insure any of security interests, liens, or encumbrances of the properties or interests in properties subject thereto; (d) any change in the Borrower's name or the merger of the Borrower into another entity; or (e) any act of commission or omission of any kind or at any time upon the part of the Lender with respect to any matter whatsoever, other than the execution and delivery by the Lender to the Guarantor of an express written release or cancellation of this Guaranty. The Guarantor hereby consents to all acts of commission or omission of the Lender set forth above and agrees that the standards of good faith, diligence, reasonableness and care shall be measured, determined and governed solely by the terms and provisions hereof.

In order to hold the Guarantor liable hereunder, there shall be no obligation on the part of the Lender, at any time, to resort for payment to the Borrower or to anyone else, or to any collateral, security, property, liens or other rights and remedies whatsoever, all of which are hereby expressly waived by the Guarantor.

The Guarantor hereby expressly waives diligence in collection or protection, presentment, demand or protest or in giving notice to anyone of the protest, dishonor, default, or nonpayment or of the creation or existence of any of the Borrower's Obligations or of any security or collateral therefor or of the acceptance of this Guaranty or of extension of credit or indulgences hereunder or of any other matters or things whatsoever relating hereto.

The Guarantor expressly agrees that the Guarantor shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing the Guaranteed Debt, whether or not the liability of the Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

The Guarantor represents and warrants to the Lender that the financial statements of the Guarantor furnished to the Lender at or prior to the execution and delivery of this Guaranty fairly present the financial condition of the Guarantor for the periods shown therein, and since the dates covered by the most recent of such financial statements, there has been no material adverse change in the Guarantor's business operations or financial condition. The Guarantor agrees to advise the Lender immediately of any adverse change in the financial condition, business operations or any other status of the Guarantor. Following an Event of Default, the Lender shall have the right at all times during business hours, upon forty-eight (48) hours written notice, to inspect the books and records of the Guarantor and make extracts therefrom. Except as expressly shown on the most recent of such financial statements, the Guarantor owns all of its assets free and clear of all liens; is not a party to any litigation, nor is any litigation threatened to the knowledge of the Guarantor which would, if adversely determined, cause any material adverse change in its business or financial condition; and has no delinquent tax liabilities, nor have any tax deficiencies been proposed against it. The Guarantor shall not sell, lease, transfer, convey or assign any of its assets, unless such sale, lease, transfer, conveyance or assignment will not have a material adverse effect on the business or financial condition of the Guarantor or its ability to perform its obligations hereunder. The Guarantor shall neither become a party to any merger or consolidation, nor, except in the ordinary course of its business consistent with past practices, acquire all or substantially all of the assets of, a controlling interest in the stock of, or a partnership or joint venture interest in, any other entity.

The Lender may, without demand or notice of any kind to anyone, apply or set off any balances, credits, deposits, accounts, moneys or other indebtedness at any time credited by or due from the Lender to the Guarantor against the amounts due hereunder and in such order of application as the Lender may from time to time elect.

AS FURTHER SECURITY, ANY AND ALL DEBTS AND LIABILITIES NOW OR HEREAFTER ARISING AND OWING TO THE GUARANTOR BY THE BORROWER, OR TO ANY OTHER PARTY LIABLE TO THE LENDER FOR THE BORROWER'S OBLIGATIONS, ARE HEREBY SUBORDINATED TO THE LENDER'S CLAIMS. THE GUARANTOR HEREBY AGREES THAT THE GUARANTOR MAY BE JOINED AS A PARTY DEFENDANT IN ANY LEGAL PROCEEDING (INCLUDING, BUT NOT LIMITED TO, A FORECLOSURE PROCEEDING) INSTITUTED BY THE BANK AGAINST THE BORROWER. THE GUARANTOR, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES IRREVOCABLY THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING COMMENCED BY OR AGAINST THE GUARANTOR IN WHICH THE GUARANTOR AND THE LENDER ARE ADVERSE

PARTIES. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE LENDERGRANTING ANY FINANCIAL ACCOMMODATION TO THE BORROWER AND ACCEPTING THIS GUARANTY.

Should a claim (a "Repayment Claim") be made upon the Lender at any time for repayment of any amount received by the Lender in payment of the Borrower's Obligations, or any part thereof, whether received from the Borrower, the Guarantor pursuant hereto, or received by the Lender as the proceeds of collateral, by reason of: (i) any judgment, decree or order of any court or administrative body having jurisdiction over the Lender or any of its property; or (ii) any settlement or compromise of any such Repayment Claim effected by the Lender, in its sole discretion, with the claimant (including the Borrower), the Guarantor shall remain liable to the Lender for the amount so repaid to the same extent as if such amount had never originally been received by the Lender, notwithstanding any termination hereof or the cancellation of any note or other instrument evidencing the Borrower's Obligations.

The Lender may, without notice to anyone, sell or assign the Borrower's Obligations, or any part thereof, or grant participations therein, and in any such event each and every immediate or remote assignee or holder of, or participant in, all or any of the Borrower's Obligations shall have the right to enforce this Guaranty, by suit or otherwise for the benefit of such assignee, holder, or participant, as fully as if herein by name specifically given such right herein, but the Lender shall have an unimpaired right, prior and superior to that of any such assignee, holder or participant, to enforce this Guaranty for the benefit of the Lender, as to any part of the Borrower's Obligations retained by the Lender.

Unless and until all of the Borrower's Obligations have been paid in full, no release or discharge of any other person, whether primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the institution of bankruptcy, receivership, insolvency, reorganization, dissolution or liquidation proceedings by or against the Guarantor or any other person primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the entry of any restraining or other order in any such proceedings, shall release or discharge the Guarantor, or any other guarantor of the indebtedness, or any other person, firm or corporation liable to the Lender for the Borrower's Obligations.

To secure Guarantor's obligation hereunder Guarantor grants to Lender a security interest in all of Guarantor's right, title and interest in and to any assets, goods, equipment, fixtures, inventory, accounts (including but not limited to accounts, deposits and accounts receivable held with Lender or other financial institutions); payment, intangibles, general intangibles, letter of credit rights, software, chattel paper, instruments, documents, investment property and deposit accounts, now owned or hereafter acquired, insurance proceeds, rents and all products and proceeds thereof (the forgoing terms being used with the respective meanings accorded such terms under Article 9 of the Uniform Commercial Code). Lender is hereby authorized to file a financing statement naming Guarantors as debtor and indicating "All Assets" or words of similar import as the collateral. If an event of default occurs under the Note, Lender may exercise all rights and remedies of a secured party after default as set forth in said Article 9 and all rights and remedies as set forth in Note, Mortgage and Guaranty. If any secured obligations remain unliquidated, contingent or in dispute at the time Lender exercises any such remedy, Lender may retain any cash realized upon the sale or collection of any such collateral hereunder until each such obligation is either paid or performed in full or otherwise satisfied.

or of the creation or existence of any of the Borrower's Obligations or of any security or collateral therefor or of the acceptance of this Guaranty or of extension of credit or indulgences hereunder or of any other matters or things whatsoever relating hereto.

The Guarantor expressly agrees that the Guarantor shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing the Guaranteed Debt, whether or not the liability of the Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

The Guarantor represents and warrants to the Lender that the financial statements of the Guarantor furnished to the Lender at or prior to the execution and delivery of this Guaranty fairly present the financial condition of the Guarantor for the periods shown therein, and since the dates covered by the most recent of such financial statements, there has been no material adverse change in the Guarantor's business operations or financial condition. The Guarantor agrees to advise the Lender immediately of any adverse change in the financial condition, business operations or any other status of the Guarantor. Following an Event of Default, the Lender shall have the right at all times during business hours, upon forty-eight (48) hours written notice, to inspect the books and records of the Guarantor and make extracts therefrom. Except as expressly shown on the most recent of such financial statements, the Guarantor owns all of its assets free and clear of all liens; is not a party to any litigation, nor is any litigation threatened to the knowledge of the Guarantor which would, if adversely determined, cause any material adverse change in its business or financial condition; and has no delinquent tax liabilities, nor have any tax deficiencies been proposed against it. The Guarantor shall not sell, lease, transfer, convey or assign any of its assets, unless such sale, lease, transfer, conveyance or assignment will not have a material adverse effect on the business or financial condition of the Guarantor or its ability to perform its obligations hereunder. The Guarantor shall neither become a party to any merger or consolidation, nor, except in the ordinary course of its business consistent with past practices, acquire all or substantially all of the assets of, a controlling interest in the stock of, or a partnership or joint venture interest in, any other entity.

The Lender may, without demand or notice of any kind to anyone, apply or set off any balances, credits, deposits, accounts, moneys or other indebtedness at any time credited by or due from the Lender to the Guarantor against the amounts due hereunder and in such order of application as the Lender may from time to time elect.

AS FURTHER SECURITY, ANY AND ALL DEBTS AND LIABILITIES NOW OR HEREAFTER ARISING AND OWING TO THE GUARANTOR BY THE BORROWER, OR TO ANY OTHER PARTY LIABLE TO THE LENDER FOR THE BORROWER'S OBLIGATIONS, ARE HEREBY SUBORDINATED TO THE LENDER'S CLAIMS. THE GUARANTOR HEREBY AGREES THAT THE GUARANTOR MAY BE JOINED AS A PARTY DEFENDANT IN ANY LEGAL PROCEEDING (INCLUDING, BUT NOT LIMITED TO, A FORECLOSURE PROCEEDING) INSTITUTED BY THE BANK AGAINST THE BORROWER. THE GUARANTOR, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES IRREVOCABLY THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING COMMENCED BY OR AGAINST THE GUARANTOR IN WHICH THE GUARANTOR AND THE LENDER ARE ADVERSE PARTIES. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE

This Guaranty has been delivered to the Lender at its offices in Michigan, and the rights, remedies and liabilities of the parties shall be construed and determined in accordance with the laws of the State of Michigan, in which State it shall be performed by the Guarantor.

TO INDUCE THE LENDER TO GRANT FINANCIAL ACCOMMODATIONS TO THE BORROWER, THE GUARANTOR IRREVOCABLY AGREES THAT ALL ACTIONS ARISING DIRECTLY OR INDIRECTLY AS A RESULT OR IN CONSEQUENCE OF THIS GUARANTY SHALL BE INSTITUTED AND LITIGATED ONLY IN COURTS HAVING SITUS IN THE COUNTY OF MACOMB, MICHIGAN. THE GUARANTOR HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY STATE OR FEDERAL COURT LOCATED AND HAVING ITS SITUS IN THE COUNTY OF WAYNE, MICHIGAN, AND WAIVES ANY OBJECTION BASED ON FORUM NON CONVENIENS. FURTHERMORE, THE GUARANTOR WAIVES ALL NOTICES AND DEMANDS IN CONNECTION WITH THE ENFORCEMENT OF THE LENDER'S RIGHTS HEREUNDER, AND HEREBY CONSENTS TO, AND WAIVES NOTICE OF THE RELEASE, WITH OR WITHOUT CONSIDERATION, OF THE BORROWER OR ANY OTHER PERSON RESPONSIBLE FOR PAYMENT OF THE BORROWER'S OBLIGATIONS, OR OF ANY COLLATERAL THEREFOR.

Wherever possible each provision of this Guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

It is agreed that the Guarantor's liability is independent of any other guaranties at any time in effect with respect to all or any part of the Borrower's Obligations, and that the Guarantor's liability hereunder may be enforced regardless of the existence of any such other guaranties.

No delay on the part of the Lender in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Lender of any right or remedy shall preclude other or further exercise thereof, or the exercise of any other right or remedy. No modification, termination, discharge or waiver of any of the provisions hereof shall be binding upon the Lender, except as expressly set forth in a writing duly signed and delivered on behalf of the Lender.

The execution, delivery and performance of this Guaranty by the Guarantor have been duly authorized by all necessary action on the part of the Guarantor and do not and will not (i) require any consent or approval which has not been obtained, (ii) violate any provision of organizational documents of the Guarantor or of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to the Guarantor; (iii) require the consent or approval of, or filing or registration with, any governmental body, agency or authority, or (iv) result in a breach of or constitute a default under, or result in the imposition of any lien, charge or encumbrance upon any property of the Guarantor pursuant to, any indenture or other agreement or instrument under which the Guarantor is a party or by which it or any of its properties may be bound or affected. The person(s) executing and delivering this Guaranty for and on behalf of the Guarantor, are duly authorized to so act.

This Guaranty: (i) is valid, binding and enforceable in accordance with its provisions, and no conditions exist to the legal effectiveness of this Guaranty as to the Guarantor; (ii) contains the

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entire agreement between the Guarantor and the Lender; (iii) is the final expression of their intentions; and (iv) supersedes all negotiations, representations, warranties, commitments, offers, contracts (of any kind or nature, whether oral or written) prior to or contemporaneous with the execution hereof. No prior or contemporaneous representations, warranties, understandings, offers or agreements of any kind or nature, whether oral or written, have been made by the Lender or relied upon by the Guarantor in connection with the execution hereof.

This Guaranty shall inure to the benefit of the Lender and its successors and assigns.

The term "Guarantor" as used herein shall mean all parties signing this Guaranty, and the provisions hereof shall be binding upon the Guarantor, and each one of them, and all such parties, their respective successors and assigns. As to each other, the liability of Guarantors shall be joint and several.

IN WITNESS WHEREOF, the undersigned have caused this Guaranty to be executed all as of the day and year first above written.

"GUARANTOR"

Park Street Group, LLC,
a Michigan limited liability company

By: Dean J. Groulx
Name: Dean J. Groulx
Its: Member

EXHIBIT 13

CONTINUING UNLIMITED GUARANTY

THIS CONTINUING UNLIMITED GUARANTY dated as of August 12, 2016 (the "Guaranty"), is executed by Dean J. Groulx, an individual (collectively the "Guarantor"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304, to and for the benefit of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), whose address is 335 East Maple Road, Birmingham, Michigan 48009.

RECITALS:

A. Park Street Group Realty Services, LLC, a Michigan limited liability company, (the "Borrower"), desire or may desire at some time and/or from time to time to borrow funds and obtain other financial accommodations from the Lender (the "Loan").

B. Guarantor is directly or indirectly financially interested in the Borrower and desires the Lender to extend or continue the extension of credit to the Borrower and the Lender has required that Guarantor execute and deliver this Guaranty to the Lender as a condition to the extension and continuation of credit by the Lender.

C. The extension or continued extension of credit by the Lender is necessary and desirable to the conduct and operation of the business of the Borrower and will inure to the financial benefit of the Guarantor.

NOW, THEREFORE, FOR VALUE RECEIVED, it is agreed that the preceding provisions and recitals are an integral part hereof and that this Guaranty shall be construed in light thereof, and in consideration of advances, credit or other financial accommodation heretofore afforded, concurrently herewith being afforded or hereafter to be afforded to the Borrower by the Lender, the Guarantor, hereby unconditionally and absolutely guarantees to the Lender or other person paying or incurring the same, irrespective of the validity, regularity or enforceability of any instrument, writing, arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of: (a) any and all indebtedness, obligations and liabilities of every kind and nature of the Borrower to the Lender, howsoever evidenced, whether now existing or hereafter created or arising, direct or indirect, primary or secondary, absolute or contingent, due or to become due, joint, several or joint and several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise, including without limitation any sums due in connection with that certain Loan Agreement by and between Lender and Borrower of even date (the "Loan Agreement") plus (b) all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Lender, its parent or affiliates), paid or incurred by the Lender in endeavoring to collect all or any part of the foregoing indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing this Guaranty, or in defending against any defense, counterclaim, setoff or cross-claim based on any act of commission or omission by the Lender with respect to the foregoing indebtedness, any collateral therefor, or in connection with any Repayment Claim (as hereinafter defined) (the Borrower's obligations referred to above are hereinafter collectively referred to as the "Borrower's Obligations") (the Guarantor's obligations undertaken hereunder are collectively

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referred to as the "Guaranteed Debt"). In addition, the Guarantor hereby unconditionally and absolutely guarantees to the Lender the prompt, full and faithful performance and discharge by the Borrower of each of the terms, conditions, agreements, representations and warranties on the part of the Borrower contained in any agreement, or in any modification or addenda thereto or substitution thereof in connection with any of the Guaranteed Debt (the "Guarantor Performance Obligations").

Upon an event of default under the Borrower's Obligations, beyond any applicable notice and cure periods, or in case of the death of the Guarantor or any bankruptcy, reorganization, debt arrangement or other proceeding under any bankruptcy or insolvency law, any dissolution, liquidation or receivership proceeding is instituted by or against the Guarantor, or any default by the Guarantor of any of the covenants, terms and conditions set forth herein, all of the Guaranteed Debt shall, without notice to anyone, immediately become due and all amounts due hereunder shall be payable by the Guarantor. The Guarantor hereby expressly and irrevocably: (a) waives, to the fullest extent possible, on behalf of itself and its successors and assigns (including any surety) and any other person, any and all rights at law or in equity to subrogation, reimbursement, exoneration, contribution, indemnification, set off or to any other rights that could accrue to a guarantor or to the holder of a claim against any person, and which the Guarantor may have or hereafter acquire against any person in connection with or as a result of the Guarantor's execution, delivery and/or performance of this Guaranty, or any other documents to which the Guarantor is a party or otherwise; provided, however, nothing in this Guaranty shall prohibit Guarantor form pursuing such claims after the Indebtedness is paid in full; (b) waives any "claim" (as such term is defined in the United States Bankruptcy Code) of any kind against the Borrower while the indebtedness has not been paid in full, and further agrees that it shall not have or assert any such rights against any person (including any surety), either directly or as an attempted set off to any action commenced against the Guarantor by the Lender or any other person; and (c) acknowledges and agrees (i) the foregoing waivers are intended to benefit the Lender and shall not limit or otherwise affect the Guarantor's liability hereunder or the enforceability of this Guaranty, (ii) the Borrower and its successors and assigns are intended third party beneficiaries of the foregoing waivers, and (iii) the agreements set forth in this paragraph and the Lender's rights under this paragraph shall survive payment in full of the Guaranteed Debt. Notwithstanding anything to the contrary herein, upon the death of any Guarantor, this Guaranty shall be binding upon such Guarantor's estate. In such event, the liability of such Guarantor under this Guaranty shall continue in effect against such Guarantor's estate and notice of such Guarantor's death shall be given to Lender no later than thirty (30) days after the date of such death. No later than the earlier to occur of (a) ninety (90) days after the date of such Guarantor's death or (b) the date on which any distribution of assets to any devisee, heir, or other beneficiary from such Guarantor's estate, a substitute guarantor acceptable to Lender, in its sole discretion, shall have executed a Guaranty in the form executed by Guarantor. Failure to comply with the terms hereof shall constitute an Event of Default under the terms of the Note and other loan documents and shall entitle Lender to exercise all remedies available to it thereunder.

Following an Event of Default (as defined in the Loan Agreement of even date), all dividends or other payments received by the Lender on account of the Borrower's Obligations, from whatever source derived, shall be taken and applied by the Lender toward the payment of the Borrower's Obligations and in such order of application as the Lender may, in its sole discretion, from time to time elect. The Lender shall have the exclusive right to determine how, when and what application of payments and credits, if any, whether derived from the Borrower or any other

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source, shall be made on the Borrower's Obligations and such determination shall be conclusive upon the Guarantor.

This Guaranty shall in all respects be continuing, absolute and unconditional, and shall remain in full force and effect with respect to the Guarantor until: (i) written notice from the Lender to the Guarantor by United States certified mail of its discontinuance as to the Guarantor; or (ii) until all Guaranteed Debt created or existing before receipt of either such notice shall have been fully paid. If there is more than one Guarantor party hereto and if this Guaranty is discontinued as to any Guarantor, this Guaranty shall nevertheless continue and remain in force against any other guarantor until discontinued as to all other Guarantors. In the event of the death, incompetency or dissolution of the Guarantor, this Guaranty shall continue as to all of the Guaranteed Debt theretofore incurred by the Borrower even though the Borrower's Obligations are renewed or the time of maturity of the Borrower's Obligations is extended without the consent of the successors or assigns of the Guarantor.

No compromise, settlement, release or discharge of, or indulgence with respect to, or failure, neglect or omission to enforce or exercise any right against any other guarantor shall release or discharge the Guarantor.

The Guarantor's liability under this Guaranty shall in no way be modified, affected, impaired, reduced, released or discharged by any of the following (any or all of which may be done or omitted by the Lender in its sole discretion, without notice to anyone and irrespective of whether the Borrower's Obligations shall be increased or decreased thereby): (a) any acceptance by the Lender of any new or renewal note or notes of the Borrower, or of any security or collateral for, or other guarantors or obligors upon, any of the Borrower's Obligations; (b) any compromise, settlement, surrender, release, discharge, renewal, refinancing, extension, alteration, exchange, sale, pledge or election with respect to the Borrower's Obligations, or any note by the Borrower, or with respect to any collateral under Section 1111 or any action under Section 364, or any other section of the United States Bankruptcy Code, now existing or hereafter amended, or other disposition of, or substitution for, or indulgence with respect to, or failure, neglect or omission to realize upon, or to enforce or exercise any liens or rights of appropriation or other rights with respect to, the Borrower's Obligations or any security or collateral therefor or any claims against any person or persons primarily or secondarily liable thereon; (c) any failure, neglect or omission to perfect, protect, secure or insure any of security interests, liens, or encumbrances of the properties or interests in properties subject thereto; (d) any change in the Borrower's name or the merger of the Borrower into another entity; or (e) any act of commission or omission of any kind or at any time upon the part of the Lender with respect to any matter whatsoever, other than the execution and delivery by the Lender to the Guarantor of an express written release or cancellation of this Guaranty. The Guarantor hereby consents to all acts of commission or omission of the Lender set forth above and agrees that the standards of good faith, diligence, reasonableness and care shall be measured, determined and governed solely by the terms and provisions hereof.

In order to hold the Guarantor liable hereunder, there shall be no obligation on the part of the Lender, at any time, to resort for payment to the Borrower or to anyone else, or to any collateral, security, property, liens or other rights and remedies whatsoever, all of which are hereby expressly waived by the Guarantor.

The Guarantor hereby expressly waives diligence in collection or protection, presentment, demand or protest or in giving notice to anyone of the protest, dishonor, default, or nonpayment

LENDERGRANTING ANY FINANCIAL ACCOMMODATION TO THE BORROWER AND ACCEPTING THIS GUARANTY.

Should a claim (a "Repayment Claim") be made upon the Lender at any time for repayment of any amount received by the Lender in payment of the Borrower's Obligations, or any part thereof, whether received from the Borrower, the Guarantor pursuant hereto, or received by the Lender as the proceeds of collateral, by reason of: (i) any judgment, decree or order of any court or administrative body having jurisdiction over the Lender or any of its property; or (ii) any settlement or compromise of any such Repayment Claim effected by the Lender, in its sole discretion, with the claimant (including the Borrower), the Guarantor shall remain liable to the Lender for the amount so repaid to the same extent as if such amount had never originally been received by the Lender, notwithstanding any termination hereof or the cancellation of any note or other instrument evidencing the Borrower's Obligations.

The Lender may, without notice to anyone, sell or assign the Borrower's Obligations, or any part thereof, or grant participations therein, and in any such event each and every immediate or remote assignee or holder of, or participant in, all or any of the Borrower's Obligations shall have the right to enforce this Guaranty, by suit or otherwise for the benefit of such assignee, holder, or participant, as fully as if herein by name specifically given such right herein, but the Lender shall have an unimpaired right, prior and superior to that of any such assignee, holder or participant, to enforce this Guaranty for the benefit of the Lender, as to any part of the Borrower's Obligations retained by the Lender.

Unless and until all of the Borrower's Obligations have been paid in full, no release or discharge of any other person, whether primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the institution of bankruptcy, receivership, insolvency, reorganization, dissolution or liquidation proceedings by or against the Guarantor or any other person primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the entry of any restraining or other order in any such proceedings, shall release or discharge the Guarantor, or any other guarantor of the indebtedness, or any other person, firm or corporation liable to the Lender for the Borrower's Obligations.

To secure Guarantor's obligation hereunder Guarantor grants to Lender a security interest in all of Guarantor's right, title and interest in and to any assets, goods, equipment, fixtures, inventory, accounts (including but not limited to accounts, deposits and accounts receivable held with Lender or other financial institutions); payment, intangibles, general intangibles, letter of credit rights, software, chattel paper, instruments, documents, investment property and deposit accounts, now owned or hereafter acquired, insurance proceeds, rents and all products and proceeds thereof (the forgoing terms being used with the respective meanings accorded such terms under Article 9 of the Uniform Commercial Code). Lender is hereby authorized to file a financing statement naming Guarantors as debtor and indicating "All Assets" or words of similar import as the collateral. If an event of default occurs under the Note, Lender may exercise all rights and remedies of a secured party after default as set forth in said Article 9 and all rights and remedies as set forth in Note, Mortgage and Guaranty. If any secured obligations remain unliquidated, contingent or in dispute at the time Lender exercises any such remedy, Lender may retain any cash realized upon the sale or collection of any such collateral hereunder until each such obligation is either paid or performed in full or otherwise satisfied.

This Guaranty has been delivered to the Lender at its offices in Michigan, and the rights, remedies and liabilities of the parties shall be construed and determined in accordance with the laws of the State of Michigan, in which State it shall be performed by the Guarantor.

TO INDUCE THE LENDER TO GRANT FINANCIAL ACCOMMODATIONS TO THE BORROWER, THE GUARANTOR IRREVOCABLY AGREES THAT ALL ACTIONS ARISING DIRECTLY OR INDIRECTLY AS A RESULT OR IN CONSEQUENCE OF THIS GUARANTY SHALL BE INSTITUTED AND LITIGATED ONLY IN COURTS HAVING SITUS IN THE COUNTY OF MACOMB, MICHIGAN. THE GUARANTOR HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY STATE OR FEDERAL COURT LOCATED AND HAVING ITS SITUS IN THE COUNTY OF WAYNE, MICHIGAN, AND WAIVES ANY OBJECTION BASED ON FORUM NON CONVENIENS. FURTHERMORE, THE GUARANTOR WAIVES ALL NOTICES AND DEMANDS IN CONNECTION WITH THE ENFORCEMENT OF THE LENDER'S RIGHTS HEREUNDER, AND HEREBY CONSENTS TO, AND WAIVES NOTICE OF THE RELEASE, WITH OR WITHOUT CONSIDERATION, OF THE BORROWER OR ANY OTHER PERSON RESPONSIBLE FOR PAYMENT OF THE BORROWER'S OBLIGATIONS, OR OF ANY COLLATERAL THEREFOR.

Wherever possible each provision of this Guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

It is agreed that the Guarantor's liability is independent of any other guaranties at any time in effect with respect to all or any part of the Borrower's Obligations, and that the Guarantor's liability hereunder may be enforced regardless of the existence of any such other guaranties.

No delay on the part of the Lender in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Lender of any right or remedy shall preclude other or further exercise thereof, or the exercise of any other right or remedy. No modification, termination, discharge or waiver of any of the provisions hereof shall be binding upon the Lender, except as expressly set forth in a writing duly signed and delivered on behalf of the Lender.

The execution, delivery and performance of this Guaranty by the Guarantor have been duly authorized by all necessary action on the part of the Guarantor and do not and will not (i) require any consent or approval which has not been obtained, (ii) violate any provision of organizational documents of the Guarantor or of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to the Guarantor; (iii) require the consent or approval of, or filing or registration with, any governmental body, agency or authority, or (iv) result in a breach of or constitute a default under, or result in the imposition of any lien, charge or encumbrance upon any property of the Guarantor pursuant to, any indenture or other agreement or instrument under which the Guarantor is a party or by which it or any of its properties may be bound or affected. The person(s) executing and delivering this Guaranty for and on behalf of the Guarantor, are duly authorized to so act.

This Guaranty: (i) is valid, binding and enforceable in accordance with its provisions, and no conditions exist to the legal effectiveness of this Guaranty as to the Guarantor; (ii) contains the

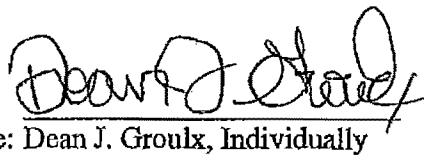
entire agreement between the Guarantor and the Lender; (iii) is the final expression of their intentions; and (iv) supersedes all negotiations, representations, warranties, commitments, offers, contracts (of any kind or nature, whether oral or written) prior to or contemporaneous with the execution hereof. No prior or contemporaneous representations, warranties, understandings, offers or agreements of any kind or nature, whether oral or written, have been made by the Lender or relied upon by the Guarantor in connection with the execution hereof.

This Guaranty shall inure to the benefit of the Lender and its successors and assigns.

The term "Guarantor" as used herein shall mean all parties signing this Guaranty, and the provisions hereof shall be binding upon the Guarantor, and each one of them, and all such parties, their respective successors and assigns. As to each other, the liability of Guarantors shall be joint and several.

IN WITNESS WHEREOF, the undersigned have caused this Guaranty to be executed all as of the day and year first above written.

"GUARANTOR"

By: 

Name: Dean J. Groulx, Individually

EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND mm

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC , a Michigan Limited Liability Company, DEAN J. GROULX, an individual.

Defendants.

2018-163298-CB

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DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND BRIEF IN SUPPORT OF MOTION

FEE

MOTION FOR SUMMARY DISPOSITION

Defendants, Park Street Group Realty Services, LLC (Borrower), Park Street Group LLC and Dean Groulx (Guarantors), move this Court for the entry of an order dismissing this lawsuit with prejudice under MCR 2.116(C)(8). Plaintiff's lawsuit seeks to enforce a loan that charges a criminally usurious interest rate in violation of Michigan law. Plaintiff's loan is unenforceable, and Plaintiff has failed to state a claim upon which relief may be granted by this Court as more fully discussed below in Defendants' brief in support of their motion. Defendants respectfully request the dismissal of this lawsuit with prejudice.

BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

I. PRELIMINARY STATEMENT

This is an action by an unregulated, private lender seeking to enforce an illegal, usurious loan. Soaring Pine Capital Real Estate and Debt Fund II, LLC (Soaring Pine) loaned $1 million to Borrower under a 1-year term-note, but charged the Borrower interest on the loan at an effective annual rate exceeding 33%. The maximum rate permitted by Michigan law is 25% per annum. MCL §§ 438.41 and 438.61(3).

Soaring Pine's loan violates Michigan's criminal usury statute. MCL §§ 438.41 and 438.42. Under the "wrongful conduct rule," a lender who violates the criminal usury statute is barred from any recovery of principal or interest allegedly owed on the unlawful loan. Soaring Pine has therefore failed to state a claim upon which relief can be granted from the Borrower or the Guarantors. The complaint should be dismissed with prejudice as a matter of law, and Borrower should be awarded its legal fees and costs as required by MCL § 438.41.

II. PLAINTIFF'S ALLEGATIONS AND LOAN HISTORY[1]

Soaring Pine is a private, unregulated lender.[2] On August 12, 2016, Soaring Pine made an initial term-loan of $500,000.00 to Borrower.[3] The purpose of the loan was to provide Borrower with "working capital," including to "acquire and renovate" single-family homes in the City of Detroit.[4] On September 23, 2016, Soaring Pine increased the amount of its business loan to Borrower from $500,000 to $1 million.[5] The business loan was a 1-year term-loan, maturing on September 23, 2017.[6]

Soaring Pine charged Borrower "interest" on the loan at the stated rate of 20% per annum.[7] But it also charged Borrower a "commitment fee," equal to 5% of the principal amount of each of the loans, or $50,000.00, which was deducted from the loan proceeds "at closing."[8] And it also charged Borrower a "success fee" of $1,000.00 for each "home sale."[9]

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[1] For purposes of this motion only, factual allegations in the Complaint are considered true when reviewing a motion under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

[2] A "regulated" lender is defined under Michigan's usury statutes as "a state or nationally chartered bank, a state or federal chartered" savings bank, savings and loan association, credit union, insurance carrier, finance subsidiary of a manufacturing corporation or a related entity. MCL §§ 438.61(2) and (3).

[3] Mortgage Note, dated August 12, 2016 ("Mortgage Note"), attached as Ex. 1 to Soaring Pine's Complaint, and Loan Agreement, dated August 12, 2016 ("Loan Agreement"), attached as Ex. 2 to the Complaint.

[4] Loan Agreement, Use of Proceeds, at ¶ 2.2.

[5] Amended and Restated Mortgage Note, dated September 23, 2016 ("Amended and Restated Mortgage Note"), attached as Ex. 3 to the Complaint, and Amendment to Loan Agreement, dated September 23, 2016 ("Amendment to Loan Agreement"), attached as Ex. 4 to the Complaint.

[6] Amended and Restated Mortgage Note, Maturity Date, p. 1.

[7] Mortgage Note, Interest Rate, p.1; Amended and Restated Mortgage Note, Interest Rate, p. 1.

[8] Loan Agreement, Definitions, ¶ 1.6.

[9] Loan Agreement, Sale of Homes Purchased with Loan Proceeds, ¶ 9.2.

The loan documents also provide that the first two-months of interest for both loans "will be capitalized and added to the loan balance, but no payments will be due."[10] These accrued but capitalized interest charges were then added to the balance of the loan, increasing the "principal amount" of the loan to $1,029,811.75.[11] Soaring Pine then charged Borrower 20% interest on the accrued but capitalized 20% interest charges due for the months of September, October and November, 2016.[12]

Borrower pledged single-family homes as collateral for the loans, and it granted Soaring Pine a mortgage on each of the properties.[13] Also, Guarantors each signed a guaranty of Borrower's obligations to Soaring Pine under the loan documents.[14]

On December 27, 2017, Soaring Pine sent a notice of default to Borrower, accelerating the interest rate from 20% to the default rate of 25% and demanding payment in full of all sums due, including $70,000.00 in "success fees."[15] The loan documents also provide for 5% in late fees.[16]

On January 19, 2018, Soaring Pine filed this action, seeking to enforce the loan agreements and to collect all amounts purportedly due under the agreements, including principal, accrued but unpaid interest, and $70,000.00 in "success fees."

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[10] Mortgage Note, Repayment, p. 1; Amended and Restated Mortgage Note, Repayment, p. 1; see also Complaint, Request for Relief, subpoint(d), where Soaring Pine states that principal balance of the loan $1,029,811.75.

[11] *Id.*

[12] *Id.*

[13] Mortgages, attached as Exs. 7-11 to the Complaint.

[14] Ex. 12 to the Complaint, Unlimited Guaranty, dated August 12, 2016, and Ex. 13 to the Complaint, Unlimited Guaranty, dated August 12, 2016.

[15] Ex. 5 to the Complaint, Letter from Simon PLC to Borrower dated December 27, 2017.

[16] Mortgage Note, Late Charges, p. 3; Amended and Restated Mortgage Note, Late Charges, p. 4.

III. ARGUMENT

A. Michigan's Civil and Criminal Usury Statutes.

As a threshold point, it is important to review Michigan's civil and criminal usury statutes prior to analyzing the viability of Soaring Pine's lawsuit. "Usury is, generally, speaking 'the receiving, securing or taking of a greater sum for the loan … than is allowed by law." *Hillman's v Em'n Al's*, 345 Mich 644, 651 (1956), quoting 55 Am Jur, Usury § 2. To prove the defense of usury, a borrower has the burden of proving by a preponderance of the evidence (1) the existence of a loan, (2) an understanding that the principal amount of the loan will be repaid, (3) the exaction of a greater profit by the lender than is allowed by law, and (4) intent to violate the law. MCL §§ 438.32 and 438.41; *Badalow v. Bogosoff*, 229 Mich 299, 302 (1924) (borrower must prove defense of usury by preponderance of the evidence).

The original purpose of the usury laws was "to protect necessitous borrowers from extortion." *Wilcox v Moore*, 354 Mich 499, 504 (1958). The purpose of the usury laws has since evolved to also "protect borrowers from the outrageous demands often made and required by lenders." *Duby v. Duby*, 163 Mich App 396, 399 (1987).

"The test of the existence of usury in a contract is whether it is intended that the contract shall and will, if performed, result in producing to the creditor a rate of return greater than that allowed by law." Michigan Law and Practice Encyclopedia, *USURY* § 4 (2nd Ed 2012); see also *Scalici v Bank One, NA*, 2005 WL 2291732 at *4 (Mich Ct App, Sept. 20, 2005).[17] It is not relevant whether "unlawful interest be actually paid or received in order to constitute usury." *Con't Nat'l Bank v Fleming*, 170 Mich 624, 643 (1912). When determining whether a transaction

[17] The unpublished decisions and Michigan Attorney General opinions discussed in this brief are attached collectively as Exhibit 1 to this brief.

violates the usury laws, "a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance." *Wilcox*, 354 Mich at 504; see also *Paul v Mutual Financial Corp*, 150 Mich App 773, 780 (1986) ("court must look beyond form to characterize the real nature of the transaction in order to determine whether the transaction falls within the usury statute"), citing *Wilcox*, 354 Mich at 504.

Michigan law is well-settled that "any fee imposed upon the borrower, other than reasonable and necessary charges, such as recording fees, title insurance, deed preparation and credit reports recognized in section 1(a) of the Usury Statute, in exchange for the lending of money must be taken into consideration in determining the rate of interest being charged." OAG, 1975-1976, No. 5085, p. 717 (Dec. 16, 1976); see also *Scalici*, 2005 WL 2291732 at *4 (any "fee" charged by the lender to the borrower for the furnishing of the loan is considered "interest" for purposes of usury).

Further, intent to violate the usury law is presumed if the loan agreement itself provides for interest at a rate greater than that which is permitted by law. *Paul,* 150 Mich App at 780. Proof of an actual, subjective intent to violate the law is wholly irrelevant. *Id.*

Michigan has a civil and a criminal usury statute, both of which are penal in nature. The civil usury statute is found in Act No. 326 of the Public Acts of 1966, MCL §§ 438.31–438.33. The purpose of the civil usury act is to "regulate the rate of interest of money; to provide exceptions; to prescribe the rights of parties." *Id.* MCL § 438.32 sets forth the penalties to a lender who violates the civil usury statute:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

The Michigan criminal usury statute is embodied in Act No. 259 of the Public Acts of 1968, MCL §§ 438.41-438.42. Under the criminal statute:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

MCL § 438.41.

The criminal usury statutes also provide that "[a] person is guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by this act. Any person guilty of possession of usurious loan records may be imprisoned for a term not to exceed 1 year or fined not more than $1,000.00, or both." MCL § 438.42.

Under the civil usury statute, business loans of $100,000.00 or more, where the primary security for which is not a single-family residence, are not subject to the interest rate limitations enumerated in the civil usury statute. Section 1(c)(11) of the civil usury statute states:

> The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of **any rate of interest**.

MCL § 438.31c(11) (emphasis added). However, business loans of $100,000.00 or more are subject to the interest rate prohibitions imposed by Michigan's criminal usury statute.

The Exemption of Loans to Business Entities from Usury Statue, MCL § 438.61, expressly provides that despite the exemptions contained in Michigan's civil usury statute, an unregulated lender may charge "any rate of interest" to a "business entity," **provided** that the rate does not exceed 25% simple interest per annum, as prohibited by Michigan's criminal usury statute.[18] MCL § 438.61(3). The statute states in relevant part:

> **Notwithstanding Act No. 326 of the Public Acts of 1966**, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to **any rate of interest not exceeding the rate allowed under Act No. 259 of the Public Acts of 1968**.

MCL § 438.61(3) (emphasis added).

Further, unlike the Michigan Business Corporation Act, the Michigan Limited Liability Company Act limits the interest rate charged by a lender to a limited liability company.[19] A lender may not charge a limited liability company an interest rate exceeding 25% simple interest per annum, as required by the criminal usury statute.[20] MCL § 450.4212 states: "[a] domestic or foreign limited liability company, whether or not formed at the request of a lender, may agree in writing to pay any rate of interest **as long as that rate of interest is not in excess of the rate set**

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[18] The Exemption of Loans to Business Entities from Usury Statute (MCL§ 438.61) became effective as of July 10, 1970, more than 3-years *after* the Civil Usury Statute (MCL §§ 438.31-438.33) became effective as of March 10, 1967.

[19] The Michigan Business Corporation Act states: "[a] domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal right and the defense of usury shall be prohibited." MCL § 450.1275.

[20] Borrower is a Michigan limited liability company. See Complaint at ¶ 3.

forth in Act 259 of Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Compiled Laws." (Emphasis added.)

When Soaring Pine's loan to Borrower is analyzed under the relevant usury statutes discussed above, it is readily apparent that the annual rate of return to Soaring Pine exceeds the amount permitted by Michigan's criminal usury statute. Thus, the loan here is unlawful.

B. Soaring Pine's Loan to Borrower Violates the Criminal Usury Statute.

The business loan in this case is a 1-year term note. The relevant inquiry is whether the business loan, if fully performed within 1 year, would result in an annual rate of return to Soaring Pine of greater than 25% simple interest. MCL § 438.41; see also *Scalici,* 2005 WL 2291732 at *4 ("[w]hile the notes do not directly state the applicable annual percentage rate, the fact that the rate of return invariably exceeded the annual rate of 25% was self-evident from the amounts listed on the notes. Consequently, the notes attached to the pleadings clearly indicate that plaintiffs knowingly charged, took, or received interest on a loan at a rate exceeding 25% at simple interest per annum contrary to MCL 438.41.").

By the plain terms of the loan agreements at issue here, Soaring Pine's loan agreements, if fully performed within 1-year, would result in an annual rate of return to Soaring Pine of at least 33%. That rate of return violates Michigan's criminal usury statute.

First, Soaring Pine charged Borrower interest on the principal amount of the loan at the stated annual rate of 20%. It also charged Borrower 20% interest on three-months of accrued interest charges that were "capitalized and added to the loan balance." This effectively resulted

in an additional 1.00 basis points added to the yield on the principal amount of the loan, or an effective rate of 21% per annum when added to the 20% interest stated in the loan agreements.[21]

Second, Soaring Pine also charged, and intended to collect, a "success fee." The Loan Agreement provides that Borrower would be obligated to pay a $1,000.00 "success fee" upon the sale of each residential property. Michigan law is well-settled that where the loan document provides that the lender is entitled to an additional fee, in a fixed-amount, upon the sale of the borrower's real property, the fee is considered "interest" for purposes of Michigan's usury laws. See, e.g., *Cont'l Nat'l Bank*, 170 Mich at 643-644; *Wilcox*, 354 Mich at 508; *Leach v Dolse*, 186 Mich 695, 701-702 (1915); see also OAG, 2014-2015, No. 7283, p. 5 (May 4, 2015) (citing *Brown v. Cardoza,* 67 Cal App 2d 187; 153 P2d 767, (1944) (lender held to have violated usury laws when the loan documents gave lender a $300.00 "bonus" upon the sale of borrower's property).

Soaring Pine intended to collect $70,000.00 in "success fees," in addition to interest and other charges under the Loan Agreement. This amounts to 7% of the principal amount of the loan.[22] When this fee is added to the aggregated interest rate of 21%, the effective annual rate of return to Soaring Pine is 28%.

Third, Soaring Pine charged the Borrower $50,000.00 in loan "commitment fees" which are, and should be considered, additional "interest" on the loan. As stated above, the Court must look at the true nature of the transaction, disregarding how the lender labels the charges to the borrower, for purposes of determining whether a loan is usurious. *Wilcox*, 354 Mich at 504.

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[21] $100,000.00 at 20% per annum = $200,000.00 ÷ 12-months = $16,666.67 per month × 3 months of accrued but capitalized interest charges = $50.000 x 20% = $10,000.00. $10,000.00 ÷ $1,000,000.00 = 1%.

[22] $70,000.00 ÷ $1,000,000.00 = 7.00%.

A "loan commitment fee" is consideration received by a lender in return for its promise to make a loan at some future date at a specific rate at the borrower's option. *FDIC v Kramer,* 100 Mich App 495, 497 (1980). "A lender may receive a commitment fee if (1) it is not a subterfuge to charge an illegal rate of interest or illegal discount points, (2) the fee is paid in advance of closing so that it does not appear to be illegal interest or discount points, and (3) the commitment only binds the lender to make the loan and does not bind the borrower to complete the transaction." OAG, 1981-1982, No. 5972, p. 4 (Sept. 2, 1981). The lender must provide "something of value separate from the loan itself in exchange for the commitment fee." OAG, 1988-1989, No. 6537, p. 4 (Sept. 13, 1988).

Here, the "commitment fee" charged by Soaring Pine to Borrower is actually additional, disguised interest on the loan. The fee was not paid "in advance of closing." Indeed, the Loan Agreement itself clearly states that the fee "is due and payable at closing."[23] Further, Soaring Pine did not issue a "loan commitment" to the Borrower, promising to make a loan at a future date in a specified amount at a specified rate, at the Borrower's option, independent of the loan. The "commitment fee" was an additional fee charged to the Borrower at closing for the loan itself. Accordingly, the "commitment fee" is, and must be considered, additional interest for purposes of the usury laws as a matter of law.[24]

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[23] See Loan Agreement, Definitions, at ¶ 1.6.

[24] Indeed, contrast Soaring Pine's purported "commitment fee" with the bona fide loan commitment fee charged in *FDIC v Kramer*. See *FDIC*, 100 Mich App at 497 (fee paid more than 3-weeks prior to the loan in return for a promise from lender to loan the borrower $110,000.00 at 6¾% for up to 115 days deemed a loan commitment fee, and not interest for purposes of usury laws).

Soaring Pine charged (and collected from) the Borrower $50,000.00 in "commitment fees" at closing, or 5% of the principal amount of the loan.[25] Adding 5% in "commitment fees" to the 21% in interest charges and to the additional 7% in "success fees" charged by Soaring Pine results in an effective annual rate of return of 33%.

Soaring Pine knowingly entered into a loan agreement and charged "interest" with an effective annual rate of return of at least 33% from the inception of the transaction.[26] The loan documents on their face violate Michigan's criminal usury statute, which prohibits lenders from charging, receiving, or collecting interest "at a rate exceeding 25% at simple interest per annum." MCL § 438.41; see also MCL §§ 438.61 and 450.4212. In addition, Soaring Pine is in possession of usurious loan documents, as evidenced by the loan documents attached to its complaint, in violation of MCL § 438.42.

Soaring Pine's violation of Michigan's criminal usury statute warrants the application of the wrongful conduct rule. Under the "wrongful conduct rule," as discussed below, Soaring Pine is barred from any recovery, because the loan transaction was usurious by its clear and unambiguous terms from its very inception.

C. The Wrongful Conduct Rule Bars Enforcement of Soaring Pine's Loan.

The wrongful conduct rule bars a plaintiff's claim when the claim is based, in whole or in part, on plaintiff's illegal conduct. *Orzel v Scott Drug Company,* 449 Mich 550, 558 (1995). In *Orzel,* the Michigan Supreme Court explained:

> The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a

[25] $50,000.00 ÷ $1,000,000.00 = 5.00%.

[26] If the Default Rate at 25% and the Late Charges of 5% are factored into the interest rate calculation, Soaring Pine is charging, or attempting to collect, interest at a rate of **43%** per annum.

> plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.

Id. at 559-560 (citations omitted). For the wrongful conduct rule to apply: (1) the plaintiff's "conduct must be prohibited or almost entirely prohibited under a penal or criminal statute[;]" and (2) "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 561, 564.

The wrongful conduct rule is applicable here. As discussed above, a lender who charges a borrower interest at a rate exceeding 25% simple interest per annum is guilty of criminal usury. MCL § 438.41. Additionally, any person in possession of "usurious loan records" is also guilty of a misdemeanor punishable by a prison term of up to 1-year in prison. MCL § 438.42. The Court should not allow Soaring Pine to enforce an unlawful loan in violation of the criminal usury laws.

Indeed, Michigan courts have consistently applied the "wrongful conduct rule" to bar a lender who violates the criminal usury statute from any recovery of principal or interest due on the unlawful loan. See, *e.g.*, *Scalici v Bank One, NA*, 2005 WL 2291732 (Mich Ct App, Sept. 20, 2005); *Wellman v Bank One, NA*, 2005 WL 2291741 (Mich Ct App, Sept. 20, 2005).

In *Scalici,* for instance, the Michigan Court of Appeals affirmed the dismissal of the plaintiff-lender's complaint, because the wrongful conduct rule barred the lender from enforcing a loan charging more than 25% interest per annum in violation of the criminal usury statute. The court held:

> Under the plain meaning of this statute, one of the powers possessed by corporations is the power to agree to pay a rate of interest in excess of the legal rate. However, while the statute permits corporations to agree to pay potentially usurious interest, nothing within this language necessarily absolves the corporation's lenders of criminal liability under MCL 438.41. Furthermore, this grant of power is consistent with MCL 438.61, which creates exceptions to the usury statutes for loans made to business entities. Under MCL 438.61(2), a limited class of lenders, such as banks, may lawfully charge a business entity any rate of interest, notwithstanding both the civil and criminal usury statutes.[5] Conversely, while MCL 438.61(3) does allow persons other than those identified in MCL 438.61(2) to charge a business entity an interest rate in excess of the civil usury statutes, it also provides that the interest rate charged may not exceed the criminal usury limits. Thus, while corporations do have the power to agree to pay a rate in excess of the legal rate, only certain classes of lenders may actually charge a rate in excess of the rate provided by MCL 438.41 without incurring criminal liability. The provision for continued criminal liability under MCL 438.61(3) for persons who charge business entities an interest rate in violation of MCL 438.41 directly contradicts plaintiffs' contention that MCL 450.1275 removes plaintiffs' loans from operation of the criminal usury laws. Consequently, the trial court properly determined that plaintiffs violated MCL 438.41 and that this violation warranted application of the wrongful conduct rule.

Scalici, 2005 WL 2291732 at *5.

The loan documents attached to Soaring Pine's Complaint establish that its loan to Borrower violates Michigan's criminal usury statute. Soaring Pine's loan is therefore unenforceable under the wrongful conduct rule and the Complaint should be dismissed under MCR 2.116(C)(8). *Id.* See also, *Wellman*, 2005 WL 2291741 at *1.

D. <u>Usury Savings Clauses in the Mortgage Notes are Invalid and Unenforceable</u>.

Soaring Pine included a so-called "usury savings clause" in paragraph 5 of the Mortgage Note and the Amended and Restated Mortgage Note. Paragraph 5 states:

> Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid, or payable by the Borrower in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of

> interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all excess paid shall automatically be credited against and in reduction of the principal due under this Note. If Lender shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of the Lender, shall become due and payable thirty (30) days from the date of such determination.[27]

Whether a lender can shield itself from criminal penalties proscribed by the Michigan usury statutes in this manner does not appear to have been squarely addressed by the Michigan Supreme Court. Other jurisdictions, however, have considered this issue and held that such clauses do not insulate the lender from criminal usury liability or otherwise validate a loan that violates the criminal usury statute from the inception of the loan. See, e.g., *NV One, LLC v Potomac Realty Capital, LLC*, 84 A3d 800, 807-808 (RI 2014) ("usury savings clauses are unenforceable."); *Swindell v Fed'l Nat'l Mortg Ass'n*, 330 NC 153, 160, 409 SE 2d 892, 896 (1991) ("[a] lender cannot charge usurious interest rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower.").[28]

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[27] See Complaint Ex. 1 and Ex. 3.

[28] In other states, courts have held that a usury savings clause will not immunize a lender from criminal liability where, as here, the interest rate exceeds the maximum legal limit from the inception of the loan transaction, but may be a factor taken into consideration to mitigate a finding of criminal intent where the rate charged at the outset of the loan is lawful, but becomes usurious only after the lender raises the rate to an unlawful amount typically after an event of default. *Nevels v Harris*, 129 Tex 190, 102 SW2d 1046, 1050 (1937) (a usury savings clause may be enforceable in the case where a loan's initial interest rate is legal but, then, is adjusted afterward to a default rate in excess of the maximum amount permitted by law, but "a person may [not] exact from the borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done."); *First State*

Soaring Pine's "usury savings clause" is inconsistent with the Michigan criminal usury laws and unenforceable here. Allowing a lender to knowingly violate the criminal usury statutes by charging interest at an annual rate of 33% invites lenders to write usurious loans with impunity, only to declare a "do over" and re-write the interest rate to the "maximum rate permitted by law" if, and when, a borrower raises the defense of usury. This is precisely the type of predatory lending practices which the usury laws are intended to deter and redress in the first place.

First, permitting the lender to unilaterally reform the contract to provide for the "maximum rate permitted by law" after knowingly entering into an illegal transaction by charging usurious interest at the inception of the loan transaction is inconsistent with the penal nature of the Michigan civil usury statute. A lender who violates the civil usury statute by either entering into an illegal contract or charging excessive interest "is barred from the recovery of **any interest**, any official fees, delinquency or collection charges, attorney fees or court costs" by express operation of the statute. MCL § 438.32 (emphasis added). In other words, "[w]hen a lender seeks to enforce a usurious contract, the borrower is entitled to have any previously paid interest applied against the outstanding principal" and the lender may recover only the principal amount of his loan—and nothing else. *Id.; see also Scalici, supra; Wellman, supra; Washburn v. Michailoff,* 240 Mich App 669, 674 (2000).

Bank v Dorst, 843 SW2d 790, 793 (Tex Ct App 1992) ("as a simple example, a creditor may not specifically contract for a 30% interest rate and then avoid the imposition of usury penalties by relying on a savings clause that declares an intention not to collect the usurious interest."); *Jersey-Palm-Gross, Inc v. Paper*, 639 So 2d 664 (Fl Ct App 4th Dist 1994) (upholding a finding of usury notwithstanding a usury savings clause, concluding "a usury savings clause cannot, by itself, absolutely insulate a lender from finding of usury," if the actual rate charged at the outset of the loan is usurious).

Second, a lender "is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan … at a rate exceeding 25% at simple interest per annum…." MCL § 438.41 (emphasis added). Thus, a lender who attempts to waive the **right to collect** usurious interest after-the-fact through a usury saving clause would not negate the violation, because the mere **charging** of interest in excess of 25% per annum constitutes a criminal act. *Id.* Under the wrongful conduct rule, a lender who violates the criminal usury statute is barred from any recovery (principal, interest, legal fees, costs, or other fees). *Scalici, supra; Wellman, supra*.

Third, in an unpublished opinion, the Michigan Court of Appeals, in *Karel v JRCK Corp,* 2012 WL 1648871 (Mich Ct App) (May 10, 2012), affirmed a trial court decision granting summary disposition in favor of the borrower and barring the lender under the wrongful-conduct rule from recovering any interest under a usurious loan, notwithstanding a usury savings clause in the promissory note. In *Karel*, a lender loaned the defendants $230,000 at 17.5% interest pursuant to a promissory note. The note provided that in the event of default, the borrowers would be charged 27.5% interest "or if such rate is usurious, the highest legal rate." *Id.* at *1. The defendants defaulted, and the lender sued, seeking to collecting the principal amount of the loan plus 27.5% interest at the default rate.

The lender filed a motion for summary disposition, asserting that there was no genuine issue of material fact that the defendants had defaulted and owed the principal and default interest. In response, the defendants filed a counter-motion for summary disposition, arguing that under the wrongful conduct rule, the lender was barred from any recovery (principal or interest) because he was charging criminally usurious interest.

According to the Court of Appeals, the "trial court determined that the promissory note **was not facially usurious** but that the interest sought by plaintiff [after default] was usurious. Therefore, under the wrongful conduct rule, the trial court barred plaintiff from recovering interest, fees, or costs under the promissory note, but did not bar plaintiff from recovering the principal" notwithstanding the usury savings clause. *Id.*, at *1 (emphasis added).

On appeal, the Court of Appeals affirmed, reasoning that the wrongful conduct rule barred the lender from recovering interest under the note, because it charged interest in excess of the maximum rate permitted by law. However, because the note was not "facially usurious," it did not err in permitting the lender to recover his principal from defendants. *Id.* at *2-3.

The *Karel* decision is both instructive and distinguishable. It is instructive because the Court of Appeals affirmed a lower court ruling barring a lender from recovering interest under a promissory note—despite the note's usury savings clause—because the loan became usurious after the lender attempted to charge 27.5% interest at the default rate after the defendants defaulted. In this regard, the *Karel* decision is in line with the second line of cases from other jurisdictions, in which state courts have held that a usury savings clause may negate a finding of criminal intent where the loan is not usurious at the outset of the loan transaction, but becomes usurious after the lender attempts to enforce a usurious default rate after an event of default. But a usury savings clause will not immunize the lender from criminal liability if the loan is "facially usurious" from the inception of the transaction. (See footnote 27, *supra*.)

Karel is also distinguishable, however, because in contrast to the situation in *Karel,* where the lender initially charged a lawful interest rate but then charged a higher, unlawful rate after the borrowers defaulted, Soaring Pine's loan documents "on their face" provide for "interest" at

the illegal and criminally usurious rate of 33% per annum from the outset of the loan transaction. Accordingly, under the wrongful conduct rule Soaring Pine is barred from any recovery (principal, interest, legal fees, costs, or other fees) as a consequence of it violation of Michigan's criminal usury statute. *Scalici, supra; Wellman, supra.*

V. CONCLUSION AND REQUESTED RELIEF

For all of these reasons, Soaring Pine's Complaint should be dismissed with prejudice, and Borrower "shall" be awarded its legal fees and court costs in accordance with MCL § 438.32.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018, I electronically filed the foregoing document with the Clerk of the Court using the TrueFiling electronic filing system, which will send notification of such filing to all counsel of record.

By: /s/ Steven M. Ribiat
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STATE OF MICHIGAN

IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

APPENDIX – VOLUME II
PLAINTIFF/COUNTER-DEFENDANT/CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 18, 2022

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EXHIBIT 3

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT
(BUSINESS COURT)

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff,

Case No.: 2018 – 163298 - CB
Hon. Wendy L. Potts

v.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, **PARK STREET GROUP, LLC**, a Michigan Limited Liability Company, **DEAN J. GROULX**, an Individual,

Jointly and severally,
Defendants.

_____/

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_____/

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

Soaring Pine Capital Real Estate and Debt Fund II, LLC ("Plaintiff"), by and through its attorneys, Simon PLC Attorneys and Counselors, states for its Reply Brief as follows:

A. RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION.

Plaintiff filed a four count complaint against Defendants on January 18, 2018 seeking to recover $1,217,821.07, plus interest and costs, related to a commercial loan that the defendants failed to repay. The first three counts of the complaint state a cause of action for breach of multiple different contracts (Count I – promissory note, Count II – guaranty, Count III- guaranty) and the fourth count seeks appointment of a receiver.

In response, Defendants filed the instant February 14, 2018 Motion wherein they readily and completely admit that they entered into and signed the loan documents, that they received the One Million Dollars from Plaintiff, and that they failed to repay the loan. Instead of repaying Plaintiff, Defendants are asking the Court to ignore their own admissions and instead make a finding that they owe Plaintiff *nothing*.

The standard of review for a motion under MCR 2.116(C)(8) is entirely absent from Defendants' brief save for a footnote concession that Plaintiff's factual allegations are to be considered as true. As explained by our Supreme Court in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999),

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [Citations and quotation marks omitted.]

The Court is left to guess where Plaintiff "has failed to state a claim on which relief can be granted," as well as where Defendants have met their burden to establish that no factual development could possibly justify a recovery by Plaintiff. Despite this long standing and well recognized standard of review under MCR 2.116(C)(8), Defendants

elected to provide the Court with 19 pages of briefing on factual background - outside of the pleadings - wherein they purport to detail a defense to contract which they label with tantalizing words like “criminally”, “unregulated”, and “predatory.” Defendants’ attorneys propose to be Defendants’ expert witness on the mathematical calculation of interest, as well as Defendants’ fact witnesses as to a host of issues, all wrapped up concisely in a motion on the pleadings.

Defendants’ motion must be denied.

In between these fact issues raised outside of the pleadings by Defendants’ attorneys, are each and all of the necessary judicial admissions of Defendants conceding that Plaintiff has pleaded each of the essential elements of a valid contract: *“(Plaintiff) loaned $1 million to Borrower under a 1-year term note…*” (Defendants’ Brief at Page 2.) “A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.” *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). “In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). The court may grant the motion under MCR 2.116(C)(8) only when the claim, on the pleadings alone, is so clearly unenforceable as a matter of law that no factual development could possibly justify the right to recovery. *Abel v Eli Lilly & Co*, 418 Mich 311, 323 (1984).

Plaintiff's complaint specifically identified each loan contract, each guaranty, the signators, the amounts, the dates, and balances now due. Defendants admit what Plaintiff’s complaint states: there were contracts and Defendants did not make

payments thereunder, nor did Guarantors honor their guarantees. Defendants admit that the contract contains a usury savings clause. Plaintiff says it is owed $1,217,821.07 plus interest and costs. Plaintiff has absolutely stated three causes of action for Breach of Contract by Defendants. Defendants' motion should be denied.

B. DEFENDANTS' USURY ARGUMENT MUST ALSO FAIL; MCR 2.116(C)(I)(2).

Defendants claim to have met their burden to establish that Plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Defendants' (C)(8) motion for summary disposition is really a disguised C(10) motion which appears designed to avoid at all costs any inevitable discovery of statements, affidavits or testimony from Defendant Dean J. Groulx regarding his personal misconduct with regard to this matter. Plaintiff will accept Defendants' extension of the opportunity under MCR 2.116(C)(I)(2) for Plaintiff to rebut and dispose of each of Defendants' arguments and also ask the Court to grant summary disposition to Plaintiff pursuant to MCR 2.116(C)(10) as it should appear to the Court that except as to the amount of damages, that Plaintiff, rather than Defendants, is entitled to Judgment in this simple breach of contract action.

The Defendants in this action have taken One Million Dollars from the Plaintiff for which they refuse to account. Despite their attempts to deceive the court otherwise, since origination in September 2016 the Defendants have made only eight (8) monthly interest payments to Plaintiff totaling $141,510.51 (**Exhibit 1**). After July 2017, the Defendants ceased making any payments at all, in default of the terms of the note and other loan documents. A Michigan limited liability company may agree in writing to pay any rate up to 25% simple interest per annum. MCL 450.4212 and 438.41. It is evident from the instant motion that the Defendants seek to enlist this court to assist them in

completing their intended plans to re-characterize the nondefault interest amount as a thirty three percent interest rate. This court should reject that effort as well. According to Defendants, the "*(Plaintiff) is barred from any recovery (principal, interest, legal fees, costs, or other fees) as a consequence of it (sic) violation of Michigan's criminal usury statute.*" Defendants' effort to dispense with filing an answer, dispense with any fact finding by the Court, and instead proceed to a result on the pleadings that would unjustly enrich them is not warranted by existing law nor the extension, modification, or reversal of existing law.

Notwithstanding Defendants' peculiar assertions to the contrary, Defendants are not a "necessitous borrower" needing rescue from extortion and outrageous demands from a lender writing "usurious loans with impunity". Instead, the evidence in this action would show that Dean J. Groulx, a licensed attorney, boasted and inflated the credentials and assets of Defendants, to the detriment of Plaintiff, while encouraging Plaintiff to make a lending decision favorable to Defendants (**Exhibit 2**). The evidence in this action would further show that Defendant Dean J. Groulx even offered to draft the very loan documents of which he now complains (**Exhibit 3**). For Defendants and their attorneys to appear before this Court and allege that Plaintiff has failed to state a claim – in a contract action – on the basis that Defendant Dean J. Groulx and his companies need protection from the repayment demands of Plaintiff is absurd.

In their efforts to misstate the law and effectively steal One Million Dollars from Plaintiffs, Defendants cite the Court to multiple unpublished opinions. Each of those cases is factually distinguished from the instant case; importantly, each deals with unsavory actors. Both *Wellman* and *Scalici* deal with the notorious Michigan criminal Ponzi scheme of Daniel Broucek and Pupler Distributing Company. Defendants

apparently seek to align themselves favorably with this Ponzi scheme. As the Bankruptcy court found, “These investors would provide Broucek with money to invest in the form of official checks, which he would deposit at the Breton Branch. Broucek would then issue checks of principal and interest to these investors from the Breton Branch Pupler account. These checks were given to Paolo Scalici, the “manager” of these investors’ loans. Scalici took the checks to the 44th Street Branch and deposited them into each investor’s account.” (**Exhibit 4**). Scalici and Wellman would lend money to Pupler in exchange for a promissory note and a post-dated check. The *Wellman* “loans” had 17 day terms. “When calculated, the simple interest rate for both loans amounts to over 100% per year.” *Wellman*, at page 2. After this Ponzi scheme fell apart, Bank One refused to honor the postdated checks when presented for payment. Bank One’s motions for summary disposition argued successfully in each case that Wellman’s and Scalici’s claims were based on losses sustained after their criminally usurious loans to Pupler and Broucek became uncollectible, and were therefore unenforceable under the wrongful conduct rule. Despite the fact that Pupler and Broucek were the architects of the Ponzi scheme, the *Wellman* court noted that even Pupler was a victim of these particular plaintiffs, stating “(i)n any event, whether the victim of the usurious lender, which in this case is Pupler, has a remedy is irrelevant to determining whether Plaintiff’s conduct was illegal, and therefore subject to the wrongful conduct rule.” *Wellman*, at Page 3 (emphasis added). Defendants are arguing that the collusion between the plaintiffs and defendants in *Scalici* and *Wellman* is comparable to the reasonable business conduct by Plaintiff herein. Defendants in the instant case unashamedly ask this Court to factually analogize Plaintiff’s one-year term, facially non-usurious loan to Defendants, designed to aid Defendants’ allegedly honorable objective

to rehabilitate tax sale houses, with the opinions resulting out of a notorious West Michigan Ponzi scheme with greedy co-conspirator litigants charging 100% interest on 17 day terms.

The *Wellman* and *Scalici* notes contained no stated interest rate and instead purported to pay an amount undeniably far in excess of 25% simple interest. Plaintiff herein did not charge Defendants a rate of interest that exceeds 25% simple interest per annum. The performance of the loan by Defendants within one year would not result in an annual return to Plaintiff of greater than 25% interest. Defendants allege the contrary position and in support of their position make three separately incorrect arguments:

First, Defendants allege that the capitalizing of the first months' accrued interest charges "*effectively resulted in an additional 1.00 basis points added to the yield on the principal amount of the loan or an effective rate of 21% per annum when added to the 20% interest stated in the loan agreements*." Defendants apparently misunderstand the difference between simple interest and compounding interest.

> ***438.41 Criminal usury; definition; penalty.*** *A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.*

As a preliminary matter Defendants mislead the court that the first three months (Defendants' Brief at Page 8) were capitalized when the Note (see **Exhibits 5 and 6**) clearly says this applies to months one and two, only. Next, and contrary to the simple interest provision of the statute, Defendants have used a compound interest method to come up with their unfounded claim of criminal usury. "When construing statutory language, we must read the statute as a whole and in its grammatical context, giving

each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 S Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). The loan documents do not exceed the statutory cap in terms of simple interest. "Simple interest" is universally recognized as the sum of principal multiplied by the interest rate multiplied by the term of loan (P x R x T). "Compound interest", as advanced by Defendants, is universally understood as "interest on interest", wherein interest accrues on the principal and the accumulated outstanding interest of previous months. MCL 438.41 concerns itself with simple interest only. For whatever reason Defendants' attorney adopted a compound interest formula which is not referenced in the statute.

While alleging the case to be both on point as well as distinguishable from the instant case, Defendants cite this Court to an unpublished opinion in *Karel v JRCK Corp* wherein the lender attempted to charge a 27.5% default interest rate that was specifically set forth in the contract. The net default interest rate in the instant case is specifically limited to 25%. The *Karel* court also dealt with an instrument that on its face "sought a criminally usurious amount of interest." *Karel* at page 1. The note herein is not on its face usurious nor does it seek a usurious interest rate. The *Karel* court itself stated: "(t)o find the promissory note to be usurious on its face, we would have to ignore the qualifications regarding the interest rate." *Karel,* at page 2.

Second, Defendants allege that the "success fee" of $1,000.00 per property that was to be paid by Defendants to Plaintiff upon the sale of each renovated home is in fact "interest". It must not go ignored that Defendants have never paid a single

"success fee" to Plaintiff. The August 12, 2016 Loan Agreement (see **Exhibit 7**), as amended, at section 9.2 requires the payment of the success fees. Although the loan was originally secured by forty (40) total properties (**Exhibit 7 and 8** – "Exhibit A" thereto), the record reflects that Defendants have allowed and can't explain the transfer of title to thirty (30) of them, while never paying a success fee to Plaintiff (**Exhibit 9**).

The 2015 Michigan Attorney General Opinion (#7283) cited and relied upon in their motion by Defendants (**Exhibit 10**) resolves this issue in Plaintiff's favor when it states in pertinent part:

> *"A financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits will not violate usury laws so long as the lender's profit is contingent, and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement."*

In attempting to characterize the "success fee" as interest rather than repayment of principal, Defendants must first convince this Court that those fees were certain to be paid to Plaintiff by Defendants. In the words of the several courts cited by the Attorney General, in the instant case there is "a real element of risk" with respect to Plaintiff ever seeing a payment from Defendants.

> *Usury law is subject to various exceptions, including an exception developed at common law called the "interest contingency rule." . . . interest that exceeds the legal maximum is not usurious when its payment is "subject to a contingency so that the lender's profit is wholly or partially put in hazard," provided "the parties are contracting in good faith and without the intent to avoid the statute against usury." . . . This rule has been followed by courts in New York and other states. (citations omitted) To determine whether the rule applies, courts will "'look to the substance rather than to the form' of the transaction to determine whether the lender's profits are exposed to the requisite risk."*

The Attorney General concedes that only one reported Michigan case from 1900 exists on point. The *Scripps v Crawford* court "did not expressly discuss the interest contingency rule" but "it approved an agreement to use profits as payment on interest."

Similarly, Plaintiff and Defendants herein intended to apply a portion of revenues from sales of the renovated properties to pay down the loan. This intention is confirmed by Defendant Dean J. Groulx in his email of June 9, 2016 (see **Exhibit 11**):

> *"The company would purchase an initial package of 20 to 30 homes each month and ramp up from there, turning over the loan and net sale proceeds as we rehab and resell the properties. Our typical time line is 60 to 90 days from acquisition to resale."*

This admission demonstrates Defendants' intent to repay the loan with proceeds of the sale, whether they are called pay downs, principal installments, or "success fees".

As this Court knows from its findings at the hearing on the motions to appoint a receiver and for injunctive relief, the only parties who have experienced any *success* in this loan transaction are Defendants. Defendants have obtained over One Million Dollars from Plaintiff, which they refuse to account for, and cannot explain their use of, all while they allowed the assets pledged to secure the loan to be dissipated. Indeed, Defendants are asking this Court to magnify Defendants' *success* by allowing them to retain the One Million Dollars – clearly unjust enrichment to the detriment of Plaintiff.

Based upon Defendants' current conduct in attempting to be relieved entirely of the One Million Dollar obligation, their prior conduct of never paying a success fee at all, and the transfer or encumbrance of thirty of the original forty properties in contravention of the loan documents, it is abundantly evident that the sale of the properties and the generation of any success fees was never more than speculative. Defendants could have sold none, or all forty. Defendants could have substituted all forty and sold those replacement forty as well. Plaintiff's receipt of a success fee was contingent on a property having a willing and able buyer, and Defendants being honest with Plaintiff about the disposition of the property. Despite such uncertainties, Defendants invite the Court to re-write the plain unambiguous terms of the contract by arguing that the

success fees should be treated as interest imagining an "*effective annual rate of return to Soaring Pine [of] 28%*". Based on the language of the Loan Agreement and the ensuing course of events showing bad faith by Defendants, the Court should find that the "success fees" were by no means certain and therefore not interest.

Third, Defendants allege that the "commitment fee" is also "interest." In support, Defendants rely on a single purported precedent and two Attorney General Opinions from the 1980s. Defendants incorrectly conclude that *FDIC v Kramer* disposes entirely as to the requirements of Michigan law on the definition of a "loan commitment fee" and also its application to this case. The opinion in *Kramer* (**Exhibit 12**) makes absolutely no reference to definition of this particular term, nor resolution of this alleged issue in favor of Defendants (indeed, the court in *Kramer* found that the commitment fee was not hidden interest.) Further absent from Defendants' analysis of these allegedly applicable cases is the fact that all three specifically deal with consumer loans; both OAG opinions deal only with residential mortgages.

In falsely declaring the "wrongful conduct rule" applicable, the Defendants have actually misstated to the court the nature and purpose of this particular fee in the loan. The precedents and arguments relied upon by Defendants deal with a situation where a lender might charge a fee that a homeowner would pay out of its pocket to secure certain favorable loan terms for a period of time prior to actually closing on a home loan. Those circumstances are not present in the instant case. Instead, the "commitment fee" of $25,000.00 that was paid at closing on August 12, 2016 (**Exhibit 13**), and the additional $25,000.00 paid at the second closing on September 23, 2016 (**Exhibit 14**) were not paid by Defendants at all. Instead, the fees were debited from the loan

principal amounts. Two payments from principal are necessarily not interest on that same principal.[1]

Defendants in the instant action alleged they were sophisticated commercial businesses managed by an experienced attorney. The commercial loan transaction in the instant case is a complicated transaction with multiple collateral interests, requirements for oversight and reporting, and requirements for substitute collateral. That costs were and would be incurred by Plaintiff for the supervision of Defendants' performance on an ongoing basis over the term of the loan is no more clearly established than by the fact that Defendants actually admit their failure to perform the requirements of the loan. The Defendants' reliance on protections for homeowners flies in the face of legislative intent to create a corporate interest exception:

> More importantly, inasmuch as the usury laws "protect the necessitous borrower," they are meant to even the weight of bargaining power between lender and borrower, to protect "desperate and unsophisticated borrowers" from "loan shark [s]." Allan, 359 N.W.2d at 242 (quoting Schneider v. Phelps, 41 N.Y.2d 238, 242-43 (1977)). The corporate exception recognizes that corporations typically enter loan agreements for business purposes, advised by expensive corporate lawyers, and are thus in a better position to bargain with lenders for fair rates, and to assess their own ability to afford high rates of interest. In any event, the record shows nothing suggesting that Cadillac was in desperate straits when it sat down with the Bank to negotiate the loan, or that the alleged overcharges resulted from the Bank's taking advantage of loan terms Cadillac missed due to a lack of sophistication. As both the Bankruptcy Court and the District Court correctly noted, Cadillac's proper remedy is in contract if it believes Northwestern charged it more than the agreed-upon rate. If the usury law ought be stretched to accommodate "necessitous" corporate borrowers, Cadillac should suggest this to the Michigan legislature, not at the bar of this court. *In Re Cadillac Wildwood Development v. Northwestern Savings and Loan*, 995 F. 2d 1066 (1993).

Defendant Dean J. Groulx personally negotiated (**Exhibit 15 and 16**) the payment of the commitment fee at closing as defined in section 1.6 (See **Exhibits 7 and 8**) that he

[1] The court should also note that Defendants even were allowed to pay $11,506.85 in past due interest out of Principal in the second loan. – Exhibit 14.

now seeks to avoid paying. "In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). The Court's rewriting the plain terms of this simple interest contract is not a remedy available to Defendants. A court should enforce a contract as written:

> "The circumstances under which a contract provision can be said to violate law or public policy are likewise narrow. As we stated in Rory, "In ascertaining the parameters of our public policy, we must look to 'policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.' " That a contract provision fails to comport with the personal predilections of the majority of the deciding tribunal about what is reasonable or fair does not make the provision violative of law or public policy. Judicial notions of reasonableness are not "'clearly rooted in the law' " and are therefore not a valid basis for refusing to enforce an unambiguous contract provision" Defrain *v State Farm Mutual*, 491 Mich, 359, 373 (2012).

Defendants also attempt to mislead the court that the "commitment fee" is interest charged in the promissory note (**Exhibits 5 and 6**). It never appears in the promissory note, and it is instead set forth in Sec 1.6 of the Loan Agreement (see **Exhibit 7**). Defendants once again ask the Court to re-write the plain unambiguous terms of a contract to provide for a different than intended result.

In summary, none of Defendants' three (3) efforts to mathematically increase the interest rate in the plain unambiguous contracts from 20% to 33% are accurate. The Court should reject all three arguments. For the reasons stated herein, this Court should also determine that: A. Defendants are not acting in good faith; B. the note contains a valid and enforceable savings clause; C. the guarantors have waived the defenses they now purport to advance; and D. there is no precedent or public policy to support Defendants' position that this Court should unjustly enrich them with One Million Dollars:

A. <u>Defendants have unclean hands and are not acting in good faith</u>.

It should not pass this Court's review that the good faith of the parties in their contract is paramount. At all times acting in good faith Plaintiff made a commercial loan in the ordinary course of business. Plaintiff had a close relationship with Defendant Dean J. Groulx and believed it was supporting Defendants' alleged goal to rehabilitate distressed tax sale houses. Plaintiff was damaged by its reliance on the false claims of Defendants regarding Defendants' intentions with regard to this loan.

"[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v. United of Oakland, Inc.,* 193 Mich App. 146, 152 (1992). Defendants do not appear to have ever intended to honor the terms and provisions of the Loan Agreement or their guarantees. There is ample evidence that Defendants have never repaid any principal, have never paid a success fee, have permitted conveyance of property pledged as collateral, and now indicate that the ultimate objective is never to repay one dollar of the principal owed to Plaintiff.

B. <u>The contract contains a savings clause</u>.

Defendants dismiss the fact that all parties to this contract agreed to include a usury savings clause in the Note (see **Exhibit 5 and 6**).

> Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid or payable by the Borrower in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Note. If Lender shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of

> this Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall become due and payable thirty (30) days from the date of such determination.

In the plain terms of this contract Plaintiff never seeks, nor demands, payment of interest in excess of what is allowable by law. In the plain terms of this contract Defendants never agreed to pay, nor are required to pay, interest in excess of what is allowable by law. Defendants concede in their motion that that there is no Michigan precedent prohibiting such provisions yet they ask the Court to step in and create ambiguity in this contract where none exists, on the basis of Defendants' attorney's apparent belief that Plaintiff's "*usury savings clause is inconsistent with the Michigan criminal usury laws and unenforceable here*." The terms of this contract are plain and unambiguous; their meaning is clear. "Where the language of the writing is not ambiguous the construction is a question of law for the court on consideration of the entire instrument." *In Re Landwehr's Estate*, 286 Mich. 698, 702, 282 N.W. 873, 874 (1938) (quoting *Griffin Manufacturing Co. v. Mitshkun*, 233 Mich. 640, 642, 207 N.W. 814, 816 (1926). Courts are not to create ambiguity where none exists. Ibid.

Since there is no precedent for their position that a usury savings clause is *per se* prohibited in Michigan, Defendants make the leap to insist that this Court -- in a motion on the pleadings -- determine that the "wrongful conduct rule" necessitates a finding by this Court that this particular usury savings clause is prohibited in Michigan. But the wrongful conduct rule is historically applied in cases that include the concept of "contributory negligence". The flagship case for the rule is *Orzel v Scott Drug Co*, 449 Mich 550, 558 (1995). In *Orzel*, Plaintiff was a drug addict who developed a mental disability from his use of drugs. The court explained:

> *"The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct*

rule. To implicate the wrongful-conduct rule, Plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. Cases in which the wrongful-conduct rule has been applied include: Radikopf (illegal lottery); Manning (trespass and gambling); Cook (illegal contract); Budwit (murder); Piechowiak (embezzlement); Ohio State Life Ins Co (murder); Garwols (murder); McDonald (illegal contract); Pantely (perjury); Glazier (murder); Imperial Kosher Catering (arson)."

For the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the alleged illegal conduct and the asserted damages. Plaintiff' does not claim that its damages consist primarily of Defendants' failure to pay interest in any amount. Plaintiff's damages arise from the One Million Dollars that Defendants took from Plaintiff and have not repaid to them, from the loan proceeds allegedly being used to buy real estate without any accountings and reports in support, from not being repaid when property was sold, and from not receiving substitute collateral when property was sold. Plaintiff's damages also result from breach of the mortgage instruments. Defendants have conveyed pledged property in violation of the mortgage, and have permitted waste upon the collateral property such that a Receiver has been appointed by the Court.

C. <u>The Guarantor Defendants have waived the defenses they now advance</u>.

Defendants ignore the fact that the guaranty contracts in the pleadings are distinct from the loan agreement and note. Defendant Dean J. Groulx and Defendant Park Street Group, LLC cannot plead the usury defense of another party. Indeed, the guarantor Defendants have specifically waived any such defenses. The Guarantees (**Exhibit 17 and 18**) specifically include the following comprehensive waiver provisions upon which Plaintiff is entitled to rely:

… the Guarantor, hereby unconditionally and absolutely guaranteed to the Lender or other person paying or incurring the same, irrespective of the validity, regularity or enforceability of any instrument, writing, arrangement or credit arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of (a) any and

> *all indebtedness, obligations, and liabilities of every kind and nature of the Borrower to the Lender…*
> …
> *The Guarantor expressly agrees that the Guarantor shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing the Guaranteed Debt, whether or not the liability of the Borrower or any other Obligor for the deficiency is discharged pursuant to statute or judicial decision*.
> …
> *Unless and until all of the Borrower's Obligations have been paid in full, no release or discharge of any other person, whether primarily or secondarily liable for and obligated with respect to the Borrower's Obligations … shall release or discharge the Guarantor, or any other guarantor of the indebtedness…*

Contract language should be given its ordinary and plain meaning. When two parties have entered into a written contract and have expressed their intention that the writing constitute the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 409-410; 285 NW2d 770 (1979) (citing *3 Corbin on Contracts, § 573*); See also*, Michigan National Bank v Laskowski*, 228 Mich App 710, 714-715, 580 NW2d 8 (1998). A contracting party has a duty to examine the contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty. *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 130; NW2d (2005).

D. <u>There is no Michigan case law that holds that the entire loan is void if the usury statute is violated.</u>

Defendants expand their argument regarding the "wrongful conduct rule" to claim that a usurious interest rate voids the entire loan, allowing them to keep the One Million Dollars taken from Plaintiff. Defendants rely on *Karel,* even though that court held "… the trial court did not err in permitting plaintiff to recover principal." *Karel,* at Page 3. Defendants also rely on *Scalici* for a passing reference to recovery of principal, even

though the *Scalici* court clearly wanted to punish plaintiffs for knowingly participating in a fraudulent financial scheme:

> *"Plaintiffs contend that, because MCL 438.32 prevents a usurious lender from recovering usurious interest charges, it must necessarily permit the recovery of the principal. Hence, MCL 438.32 implicitly permits recovery against defendants. We disagree."*

Scalici is clearly distinguishable; the court itself stressed that the issuers of the usurious notes were the party seeking relief: "Indeed, plaintiffs' argument relies solely on their own violations of the usury statute to implicitly find authority for recovery of their losses." *Scalici at page 7.* The 2015 Michigan Attorney General Opinion (#7283), also relied upon by Defendants, analyzing the law on usury matters in this state over nearly 100 years but makes no reference at all to the 2005 unpublished opinion in *Scalici* with regard to a prohibition on the recovery of principal.

The legislature spoke when it passed MCL 438.41, the criminal usury statute, and it already specifies all penalties: "Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both." The statute does not state, as Defendants invite this Court to find, that the principal of the loan cannot be recovered. Furthermore, MCL 438.32 plainly says:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

When interpreting a statute, "our goal is to give effect to the intent of the Legislature by focusing on the statute's plain language." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134; 860 NW2d 51 (2014). There is no language in the statute denying a

lender the recovery of principal. If the legislature intended to prohibit recovery of principal it would have said so.

Defendants essentially ask this Court to do equity for them – in their C8 motion – and excuse them for repayment of a One Million Dollar loan. Plaintiff denies that Defendants have acted in good faith and have clean hands in this matter. This Court should find that Defendants have clearly forfeited the right to any such extreme and unprecedented relief by virtue of Defendants' unclean hands. In *Rose v Nat'l Auction Group*, 466 Mich 453, 463 (2002), the Michigan Supreme Court reiterated the rule:

> If there are any indications of overreaching or unfairness on [an equity plaintiff's] part, the court will refuse to entertain his case, and turn him over to the usual remedies. [quoting from *Rust v Conrad*, 47 Mich 449, 454; 11 NW 265 (1882)].

This maxim is "one of the elementary and fundamental conceptions of equity jurisprudence." *Id*. It "is designed to preserve the integrity of the judiciary." *Stachnik v Winkel*, 394 Mich 375, 382 (1975). This Court described the doctrine in *Rose*, S*upra.* at 463, as:

> a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, *however improper may have been the behavior of the defendant*. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' [Cites omitted; Italics in original].

CONCLUSION

Defendant Dean J. Groulx came to Plaintiff boasting and overinflating his trustworthiness, experience and skill in obtaining tax foreclosed properties, repairing them, and then marketing them for sale. Plaintiff was familiar with Dean J. Groulx, who had represented affiliates of Plaintiff in the past. Plaintiff extended Defendants One

Million Dollars relying on the representations of Defendant Dean J. Groulx and the promises of adequate collateral and repayment within one year. Defendants have performed none of their contractual promises, yet insist that they are entitled to retain One Million Dollars.

As indicated in the first section of this Brief, Plaintiff's pleading has plainly stated a cause of action for breaches of the relevant contracts. Pursuant to MCR 2.116(C)(I)(2) Plaintiff has also proceeded in the second section of this Brief to rebut and dispose of each of Defendants' spurious usury arguments and accordingly asks this Court to grant summary disposition to Plaintiff pursuant to MCR 2.116(C)(10) as it should appear to the Court that except as to the amount of damages, Plaintiff, rather than Defendants, is entitled to Judgment in this simple non-usurious breach of contract action.

Respectfully submitted,

SIMON PLC
Attorneys & Counselors

/s/ Steven A. Morris
Steven A. Morris (P59497)
Attorneys for Plaintiff
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Bloomfield Hills, MI 48304
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🖷 (248) 720-0291
💻 smorris@simonattys.com

Date: April 10, 2018

EXHIBIT 1

SPC Real Estate & Debt Fund II

TRANSACTION LIST BY CUSTOMER

All Dates

DATE	TRANSACTION TYPE	NUM	POSTING	MEMO/DESCRIPTION	ACCOUNT	AMOUNT
PARK STREET GROUP REALTY SERVICES, LLC						
12/30/2016	Payment		Yes		10000 Regular Checking Account - mBank	17,226.85
02/02/2017	Payment		Yes		10000 Regular Checking Account - mBank	17,226.85
02/24/2017	Payment		Yes		10000 Regular Checking Account - mBank	17,226.85
04/28/2017	Payment		Yes		10000 Regular Checking Account - mBank	17,226.85
04/28/2017	Payment		Yes		10000 Regular Checking Account - mBank	18,143.28
05/23/2017	Payment		Yes		10000 Regular Checking Account - mBank	18,153.28
06/23/2017	Payment		Yes		10000 Regular Checking Account - mBank	18,153.28
07/26/2017	Payment		Yes		10000 Regular Checking Account - mBank	18,153.27
Total for PARK STREET GROUP REALTY SERVICES, LLC						**$141,510.51**

EXHIBIT 2

Gmail

Dean Groulx <dean.groulxlaw@gmail.com>

Park Street Group Proposed Use of Loan Proceeds

Dean Groulx <dean.groulxlaw@gmail.com> Wed, Aug 31, 2016 at 11:40 PM
To: Paul Schapira <pschapira@soaringpine.com>

Dear Paul:

I apologize for the delay in forwarding the offer to the Detroit Land Bank Authority but, as I have mentioned, David and the rest of the staff are in the process of performing "due diligence" on 5,000 of the more than 14,000 residential properties being offered through the Wayne County Tax Foreclosure Auction, beginning next month.

David and our sales staff were still inspecting properties until late this evening, but David returned to the office about 30-minutes ago to provide me with a copy of the offer from his files.

As part of our "due diligence," we inspect or visit each of the 5,000 properties. Then, as we eliminate properties from our "target" list, we will perform title searches, review tax and water records, and verify with the building department whether there are any outstanding code violations for the properties. Our goal is to narrow our target list to 250 to 350 homes (from an initial pool of 5,000) for potential acquisition at the auction.

As a result, I have barely talked to David or the staff, much less seen them, in the last few weeks. They tend to work out of our Detroit office during this time, while I work in our Bloomfield Hills office exclusively.

I apologize if I am repeating myself but I thought it would be helpful if I explained my proposed use of the loan proceeds.

The primary purpose of the loan proceeds is to purchase roughly 250 select residential properties at the auction, rehabilitate, and then resell them.

(I also had contemplated purchasing properties from the land bank but as the closing on the initial tranche of the loan was delayed, it became less attractive to acquire properties from the land bank prior to the auction. Thus, I presented an offer to purchase only 12 properties from the land bank after we closed on the first tranche of the loan on August 12th.)

The basic premise is to acquire 250 properties at the auction and, then, rehabilitate them at the rate of 20 per month. At that rate, I could rehabilitate the entire pool of 250 homes in roughly 12-months.

The target purchase price is $2,500.00 for each house. Hence, total acquisition costs are projected to be $625,000.00 (250 properties x $2,500.00 each).

The auction runs from the first week in September through the second week in October. Thus, by mid-October, I hope to have acquired a year's worth of inventory from the auction (although, I will continue to purchase properties from the land bank as well if the opportunity is right).

The critical component is the "float" for the rehabilitation costs.

I am estimating that the average cost of repairs and improvements is $20,000 per house.

It can take up to 90 days to complete renovations and to perform lead-based paint inspections and to obtain certificates of occupancy from the city.

So, if I begin renovations on the first 20 homes in month 1 after acquisition, and, then, on 20 homes each month thereafter, I would need to "float" -- or cover the costs of repairs and renovations -- on 60-homes during the first 90 days before the initial 20 homes are certified and ready for sale. At an average costs of $20,000 in repairs and improvements, this would mean that the "float" for 60-homes during the initial 90-day period could be as much as $1,200,000.00 (60 x $20,000.00).

$1,200,000.00 plus $625,000.00 (the estimated costs of acquisition) amounts to $1.825,000.00. This is why when you approached me about increasing the credit facility, I had requested $2,000,000.00.

As properties purchased at the auction were rehabilitated and sold, I would then use the sale proceeds to attempt to purchase additional properties from the DLBA.

I am tentatively scheduled to meet with the executive director of the DLBA, Carrie Lewand-Monroe, sometime within the next three weeks. In order for me to be able to persuade her to allow PSG to purchase properties from the land bank "in bulk" in select neighborhoods or areas, I need to be able to demonstrate that PSG has the wherewithal for sustained development in the city.

If you have any questions or if I can be of any further assistance, please feel free to contact me.

Thank you, again, for your consideration.

Best regards,

Dean J. Groulx
Law Offices of Dean J. Groulx, P.C.
100 W. Long Lake Road Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500 - Telephone
(248) 644-5640 - Facsimile
dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

DLBA Offer 8.22.2016 (final).pdf
115K

Admitted to Practice in Illinois and Michigan

On Thu, Jun 9, 2016 at 11:38 AM, Michael Evans <MEvans@atlasoil.com> wrote:

Thanks Dean. I have most of the detail together and have briefed Sam already on some of the details. I will get back with you in short order to work towards a deal.

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Thursday, June 9, 2016 11:33 AM
To: Michael Evans <MEvans@atlasoil.com>
Cc: deangroulx@yahoo.com; Paul Schapira <pschapira@soaringpine.com>; Faiz Simon <vsimon@spcrealestate.com>
Subject: Re: Land Bank

Mike:

Thank you, again, for your consideration.

This transaction would be done through Park Street Group Realty Services, LLC, a Michigan limited liability company. This a new company, and is a licensed real estate company.

Since 2008, I have been involved in more than 1500 residential property transactions in the Tri-County area, and in parts of Ohio and Indiana.

Our core business has been to buy and sell performing and non-performing notes through affiliated companies.

More recently, we have been acquiring residential properties, rehabbing, and then reselling them as rental or income properties to a sundry of domestic and foreign investors looking for higher returns than they can reasonably expect to earn through more traditional investment vehicles.

We are approved to purchase directly from the Detroit Land Bank Authority; although, we purchase from other sources as well.

I am looking for a 750k loan on a 1 year term note to launch a new project with the Land Bank and the City of Highland Park through Park Street Group Realty Services, LLC.

The funds would be used to fund acquisitions and improvements to the properties, draws, and other operating expenses.

On average, our cost to purchase and rehab a typical 1200 square foot bungalow in Detroit is 15k; although, costs vary depending on the size and location of the properties. We then resell the homes for between 30k to 40k; although, again, the sales price can vary for a variety of reasons.

The company would purchase an initial package of 20 to 30 homes each month and ramp up from there, turning over the loan and net sale proceeds as we rehab and resell the properties. Our typical time line is 60 to 90 days from acquisition to resale.

If you have any questions or need any more information, please feel free to contact me.

Thank you, again.

Best regards,

Dean

On Jun 8, 2016 12:47 PM, "Michael Evans" <MEvans@atlasoil.com> wrote:

> Dean,
>
> Great meeting with you yesterday. I have given the Team and Sam an overview of the deal and everyone is very positive about it. Can you share with me the entity name and some general background to put in a presentation. I would also like to get the pictures you talked about yesterday so I can put those in the presentation.
>
> As soon as I can get that together I will be formally presenting it to Sam and providing my recommendation for moving forward. We can then get our term sheet together and get our timeline to get this moving.
>
> Thanks...
>
> Michael J. Evans | EVP/COO
> Simon Group Holdings
> mevans@atlasoil.com<mailto:mevans@atlasoil.com>
> V 313.662.3504 | C 313.220.2463 | F 313.332.4924

335 E. Maple, Birmingham, MI 48009

[simon-group-holdings-logo]

EXHIBIT 3

Jean Masserant

From: Michael Evans <MEvans@atlasoil.com>
Sent: Friday, July 01, 2016 12:53 PM
To: Dean Groulx; Edwin Herbert; John W. Polderman
Subject: RE: Land Bank

Skip/John,

Can you please provide an update? We need to get this done as we are wanting to buy some houses very soon.

Thanks...

Michael J. Evans | EVP/COO
Simon Group Holdings
mevans@atlasoil.com
V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924
335 E. Maple, Birmingham, MI 48009
Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Friday, July 1, 2016 11:37 AM
To: Michael Evans <MEvans@atlasoil.com>
Subject: Re: Land Bank

Good morning, Mike:

Any update?

Best regards,

Dean

On Jun 29, 2016 4:15 PM, "Dean Groulx" <dean.groulxlaw@gmail.com> wrote:

Thank you, Mike

Dean J. Groulx
Law Offices of Dean J. Groulx, P.C.
100 W. Long Lake Road Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500 - Telephone
(248) 644-5640 - Facsimile
dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Wed, Jun 29, 2016 at 12:37 PM, Michael Evans <MEvans@atlasoil.com> wrote:

I will call you shortly. Faiz is calling Polderman to see how quick he can get it done.

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Wednesday, June 29, 2016 11:44 AM

To: Michael Evans <MEvans@atlasoil.com>
Subject: Re: Land Bank

So, do you want me to still take a crack at drafting the loan papers?

Dean J. Groulx

Law Offices of Dean J. Groulx, P.C.

100 W. Long Lake Road Suite 102

Bloomfield Hills, MI 48304

(248) 644-5500 - Telephone

(248) 644-5640 - Facsimile

dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Wed, Jun 29, 2016 at 11:40 AM, Michael Evans <MEvans@atlasoil.com> wrote:

> He said he spoke with John Polderman this morning to do a draft but I want to get this done so we can move forward.

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Wednesday, June 29, 2016 11:40 AM
To: Michael Evans <MEvans@atlasoil.com>
Subject: RE: Land Bank

Yes, I will take a crack at it.

On Jun 29, 2016 11:36 AM, "Michael Evans" <MEvans@atlasoil.com> wrote:

Dean,

Do you want to take a stab at an agreement. Skip is suppose to get this done but I am concerned he is not going to hit the mark. If not I will get him to outsource as I want it done.

Thanks...

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Wednesday, June 29, 2016 11:28 AM
To: Michael Evans <MEvans@atlasoil.com>
Subject: Re: Land Bank

Good morning, Mike:

Do you think we can still finalize and fund the loan by the end of this week?

The deadline to redeem 2013 taxes is June 30th.

Beginning July 1st, I can offer to purchase homes directly from the treasurer for the full amount of the delinquent taxes. This gives me a chance to purchase some of the nicest homes available through the City/County before the properties are offered for public auction in September.

If possible, I would like to receive a set of the proposed loan agreements, so I have a chance to review them.

Thank you, again, for your consideration.

Best regards,

Dean J. Groulx

Law Offices of Dean J. Groulx, P.C.

100 W. Long Lake Road Suite 102

Bloomfield Hills, MI 48304

(248) 644-5500 - Telephone

(248) 644-5640 - Facsimile

dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Wed, Jun 22, 2016 at 11:43 AM, Dean Groulx <dean.groulxlaw@gmail.com> wrote:

> If possible, entire 750k upfront. We like to purchase in bulk in order to obtain largest discounts possible

Dean J. Groulx

Law Offices of Dean J. Groulx, P.C.

100 W. Long Lake Road Suite 102

Bloomfield Hills, MI 48304

(248) 644-5500 - Telephone

(248) 644-5640 - Facsimile

dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Wed, Jun 22, 2016 at 11:41 AM, Michael Evans <MEvans@atlasoil.com> wrote:

> Dean do you have a schedule of how / when you want the money (e.g. $100k in week 1, xx in week 2, etc....). An estimate is fine. Or are you looking to get the entire $750k up-front.
>
> Thanks...

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Wednesday, June 22, 2016 9:57 AM

To: Michael Evans <MEvans@atlasoil.com>
Cc: deangroulx@yahoo.com; Paul Schapira <pschapira@soaringpine.com>; Faiz Simon <vsimon@spcrealestate.com>
Subject: Re: Land Bank

Good morning, Mike:

I am following up to see whether there is anything more you need from me to complete the loan.

The first of the tax foreclosure sales through the City/County will begin the first week in July. I would like to get the loan in place to be able to purchase home at the initial foreclosure sale, if possible.

Thank you, again, for your consideration.

Best regards,

Dean J. Groulx

Law Offices of Dean J. Groulx, P.C.

100 W. Long Lake Road Suite 102

Bloomfield Hills, MI 48304

(248) 644-5500 - Telephone

(248) 644-5640 - Facsimile

dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Thu, Jun 9, 2016 at 12:43 PM, Dean Groulx <dean.groulxlaw@gmail.com> wrote:

> Thank you, Mike
>
> Dean J. Groulx
>
> Law Offices of Dean J. Groulx, P.C.
>
> 100 W. Long Lake Road Suite 102
>
> Bloomfield Hills, MI 48304
>
> (248) 644-5500 - Telephone
>
> (248) 644-5640 - Facsimile
>
> dean.groulxlaw@gmail.com

EXHIBIT 4

Scalici v. Bank One, NA, Not Reported in N.W.2d (2005)
2005 WL 2291732

2005 WL 2291732
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Paolo SCALICI and Victoria Scalici, Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo, Defendants-Appellees.
Theodore FORMAN, Thomas Fowler, Rodney McGrain, Juanita Mcgrain, James A. Ropicky, Susan Scalici, Bradley Wildberg, Kristan Wildberg, Bruce Ollman, and Susan Ollman, Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo, Defendants-Appellees.
Terry PALAZZOLO, Jessee Bays, and Gary Middleton, Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo, Defendants-Appellees.

No. 254632, 254633, 254634.
|
Sept. 20, 2005.

Before: SMOLENSKI, P.J., and MURPHY and DAVIS, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In these consolidated appeals, plaintiffs appeal as of right the trial court's dismissal of their claims with prejudice for failure to state a claim on which relief could be granted. MCR 2.116(C)(8). We affirm.

I. Facts and Procedural History

Plaintiffs' claims against defendants arose out of their participation in an investment scheme with Daniel Broucek, who was doing business under the name of Pupler Distributing Company (Pupler). Pursuant to the investment scheme, plaintiffs would lend money to Pupler in exchange for a promissory note and a post-dated check. Under the terms of the promissory note, plaintiffs would receive the principal amount of the loan along with a "financing fee" on the maturity date of the loan. The checks issued with the promissory notes were written for the full amount of the principal plus the "financing fee" and were post-dated to the maturity date of the loan. The post-dated checks were drawn on Pupler's account with defendant Bank One, NA (Bank One). By November of 2002, Pupler's account with Bank One was frozen and, after Broucek entered involuntary bankruptcy, plaintiffs were left holding worthless promissory notes and checks.

In February of 2003, plaintiffs filed their respective suits against defendants. Plaintiffs claimed they would not have "invested" with Pupler had it not been for the misrepresentations of Bank One's employees, including primarily the representations of defendant Amy Okoroafo, who was the banking center manager for one of Bank One's branches. Based on the alleged misrepresentations and other theories, plaintiffs argued defendants should be liable for the losses plaintiffs sustained as a result of investing in Pupler. In each case, Bank One responded by filing a motion for a more definite statement wherein it asked the court to require plaintiffs to attach copies of the notes and checks upon which plaintiffs based their claims, as required by MCR 2.113(F)(1). After plaintiffs filed amended complaints with copies of the promissory notes and, in some cases, copies of the checks attached, Bank One filed a motion for summary disposition under MCR 2.116(C)(8).[1] In these motions, Bank One argued plaintiffs' claims were based on losses sustained after their criminally usurious loans became uncollectible and, therefore, the claims were unenforceable under Michigan's wrongful conduct rule. On July 10, 2003, the trial court held a joint hearing on this issue.[2] The trial court agreed that plaintiffs' claims were barred by the wrongful conduct rule and granted summary disposition in favor of defendants under MCR 2.116(C)(8). Plaintiffs then appealed as of right.

II. Standards of Review

This Court reviews de novo the resolution of a summary disposition motion. *Corley v. Detroit Bd of Ed*, 470 Mich. 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.*; MCR 2.116(G)(5). All well-pleaded factual allegations in support of the claim are accepted as true and construed in the light most favorable to the nonmoving party. *Adair v. Michigan*, 470 Mich. 105, 119; 680 NW2d 386 (2004). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 NW2d 817 (1999), quoting *Wade v. Dep't of Corrections*, 439 Mich. 158, 162; 483 NW2d 26 (1992).

*2 This Court also reviews de novo the proper interpretation of a statute. *Macomb Co Prosecutor v. Murphy*, 464 Mich. 149, 157; 627 NW2d 247 (2001). This Court begins the interpretation of a statute by examining the language of the statute itself. *Id.* at 158. If the language is not ambiguous, the court shall not construe it, but rather will enforce it as written. *Id.* Where ambiguity exists, "this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished." *Id.* Furthermore, an act must be construed as a "whole to harmonize provisions and carry out the purpose of the Legislature." *Id.*

III. Analysis

As a preliminary matter, we note that the wrongful conduct rule does not attack plaintiffs' prima facie cases, but rather seeks to foreclose plaintiffs from proceeding for reasons unrelated to their prima facie cases. For this reason, the wrongful conduct rule is properly understood to be an affirmative defense. *Campbell v. St John Hosp.*, 434 Mich. 608, 615-616; 455 NW2d 695 (1990). Normally, the defendant has the burden of establishing the existence of an affirmative defense. *Nationwide Mut Ins Co v. Quality Builders, Inc.*, 192 Mich.App 643, 646; 482 NW2d 474 (1992). However, where a complaint shows on its face that relief is barred by an affirmative defense, the trial court may dismiss the complaint for failing to state a claim on which relief can be granted. See *Rauch v. Day and Night Mfg Corp.*, 576 F.2d 697, 702 (CA 6, 1978); see also, e.g., *Glazier v. Lee*, 171 Mich.App 216; 429 NW2d 857 (1988) (granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule). In the present case, the promissory notes, which are the basis of plaintiffs' losses, were attached to their respective amended complaints and became part of the pleadings. See MCR 2.113(F)(2). Consequently, the trial court could properly consider whether the wrongful conduct rule barred plaintiffs' claims when ruling on defendants' motions for summary disposition under MCR 2.116(C)(8). However, the relevant inquiry remains whether any factual development under the facts pleaded by plaintiffs could possibly justify recovery. *Maiden, supra* at 119.

A. The Wrongful Conduct Rule

Under Michigan's wrongful conduct rule, a plaintiff's claim will be barred if it is based, in whole or in part, on the plaintiff's own illegal conduct. *Orzel v. Scott Drug Co.*, 449 Mich. 550, 558; 537 NW2d 208 (1995). This is true even where the defendant has participated equally in the illegal activity. *Id.* at 559. In *Manning v. Bishop of Marquette*, 345 Mich. 130, 133; 76 NW2d 75 (1956), our Supreme Court succinctly stated the rule: "Our doors are open to both the virtuous and the villainous. We do not, however, lend our aid to the furtherance of an unlawful project, nor do we decide, as between 2 scoundrels, who cheated whom the more." The Court in *Orzel* noted that the rationale behind the wrongful conduct rule is rooted in public policy considerations. *Orzel, supra* at 559. The Court explained,

> *3 If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

However, the Court in *Orzel* also noted that the wrongful conduct rule is a general rule and that there are limitations and exceptions to its application. *Id.* at 561.

There are two limitations on the application of the wrongful conduct rule. First, the plaintiff's conduct must be mostly or entirely prohibited by a penal or criminal statute and must constitute sufficiently serious misconduct to warrant application of the wrongful conduct rule. *Id.* at 561. Where the plaintiff's conduct amounts to a violation of a safety statute, that violation will not be sufficient to bar his or her claim. *Id.* Second, "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 564.

In addition to these limitations, there are two exceptions that will preclude application of the wrongful conduct rule to bar a plaintiff's claims: the differing degrees of culpability exception and the statutory basis for recovery exception. Under the first exception, where the "plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries...." *Id.* at 569. The second exception applies where the plaintiff alleges the defendant violated a statute, which, either explicitly or implicitly, allows the plaintiff to recover for injuries suffered as a result of the violation. *Id.* at 570.

B. The Application of the Wrongful Conduct Rule

Plaintiffs first argue that the trial court erred by granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule where facts could be developed that would demonstrate that the criminal usury statute, MCL 438.41, did not prohibit their conduct. Specifically, plaintiffs state, because the promissory notes did not mention an interest rate, but rather referred to a "financing fee" and because they thought they were dealing with a corporation, they could not be found to have knowingly charged simple interest in excess of 25% per year without being authorized or permitted by law to do so. Consequently, plaintiffs contend, the first requirement for application of the wrongful conduct rule could not be met. We disagree.

*4 Under MCL 438.41,

> [a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

Hence, according to its plain language, a person is guilty of violating MCL 438.41 when they charge, take or receive money or other property as interest on a loan, while knowing that the interest charged, taken or received exceeded a simple interest rate of 25% per year.

In the present case, plaintiffs claim they were unaware that the "financing fee" referenced in the promissory notes attached to their amended complaints, constituted interest and, therefore, did not knowingly charge, take or receive simple interest in excess of 25% per year. We find this argument to be disingenuous. According to plain usage, a "fee" is "a sum charged or paid, as for professional services or for a privilege." *Random House Webster's College Dictionary* (1992). Likewise, "financing" is the "act of obtaining or furnishing funds for a purchase or enterprise." *Id.* Hence, in the context of these promissory notes, which clearly involve the lending of money,[3] the "financing fee" is a sum charged by the lender (i.e.plaintiffs) for the furnishing of funds to the borrower (i.e.Pupler). This is synonymous with the charging of interest on a loan. See *id.* (defining the word "interest" as "a sum paid or charged for the use of money or for borrowing money."). Furthermore, many of the promissory notes have a notation at the bottom that clearly identifies the portion of the payment that constitutes the repayment of principal and the portion that constitutes the payment of interest. Finally, while the notes do not directly state the applicable annual percentage rate, the fact that the rate of return invariably exceeded an annual rate of 25% was self-evident from the amounts listed on the notes.[4] Consequently, the promissory notes attached to the pleadings clearly indicate that plaintiffs knowingly charged, took or received interest on a loan at a rate exceeding 25% at simple interest per annum contrary to MCL 438.41.

Plaintiffs also state that they were unaware that Pupler was not a valid corporate entity when the notes were executed. Plaintiffs argue that, because they believed Pupler was a corporate entity and corporations are permitted by MCL 450.1275 to agree in writing to rates of interest in excess of the legal rate, the notes did not violate MCL 438.41. We disagree.

MCL 450.1275, which is part of the Business Corporation Act, MCL 450.1101 *et seq*, states:

> A domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

*5 Under the plain meaning of this statute, one of the powers possessed by corporations is the power to agree to pay a rate of interest in excess of the legal rate. However, while the statute permits corporations to agree to pay potentially usurious interest, nothing within this language necessarily absolves the corporation's lenders of criminal liability under MCL 438.41. Furthermore, this grant of power is consistent with MCL 438.61, which creates exceptions to the usury statutes for loans made to a business entities. Under MCL 438.61(2), a limited class of lenders, such as banks, may lawfully charge a business entity any rate of interest, notwithstanding both the civil and criminal usury statutes.[5] Conversely, while MCL 438.61(3) does allow persons other than those identified in MCL 438.61(2) to charge a business entity an interest rate in excess of the civil usury statutes, it also provides that the interest rate charged may not exceed the criminal usury limits. Thus, while corporations do have the power to agree to pay a rate in excess of the legal rate, only certain classes of lenders may actually charge a rate in excess of the rate provided by MCL 438.41 without incurring criminal liability. The provision for continued criminal liability under MCL 438.61(3) for persons who charge business entities an interest rate in violation of MCL 438.41 directly contradicts plaintiffs' contention that MCL 450.1275 removes plaintiffs' loans from operation of the criminal usury laws. Consequently, the trial court properly determined that plaintiffs violated MCL 438.41 and that this violation warranted application of the wrongful conduct rule.

Plaintiffs next argue there was an insufficient causal nexus between the charging of interest in excess of 25% and their losses to warrant application of the wrongful conduct rule. Specifically, plaintiffs contend that their losses were incurred because Pupler was a bad investment and not because of the rate of interest charged. We disagree.

In order to bar a plaintiff from recovery under the wrongful conduct rule, the injury suffered " 'must be traceable to his own breach of the law and the breach must be an integral and essential part of his case.' " *Manning, supra* at 136, quoting *Meador v. Hotel Grover*, 193 Miss 392, 405, 406; 9 So2d 782 (1942). In the present case, plaintiffs' losses directly resulted from their inability to collect the sums due on the promissory notes received from Pupler. While plaintiffs claim the notes are merely evidence of their "investment" in Pupler and that the actual losses were sustained because Pupler was not a sound investment, the reality is plaintiffs' entire case arises out of their decision to lend Pupler money, which loans Pupler was unable to repay. Indeed, plaintiffs cannot even establish their losses without the notes. In addition, plaintiffs' attempt to minimize the role the usurious interest rate played in the investment scheme by emphasizing the role of Bank One's employees in convincing plaintiffs to loan the money to Pupler is unconvincing. Even accepting that Bank One's employees influenced plaintiffs' decisions to loan money to Pupler, a significant factor in any decision to loan money will be the rate of return. Given the staggeringly high rate of return for most of the notes, one can reasonably conclude that the rate of return was a significant motivational factor for plaintiffs. As the trial court aptly noted, "a lot of money can be made if you're willing to trip over a few penal statutes along the way." Hence, we conclude that plaintiffs' claims are directly and causally related to their decision to engage in usurious lending. Therefore, there is a sufficient causal nexus between plaintiffs' illegal conduct and the losses suffered to warrant application of the wrongful conduct rule.

*6 Because it is clear from plaintiffs' pleadings that their losses are causally linked to their engagement in serious misconduct prohibited by a penal or criminal statute, the trial court properly concluded that the wrongful conduct rule applied to their claims.

C. The Exceptions to the Wrongful Conduct Rule

Plaintiffs next argue that, even if a penal or criminal statute prohibited their conduct and there were a causal connection between that conduct and their losses, their claims should not be barred because both exceptions to the wrongful conduct rule apply. Specifically, plaintiffs claim defendants' conduct is more culpable than their own and recovery is explicitly or implicitly permitted by statute. We disagree.

In discussing the nature of the culpability exception to the application of the wrongful conduct rule, the Court in *Orzel* noted that a plaintiff might still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries. *Orzel, supra* at 569. However, the Court explained that such cases arise when the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age. *Id.* In

interpreting this language, the Court in Stopera v. DiMarco, 218 Mich.App 565, 571-572 n 5; 554 NW2d 379 (1996) stated,

> As we stressed in the preceding paragraph, this case involves a defendant who was significantly more culpable than the plaintiff. We consider this necessary for application of the culpability exception. In its discussion of the applicability of the exception, the *Orzel* Court listed only situations where a defendant was egregiously more at fault than a plaintiff, *Orzel, supra* at 569, without suggesting that a slight difference in the degree of culpability would be sufficient for its application. Further, to apply the culpability exception in cases where a defendant is only slightly more blameworthy would likely eviscerate the wrongful conduct rule entirely; presumably, a plaintiff will almost always be able to argue that, if the allegations of a complaint are proved, a defendant's misconduct will be shown to be at least somewhat greater than the plaintiff's....

Hence, in order for plaintiffs to assert this exception, defendants must be significantly more culpable than plaintiffs for the losses suffered by plaintiffs.

In the present case, plaintiffs cannot demonstrate that defendants' actions make them more culpable than plaintiffs, let alone significantly more culpable. First, as the trial court noted, plaintiffs pleaded that defendants' conduct was tortious whereas plaintiffs' conduct was clearly felonious. In addition, defendants' culpability is limited to their role in convincing defendants to participate in the Pupler investment scheme. However, the final decisions to enter into usurious loan agreements with Pupler and continue to reinvest with Pupler, were made by the individual plaintiffs. Therefore, while plaintiffs might be able to develop facts that demonstrate defendants' culpability, and may even be able to demonstrate that defendants were equally culpable, we conclude that there are no factual developments which could lead to the conclusion that defendants were significantly more culpable than plaintiffs. Therefore, the trial court properly rejected this exception to the application of the wrongful conduct rule.

*7 Plaintiffs next argue that there is a statutory basis for recovery from defendants. Plaintiffs contend that, because MCL 438.32 prevents a usurious lender from recovering usurious interest charges, it must necessarily permit the recovery of the principal. Hence, MCL 438.32 implicitly permits recovery against defendants. We disagree.

In order for the statutory basis exception to apply, plaintiffs must allege defendants violated a statute, which, either explicitly or implicitly, allows them to recover for injuries suffered as a result of defendants' violation. *Orzel, supra* at 570. Yet plaintiffs have not pleaded that defendants violated a statute, which either explicitly or implicitly, permits them to recover their loan losses from defendants. Indeed, plaintiffs' argument relies solely on their own violations of the usury statutes to implicitly find authority for recovery of their losses. Even if reliance on their own violation of a statute were sufficient, because MCL 438.32 seeks to punish lenders who violate the civil usury law, we cannot conclude that the statutory purpose of MCL 438.32 was to protect the usurious lender's principal. See *Orzel, supra* at 571. Therefore, the statutory basis exception does not apply to plaintiffs' claims.

D. Motion to Amend

Finally, plaintiffs argue that the trial court should have given them leave to amend their respective complaints to plead facts, which would establish the existence of greater culpability on the part of defendants. We decline to address this issue because it was not raised in the statement of the questions presented, People v. Miller, 238 Mich.App 168, 172; 604 NW2d 781 (1999), and was inadequately briefed and, therefore, abandoned on appeal, People v. Van Tubbergen, 249 Mich.App 354, 365; 642 NW2d 368 (2002). Furthermore, as noted above, we have determined that no factual development could establish that defendants were significantly more culpable for plaintiffs' losses than plaintiffs. Therefore, leave to amend would have been futile and was properly denied. Hakari v. Ski Brule, Inc, 230 Mich.App 352, 355; 584 NW2d 345 (1998).

IV. Conclusion

The trial court properly determined plaintiffs' claims against defendants, as pleaded, were based on losses proximately caused by plaintiffs' own criminal conduct and, therefore, were subject to the wrongful conduct rule. In addition, the trial court correctly determined that neither exception to the wrongful conduct rule applied to plaintiffs' claims. Consequently, the trial court did not err when it dismissed plaintiffs' claims for failing to state a claim on which relief can be granted.

Affirmed.

Footnotes

1 In each case, Okoroafo filed a motion under MCR 2.116(C)(8), which relied upon Bank One's law and arguments.

2 While the three cases were not consolidated until this appeal, see *Scalici v. Bank One*, unpublished order of the Court of Appeals, entered May 10, 2004 (Docket No 254632), all three were assigned to the same trial court and were handled jointly for judicial efficiency.

3 While plaintiffs repeatedly refer to these transactions as "investments", the promissory notes clearly state that Pupler will be in default if it fails to pay the principal and "financing fee" upon the maturity of the note. The use of the word principal contemplates the repayment of a loan.

4 By way of example, in a note executed on October 28, 2002, Pupler promised to pay plaintiff Susan Scalici $880,000 on November 14, 2002. The note identified $80,000 of the payment as the "financing fee." Hence, on its face the note purports to pay a 10% return on the principal amount over a loan period of 17 days. No reasonable person could be unaware that a 10% return over a period of 17 days amounted to an annual rate of return in excess of 25%.

5 The civil usury statutes are MCL 438.31 and MCL 438.32. The criminal usury statutes are MCL 438.41 and MCL 438.42.

End of Document

EXHIBIT 5

MORTGAGE NOTE

Principal Amount: $500,000.00 **Birmingham, Michigan**

Maturity Date: August 12, 2017 **Dated: August 12, 2016**

FOR VALUE RECEIVED, the undersigned, PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company ("Borrower"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 promises to pay to the order of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), at its offices located at 335 East Maple Road, Birmingham, Michigan 48009, or at such other place as Lender may designate in writing, the principal sum of Five Hundred Thousand and 00/100 Dollars ($500,000.00), plus interest as hereinafter provided, in lawful money of the United States. Subject to the terms and conditions of this Note, the Lender will, during the term of this Note, make available to the Borrower, and then the Borrower may borrow from the Lender, and repay and re-borrow, at any time prior to the Maturity Date, any amount up to a maximum principal amount at any one time outstanding of Five Hundred Thousand and 00/100 Dollars ($500,000.00)

Interest Rate.

Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) ("Interest") per annum;

Repayment.

Commencing on September 1, 2016, and continuing on the first day of each calendar month thereafter through the Maturity Date (each, a "Payment Date"), Borrower shall pay to Lender monthly payments as follows:

Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due.

Months 3, 4, 5 & 6 – Borrower shall pay to the Lender interest only payments on the outstanding principal balance of the Loan, at the Interest Rate and

Months 7, 8, 9, 10, 11 & 12 – Borrower shall pay to the Lender principal and Interest on a Fifteen (15) year amortization,

Final Payment shall be due on the Maturity Date of August 12, 2017 of a balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest.

Except as otherwise agreed in writing by Lender, all amounts payable under this Agreement shall be paid by electronic funds transfer ("EFT") from Borrower's designated bank account to such bank account as may be designated by Lender from time to time. Borrower shall provide such information and shall execute such authorizations as Lender may from time to time require to allow Lender to withdraw payments due hereunder directly from Borrower's designated bank account.

3. **Definitions.**

"Business Day" means any day which is neither a Saturday or Sunday nor a legal holiday on which commercial banks are authorized or required to be closed in Detroit, Michigan;

"Collateral Documents" mean the Collateral Documents as defined in the Loan Agreement.

"Costs of Collection" means upon the occurrence of an Event of Default and during the continuance thereof (after giving effect to applicable notice and cure periods) or upon the occurrence of a bankruptcy related Event of Default without giving effect to any cure period or to any period in which the applicable proceeding may be contested, all third party out-of-pocket expenses incurred by Lender in connection with the administration, collection and enforcement of the Loan, including reasonable attorney fees, the cost of tax searches, UCC searches and similar charges and costs and expenses incurred in any court or bankruptcy proceeding.

"Event of Default" means the payment of any principal or interest under this Note is not made within five (5) days after the date when due under this Note or the occurrence of any other Event of Default, as defined in the Loan Agreement.

"Loan" means all amounts outstanding under this Note.

"Loan Agreement" means that certain Loan Agreement entered into between Borrower and Lender dated of even date with this Note, as same may be amended, modified or altered from time to time.

"Maturity Date" means August 12, 2017, unless accelerated sooner pursuant to the terms of this Note.

"Note" means this Note made payable by Borrower to the order, and for the benefit, of Lender.

"Payment Date" means the date each payment is due hereunder.

4. **Interest Computation; Application of Funds.**

Interest shall be calculated for the actual number of days elapsed on the basis of a three hundred sixty (360) day year, including the first date of the applicable period to, but not including, the date of repayment. The Lender may apply all payments received under this Note to accrued interest, to the principal balance outstanding under this Note and to costs, fees and expenses payable by the Borrower in any order determined by the Lender in its sole discretion. If any Payment Date is not a Business Day, such Payment Date shall be extended to the next succeeding Business Day and such extension of time shall be included in computing any interest in respect of payment due on such date.

5. **Interest Limitation.**

Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the

maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid or payable by the Borrower in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Note. If Lender shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall become due and payable thirty (30) days from the date of such determination.

6. Events of Default; Remedies.

Upon the occurrence of an Event of Default and during the continuance thereof, Lender may, subject to any notice and cure periods in the Loan Agreement, declare the entire unpaid and outstanding principal balance hereunder and all accrued interest, together with all other indebtedness of Borrower to Lender, to be due and payable in full forthwith, without further presentment, demand or notice of any kind, all of which are hereby expressly waived by Borrower, and thereupon Lender shall have and may exercise any one or more of the rights and remedies provided herein or in any Collateral Documents. The remedies provided for hereunder are cumulative to the remedies for collection of the amounts owing hereunder as set forth in the Collateral Documents and as provided by law. Nothing herein is intended, nor should it be construed, to preclude Lender from pursuing any other remedy for the recovery of any other sum to which Lender may be or become entitled for breach of the terms of this Note, Loan Agreement or any Collateral Documents relating hereto.

7. Costs of Collection.

Borrower agrees, in case of an Event of Default (and while such Event of Default continues) to pay all Costs of Collection.

8. Default Rate of Interest.

During any period(s) that an Event of Default has occurred and is continuing, or after the Maturity Date or after acceleration of maturity, the outstanding principal amount of this Note shall bear interest at a rate equal to five percent (5.0%) per annum greater than the interest rate otherwise charged hereunder.

9. Late Charges.

If any required payment is not made date it is due, then, at the option of Lender, a late charge in the amount of five percent (5.0%) of the payment so overdue may be charged.

10. No Waiver of Default.

Acceptance by Lender of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default. During an Event of Default, neither the failure of Lender promptly to exercise its right to declare the outstanding principal and accrued unpaid interest hereunder to be immediately due and payable, nor, upon the occurrence of an Event of Default, shall the failure of Lender to demand strict performance of any other obligation of Borrower or any other person who may be liable hereunder constitute a waiver of any such rights, nor a waiver of such rights in connection with any future default on the part of Borrower or any other person who may be liable hereunder.

11. Waiver of Jury Trial.

BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. BORROWER, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, AND BANK, EACH KNOWINGLY AND VOLUNTARILY AND FOR THEIR RESPECTIVE BENEFIT WAIVE ANY RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY CLAIM, DISPUTE, CONFLICT, OR CONTENTION, IF ANY, AS MAY ARISE UNDER THIS NOTE OR THE LOAN EVIDENCED BY THIS NOTE, AND AGREE THAT ANY LITIGATION BETWEEN THE PARTIES CONCERNING THIS NOTE OR THE LOAN EVIDENCED BY THIS NOTE SHALL BE HEARD BY A COURT OF COMPETENT JURISDICTION SITTING WITHOUT A JURY.

12. General.

Borrower and all guarantors of this Note, if any, hereby jointly and severally waive presentment for payment, demand, notice of non-payment, notice of protest or protest of this Note, diligence in collection or bringing suit, and hereby consent to any and all extensions of time, renewals, waivers, or modifications that may be granted by Lender with respect to payment or any other provisions of this Note, and to the release of any collateral or any part thereof, with or without substitution. The liability of Borrower shall be absolute and unconditional, without regard to the liability of any other party hereto. This Note shall be deemed to have been executed in, and all rights and obligations hereunder shall be governed by, the laws of the State of Michigan.

13. Other Documents.

Borrower and Lender have signed other Collateral Documents in conjunction herewith providing for security for this Note or other matters. Reference is hereby made to the Collateral Documents for additional terms relating to the transaction giving rise to this Note, the security or support given for this Note and additional terms and conditions under which this Note matures, may be accelerated or prepaid.

Signature Page Follows

[Signature page to Construction Mortgage Note]

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: Dean J. Groulx

Name: Dean J. Groulx

Its: MEMBER

EXHIBIT 6

AMENDED AND RESTATED MORTGAGE NOTE

Principal Amount: $1,000,000.00 **Birmingham, Michigan**

Maturity Date: September 23, 2017 **Dated: September 23, 2016**

FOR VALUE RECEIVED, the undersigned, PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company ("Borrower"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 promises to pay to the order of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), at its offices located at 335 East Maple Road, Birmingham, Michigan 48009, or at such other place as Lender may designate in writing, the principal sum of One Million and 00/100 Dollars ($1,000,000.00), plus interest as hereinafter provided, in lawful money of the United States. Subject to the terms and conditions of this Amended and Restated Note, the Lender will, during the term of this Amended and Restated Note, make available to the Borrower, and then the Borrower may borrow from the Lender, and repay and re-borrow, at any time prior to the Maturity Date, any amount up to a maximum principal amount at any one time outstanding of One Million and 00/100 Dollars ($1,000,000.00)

Interest Rate.

Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) ("Interest") per annum;

Repayment.

Commencing on October 23, 2016, and continuing on the twenty-third (23rd) day of each calendar month thereafter through the Maturity Date (each, a "Payment Date"), Borrower shall pay to Lender monthly payments as follows:

Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due. However, interest on the first Five Hundred Thousand and 00/100 Dollars ($500,000.00) advance made on August 12, 2016 shall be paid at the closing on this Amended and Restated Note.

Months 3, 4, 5 & 6 – Borrower shall pay to the Lender interest only payments on the outstanding principal balance of the Loan, at the Interest Rate and

Months 7, 8, 9, 10, 11 & 12 – Borrower shall pay to the Lender principal and Interest on a Fifteen (15) year amortization,

Final Payment shall be due on the Maturity Date of September 1, 2017 of a balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest.

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Except as otherwise agreed in writing by Lender, all amounts payable under this Agreement shall be paid by electronic funds transfer ("EFT") from Borrower's designated bank account to such bank account as may be designated by Lender from time to time. Borrower shall provide such information and shall execute such authorizations as Lender may from time to time require to allow Lender to withdraw payments due hereunder directly from Borrower's designated bank account.

3. Definitions.

"Business Day" means any day which is neither a Saturday or Sunday nor a legal holiday on which commercial banks are authorized or required to be closed in Detroit, Michigan;

"Collateral Documents" mean the Collateral Documents as defined in the Loan Agreement.

"Costs of Collection" means upon the occurrence of an Event of Default and during the continuance thereof (after giving effect to applicable notice and cure periods) or upon the occurrence of a bankruptcy related Event of Default without giving effect to any cure period or to any period in which the applicable proceeding may be contested, all third party out-of-pocket expenses incurred by Lender in connection with the administration, collection and enforcement of the Loan, including reasonable attorney fees, the cost of tax searches, UCC searches and similar charges and costs and expenses incurred in any court or bankruptcy proceeding.

"Event of Default" means the payment of any principal or interest under this Amended and Restated Note is not made within five (5) days after the date when due under this Amended and Restated Note or the occurrence of any other Event of Default, as defined in the Loan Agreement.

"Loan" means all amounts outstanding under this Amended and Restated Note.

"Loan Agreement" means that certain Loan Agreement as amended entered into between Borrower and Lender dated August 12, 2016 and Amended with an effective date of September 1, 2016, as same may be amended, modified or altered from time to time.

"Maturity Date" means September 1, 2017, unless accelerated sooner pursuant to the terms of this Amended and Restated Note.

"Amended and Restated Note" means this Note made payable by Borrower to the order, and for the benefit, of Lender.

"Payment Date" means the date each payment is due hereunder.

4. Interest Computation; Application of Funds.

Interest shall be calculated for the actual number of days elapsed on the basis of a three hundred sixty (360) day year, including the first date of the applicable period to, but not including, the date of repayment. The Lender may apply all payments received under this Amended and Restated Note to accrued interest, to the principal balance outstanding under this Amended and Restated Note and to costs, fees and expenses payable by the Borrower in any order determined by the Lender in its sole discretion. If any Payment Date is not a Business Day, such Payment

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Date shall be extended to the next succeeding Business Day and such extension of time shall be included in computing any interest in respect of payment due on such date.

5. Interest Limitation.

Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require the Borrower to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Amended and Restated Note. Should any interest or other charges, charged, paid or payable by the Borrower in connection with this Amended and Restated Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Amended and Restated Note. If Lender shall reasonably determine that the interest rate applicable to this Amended and Restated Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Amended and Restated Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Amended and Restated Note, with accrued interest at the highest rate then permitted to be charged by stipulation in writing between Lender and Borrower, at the option of Lender, shall become due and payable thirty (30) days from the date of such determination.

6. Events of Default; Remedies.

Upon the occurrence of an Event of Default and during the continuance thereof, Lender may, subject to any notice and cure periods in the Loan Agreement, declare the entire unpaid and outstanding principal balance hereunder and all accrued interest, together with all other indebtedness of Borrower to Lender, to be due and payable in full forthwith, without further presentment, demand or notice of any kind, all of which are hereby expressly waived by Borrower, and thereupon Lender shall have and may exercise any one or more of the rights and remedies provided herein or in any Collateral Documents. The remedies provided for hereunder are cumulative to the remedies for collection of the amounts owing hereunder as set forth in the Collateral Documents and as provided by law. Nothing herein is intended, nor should it be construed, to preclude Lender from pursuing any other remedy for the recovery of any other sum to which Lender may be or become entitled for breach of the terms of this Amended and Restated Note, Loan Agreement or any Collateral Documents relating hereto.

7. Costs of Collection.

Borrower agrees, in case of an Event of Default (and while such Event of Default continues) to pay all Costs of Collection.

8. Default Rate of Interest.

During any period(s) that an Event of Default has occurred and is continuing, or after the Maturity Date or after acceleration of maturity, the outstanding principal amount of this Amended and Restated Note shall bear interest at a rate equal to five percent (5.0%) per annum greater than the interest rate otherwise charged hereunder.

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9. Late Charges.

If any required payment is not made date it is due, then, at the option of Lender, a late charge in the amount of five percent (5.0%) of the payment so overdue may be charged.

10. No Waiver of Default.

Acceptance by Lender of any payment in an amount less than the amount then due shall be deemed an acceptance on account only, and the failure to pay the entire amount then due shall be and continue to be an Event of Default. During an Event of Default, neither the failure of Lender promptly to exercise its right to declare the outstanding principal and accrued unpaid interest hereunder to be immediately due and payable, nor, upon the occurrence of an Event of Default, shall the failure of Lender to demand strict performance of any other obligation of Borrower or any other person who may be liable hereunder constitute a waiver of any such rights, nor a waiver of such rights in connection with any future default on the part of Borrower or any other person who may be liable hereunder.

11. Waiver of Jury Trial.

BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. BORROWER, AFTER CONSULTING (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, AND BANK, EACH KNOWINGLY AND VOLUNTARILY AND FOR THEIR RESPECTIVE BENEFIT WAIVE ANY RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY CLAIM, DISPUTE, CONFLICT, OR CONTENTION, IF ANY, AS MAY ARISE UNDER THIS AMENDED AND RESTATED NOTE OR THE LOAN EVIDENCED BY THIS AMENDED AND RESTATED NOTE, AND AGREE THAT ANY LITIGATION BETWEEN THE PARTIES CONCERNING THIS AMENDED AND RESTATED NOTE OR THE LOAN EVIDENCED BY THIS AMENDED AND RESTATED NOTE SHALL BE HEARD BY A COURT OF COMPETENT JURISDICTION SITTING WITHOUT A JURY.

12. General.

Borrower and all guarantors of this Amended and Restated Note, if any, hereby jointly and severally waive presentment for payment, demand, notice of non-payment, notice of protest or protest of this Amended and Restated Note, diligence in collection or bringing suit, and hereby consent to any and all extensions of time, renewals, waivers, or modifications that may be granted by Lender with respect to payment or any other provisions of this Amended and Restated Note, and to the release of any collateral or any part thereof, with or without substitution. The liability of Borrower shall be absolute and unconditional, without regard to the liability of any other party hereto. This Amended and Restated Note shall be deemed to have been executed in, and all rights and obligations hereunder shall be governed by, the laws of the State of Michigan.

13. Other Documents.

Borrower and Lender have signed other Collateral Documents in conjunction herewith providing for security for the prior Note as defined below and this Amended and Restated Note or other matters. Reference is hereby made to the Collateral Documents for additional terms relating

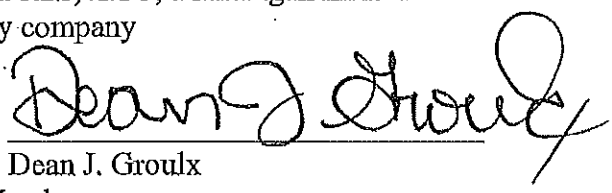
to the transaction giving rise to the prior Note and to this Amended and Restated Note, the security or support given for the prior Note and this Amended and Restated Note and additional terms and conditions under which this Amended and Restated Note matures, may be accelerated or prepaid.

14. Restated Note.

This Note amends, restates, supersedes and replaces the Mortgage Note dated August 12, 2016 in the principal amount of $500,000.00 by the undersigned payable to the Lender (the "Prior Note") provided however (i) execution and delivery by the undersigned of this Amended and Restated Note shall not in any manner or circumstances to be deemed a payment of a novation or to have terminated, extinguished or discharged any of the undersigned indebtedness evidenced by the Prior Note, all of which indebtedness shall continue under and shall hereinafter be evidenced and governed by this Amended and Restated Note and (ii) all collateral and guaranties securing or supporting the Prior Note shall continue and secure and support this Amended and Restated Note.

The undersigned acknowledges and agrees that the collateral includes without limitation, all collateral and rights and properties described in in Exhibit A of the Amendment to Loan Agreement of even date. The collateral also includes all UCC financing statements between the Borrower, Borrower's Guarantors and the Lender filed after execution of the prior Note.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: 

Name: Dean J. Groulx

Its: Member

EXHIBIT 7

LOAN AGREEMENT

THIS LOAN AGREEMENT ("Agreement") shall be effective as of the 12 of August, 2016, by and between **SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC,** a Delaware limited liability company, whose address is 335 East Maple Road, Birmingham, Michigan 48009 ("Lender"), and **PARK STREET GROUP REALTY SERVICES, LLC,** a Michigan limited liability company, whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 ("Borrower").

WITNESSETH:

WHEREAS, Lender and Borrower desire to enter into the loan transactions described in this Agreement, provided Borrower adheres to all of the terms and conditions of this Agreement as hereinafter described; and

WHEREAS, Borrower has requested that Lender lend funds to Borrower upon the terms and conditions described in this Agreement; and

WHEREAS, Lender desires to lend such funds to Borrower on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and the following several and mutual recitals, representations, warranties, promises, covenants, conditions and stipulations herein contained, Borrower and Lender do hereby covenant and agree as follows:

SECTION 1 DEFINITIONS

In this Loan Agreement and in the Collateral Documents herein referenced the following general words, phrases and expressions shall have the respective meanings attributed to them:

1.1. **"Agreement"** shall mean this Loan Agreement, and all amendments, modifications and extensions hereof.

1.2. **"Lender"** shall mean Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company.

1.3. **"Borrower"** shall mean Park Street Group Realty Services, LLC, a Michigan limited liability company.

1.4. **"Collateral"** shall mean the Premises now owned by Borrower and Guarantor which collectively have a value of $750,000.00, described in any of the Collateral Documents, including, but not limited to the following:

(a) Premises (as hereinafter defined);

(b) All general intangibles and contract rights related to the Premises, including all licenses, permits and registrations;

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(c) all equipment, including all machinery, furniture, fixtures, trade fixtures, furnishings and personal property located upon the Premises and/or used in connection therewith, now or hereafter owned by Borrower; and

(d) all accessions, parts, attachments, and accessories used or intended for use in connection with the foregoing, and proceeds, products, proceeds of hazard insurance, and eminent domain proceedings, and condemnation awards of all of the foregoing, and all repossessions, returns and records of any of the foregoing.

1.5. **"Collateral Documents"** shall mean any and all documents, instruments, notes, guaranties, mortgages, assignments, security agreements, indemnification agreements, environmental certificates and indemnity agreements, estoppels, certificates and written memoranda referred to herein, or executed in connection herewith or therewith, now or hereafter existing, in form and substance satisfactory to Lender.

1.6. **"Commitment Fee"** shall mean Twenty-Five Thousand and 00/100 Dollars ($25,000.00) which is due and payable to lender at closing from the Loan.

1.7. **"Environmental Laws"** shall mean all laws, regulations and rules of the United States of America, State of Michigan, local authorities and their respective agencies and departments relating to pollution or the protection of the environment, including but not limited to, those governing the use, storage, treatment, handling, production or disposal of Hazardous Materials and/or the emission, discharge or release of Hazardous Materials into the environment. Environmental Laws include, without limitation, the Clean Air Act (42 USC 7401 et sea,.), Clean Water Act (33 USC 1251 et sea.), Resource Conservation and Recovery Act of 1976 (42 USC 6901 et seg.), Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 USC 9601 et seg.), Hazardous Materials Transportation Act (49 USC 1801 et seg.), Solid Waste Disposal Act (42 USC 6901 et seg.), and Toxic Substances Control Act (15 USC 2601 et sef.), as each of such laws have been or are hereafter amended, together with all rules and regulations promulgated by the U.S. Environmental Protection Agency, and all additional environmental laws, rules and regulations in effect on the date hereof and as are hereafter enacted, including the common law and including the terms and conditions of any permits, approvals, orders and/or judgments relating to the Premises.

1.8. **"Event(s) of Default"** shall mean any of the events listed in Section 7 of this Agreement, provided that any requirement for the giving of notice, lapse of time or both, has been satisfied.

1.9. **"Guarantor(s)"** shall mean unlimited personal guarantees of Dean J. Groulx, individually, and Park Street Group, LLC, a Michigan limited liability company.

1.10. **"Hazardous Materials"** shall mean any flammables, explosives, radioactive materials, hazardous wastes, friable asbestos or any material containing asbestos, toxic substances or related materials, including, without limitation, substances now or hereafter defined as hazardous substances, hazardous materials or toxic substances in or under any Environmental Law(s).

1.11. **"Improvements"** shall mean improvements located on, or to be constructed on, the Premises in accordance with the Plans including, without limitation, all infrastructure and utility work.

1.12. **"Indebtedness"** shall mean:

(a) all indebtedness, obligations and liabilities of the Borrower and Guarantor under the Loan or arising under any of the Collateral Documents, of whatsoever kind, nature and description, primary or secondary, direct, indirect or contingent, due or to become due, and whether now existing or hereafter arising, and including without limitation of the generality of the foregoing, all indemnities, defenses and hold harmless obligations of Borrower and Guarantor to Lender in connection with the Loan;

(b) a $500,000.00 term loan made by Lender in connection with the Loan and/or the Collateral Documents as provided herein, and whether made at Lender's option or otherwise, and the Loan and all notes now or hereafter executed or existing in connection herewith, and interest accrued thereon, from time to time;

(c) all future advances made by Lender for the protection or preservation of Lender's rights and interests in the Collateral, as expressly provided herein or in the Collateral Documents, including, but not by way of limitation, advances for taxes, levies, assessments, insurance or maintenance of the Collateral which are not timely paid by Borrower in accordance with the terms of this Agreement;

(d) all third party out-of-pocket costs and expenses actually incurred by Lender in connection with or arising out of the protection, enforcement or collection of any of the foregoing, including without limitation, reasonable attorneys' fees; and

(e) all costs and expenses actually incurred by Lender in connection with, or arising out of, the sale, disposition, liquidation or other realization [including, but not by way of limitation, the taking, retaking or holding, and all proceedings (judicial or otherwise)] of the Collateral, including, without limitation, reasonable attorneys' fees, to the extent permitted herein.

1.13. **"Lease(s)"** shall mean all leases, licenses, land contracts, or occupancy agreements of any kind whatsoever on the Premises.

1.14. **"Legal Requirements"** shall mean the following, as applicable, with respect to the Improvements and the use, ownership, occupancy and maintenance of the Premises, including accessibility for disabled or handicapped persons:

(a) all laws, ordinances and regulations of the United States of America, the State of Michigan, and all county and municipal governments and regulating authorities having jurisdiction;

(b) the orders of any court or regulatory, administrative or municipal authority; and

(c) the terms and conditions of all governmental approvals, licenses, permits (including building permits and certificates of occupancy) issued by local government authorities.

1.15. **"Loan"** shall mean a term loan in the Loan Amount.

1.16. **"Loan Amount"** shall mean Five Hundred Thousand and 00/100 Dollars ($500,000.00).

1.17. **"Organizational Documents"** shall mean and include Borrower's (and Borrower's members') operating agreement, certified articles of organization and a certificate of good standing duly

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issued by the Michigan Department of Labor and Economic Growth.

1.18. **"Permitted Encumbrances"** shall mean the recorded easements and restrictions affecting the Premises and described in the Mortgage (hereinafter defined).

1.19. **"Premises"** shall mean the homes described in Exhibit A ("~~Additional~~ Collateral") or substitute collateral as provided in paragraph 9.3.**"Project"** shall mean the Premises and Improvements.

1.20. **"Title Insurance"** shall mean title insurance acceptable to Lender for insuring first mortgage liens on all additional collateral listed in Exhibit A.

SECTION 2 LOAN

2.1. **Loan Amount**: Lender agrees to lend to Borrower and Borrower agrees to take from Lender the Loan in the Loan Amount upon the terms, covenants and conditions hereinafter set forth.

2.2. **Use of Proceeds**: The proceeds of the Loan shall be used for working capital, including to acquire and renovate the Premises.

2.3. **Term**: The maturity date of the Loan is set forth in the Note.

2.4. **Interest Rate**: The Loan shall bear interest in accordance with the terms of the Note.

2.5. **Repayment**: The Loan shall be paid in accordance with the terms of the Note.

2.6. **Prepayment**: The Loan may be prepaid only in accordance with the terms of the Note.

2.7. **Promissory Note**: Borrower shall evidence its obligation to repay the Loan by executing its Promissory Note in the principal amount of the Loan Amount. The Promissory Note is sometimes referred to herein as the "Note." The Note shall be dated as of the date of delivery by Borrower to Lender.

2.8. **Security**: As security for the payment of the Loan, the Note, and all loans and advances made pursuant to this Agreement and the Collateral Documents, and for the performance and observance of the terms and conditions of this Agreement and the Collateral Documents, Borrower shall execute and deliver to Lender or cause to be executed and delivered to Lender the following Collateral Documents:

(a) A first, prior, valid, enforceable and perfected Mortgages on the Premises (the "Mortgage"), including land, roads and easements, and rights to the beneficial use and enjoyment of the Premises, and upon all Improvements, appurtenances and Borrower owned fixtures located thereon, including all personal property of Borrower used in the operation of the Improvements, subject only to the Permitted Encumbrances, if any.

(b) A first security agreement covering all personal property owned by Borrower.

(c) The Guarantees.

(d) Financing statements as necessary to perfect the security interests and liens of the Lender with respect to the security described above.

(e) Any other documents requested by the Lender to evidence or secure the Loan.

SECTION 3 CONDITIONS PRECEDENT TO CLOSING. DISBURSEMENT OF THE LOAN:

3.1. The obligation of Lender to close the Loan and make the initial advance of the proceeds of the Loan is subject to the following conditions precedent, which shall be in form and substance acceptable to Lender in all respects:

3.1.1. Execution of all documents evidencing and securing the Indebtedness.

3.1.2. Lender shall have received the Organizational Documents; and:

(a) **Mortgage Title Insurance.** The Title Insurance shall be an ALTA Loan Policy issued by Title Insurer selected by Lender and issued in an amount equal to the estimated value of each of the homes listed in Exhibit A as Additional Collateral. Title Insurance shall show marketable title in Borrower or Park Street Group, LLC in each of the homes listed in Exhibit A. Lender's mortgages will constitute a first lien upon the Premises in Exhibit A (the "Title Policy"). The amount of Title Insurance for each home will be based on the estimated value of each home listed.

(b) **Insurance**. It is understood that the Premises at time of purchase will be "uninsurable" Borrower however while marketing any of the Premises to prospective purchasers after certificates of occupancy have been procured by the municipality will purchase all risk insurance for the full replacement value of the Premises and the improvements as well as public liability insurance in an amount acceptable to Lender naming Lender as a loss payee. In addition, Borrower agrees to purchase all risk insurance for the replacement value of the Additional Collateral listed in Exhibit A as well as public liability insurance in an amount acceptable to Lender naming Lender as a Loss Payee if the Premises are insurable in their current condition.

(c) **Taxes**. The Borrower agrees to pay all real estate taxes due and assessed against the Premises when due or in accordance with any payment plan approved by the applicable taxing authority.

(d) **Compliance with Michigan Construction Lien Act**. Borrower shall be in compliance with the construction lien laws of the State of Michigan, as amended when any renovations are done to the premises. Borrower shall have prior to any renovations to the premises, Borrower shall have recorded in the office of the appropriate County Register of Deeds, a Notice of Commencement as required by said Construction Lien Act, prior to the first "actual improvement" to the Premises or prior to any repair or construction activities at the Premises. Further, neither Borrower, nor any Contractor, agent, employee or any other person or entity shall have taken any action which would constitute an "actual physical improvement" to the Premises prior to the recordation of Lenders Mortgage on the premises and Lender receives first mortgage lien coverage by the Title insurer. The term "actual physical improvement" shall be defined as the same is defined in the Construction Lien Act of Michigan. Borrower shall also designate a "Designee" acceptable to Lender as required by the Construction Lien Act.

(h) **Compliance with All Governmental Laws and Regulations**. With respect

to any renovations or improvements to the Premises Borrower agrees to obtain any governmental approvals and/or permits necessary from the required governmental authority(ies) for the renovations and/or improvements to the Premises, and if requested by Lender shall submitted satisfactory evidence thereof to the Lender.

(i) **Zoning**. If requested by Lender, evidence that the Premises are lawfully zoned to accommodate the Improvements, if any, and that all prerequisite conditions of Borrower pursuant to said zoning have been timely, properly and completely complied with. If there are no Improvements, evidence that the Premises is properly zoned for Borrower's intended use.

3.1.3. Lender shall have received the Commitment Fee as defined in Section 1.6 above.

SECTION 4 INTENTIONALLY OMITTED

SECTION 5 REPRESENTATIONS AND WARRANTIES

Borrower represents and warrants to Lender as follows, as of the date hereof:

5.1. **Authority:**

(a) Borrower is a limited liability company, duly organized and validly existing under the laws of the State of Michigan and has the power to own property and to carry on its business as now being conducted, and is duly qualified to do business, and is in good standing, in the jurisdiction in which the transaction of its business makes such qualification necessary and has a certificate of good standing.

(b) Borrower has full power and authority to enter into this Agreement, to make the borrowings hereunder, to execute and deliver the Note and the Collateral Documents, and to incur the obligations provided for herein, all of which have been duly authorized by all proper and necessary membership action. No consent or approval of any public authority is required as a condition to the validity of this Agreement or the Note, Mortgage or any other Collateral Document.

(c) Borrower will procure all necessary governmental approvals, permits and licenses for any improvements and/or renovations to the Premises.

5.2. **Title**: Borrower will be the holder of good and valid fee title to the Premises and represents and warrants that there are no mortgages, liens or encumbrances on said Premises except for the Leases and Permitted Encumbrances and those liens in favor of Lender. Borrower represents it is the holder of good and valid fee title to the homes listed in Exhibit A as Additional Collateral and warrants that there are no mortgage or liens, or encumbrances on said homes except for the Leases and Permitted Encumbrances and those liens in favor of Lender.

5.3. **Litigation**: There are no actions, suits or proceedings pending or threatened against or affecting Borrower or Guarantors, or the Premises or any other property of Borrower, in any court or before or by any federal, state, municipal or other governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, which may result in any material adverse change in the business, properties or assets or in the condition, financial or otherwise, of Borrower or Guarantor. Neither Borrower, nor any Guarantors, is in default with respect to any order, writ, injunction, decree or

demand of any court or federal, state, municipal or other governmental department, commission, board, bureau, agency, instrumentality, default under which might have consequences which would materially and adversely affect their respective business or properties.

5.4. **Financial Condition**: The financial statements heretofore delivered to Lender are complete and correct in all material respects and fully present the financial condition of Borrower and Guarantor. The financial statements of Borrower fully present the result of its operations and transactions in its surplus accounts as at the date and for the period referred to and the same have been prepared in accordance with generally accepted accounting principles applied on a consistent basis throughout the period involved. There are no liabilities, direct or indirect, fixed or contingent, of Borrower or Guarantor as of the date of such finaucial statemeuts or balance sheet(s) which are not reflected therein or in the notes thereto. There has been no material adverse change in the financial condition or operation of Borrower or Guarantor since the date of said financial statements or balance sheet(s).

5.5. **Adverse Contracts. Etc.**: Borrower is not a party to any contract or agreement or subject to any other restriction or unusually burdensome order of any regulatory commission, board or agency which materially and adversely affects its business, properties or assets or its condition, financial or otherwise. The execution and performance of this Agreement will not result in the creation of any other encumbrance or charge upon any asset of Borrower pursuant to the terms of any other agreement. No provision of any existing mortgage, indenture, contract or agreement or affecting the Premises is in effect which would couflict with or iu any way prevent the execution, delivery or carrying out of the terms of this Agreement. The consummation of the Loan transaction and the execution of this Agreement and the Collateral Documents will not violate the terms and conditions of any contract or agreements to which Borrower or any Guarantor is a party.

5.6 **Utilities**: All utility services necessary for the use of the Premises as contemplated hereby are or will be available at the boundaries of the Premises, including water supply, storm and sanitary sewer facilities, gas, electric and telephone facilities and no off-site easements are required.

5.7 **Liens**: Other than Collateral Documents and Construction Contracts, Borrower has made no contract or arrangement of any kind, the performance of which by the other party thereto would give rise to a lien or claim of lien on the Premises.

5.9. **Access**: There is access to and from a public right away to and from the Premises sufficient for motor vehicles including all construction equipment.

5.10. **Default**: No event or circumstance on the part of Borrower has occurred under this Agreement, the Note or the Collateral Documents, now existing and no event has occurred and is continuing which with notice or the passage of time or either would constitute an Event of Default under any thereof.

SECTION 6 PARTICULAR COVENANTS OF BORROWER

6.1. **Insurance**:

(a) **Liability and Casualty Insurance**. To maintain insurance on the Premises in

accordance with Paragraph 3.12 (b) above.

6.2. **Payment of Taxes**: Borrower shall pay all taxes in conformance with Paragraph 3.12 (c) above.

6.3. **Observance of Rules**: Borrower covenants and represents and warrants that Borrower has and will continue at all times to promptly comply with all applicable laws, ordinances, regulations or requirements of any governmental authority relating to Borrower's business, property or affairs, including without limitation, the Premises.

6.4. **Business Existence**: Borrower will keep and cause to be kept in full force and effect and in "good standing", its existence as a limited liability company and all rights, licenses, leases and franchises reasonably necessary to conduct the business of the Borrower.

6.5. **Environmental Matters**: Borrower shall: (i) cause the Premises to be in compliance with all applicable Environmental Laws, rules and regulations; (ii) act promptly and in accordance with all requirements as to time and date required by applicable law and the preparation of any remediation plan and in the carrying out of that remediation plan; and (iii) comply promptly in all respects with the Environmental Certificate executed and delivered to Lender on even date. Further, if: (a) a claim of a violation of any Enviromental Law, ordinance or regulation is made by any governmental authority with respect to the Premises, (b) Lender reasonably believes that a new recognized environmental condition exists at the Premises; and/or (c) an Event of Default occurs and is continuing, Borrower shall furnish to Lender such environmental updates and questionnaires as Lender may reasonably request thereafter and, to the extent reasonably required by Lender, perform such further studies, testing and/or remediation as a result thereof.

6.6. **Control; Limitation on Sale: Further Encumbrance**:

(a) Borrower shall not further encumber, mortgage or permit any security interest or lien to attach to the Premises, without the prior written consent of Lender, except for Leases, encumbrances, mortgages or security interests in favor of Lender (See Section 6.8 below which further defines).

6.7. **Compliance**: Borrower shall comply with all applicable Legal Requirements, all covenants, restrictions and easements affecting the Premises, including building and use restrictions.

6.8. **Non-Pledge:** Borrower and Guarantor will not, without the prior written consent of Lender, mortgage or pledge as security for any other loans obtained by Borrower or Guarantor, the Premises as described herein, including improvements thereon, or the fixtures or personal property used in the operation of the improvements on the Premises. If any such mortgage or pledge is entered into without the prior written consent of the Lender, the entire Indebtedness secured hereby, may, at the option of Lender, be declared immediately due and payable without notice. Further, Borrower and Guarantor also shall pay any and all other obligations, liabilities or debts which may become liens, security interest, encumbrances upon or charges against the Premises for any repairs or improvements that are now or may hereafter be made thereon, and shall not, without Lender's prior written consent permit any lien, security interest, encumbrance or charge of any kind to accrue and remain outstanding against the Premises or any part thereof, or any improvements thereon, irrespective of whether such lien, security interest, encumbrance or charge is junior to the lien of this Borrower or Guarantor. Notwithstanding the foregoing, if any personal property by way of additions, replacements or substitutions is hereafter purchased and installed, affixed or

placed by Borrower or Guarantor on the Premises under a security agreement the lien or title of which is superior to the lien created by any Mortgages Borrower or Guarantor execute in favor of Lender, all the right, title and interest of Borrower or Guarantor in and to any and all such personal property, together with the benefit of any deposits or payments made thereon by Borrower and Guarantor shall nevertheless be and are hereby assigned to Lender and are covered by the lien of all the Mortgages Borrower or Guarantor grants to Lender.

SECTION 7 DEFAULT AND REMEDIES

7.1. **Default:** The entire unpaid Indebtedness shall be deemed matured and shall become immediately due and payable, at the option of Lender, without notice or demand, except as otherwise specifically required herein and without regard to any maturity date, upon the occurrence of any of the following events of default (each, an "Event of Default" and collectively, the "Events of Default"), which shall be deemed to be an Event of Default under this Agreement, the Note and the Collateral Documents:

(a) Default shall be made in the payment by Borrower of any installment of principal and/or interest under the Note or of any payment required to be made by Borrower pursuant to this Agreement or under any Collateral Document, within five (5) days after the date such payment is due, which is not cured within 10 days of written notice to Borrower by Lender; or

(b) Failure of Borrower to make any deposit of funds required hereunder or under any Collateral Documents within thirty (30) days after written demand therefor; or

(c) The filing of any construction lien against the Premises or any part thereof or any interest or right made appurtenant thereto which is not discharged or bonded over by a statutory bond (so as to cause the lien to be removed from title) or title insured by Title Insurer to the satisfaction of Lender within thirty (30) days from the date of Borrower's receiving knowledge thereof; or

(d) Any representation or warranty heretofore or hereafter made by or on behalf of Borrower or any Guarantor is found by Lender to have been false or misleading in any material respect when made or subsequently breached in any material and adverse respect; or

(e) Intentionally Omitted; or

(f) Intentionally Omitted; or

(g) There shall occur: (i) a termination of existence or dissolution of Borrower; or (ii) a sale out of the ordinary course of business by Borrower of all or of a substantial part of its assets; or (iii) a breach or violation of Section 6.6 of this Agreement; provided, however, with respect to: (A) Section 6.6(a), if within ten (10) days after Lender's receipt of the Permitted Transfer Documents, Lender determines that the Permitted Transfer Documents evidence a conveyance that is not a Permitted Transfer, Borrower shall have ten (10) business days from receipt of written notice from Lender to cure the same; and (B) Section 6.6(b), the cure period set forth in Section 7.1(c) shall apply to construction or monetary liens; or

(h) The Collateral or any material part thereof shall be destroyed or materially damaged, and not rebuilt, repaired or replaced to the extent required by the terms of this Agreement or any Collateral Documents; or

(i) The failure or breach of any other non-monetary covenant, or any warranty, promise, or representation herein contained and/or contained in either Note or in any of the Collateral Documents and the continuation of such failure or breach for a period of thirty (30) days after written notice thereof to the Borrower; provided, however, if a different period or notice requirement is specified for a particular breach under any other subsection of this Section 7 or any other document (notice shall not be required for a default under Subsections, 7.1(d), 7.1(g) [except as expressly set forth in Section 7.1(g)], 7.1(j), and 7.1(k)), then that specific provision shall control; provided, further, that the thirty (30) day cure period provided by this Section 7.1(i) shall not be in addition to any cure period specifically provided elsewhere in this Agreement or in the Note or any Collateral Document; notwithstanding the foregoing, should an Event of Default exist under a Subsection other than 7.1 (a), 7.1(d), 7.1(g) [except with respect to the cure of construction or monetary liens], 7.1(j), and 7.1(k), then the applicable cure period may be extended for an additional period of ninety (90) days as long as Borrower has commenced the cure and diligently pursues the cure within the initial thirty (30) day period and thereafter; or

(j) Should any of the following occur with regard to Borrower or any Guarantor:

(i) a general assignment for the benefit of creditors; or

(ii) the filing of a voluntary petition under any bankruptcy or insolvency law; or

(iii) the filing of any involuntary petition under any bankruptcy or insolvency law by the creditors of Borrower or any Guarantor, said petition remaining undischarged for a period of ninety (90) days; or

(iv) the appointment by any court of a receiver to take possession of substantially all assets of Borrower, any Guarantor or of the Premises, said receivership remaining undischarged for a period of ninety (90) days; or

(v) attachment, execution or other judicial seizure of substantially all of assets of Borrower or any Guarantor, such attachment, execution or other seizure remaining undismissed or undischarged for a period of ninety (90) days after the levy thereof for assets other than the Premises; or

(vi) attachment, execution or other judicial seizure of the Premises, such attachment, execution or other seizure remaining undismissed or undischarged for a period of thirty (30) days after the levy thereof; or

(vii) any judgment against Borrower, or any garnishment, attachment or other levy against the property of Borrower, with respect to a claim for any amount in excess of Twenty-Five Thousand Dollars ($25,000.00) remains unpaid, unstayed on appeal, undischarged, unbonded or undismissed for a period of sixty (60) days; or

(viii) any judgment against any Guarantor, or any garnishment, attachment or other levy against the property of any Guarantor, with respect to a claim for any amount in excess of Twenty-Five Thousand Dollars ($25,000.00) remains unpaid, unstayed on appeal, undischarged, unbonded

or undismissed for a period of sixty (60) days.

(k) If Hazardous Materials are found on, upon or under the Premises, in amounts in excess of the amounts permitted by the Environmental Laws, and if such Hazardous Materials are not removed or remediated as required by any governmental authority having jurisdiction within the time periods required by said governmental authority or, within the time period required by applicable laws, ordinances or regulations or if Borrower fails to commence and prosecute remediation within the time periods required by law or by any such governmental authority.

7.2. **Borrower's Obligation to Give Notice of Event of Default**: Borrower shall give written notice to Lender of the occurrence of any Event of Default or the existence of any event which would, with the passage of time or giving of notice or both, constitute an Event of Default hereunder promptly after discovery of any such event.

7.3. Intentionally Omitted

7.4. **Application of Funds in Account: Default Charge**: After maturity of the Note, by acceleration or otherwise:

(a) Lender shall have the right to apply all or any part of said funds or of any funds in any account of Borrower then maintained with Lender to payment of principal and accrued interest under the Note at Lender's discretion and the obligations of Borrower hereunder.

(b) Borrower shall pay interest at the default rate of interest set forth in the Note.

7.5. **Remedies are Cumulative**: All remedies provided for herein are cumulative and shall be in addition to any and all other rights and remedies provided by law, including banker's lien and right of offset. The exercise of any right or remedy by Lender hereunder shall not in any way constitute a cure or waiver of an Event of Default or invalidate any act done pursuant to any notice of default or prejudice Lender in the exercise of any of its rights hereunder or under the Mortgage, unless in the exercise of said rights, Lender realizes all amounts owed under the Note, the Mortgage and hereunder.

7.6. **Waiver of Certain Laws**: To the extent permitted by applicable law, all parties hereto, except Lender, hereby agree to waive and do hereby absolutely and irrevocably waive and relinquish the benefit and advantage of any non-judicial valuation, stay, appraisement, extension or right to a judicial hearing prior to foreclosure, pursuant to statute and case made and provided, now existing or which may hereafter exist, which but for this provision, might be applicable to any sale made under the judgment, order or decree or any court, or otherwise, based on any promissory note or Collateral Documents contemplated hereby or on any claim for interest on the promissory note or on any security interest contemplated by this Agreement.

7.7. **Receiver**: Lender herein, upon the happening of an Event of Default, shall be entitled without notice or contest, and completely without regard to the adequacy of any security for the debt, to the appointment of a receiver of the business, including Borrower's rights under the Leases, if any, and Premises and of the rents and profits derived therefrom during the term of the Loan. This appointment shall be in addition to any other rights, relief or remedies afforded Lender. Such receiver, to the extent permitted by court order, which may include the following in addition to any other rights to which he, she or it shall be entitled, may exercise the rights granted herein to Lender hereunder and under the

Collateral Documents and shall be authorized to sell, foreclose or complete foreclosure on all security interests contemplated by this Agreement for the benefit of Lender. In the event of any deficiency, Borrower shall remain liable therefor.

7.8. **WAIVER OF JURY TRIAL**: BORROWER ACKNOWLEDGES THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL RIGHT, BUT THAT THE SAME MAY BE WAIVED. BORROWER, AFTER CONSULTATION (OR HAVING HAD THE OPPORTUNITY TO CONSULT) WITH COUNSEL OF ITS CHOICE, KNOWINGLY AND VOLUNTARILY, HEREBY WAIVES ANY RIGHT TO TRIAL BY JURY IN THE EVENT OF LITIGATION REGARDING PERFORMANCE OR ENFORCEMENT OF, OR IN ANY WAY RELATED TO, THE LOAN, THIS AGREEMENT OR ANY COLLATERAL DOCUMENT.

7.9. **Assignments**. Borrower hereby assigns to Lender as collateral security for the Loan, all of Borrower's right, title and interest in all contracts and agreements, including without limitatiou, all purchase agreemeuts to sell Premises (defined below), all construction contracts and all contracts with engineers and architects (collectively, the "Assigned Contracts"). Followiug an Event of Default, at Lender's election, upon written notice to Borrower, the Assigned Contracts shall be deemed assigned to Lender and Borrower shall execute, or cause the couuter party to execute, any necessary documentatiou to evidence the assignment of the Assigned Contracts.

SECTION 8 MISCELLANEOUS

8.1. **No Waiver**: No waiver of any default or breach by Borrower hereunder shall be implied from any omission by Lender to take action on account of such default if such default persists or is repeated. No express waiver shall affect any default other than the default specified in the waiver, and it shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by Lender to or of any act by Borrower requiring further consent or approval shall not be deemed to waive or render uunecessary the consent or approval to or of any subsequent similar act.

8.2. **No Third Parties Benefited**: This Agreement is made and entered into for the sole protection and benefit of Lender and Borrower, their successors and assigns, and no other person or persons shall have any right of action hereon.

8.3. **Actions**: Lender shall have the right to commence, appear in or defend any action or proceeding purporting to affect the rights, duties or liabilities of the parties hereunder. In connection therewith, Lender may incur and pay costs and expenses, including a reasonable attorneys' fee. Borrower agrees to pay to Lender on demand all such expenses.

8.4. **Commissions and Brokerage Fees**: Borrower agrees to indemnify Lender from any responsibility and/or liability for the payment of any commission, charge or brokerage fees to anyone which may be payable in connection with the making of the Loan herein contemplated unless such commission, charge or brokerage fee is due pursuant to a written agreement between Lender and the applicable broker; it being understood that any such commission, charge or brokerage fees will be paid directly by the Borrower to the party or parties entitled thereto. Lender represents and warrants to Borrower that Lender has not dealt with the Borrower through the agency of any person or entity in a manner which would, in Lender's good faith opinion, provide such person or entity with a claim for a

commission or fee.

8.5. **Successors and Assigns**: The terms hereof shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto; provided, however, that Borrower shall not assign its rights hereunder in whole or in part without the prior written consent of Lender. Any such assignment without said consent shall be void.

8.6. **Modifications**: Without any notice to or any further assent by any other persons, except for Borrower, the liability of Borrower to Lender for any Indebtedness may, from time to time, in whole or in part, be renewed, extended, modified, accrued, compromised or released by Lender. Any Collateral or liens for any such Indebtedness may be exchanged, sold, discharged or surrendered by Lender upon written notice to Borrower, all without affecting the obligations of any parties hereto under this Agreement or any other persons who may become subject to this Agreement and any assignment, pledge, guaranty, security agreement or chattel mortgage contemplated hereby. All of the obligations of any parties hereto, except Lender, contemplated by this Agreement shall be deemed to be joint and several.

8.7. **Continuing Agreement**: All of Borrower's and/or any other parties' agreements, representations, warranties and certificates under, pursuant or relating to this Agreement shall survive and continue until all Indebtedness hereunder is paid in full as to both principal and interest.

8.8. **Payment of Costs**: It is understood and agreed that Borrower shall pay, now or hereafter, all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by Lender in connection with the consummation and closing of the Loan. All of said amounts required to be paid by Borrower as aforesaid may, at Lender's option, be charged by Lender as an advance against the proceeds of the Loan. All costs, including reasonable attorneys' fees incurred by Lender, in connection with the administration, enforcement, remedial and/or protective activities of the Loan, including the cost of any inspection by Lender, tax searches, title updates, filing and recording fees, environmental remediation costs, UCC searches and the like, and including by way of description and not limitation, such charges incurred in any court or bankruptcy proceedings, shall be paid by Borrower and secured by the Collateral Documents.

8.9. **Additional Documentation**: Borrower, from time to time, upon written request of Lender will make, execute, acknowledge and deliver all such further and additional instruments and take all such further action as may be reasonably required to carry out the intent and purpose of this Agreement and to provide for the payment of all loans, notes, borrowings and advances according to the intent and purpose herein and therein expressed.

8.10. **Governing Law**: This Agreement, the Note and all Collateral Documents shall be interpreted and the rights of the parties hereunder shall be determined under the laws of the State of Michigan.

8.11. **Financing Statements**: No financing statements covering any collateral or proceeds thereof, as contemplated by this Agreement, are on file in any public office, except financing statements with Lender and Borrower's prior lender, which, with respect to Borrower's prior lender, Borrower represents and warrants shall be discharged on or immediately following the date hereof.

8.12. **Counterparts**: This Agreement may be executed in several counterparts, and each executed counterpart shall constitute an original instrument, but such counterparts shall together constitute

but one and the same instrument.

8.13. **Inclusion by Reference:** All of the various instruments and documents referred or alluded to in this Agreement shall be deemed to be included herein and made a part hereof as though specifically set forth herein, word by word; provided, however, that if any conflict exists with respect to the rights of Lender, then the terms of such instruments, documents, pledges and security agreements will govern.

8.14. **Severability:** Should any part, term or provision of this Agreement be determined by the courts to be illegal or in conflict with any law of the State of Michigan, the validity of the remaining portions or provisions of the Agreement shall not be affected thereby.

8.15. **Notices:** All notices or demands hereunder to the parties hereto shall be sufficient if made in writing and (a) sent by certified mail, return receipt requested, postage prepaid; (b) sent by a recognized overnight courier for next business day delivery; or (c) delivered by personal service, and addressed to the parties as set forth on the first page hereof. Notice made in accordance with these provisions shall be deemed delivered at the time of written receipt if delivered by hand, on the third business day after mailing if mailed by certified mail, or on the next business day after deposit with a recognized overnight courier service if delivered by overnight courier, provided, that it is sent for next business day delivery, guaranteeing such delivery.

8.16. **Hold Harmless/Indemnity:** Borrower and Guarantors hereby assume responsibility and liability for, and hereby hold harmless and indemnify Lender from and against any and all, by way of example but without limitation, liabilities, demands, obligations, injuries, costs, damages (direct, indirect), awards, loss of interest not exceeding the legal rate, principal, or any portion of the Loan, charges, expenses, payments of monies and reasonable attorneys' fees, incurred or suffered, directly or indirectly, by Lender and/or asserted against Lender by any person or entity whatsoever, including Borrower or Guarantors, arising out of this Agreement, the Note or the Collateral Documents, or any other document executed pursuant to this Agreement, or the relationship herein set forth or the exercise of any right or remedy including the realization, disposition or sale of the Premises, or any portion thereof, or the exercise of any right in connection therewith, for which Lender may be liable, for any reason whatsoever, unless: (a) caused by the intentional acts or gross negligence of Lender, its employees or authorized agents; or (b) such assertion by Borrower and/or Guarantor is made in good faith.

8.17. **Relationship:** Nothing contained in this Agreement or any action of Lender or Borrower shall create any relationship of agency, partnership, co-venture, joint venture so as to render Lender liable in any manner to any party dealing with Borrower and Borrower and Guarantors shall indemnify, defend and hold Lender harmless from and against any claim that Lender is, or has acted in the capacity of an agent, partner, co-venturer or joint venturer of or with Borrower unless any such claim results from an intentional act or gross negligence of Lender or its employees or authorized agents. All obligations of Lender hereunder, including the obligation to make money advances are imposed solely and exclusively for the benefit of Borrower and its successors and assigns and no other person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Lender will make money advances in the absence of strict compliance with any or all such conditions, and no other person shall, under any circumstances, be deemed to be a beneficiary of such conditions, any and all of which may be freely waived in whole or in part by Lender at any time if in its sole discretion it deems it desirable to do so.

8.18. **Entire Agreement:** This Agreement, the Note and other Collateral Documents

constitute the entire agreement between Lender and Borrower concerning the subject matter of this Agreement and supersede any conflicting terms and conditions set forth in any other agreement between the parties.

SECTION 9 REPORTS:

9.1. Borrower shall provide to Lender a Bi-Weekly reports identifying all homes purchased by Borrower with Loan, and the cost of each home and approximate cost of renovations. The Bi-Weekly Reports will also include an updated valuation statement of the Premises pledged as Collateral pursuant to Exhibit A attached.

9.2. **Sale of Homes Purchased with Loan Proceeds**: The Borrower shall provide Lender with five (5) days prior written notice of a sale of any home purchased with the Loan (a "Home Sale"). Upon consummation of a Home Sale, Borrower shall to pay to Lender a success fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold ("Success Fee").

9.3. **Sale of Homes listed per Exhibit A**: Upon the sale of any home listed in Exhibit A, Borrower agrees to provide Lender with substitute collateral via placement of a first priority mortgage on another home of equal value (per estimates of value listed, Exhibit E) in which Borrower has fee title and in which Lender will be in a first lien position.

Exhibit A attached: Premises pledges as Collateral.

Exhibit B attached: Mortgage Note

Exhibit C attached: A form of Mortgage

Exhibit D attached: Two (2) Guarantees

Exhibit E attached: Chart of Value of Collateral

9.4 **Discharge of Mortgages/Financing Statements**. Upon the fulfilment of all of Borrower's obligations to Lender hereunder, Lender shall promptly (a) discharge all mortgages or liens in favor of Lender on the Premises or the substitute collateral described in paragraph 9.3, and (b) terminate all financing statements in favor of Lender in regards to Borrower or its assets.

(Space Intentionally Left Blank)

IN WITNESS WHEREOF, Lender and Borrower have each caused this Loan Agreement to be executed all as of the day and year first above written.

LENDER:

SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC, a Delaware limited liability company

By: _____
Its: EVP
Dated: 8/12/16

BORROWER:

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company

By: _____
Dean J. Groulx
Its: Sole Member
Dated: Aug. 12, 2016

GUARANTOR:

PARK STREET GROUP. LLC, a Michigan limited liability company

By: _____
Dean J. Groulx
Its: Sole Member
Dated: Aug. 12, 2016

EXHIBIT 8

EXHIBIT A

EXHIBIT "A"

DESCRIPTION OF REAL ESTATE

The following described real estate, situated in the City of Detroit, County of Wayne, State of Michigan, to wit:

Parcel 1:	W MARLBOUROUGH LOT 89 SEFTON PARK SUB L38 P86 PLATS, WCR 21/478 35 X 126.89A Commonly known as: 5231 MARLBOROUGH, DETROIT, MICHIGAN 48224 Tax Parcel Number: 21059525
Parcel 2:	LOT 10, BLOCK 2, ASSESSOR'S PLAT NO 28, L/P 10/33 Commonly known as: 1717 & 17198 BAILEY, LANSING, MICHIGAN 48910 Tax Parcel Number: 33-01-01-22354-061
Parcel 3:	W ARCHDALE LOT 2678 FRISCHKORNS GRAND-DALE SUB NO 7 L59 P6 PLATS, WCR 22/591 37.95 X 123 Commonly known as: 9997 ARCHDALE, DETROIT, MI 48227 Tax Parcel Number: 22072071
Parcel 4:	E INDIANA LOT 186 WESTLAWN SUB NO 3 L32 P12 PLATS, WCR 18/390 35 X 100 Commonly known as: 11470 INDIANA, DETROIT, MI 48204 Tax Parcel Number: 18015529
Parcel 5:	N ELMDALE LOT 463 GRATIOT GARDENS SUB L32 P14 PLATS, WCR 21/455 40 X 150 Commonly known as: 12559 ELMDALE, DETROIT, MI 48213 Tax Parcel Number: 21007368
Parcel 6:	THE EAST 16 FEET OF LOT 348 AND THE WEST 25 FEET OF LOT 349, AVALON HEIGHTS SUBDIVISION, AS RECORDED IN LIBER 49, PAGE 100 OF PLATS, WAYNE COUNTY RECORDS Commonly known as: 16257 MANNING, DETROIT, MI 48205 Tax Parcel Number: 21023434
Parcel 7:	N SRARATOGA LOT 276 PULCHER ESTATE SUB L44 P76 PLATS, WCR 21/656 35X120 Commonly known as: 13881 Saratoga St., Detroit, MI 48205 Tax Parcel Number: 21019152
Parcel 8:	N JANE LOT 10 AND LOT 11 DURUSSELL SUB L44 P66 PLATS, WCR 21/664 65.65 IRREG Commonly known as: 12845 JANE ST., DETROIT, MI 48205 Tax Parcel Number: 21011847-48

Parcel 9:	W CARRIE LOT 42 HUTTON & PITCHERS 7 MILE DR SUB L 42 P 32 PLATS, WCR 15/226 35 X 126 Commonly known as: 18611 CARRIE, DETROIT, MICHIGAN 48234 Tax Parcel Number: 15008511
Parcel 10:	NORTH 20.0 FEET OF LOT 488 AND ALL OF LOT 489, INCLUDING 1/2 VACATED ALLEY AT THE REAR, FRISCHKORN'S PARK VIEW SUBDIVISION. ACCORDING TO THE RECORDED PLAT THEREOF, AS RECORDED IN LIBER 41, PAGE 95, OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 7629 DACOSTA, REDFORD, MICHIGAN 48239 Parcel Id No. : 22-116023-4/22-1116023
Parcel 11:	W AMERICAN LOT 37 MERRITT M WILLMARTHS SUB L21 P 87 PLATS, WCR 16/199 30 X 100 Commonly known as: 10431 AMERICAN, DETROIT, MICHIGAN 48204 Tax ID No.: 16024270
Parcel 12:	E NORTHLAWN LOT 451 WESTLAWN SUB L31 P68 PLATS, WCR 16/236 35 X 105.01 Commonly known as: 1238 NORTHLAWN, DETROIT, MICHIGAN 48238 Parcel ID No.: 16031607
Parcel 13:	LOT 1061 DAVID TROMBLY ESTATES SUBDIVISION NO. 4, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 48, OF PLATS PAGE(S) 44, WAYNE COUNTY RECORDS. Commonly known as: 13074 KILBOURNE ST., DETROIT, MI 48213 Tax ID No.: 21009931
Parcel 14:	S WADE LOT 425 DAVID TROMBLYS HARPER AVE SUB NO 1 L51 P24 PLATS, WCR 21/758 35 X 100.60 Commonly known as: 13412 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006037
Parcel 15:	N PFENT LOT 105 MAPLE VIEW PARK SUB L51 P76 PLATS, WCR 21/764 35 X 115 Commonly known as: 13641 PFENT, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021942
Parcel 16:	N PFENT W 35 FT LOT 28 CAROL PARK SUB L43 P23 PLATS, W C R 21/799 35 X 115. Commonly known as: 14053 PFENT, DETROIT, MI 48205 Parcel ID No.: 21021977
Parcel 17:	N WADE LOT 688 RAVENDALE SUB NO2 L49 P96 PLATS, WCR 21/739 35 X 110 Commonly known as: 14295 WADE, DETROIT, MICHIGAN 48213 Parcel ID No.: 21006363

Parcel 18:	E LESURE LOT 204 & W 8 FT VAC ALLEY ADJ HURON HEIGHTS SUB L34 P71 PLATS, WCR 22/62 35 X 112 Commonly known as: 14870 LESURE, DETROIT, MICHIGAN 48227 Parcel ID No.: 22032612
Parcel 19:	S LAPPIN LOT 677 AVALON HEIGHTS SUB L49 P100 PLATS, WCR 21/789 40 X 125 Commonly known as: 16028 LAPPIN, DETROIT, MICHIGAN 48205 Parcel ID No.: 21021645
Parcel 20:	W ANNOTT LOT 2217 DRENNAN & SELDONS LASALLE COLLEGE PARK SUB NO 7 L60 P30 PLATS, W C R 21/934 36 IRREG Commonly known as: 17803 ANNOTT, DETROIT, MI 48205 Parcel ID No.: 21035698
Parcel 21:	E Sherwood N 14.50 FT LOT 27 AND S 22.75 FT LOT 28 WARRENS FORD PACKARD SUB L37 P71 PLATS, W C R 15/221 37.25 X 124. Commonly known as: 18846 SHERWOOD, DETROIT, MI 48234 Parcel ID No.: 15011985-6
Parcel 22:	W ROWE LOT 89 TWIN PINES SUB L43 P58 PLATS, WCR 21/794 40 X 125.75 Commonly known as: 19353 ROWE, DETROIT, MICHIGAN 48205 Parcel ID No.: 21035983
Parcel 23:	W CARRIE LOT 405 PATERSON BROS & CO OUTER DRIVE-VAN DYKE SUB L46 P89 PLATS, WCR 15/260 40x100 Commonly known as: 19635 CARRIE, DETROIT, MICHIGAN 48234 Parcel ID No.: 15008433
Parcel 24:	N VIRGINIA PK LOT 199 MCGREGORS SUB L30 P39 PLATS, WCR 8/116 35 X 134.52A Commonly known as: 1982 VIRGINIA PARK, DETROIT, MI 48206 Parcel ID No.: 8002022
Parcel 25:	W GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L GREELEY LOT 1126 EIGHT-OAKLAND SUB NO 1 L37 P23 PLATS, WCR 9/176 35 x 100 Commonly known as: 20125 GREELEY, DETROIT, MICHIGAN 48203 Parcel ID No.: 9019429
Parcel 26:	S BLAINE LOT 262 DEXTER BLVD SUB L30 P32 PLATS, WCR 12/172 34X105 Commonly known as: 3275 BLAINE, DETROIT, MICHIGAN 48206 Parcel ID No.: 12002175
Parcel 27:	LOT 30, RIVARD VILLAS SUBDIVISION, AS RECORDED IN LIBER 60 OF PLATS, PAGE 1, WAYNE COUNTY RECORDS. Commonly known as: 5315 LODEWYCK, DETROIT, MI 48224 Parcel ID No.: 21077928

Parcel 28:	LOT 513, AND THE EAST 9 FEET OF THE VACATED ALLEY ADJACENT THERETO, FRISCHKORN'S WARREN AVENUE PARK SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN LIBER 39, OF PLATS PAGE(S) 89, WAYNE COUNTY RECORDS. Commonly known as: 6403 BRACE, DETROIT, MI 48228 Parcel ID No.: 22081318
Parcel 29:	E BRYDEN LOT 279 FRISCHKORNS TIREMAN PARK SUB L34 P43, WCR 16/225 35 X 109 Commonly known as: 8190 BRYDEN, DETROIT, MICHIGAN 48204 Parcel ID No.: 16024481
Parcel 30:	E CARBONDALE LOT 152 SCRIPPS HOLDEN AVE SUB L19 P67 PLATS, WCR 16/210 30 X 94 Commonly known as: 8338 CARBONDALE, DETROIT, MICHIGAN 48204 Parcel ID No.: 16016568
Parcel 31:	ALL THAT CERTAIN PARCEL OF LAND SITUATED IN THE COUNTY OF WAYNE AND STATE OF MICHIGAN AND BEING KNOWN AND DESIGNATED AS FOLLOWS: LOT 153, COLLEGE VIEW SUBDIVISION, WAYNE COUNTY, MICHIGAN, RECORDED LIBER 45, PAGE 49 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 16589 BIRWOOD ST, DETROIT, MI 48221. Parcel ID No.: 16042468
Parcel 32:	LOT 146, MORIN PARK SUBDIVISION NUMBER 1 ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 41, PAGE 94, OF PLATS, WAYNE COUNTY RECORDS MICHIGAN. Commonly known as: 7824 METTETAL STREET, DETROIT, MICHIGAN Parcel ID No.: 01-22059630
Parcel 33:	LOT 42, INCLUDING ONE-HALF VACATED ALLEY AT THERE REAR THEREOF, C.W. HARRAH'S SEVEN MILE ROAD SUBDIVISION, AS RECORDED IN LIBER 57, PAGE 79 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 18495 FAUST AVENUE, DETROIT, MI 48219 Parcel ID No.: 22078796
Parcel 34:	S HAMPSHIRE LOT 39 PARKVIEW MANOR SUB L47 P48 PLATS, W C R 21/703 46.41 IRREG. Commonly known as: 13106 HAMPSHIRE, DETROIT, MI 48213 Parcel ID No.: 01-21005499
Parcel 35:	LAND SITUATED IN THE CITY OF DETROIT, COUNTY OF WAYNE, STATE OF MICHIGAN, MORE PARTICULARLY DESCRIBED AS: LOT 1458 AND 1/2 VACATED ALLEY ADJOINING IN REAR, DRENNAN AND SELDON'S REGENT PARK SUBDIVISION NO. 3, ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 59 OF PLATS, PAGE 88, WAYNE COUNTY RECORDS.

	Commonly known as: 14064 ROSSINI DRIVE, DETROIT, MI 48205 Parcel ID No. 21024857004
Parcel 36:	LOT 80, MADAY-ESTATE SUBDIVISION, A SUBDIVISION ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 47 ON PAGE(S) 8 OF PLATS, WAYNE COUNTY RECORDS. Commonly known as: 8867 SAINT MARYS, DETROIT, MI 48228 Parcel ID No.: 22059350

The following described real estate, situated in the City of Flint, County of Genesee, State of Michigan, to wit:

Parcel 37:	WESTGATE PARK LOT 50, BLK 1; WESTGATE PARK MANOR PART OF OUTLOT BEGINNING AT NWLY CORNER OF LOT 50, BLOCK 1 OF WESTGATE PARK, TH SLY ALG WLY LINE OF 50 LOT, 85 FT TO SWLY CORNER OF 50 LOT; TH SWLY ALG SLY LINE OF 50 LOT EXTENDED SWLY 100 FT; TH NWLY TO A PT, ON NLY LINE OF 50 LOT EXTENDED SWLY 100 FT FROM BEGINNING; TH NELY 100 FT TO POB. Commonly known as: 1919 CARMANBROOK PKWY, FLINT, MI 48507 Parcel Id: 40-24-376-189

The following described real estate, situated in the City of Saginaw, County of Saginaw, State of Michigan, to wit:

Parcel 38:	LOT 20, INCLUDING 1/2 VACATED ALLEY ADJACENT THERETO, BLOCK 30, SAGINAW IMPROVEMENT COMPANY'S ADDITION B, CITY OF SAGINAW, SAGINAW COUNTY, MICHIGAN ACCORDING TO THE PLAT THEREOF AS RECORDED IN LIBER 2, PAGE 15 OF PLATS, SAGINAW COUNTY RECORDS. PIN: 11-0977-00000 Commonly known as: 2322 ROBINWOOD AVENUE, SAGINAW, MICHIGAN 48601 Parcel Id: 11-0977-00000

The following described real estate, situated in the City of Lapeer, County of Lapeer, State of Michigan, to wit:

Parcel 39:	SEC 31 T8N R10E THE N 1/2 PRT OF NW FRL 1/4 SEC 31 BEG AT A PT ON W SEC LINE THAT IS S 1375.95 FT FROM NW CRN OF SEC 31, TH CONTINUING S 200.00 FT ALONG SAID W SEC LINE, TH S 89 DEG 22' E 440.0 FT ALONG N LINE OF S 50 A OF NW FRL 1/4 AS OCCUPIED, TH N 200.0 FT, TH N 89 DEG 22' W 440.0 FT TO POB EXCEPT THE NORTH 1/2 THEREOF, CONTAINS 1.01 A. Commonly known as: 1572 MILLVILLE RD. LAPEER, MICHIGAN 48446 Parcel Id: 014-031-004-10

All that certain parcel of land situated in the City of Ypsilanti, County of Washtenaw and State of Michigan, being known as follows:

Parcel 40:	THE WESTERLY 48 FEET OF THE SOUTHERLY 132 FEET OF LAND LYING AT NORTHEAST CORNER OF ORCHARD AND FREDERICK STREET ON LOT 69, WORDEN GARDENS, UNRECORDED. Commonly known as: 850 FREDERICK ST., YPSILANTI, MI 48197 Parcel Id: 11-11-39-431-009

EXHIBIT 9

17 AUG-14 PM 4 :00

Bernard J. Youngblood
Wayne County Register of Deeds
2017275994 L: 53885 P: 391
08/14/2017 04:00 PM WD Total Pages: 1

P.A. 327 OF 1968
AFFIDAVIT FILED

Warranty Deed

The Grantor Rubicon Realty Group, LLC By Dean Groux, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48302

Conveys and warrants to: Pioneer Investments, LLC whose address 500 Griswold #2420, Detroit, MI 48226

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 44 & East 9 Feet of Vacant Alley adjacent to the rear, TARABUSI GREENFIELD GARDENS SUBDIVISON, as recorded in Liber 50 Page 46 Wayne County Records

More Commonly Known as: 16233 Whitcomb, Detroit, MI 48235
Ward 22, Item no. 047932.

SEE REAL ESTATE TRANSFER TAX VALUATION AFFIDAVIT

Subject to existing building and use restriction, zoning ordinance and easements if any.

Dated: 07/24/17

Signed by:

By: Dean Groux, Member
Rubicon Realty Group, LLC

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 07/24/17 by Dean Groux, Member of Rubicon Realty Group, LLC

Gail M Himrod
Notary Public Oakland County, Michigan
Acting In: Oakland
My Commission Expires: 04/24/2019

Drafted by: EDWARD HUDSON PLC
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: ~~70128PA~~ 160253
Return to: Pioneer Investments, LLC
500 Griswold #2420, Detroit, MI 48226
City/County Stamps: 39.60
State Stamps: 270.00
Recording fee: 20.00

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or taxes owed to any other entities.
No. 16385 Not Examined
Date 8-8-17 WAYNE COUNTY TREASURER Clerk

'17 AUG-14 PM 4 :00

Bernard J. Youngblood
Wayne County Register of Deeds
2017275991 L: 53885 P: 388
08/14/2017 04:00 PM WD Total Pages: 1

P.A. 327 OF 1968
AFFIDAVIT FILED

Warranty Deed

The Grantor Rubicon Realty Group, LLC By Dean Groux, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48302

Conveys and warrants to: Pioneer Investments, LLC whose address 500 Griswold #2420, Detroit, MI 48226

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 936, B E TAYLORS RAINBOW SUBDIVISION, as recorded in Liber 41 of Plat's, Page 75, Wayne County Records.

More Commonly Known as: 16591 Asbury Park, Detroit, MI 48235
Ward 22, Item No. 061907.

SEE REAL ESTATE TRANSFER TAX VALUATION AFFIDAVIT

Subject to existing building and use restriction, zoning ordinance and easements if any.

Dated: 07/24/17

Signed by:
Dean J. Groux
By: Dean Groux, Member
Rubicon Realty Group, LLC

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 07/24/17 by Dean Groux, Member of Rubicon Realty Group, LLC

Gail M Himrod
Notary Public Oakland County, Michigan
Acting In: Oakland
My Commission Expires: 04/24/2019

Drafted by: EDWARD HUDSON PLC
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: 170128FA
Return to: Pioneer Investments, LLC
500 Griswold #2420, Detroit, MI 48226
City/County Stamps: 39.60
State Stamps: 270.00
Recording fee: 20.00

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

This is to certify that there are no delinquent property taxes owed to our office for this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.
No. 16385 Not Examined
Date 8-2-17 WAYNE COUNTY TREASURER Clerk

'18 JAN-19 AM10:20

Bernard J. Youngblood
Wayne County Register of Deeds
2018016168 L: 54175 P: 63
01/19/2018 10:22 AM WD Total Pages: 1

P.A. 327 OF 1968
AFFIDAVIT FILED

Warranty Deed

The Grantor Rubicon Realty Group, LLC, by Dean Groulx, Member whose address is 100 W Long Lake Rd, Ste 160, Bloomfield Hills, MI 48304

Conveys and warrants to: Alpha Detroit, LLC whose address 100 W Big Beaver Rd Ste 200, Troy, MI 48084

The following described premises situated in the City of Detroit, County of Wayne, State of Michigan:

Lot 74 and East 9 feet of vacated alley adjacent ROYCOURT SUBDIVISION, according to the plat thereof, as recorded in Liber 49 of Plats, Page 62, Wayne County Records

More Commonly Known as: 12667 Woodmont, Detroit, MI 48227
Ward 22, Item No. 062903.

For the full consideration of $1.00 see attached transfer evaluation affidavit

Subject to existing building and use restriction, zoning ordinance and easements if any.

OF RECORD

Dated: 12/14/17

Signed by:

Rubicon Realty Group, LLC,
by Dean Groulx, Member

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 12/14/17 by Dean Groulx, member of Rubicon Realty Group, LLC

Notary Public County, Michigan
Acting in:
My Commission Expires:

Juliete G Flores-Allen
Notary Public of Michigan
Oakland County
Expires 04/27/2023
Acting in the County of

Drafted by: EDWARD HUDSON III
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: 171258
Return to: Alpha Detroit, LLC, 100 W Big Beaver Rd Ste 200, Troy, MI 48084

City/County Stamps: 36.85
State Stamps: 251.25
Recording fee: 20.00

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.
No: 15169 _____ Not Examined
Date: 1-18-18 WAYNE COUNTY TREASURER Clerk

Bernard J. Youngblood
Wayne County Register of Deeds
2017337775 L: 54019 P: 1173
10/23/2017 11:31 AM WD Total Pages: 1

'17 OCT-23 AM11:31

WARRANTY DEED

The Grantor(s), Rubicon Realty Group, LLC by Dean Groux, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Naranjo Fernandez, LLC, Grantee(s) whose address is 5750 Collins Avenue Apt. 15E, Miami Beach, FL 33140 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 228, Crescent Heights Subdivision, according to the plat thereof, as recorded in Liber 35 of Plats, Page 29, Wayne County Records

Commonly known as: 15762 Gilchrist
Detroit, MI 48227

Parcel ID: 22065353.

For the Full Consideration of Forty Seven Thousand Five Hundred and 00/100 Dollar(s) ($47,500.00) subject to building and use restrictions and easements of record, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions of record, zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future installments of special assessments payable hereafter.

Dated this 18th day of September, 2017.

Rubicon Realty Group, LLC

BY: Dean J. Groux
Dean Groux, Member

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #460445
10/23/2017
Receipt# 17-289587 L: 54019 P: 1173
State Tax: $356.25 County Tax: $52.25

STATE OF Michigan

COUNTY OF OAKLAND

I, Gail M Himrod a Notary Public of the County and State first above written, do hereby certify that Dean Groux, Member of Rubicon Realty Group, LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 18th day of September, 2017.

Gail M Himrod
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

Prepared by:
Rubicon Realty Group, LLC by Dean Groux, Member
100 W Long Lake Rd, Ste 102
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
560 Kirts Blvd Ste. 115
Troy, MI 48084
File #: 171239

When recorded mail to:
Naranjo Fernandez, LLC
5750 Collins Avenue Apt. 15E
Miami Beach, FL 33140

This is to certify that there are no delinquent [illegible] this property for five years prior to the date of the [illegible] is made as to the status of any tax liens or titles owned [illegible]
No: 23218
Date 10/12/17 WAYNE COUNTY TREASURER Clerk Not Examined

Bernard J. Youngblood
Wayne County Register of Deeds
2017238795 L: 53803 P: 335
06/28/2017 02:06 PM WD Total Pages: 1

'17 JUN-28 PM 2 :04

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #447167
06/28/2017

ReceiptN 17-205718 L: 53803 P: 335
State Tax: $150.00 County Tax: $22.00

WARRANTY DEED

The Grantor(s), Rubicon Realty Group, LLC, Dean Groulx, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Rockpoint Homes, LLC, Grantee(s) whose address is 10531 Farmington, Livonia, MI 48150 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 545 B.E. Taylors Rainbow Subdivision, as recorded in Liber 41 Page 75 of Plats, Wayne County Record

Commonly known as: 16744 Oakfield
Detroit, MI 48235

Parcel ID: 22069236.

For the Full Consideration of Twenty Thousand and 00/100 Dollar(s) ($20,000.00) subject to building and use restrictions and easements of record, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions of record, zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future installments of special assessments payable hereafter.

Dated this 16th day of June, 2017.

Rubicon Realty Group, LLC
BY: _____
Dean Groulx
Member

STATE OF Michigan

COUNTY OF ~~Wayne~~ Oakland

I, Gail M Himrod, a Notary Public of the County and State first above written, do hereby certify that Dan Groulx, Member of Rubicon Realty Group, LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 16th day of June, 2017

Gail M Himrod
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

Prepared by:
Rubicon Realty Group, LLC, Dean Groulx, Member
100 W Long Lake Rd, Ste 102
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
560 Kirts Blvd Ste. 115
Troy, MI 48084
File #: 171088FA

When recorded mail to:
Rockpoint Homes, LLC
10531 Farmington
Livonia, MI 48150

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens, or titles owed to any other entities.
Rec. 12842 _____ Not Examined
Date 6-27-17 WAYNE COUNTY TREASURER Clerk

'17 JUN-30 PM 2:00

Bernard J. Youngblood
Wayne County Register of Deeds
2017240891 L: 53808 P: 606
06/30/2017 02:00 PM WD Total Pages: 1

WARRANTY DEED

The Grantor(s), Rubicon Realty Group, LLC, by Dean Groulx, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Lana Detroit, LLC, Grantee(s) whose address is 11390 N E 8th Ave, Biscayne Park, FL 33181 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 294 B E TAYLORS RAINBOW SUB as recorded in Liber 41 Page 75, Wayne County Records.

Commonly known as: 16861 Archdale
Detroit, MI 48235

Parcel ID: 22071755.

For the Full Consideration of Thirty Seven Thousand and 00/100 Dollar(s) ($37,000.00) subject to building and use restrictions and easements of record, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions of record, zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future installments of special assessments payable hereafter.

Dated this 9th day of June, 2017.

Rubicon Realty Group, LLC
BY: Dean J. Groulx
Dean Groulx
Member

STATE OF Michigan
COUNTY OF ~~Wayne~~ OAKLAND

I, Gail M. Himrod, a Notary Public of the County and State first above written, do hereby certify that Dean Groulx, Member of Rubicon Realty Group, LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witnsss my hand and official seal, this the 9th day of June, 2017.

Gail M Himrod
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

Prepared by:
Rubicon Realty Group, LLC, by Dean Groulx, Member
100 W Long Lake Rd, Ste 102
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
560 Kirts Blvd Ste. 115
Troy, MI 46084
File #: 181258

When recorded mail to:
Lana Detroit, LLC
11390 N E 8th Ave
Biscayne Park, FL 33161

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or taxes owed to any other entities.
No: 12271 _____ Not Examined
Date: 6-21-17 WAYNE COUNTY TREASURER Clerk: TMS

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County
06/30/2017
Tax Stamp #447648
Receipt# 17-207239 L: 53808 P: 606
State Tax: $277.50 County Tax: $40.70

Return to Search Results

You searched for: HouseNumber=18458 and StreetName=Fenmore and Document Types to Search Over:=20 DAY, ABANDONED PROPERTY PROJECT, ABANDONMENT OF EASEMENT, ABSTRACT OF JUDGEMENT, ABSTRACT OF JUDGEMENT RELEASE, and 216 more

No results found

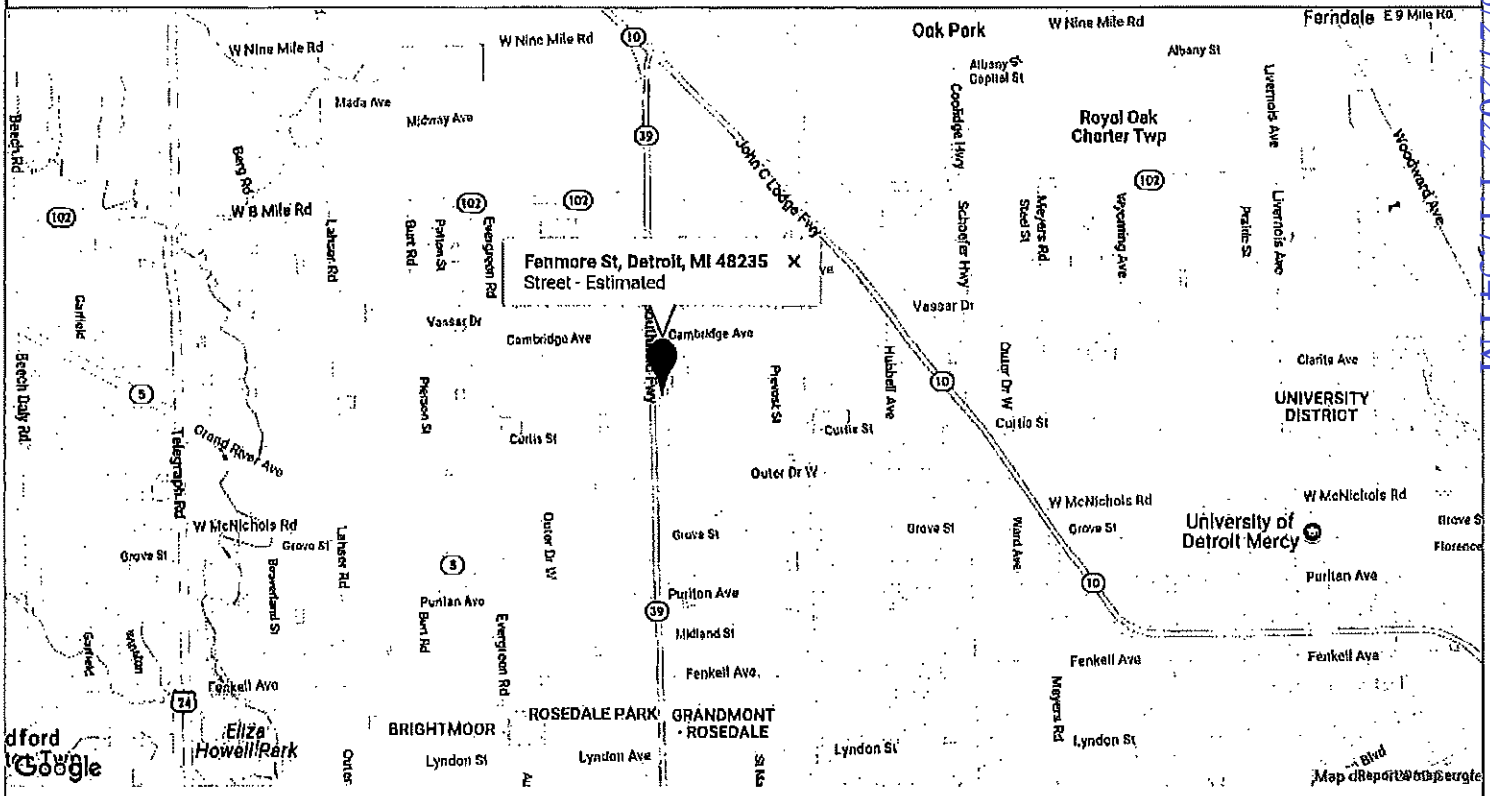
First American

Property Search (Fees may apply. Not available where prohibited by law.)

* MI	Wayne	OR * zip	18458	fenmore	unit #	Detroit

APN | Owner

APN | last name, company or trust | first name



Search List

473 properties found

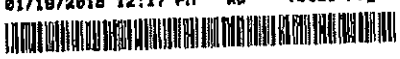
0 properties selected

APN	Address	Owner(s)	Action	
22072631.	18435 Fenmore St Detroit, MI 48235	Scott Raymond A		
22072330.	18440 Fenmore St Detroit, MI 48235	Joe Jerome E		
22072630.	18445 Fenmore St Detroit, MI 48235	Braxton Denisa		
22072331.	18450 Fenmore St Detroit, MI 48235	Farmer Charles M		
22072629.	18455 Fenmore St Detroit, MI 48235	Johnson Eddie Mae		
22072332.	18460 Fenmore St Detroit, MI 48235	Noble G A		
22072628.	18461 Fenmore St Detroit, MI 48235	Wright Clement		
22072333.	18466 Fenmore St Detroit, MI 48235	Johnson Robert		
22072627.	18469 Fenmore St Detroit, MI 48235	Jackson Constance		
22072334.	18472 Fenmore St Detroit, MI 48235	Romain Ralph Phillip		
22072626.	18477 Fenmore St Detroit, MI 48235	Montague Kathaleen J		

'18 JAN-19 PM12:16

AFFIDAVIT FILED

Bernard J. Youngblood
Wayne County Register of Deeds
2018018385 L: 54175 P: 884
01/19/2018 12:17 PM WD Total Pages: 1



Warranty Deed

The Grantor Rubicon Realty Group, LLC, by Dean Groulx, Member whose address is 100 W Long Lake Rd, Ste 160, Bloomfield Hills, MI 48304

Conveys and warrants to: Alpha Detroit, LLC whose address 100 W Big Beaver Rd Ste 200, Troy, MI 48084

The following described premises situated in the City of Detroit, County of Wayne, State of Michigan:

Lot 421 and East 10 feet of vacated alley adjacent REDFORD SOUTHFIELD COURT SUBDIVISION, according to the plat thereof, as recorded in Liber 54 of Plats, Page 13, Wayne County Records

More Commonly Known as: 18309 Fenmore, Detroit, MI 48235
Ward 22, Item No. 072638.

For the full consideration of $1.00 see attached transfer evaluation affidavit

Subject to existing building and use restriction, zoning ordinance and easements if any. OF RECORD

Dated: 12/14/17

Signed by:

Rubicon Realty Group, LLC,
by Dean Groulx, Member

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 12/14/17 by Dean Groulx, member of Rubicon Realty Group, LLC

Notary Public County, Michigan
Acting In:
My Commission Expires:

Juliete G Flores-Allen
Notary Public of Michigan
Oakland County
Expires 04/27/2023
Acting in the County of

Drafted by: EDWARD HUDSON
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: 171258
Return to: Alpha Detroit, LLC, 100 W Big Beaver Rd Ste 200, Troy, MI 48084

City/County Stamps: 36.85
State Stamps: 251.25
Recording fee: 20.00

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.
No. 1519 Not Examined
Date 1-18-18 WAYNE COUNTY TREASURER Clerk

'17 AUG-14 PM 4 :00

Bernard J. Youngblood
Wayne County Register of Deeds
2017275992 L: 53885 P: 389
08/14/2017 04:00 PM WD Total Pages: 1

P.A. 327 OF 1968 AFFIDAVIT FILED

Warranty Deed

The Grantor Rubicon Realty Group, LLC By Dean Groux, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48302

Conveys and warrants to: Pioneer Investments, LLC whose address 500 Griswold #2420, Detroit, MI 48226

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 820 BROOKLINE SUBDIVISION NO 3, as recorded in Liber 43 Page 61 of Plats, Wayne County Records

More Commonly Known as: 18993 Ashton, Detroit, MI 48219

Ward 22, Item No. 075433.SEE REAL ESTATE TRANSFER TAX VALUATION AFFIDAVIT

Subject to existing building and use restriction, zoning ordinance and easements if any.

Dated: 07/24/17

Signed by:

By: Dean Groux, Member
Rubicon Realty Group, LLC

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 07/24/17 by Dean Groux, Member of Rubicon Realty Group, LLC

Notary Public Oakland County, Michigan
Acting In: Oakland
My Commission Expires: 04/24/2019

Drafted by: EDWARD HUDSON PLC
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: 170128FA
Return to: Pioneer Investments, LLC
500 Griswold #2420, Detroit, MI 48226
City/County Stamps: 39.60
State Stamps: 270.00
Recording fee: 20.00

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.
No: 16385 _____ Not Examined
Date: 8-2-17 WAYNE COUNTY TREASURER Clerk

'17 AUG-22 PM 1 :59

Bernard J. Youngblood
Wayne County Register of Deeds
2017282208 L: 53900 P: 452
08/22/2017 02:02 PM WD Total Pages: 1

P.A. 327 OF 1968
AFFIDAVIT FILED

Warranty Deed

The Grantor Rubicon Realty Group, LLC By Dean Groux, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48302

Conveys and warrants to: Pioneer Investments, LLC whose address 500 Griswold #2420, Detroit, MI 48226

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

The South 7 feet of Lot 158 and the North 36 Feet of Lot 159 and the east 9 feet of vacated alley attached to the rear, SOUTHFIELD WOODS D SUBDIVISION, as recorded in liber 56 Page 69 Plats, Wayne County Records

More Commonly Known as: 19501 Greenview, Detroit, MI 48219
Ward 22, Item No. 080159.

SEE REAL ESTATE TRANSFER TAX VALUATION AFFIDAVIT

Subject to existing building and use restriction, zoning ordinance and easements if any.

Dated: 07/24/17

Signed by:

By: Dean Groux, Member
Rubicon Realty Group, LLC

STATE OF MICHIGAN
COUNTY OF Oakland

The foregoing instrument was acknowledged before me this 07/24/17 by Dean Groux, Member of Rubicon Realty Group, LLC

Notary Public Oakland County, Michigan
Acting In: Oakland
My Commission Expires: 04/24/2019

Drafted by: EDWARD HUDSON
570 KIRTS BLVD STE 205, TROY, MI 48054
File No.: 170128FA
Return to: Pioneer Investments, LLC
500 Griswold #2420, Detroit, MI 48226
City/County Stamps: 39.60
State Stamps: 270.00
Recording fee: 20.00

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.

No: 12567 _____ Not Examined
Date 8-14-17 WAYNE COUNTY TREASURER Clerk

Return to Search Results

You searched for: HouseNumber=20566 and StreetName=Glastonberry and Document Types to Search Over:=20 DAY, ABANDONED PROPERTY PROJECT, ABANDONMENT OF EASEMENT, ABSTRACT OF JUDGEMENT, ABSTRACT OF JUDGEMENT RELEASE, and 216 more

No results found

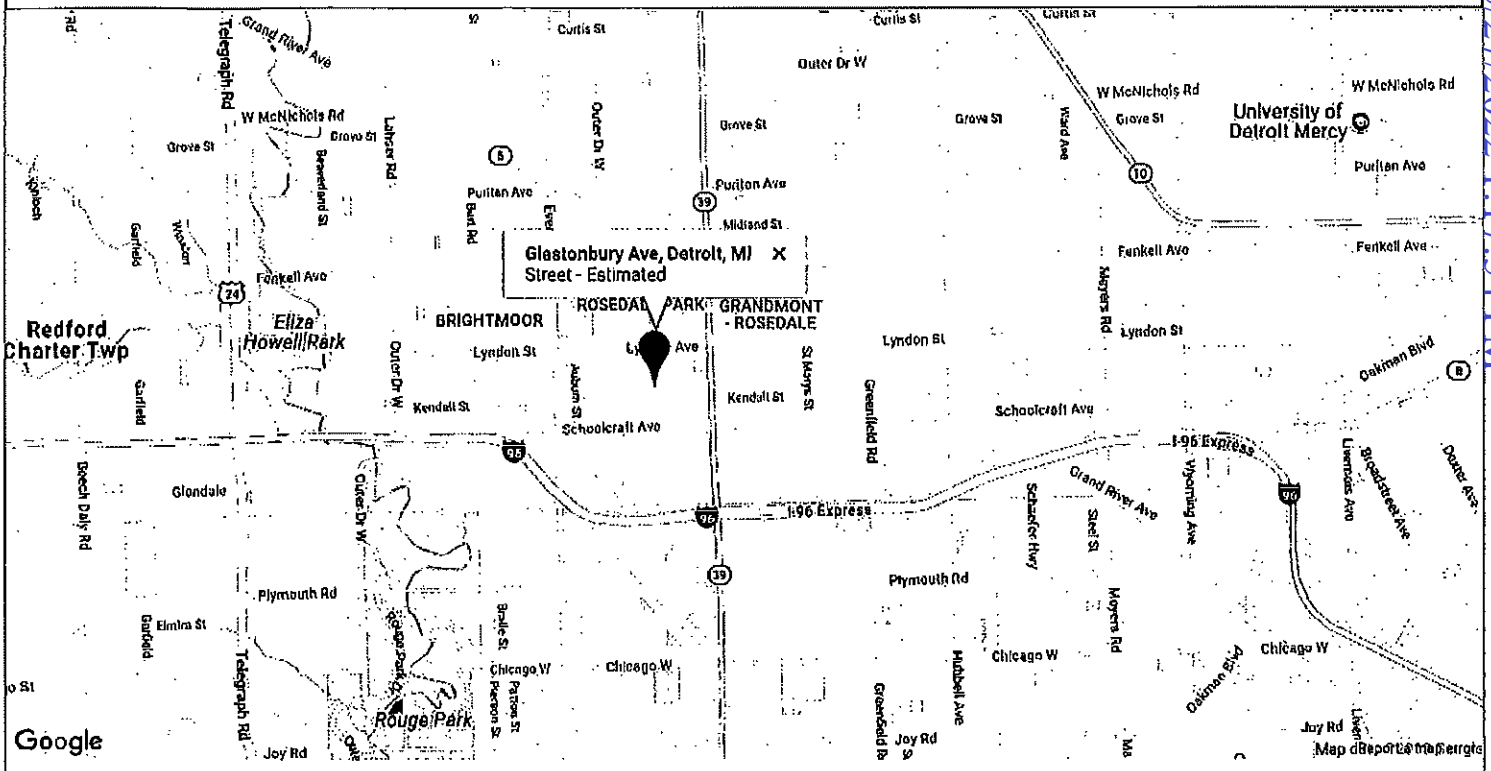
First American

Property Search (Fees may apply. Not available where prohibited by law.)

* MI | Wayne | OR * zip 20566 | Glastonberry | unit # | Detroit

APN | Owner

APN | last name, company or trust | first name



Search List

8 properties found

0 properties selected

APN	Address	Owner(s)	Action	
23-07-127-109	38430 Glastonberry Farmington Hills, M...	Farris Corey		
23-07-127-110	38438 Glastonberry Farmington Hills, M...	Jillian Armen		
23-07-127-111	38560 Glastonberry Farmington Hills, M...	Kuhn Eric Todd		
23-07-127-097	38573 Glastonberry Farmington Hills, M...	Deise De Souza / Rodrigo Silva		
23-07-127-112	38574 Glastonberry Farmington Hills, M...	Smola Debra S		
23-07-127-098	38579 Glastonberry Farmington Hills, M...	Blair Elaine V		
23-07-127-099	38587 Glastonberry Farmington Hills, M...	38587 Glastonberry Llc		
23-07-127-100	38595 Glastonberry Farmington Hills, M...	Holmes Richard J		

Bernard J. Youngblood
Wayne County Register of Deeds
2017238796 L: 53803 P: 338
06/28/2017 02:08 PM WD Total Pages: 1

'17 JUN-28 PM 2:05

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #447188
06/28/2017

Receipt# 17-205718 L: 53803 P: 338
State Tax: $150.00 County Tax: $22.00

WARRANTY DEED

The Grantor(s), Rubicon Realty Group, LLC, by Dean Groulx, Member whose address is 100 W Long Lake Rd Se 160, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Rockpoint Homes, LLC, Grantee(s) whose address is 10531 Farmington, Livonia, MI 48150 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 465, LONGFELLOW MANOR SUBDIVISION, according to the plat thereof as recordedi n Liber 53 of Plats, Page 18, Wayne County Records.

Commonly known as: 18321 Sunderland
Detroit, MI 48219

Parcel ID: 22084992.

For the Full Consideration of Twenty Thousand and 00/100 Dollar(s) ($20,000.00) subject to building and use restrictions and easements of record, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions of record, zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future instellments of special assessments payable hereafter.

Dated this 16th day of June, 2017.

Rubicon Realty Group, LLC
BY: Dean J. Groulx
Dean Groulx
Member

STATE OF Michigan

COUNTY OF Oakland

I, Gail M Himroo, a Notary Public of the County and State first above written, do hereby certify that Dean Groulx, Member of Rubicon Realty Group, LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 16th day of June, 2017.

Gail M Himroo
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROO
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

Prepared by:
Rubicon Realty Group, LLC, by Dean Groulx, Member
100 W Long Lake Rd Se 160
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
580 Kirts Blvd Ste. 115
Troy, MI 48084
File #: 171090FA

When recorded mail to:
Rockpoint Homes, LLC
10531 Farmington
Livonia, MI 48150

This is to certify that there are no delinquent property taxes owed to our office for this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or taxes owed to any other entities.
Nbr 12842 _____ Not Examined
Date 6-27-17 WAYNE COUNTY TREASURER Clerk

'17 JUN-30 PM 2 :00

Bernard J. Youngblood
Wayne County Register of Deeds
2017240690 L: 53808 P: 605
06/30/2017 02:00 PM WD Total Pages: 1

WARRANTY DEED

The Grantor(s), Rubicon Realty Group LLC, by Dean Grouix, Member whose address is 100 W Long Lake Rd, Ste 102, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Lana Detroit, LLC, Grantee(s) whose address is 11390 NE 8th Avenue, Biscayne Park, Fl 33161 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 98, MORNINGSIDE SUBDIVISION, as recorded in Liber 41 Page 61, Wayne County Records

Commonly known as: 15340 Hayden
Detroit, MI 48223

Parcel ID: 22099148.

For the Full Consideration of Thirty Seven Thousand and 00/100 Dollar(s) ($37,000.00) subject to building and use restrictions and easements of record, if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions of record, zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future installments of special assessments payable hereafter.

Dated this 9th day of June, 2017.

Rubicon Realty Group LLC
BY: Dean J Grouix
Dean J Grouix
Member

STATE OF ~~Michigan~~ MI
COUNTY OF ~~Wayne~~ OAKLAND

I, Gail M. Himrod, a Notary Public of the County and State first above written, do hereby certify that Dean Grouix, Member of Rubicon Realty Group LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 9th day of June, 2017.

Gail M Himrod
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

Prepared by:
Rubicon Realty Group LLC, by Dean Grouix, Member
100 W Long Lake Rd, Ste 102
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
560 Kirts Blvd Ste. 115
Troy, MI 48084
File #: 161254

When recorded mail to:
Lana Detroit, LLC
11390 NE 8th Avenue
Biscayne Park, Fl 33161

This is to certify that there are no delinquent property taxes owed to our office for this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or taxes owed to any other entities.
Nov. 12771 Not Examined
Date 6-21-17 WAYNE COUNTY TREASURER Clerk

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #447647
06/30/2017
Receipt# 17-207239 L: 53808 P: 605
State Tax: $277.50 County Tax: $40.70

~~'17 NOV-16 PM 2:47~~

Bernard J. Youngblood
Wayne County Register of Deeds
2017386288 L: 54078 P: 1498
11/21/2017 02:47 PM WD Total Pages: 1

'17 NOV-21 PM 2:47

WARRANTY DEED

The Grantor(s), Rubicon Realty Group, LLC, Dean Groulx, Member whose address is 100 W Long Lake Rd Ste 102, Bloomfield Hills, MI 48304, convey(s) and warrant(s) to Immojenche, LLC, Grantee(s) whose address is 2222 W Grand River Ste A, Okemos, MI 48864 the following described premises:

Land situated in the City of Detroit, County of Wayne, State of Michigan, described as follows:

Lot 533, Mayfair Park Subdivision, according to the plat thereof, as recorded in Liber 41 of Plats, Page 78, Wayne County Records

Commonly known as: 17320 Fielding
Detroit, MI 48219

Parcel ID: 22/102692.

For the Full Consideration of Forty Seven Thousand Five Hundred and 00/100 Dollar(s) ($47,500.00) subject to building and use restrictions and easements ~~of record,~~ if any.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

SUBJECT to easements and restrictions ~~of record,~~ zoning laws and ordinances affecting the premises, and rights of the public and of any governmental entity in any part thereof taken, used or deeded for street, road, right of way, or highway purposes, and subject to taxes and future installments of special assessments payable hereafter.

Dated this 3rd day of November, 2017.

Rubicon Realty Group, LLC
BY: Dean Groulx
Dean Groulx
Member

STATE OF Michigan
COUNTY OF ~~Wayne~~ OAKLAND

I, Gail M. Himrod, a Notary Public of the County and State first above written, do hereby certify that Dean Groulx, Member of Rubicon Realty Group, LLC personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal, this the 3rd day of November, 2017.

Gail M. Himrod
Notary Public

My Commission Expires: 04/24/2019

(SEAL)

GAIL M HIMROD
Notary Public - Michigan
Oakland County
My Commission Expires Apr 24, 2019
Acting in the County of Oakland

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #463772
11/21/2017
Receipt# 17-313903 L: 54078 P: 1498
State Tax: $336.25 County Tax: $52.25

Prepared by:
Rubicon Realty Group, LLC, Dean Groulx, Member
100 W Long Lake Rd Ste 102
Bloomfield Hills, MI 48304

Assisted by:
Regions Title Agency, LLC
560 Kirts Blvd Ste. 115
Troy, MI 48084
File #: 171288

When recorded mail to:
Immojenche, LLC
2222 W Grand River Ste A
Okemos, MI 48864

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax owed to any other entities.
No: 26679 _____ Not Examined
Date 11-16-17 WAYNE COUNTY TREASURER Clerk

EXHIBIT 10

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

USURY: Payment of interest with future revenues or profits.

A financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits will not violate usury laws so long as the lender's profit is contingent, and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement.

Opinion No. 7283

May 4, 2015

The Honorable Joe Hune
State Senator
The Capitol
Lansing, MI 48909

You have asked whether royalty financing violates Michigan's usury laws. To answer this question, it is helpful to begin with a brief explanation of what constitutes royalty financing and usury.

Before discussing royalty financing, an understanding of common financing concepts, including the common financing practice of loans, is relevant.

"Financing" is defined as "[t]he act or process of raising or providing funds." Black's Law Dictionary (9th ed. 2009). A common form of financing is debt financing, whereby funds are raised by either issuing bonds or taking a loan from a financial institution. *Id.* "The hallmark of a loan is the absolute right to repayment." *Blackwell Ford v Calhoun,* 219 Mich App 203, 209; 555 NW2d 856 (1996). In addition to the repayment of the principal of the loan, the lender almost always expects to receive compensation for the use of the money loaned. That compensation is termed interest. 15 Mich Civ Jur, Interest, § 1; *Balch v Detroit Trust Co,* 312 Mich 146, 152; 20 NW2d 138 (1945) ("Interest has been defined as 'a charge for the loan or forbearance of money'"). In a basic loan transaction, the

borrower receives a sum of money—the principal of the loan—and promises to repay the principal, over time, with interest.

With royalty financing,1[1] the borrower typically agrees to repay the principal with interest *and* a percentage of future revenues or profits—the royalty. See generally, 47 CJS, Interest & Usury, § 232 (2014); Anno: *Agreement for share in earnings of or income from property in lieu of, or in addition to, interest as usurious,* 16 ALR 3d 475. If revenues are low, it may be that no additional payment beyond the agreed interest will be necessary; but if revenues or profits are high, the total amount repaid will be higher.

"Usury is, generally speaking, 'the receiving, securing or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law.'" *Hillman's v Em 'N Al's*, 345 Mich 644, 651; 77 NW2d 96 (1956), quoting 55 Am Jur, Usury, § 2. "Usury consists of several essential elements, generally enumerated as; (1) a loan or forbearance . . . of money . . . ; (2) an understanding between the parties that the principal will be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law." Mich Civ Jur, Usury, § 1. In determining whether usury exists, what matters is the "real nature of the transaction," and not the particular form given it by the parties; the real nature must be determined from the facts and circumstances. *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); Mich Civ Juris, Usury, § 2.

Unless an exception applies, Michigan's usury statute generally prohibits a lender from charging a rate of interest greater than five percent, or, if agreed in writing, seven percent. MCL 438.31.2[2] Michigan's criminal usury statute prohibits a lender, unless otherwise authorized by law, from receiving interest at a rate exceeding twenty-five percent. MCL 438.41.

As noted above, under a royalty financing arrangement, when the borrower has high revenues or profits, the lender's total return on the loan—interest payments plus royalty payments—might exceed the law's legal limit for interest. Given this possibility, you ask whether this type of financing arrangement violates Michigan's usury laws.

1[1] This opinion uses the term "royalty financing" because that is the terminology used in your request. However, this type of financing arrangement is described or referred to in different ways by the courts and treatises.

2[2] There are many exceptions to the five- and seven-percent usury limits, including: regulated credit card lenders may charge interest of up to 25% per year, MCL 445.1854; parties to a mortgage on real property may agree to any rate of interest provided that the lender is regulated by an appropriate state or federal agency, MCL 438.31c; corporations may agree in writing to pay a higher rate, MCL 450.1275; certain payday loans with relatively high annual rates are authorized by the Deferred Presentment Service Transactions Act, MCL 487.2121 *et seq.*; and other loans with higher interest rates are regulated by the Regulatory Loan Act, MCL 493.1 *et seq.*

While there has been little development in this area of the law in Michigan, numerous decisions by courts in other states provide guidance in answering your question.

Usury law is subject to various exceptions, including an exception developed at common law called the "interest contingency rule." *WRI Opportunity Loans II, LLC v Cooper*, 154 Cal App 4th 525; 65 Cal Rptr 3d 205 (2007); *47 CJS, Interest & Usury, § 232*; 16 ALR 3d 475; Restatement (First) of Contracts, § 527. As explained by the California Court of Appeals:

> According to this rule, a loan that will "give the creditor a greater profit than the highest permissible rate of interest upon the occurrence of a condition [ ]is not usurious if the repayment promised on failure of the condition to occur is materially less than the amount of the loan . . . with the highest permissible interest, unless a transaction is given this form as a colorable device to obtain a greater profit than is permissible." Thus, interest that exceeds the legal maximum is not usurious when its payment is "subject to a contingency so that the lender's profit is wholly or partially put in hazard," provided "the parties are contracting in good faith and without the intent to avoid the statute against usury." [*WRI Opportunity Loans II*, 154 Cal App 4th at 534 (citations omitted).]

This rule has been followed by courts in New York and other states. *See, e.g., Hartley v Eagle Insurance Co*, 222 NY 178; 118 NE 622 (1918); *Olwine v Torrens*, 236 Pa Super 51; 344 A2d 665, 667-668 (Pa Super, 1975), and *Dopp v Yari*, 927 F Supp 814 (D New Jersey, 1996). To determine whether the rule applies, courts will "'look to the substance rather than to the form' of the transaction to determine whether the lender's profits are exposed to the requisite risk." *WRI Opportunity Loans II, LLC*, 154 Cal App 4th at 535 (citations omitted). In other words, whether this rule would exempt any particular agreement from being usurious will depend upon the particular facts and circumstances of each agreement.

For example, the facts and circumstances of a royalty financing agreement might show that the amount of the royalty payment, which is based on a share of the borrower's revenues or profits, is not certain, but contingent: business revenues or profits may be less than the amount expected by the parties; they may be within that range; or they may exceed—or even greatly exceed—the range expected. In these instances, courts have determined that, so long as these payments result from a bona fide contingency—that is, the contingency incorporates a real element of risk and is not a sham devised to avoid the usury laws—these payments are not usurious even if they exceed the legal maximum of interest allowed. See *Schiff v Pruitt,* 144 Cal App 2d 493; 301 P2d 446 (1956), *Thomassen v Carr,* 250 Cal App 2d

341, 346–349; 58 Cal Rptr 297 (1967), and *Beeler v H & R Block of Colorado, Inc*, 487 P2d 569, 572 (1971), applying "interest contingency rule."

However, where the facts and circumstances show that the risk to the lender's profit is not sufficiently great, *Teichner v Klassman*, 240 Cal App 2d 514, 516–518; 49 Cal Rptr 742 (1966); *Olwine*, 344 A2d at 667-668, or where the arrangement would result in a return in excess of the legal rate regardless of risk, *Whittemore Homes, Inc*, 190 Cal App 2d 554; 12 Cal Rptr 235 (1961); *Concord Realty Co v Continental Funding Corp*, 776 P2d 1114 (Colo, 1989), the rule will not apply, and the legal limit will still be in force.

In Michigan, "the common law prevails except as abrogated by the Constitution, the Legislature, or this Court." *People v Stevenson*, 416 Mich 383, 389; 331 NW2d 143 (1982). A review of the Constitution, statutes, and case law reveal no provision or decision expressly or impliedly abrogating application of the interest contingency rule.3[3] The only Michigan case found touching on this issue is *Scripps v Crawford*, 123 Mich 173; 81 NW 1098 (1900).

In *Scripps*, the defendant purchased the interest of an estate in a laundry business, and agreed with the estate's administrator, Union Trust Company, to pay $1,500 for the estate's interest and "one-half of the net profits that should be earned for five years. The agreement stated that this was to be 'as interest on said loan, and compensation for the good will of the estate in the business . . . .'" *Scripps*, 123 Mich at 174. A number of disputes arose between different parties, and ultimately a claim was made that the defendant's agreement with the Union Trust Company was usurious. *Id.* at 177. The Michigan Supreme Court disagreed, finding nothing unlawful about the arrangement:

> We think the allowance of something for the good will of the business was legitimate, and there is nothing to show that either party understood that an unlawful rate of interest was contemplated. One-half of the prospective net profits was to be paid as interest and as a consideration for the good will. We must therefore hold that the claim of the Union Trust Company, as finally fixed by the agreement of the parties thereto, was a valid claim against [the defendant]. [*Id.*]

3[3] Notably, the Michigan Business and Industrial Development Act, MCL 487.1101 *et seq.*, contemplates the use of royalty-based financing, and provides that "interest" "does not include anything of value that is contingent on the performance or value of the borrower including, but not limited to, a percentage of net income of the borrower, royalties, stock in the borrower, warrants to purchase stock in the borrower, and convertibility of debentures." MCL 487.1505(1), (5), and (6).

While the *Scripps* Court did not expressly discuss the interest contingency rule, it approved an agreement to use profits as payment on interest.

In OAG, 1979-1980, No 5740, p 877 (July 17, 1980), the Attorney General addressed several questions, including whether receipt by a lender of a percentage of profits as consideration for making a mortgage loan constituted interest on the loan so as to make the loan usurious, assuming the legal rate of interest is exceeded. The Opinion began its analysis by defining interest as "compensation paid for the use of money." *Id.*, citing OAG, 1975-1976, No 5085, p 717 (December 16, 1976). It then explained:

> "[a]ny fee imposed upon the borrower, other than the reasonable and necessary charges, such as recording fees, title insurance, deed preparation and credit reports recognized in section 1(a) of the Usury Statute, *supra*, in exchange for the lending of money must be taken into consideration in determining the rate of interest being charged." [*Id.*, p 879, quoting OAG No 5085, p 717.]

The Attorney General then reasoned that in the situation presented, payment of a percentage of profits would constitute interest:

> In the transaction described in your question, the fee imposed by the lender as consideration for making the loan would consist, in part, of a share in profits of the borrower's business. Being part and parcel of the loan agreement, therefore, *it is clear that such compensation constitutes interest on the loan.* [*Id.*, pp 879-880 (emphasis added).]

As support, the Attorney General quoted the following from *Brown v Cardoza*, 67

Cal App 2d 187, 192; 153 P2d 767 (1944) (citations omitted):

> The law is well settled in most jurisdictions . . . that where there is a loan of money to be compensated for by a share in earnings, income or profits, in lieu of or in addition to interest, in determining whether the transaction is usurious the share of earnings, income or profits must be considered as interest.

Given this language, OAG No 5740 could be viewed as foreclosing royalty financing or rejecting the interest contingency rule. But that construction is overbroad. That Opinion stands for the following, narrow proposition that is consistent with decisions of the courts: a lender's share in profits or revenues *that are certain* should be considered as interest for the purposes of the State's usury laws.

In this way, the facts and circumstances of a royalty financing agreement might show that the amount of the royalty payment, which is based on a share of the borrower's revenues or profits, is a certainty; i.e., the revenue or profits are certain or almost certain to occur. This was the situation in *Brown v Cardoza*—the California case relied on by OAG No 5740. In *Brown,* the lender was to receive repayment of the loan with interest plus splitting the profits on the sale of certain property. *Brown*, 153 P2d at 768. As part of its analysis, the court considered whether this "splitting the profits" should be considered interest. *Id.* at 769. The court concluded that it should because, under the terms of the loan, as the contemplated "split" of the profits from the sale of the property, the lenders were receiving a sum certain "bonus" of $300. The very loan papers disclosed the certainty of this sum, and hence, the court found that this sum must be considered interest. *Id.* at 770. In such an instance, the conclusion of both *Brown* and OAG No 5740 is correct and consistent with the above discussion of the interest contingency rule—the payment of a share of profits that are certain constitutes interest, which would be usurious if the legal rate of interest was exceeded.

It is my opinion, therefore, that a financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits, will not violate usury laws so long as the lender's profit is contingent and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement.

BILL SCHUETTE
Attorney General

EXHIBIT 11

On Thu, Jun 9, 2016 at 11:38 AM, Michael Evans <MEvans@atlasoil.com> wrote:

Thanks Dean. I have most of the detail together and have briefed Sam already on some of the details. I will get back with you in short order to work towards a deal.

Michael J. Evans | EVP/COO

Simon Group Holdings

mevans@atlasoil.com

V 313.662.3504 | **C** 313.220.2463 | **F** 313.332.4924

335 E. Maple, Birmingham, MI 48009

Simon Group Holdings

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Thursday, June 9, 2016 11:33 AM
To: Michael Evans <MEvans@atlasoil.com>
Cc: deangroulx@yahoo.com; Paul Schapira <pschapira@soaringpine.com>; Faiz Simon <vsimon@spcrealestate.com>
Subject: Re: Land Bank

Mike:

Thank you, again, for your consideration.

This transaction would be done through Park Street Group Realty Services, LLC, a Michigan limited liability company. This a new company, and is a licensed real estate company.

Since 2008, I have been involved in more than 1500 residential property transactions in the Tri-County area, and in parts of Ohio and Indiana.

Our core business has been to buy and sell performing and non-performing notes through affiliated companies.

More recently, we have been acquiring residential properties, rehabbing, and then reselling them as rental or income properties to a sundry of domestic and foreign investors looking for higher returns than they can reasonably expect to earn through more traditional investment vehicles.

We are approved to purchase directly from the Detroit Land Bank Authority; although, we purchase from other sources as well.

I am looking for a 750k loan on a 1 year term note to launch a new project with the Land Bank and the City of Highland Park through Park Street Group Realty Services, LLC.

The funds would be used to fund acquisitions and improvements to the properties, draws, and other operating expenses.

On average, our cost to purchase and rehab a typical 1200 square foot bungalow in Detroit is 15k; although, costs vary depending on the size and location of the properties. We then resell the homes for between 30k to 40k; although, again, the sales price can vary for a variety of reasons.

The company would purchase an initial package of 20 to 30 homes each month and ramp up from there, turning over the loan and net sale proceeds as we rehab and resell the properties. Our typical time line is 60 to 90 days from acquisition to resale.

If you have any questions or need any more information, please feel free to contact me.

Thank you, again.

Best regards,

Dean

On Jun 8, 2016 12:47 PM, "Michael Evans" <MEvans@atlasoil.com> wrote:

> Dean,
>
> Great meeting with you yesterday. I have given the Team and Sam an overview of the deal and everyone is very positive about it. Can you share with me the entity name and some general background to put in a presentation. I would also like to get the pictures you talked about yesterday so I can put those in the presentation.
>
> As soon as I can get that together I will be formally presenting it to Sam and providing my recommendation for moving forward. We can then get our term sheet together and get our timeline to get this moving.
>
> Thanks...
>
> Michael J. Evans | EVP/COO
> Simon Group Holdings
> mevans@atlasoil.com<mailto:mevans@atlasoil.com>
> V 313.662.3504 | C 313.220.2463 | F 313.332.4924
> 335 E. Maple, Birmingham, MI 48009
>
> [simon-group-holdings-logo]

EXHIBIT 12

100 Mich.App. 495
100 Mich.App. 495
100 Mich.App. 495, 298 N.W.2d 755
Court of Appeals of Michigan.

FEDERAL DEPOSIT INSURANCE CORPORATION

v.

KRAMER

Docket No.
44094

Decided October 7, 1980.
Submitted June 4, 1980, at Detroit.

References for Points in Headnotes

[1] 45 Am Jur 2d, Interest and Usury § 206-209. Usury: charging borrower for or with expense or trouble of procuring money loaned. 91 ALR2d 1389.

[2] 10 Am Jur 2d, Banks § 692. 45 Am Jur 2d, Interest and Usury § 117.

[3] 10 Am Jur 2d, Banks § 692.

The Federal Deposit Insurance Corporation, as receiver of Birmingham-Bloomfield Bank, recovered a judgment on a promissory note against Hyman A. Kramer, Bernice Kramer, Reva Jacob and Josephine Mellen, Oakland Circuit Court, Richard D. Kuhn, J. Defendants appeal, alleging that the plaintiff must forfeit all interest due on the note because various fees paid constitute hidden interest which, when added to the interest called for by the note, resulted in an interest rate which is usurious. *Held:*

1. A commitment fee which bound the lender to make the loan when it was later applied for was a separate transaction from the loan and was not hidden interest.

2. Interest which would have been earned if certain escrowed funds had been placed in interest-bearing accounts is not hidden interest. There is no requirement that the lender place the escrowed funds in interest-bearing accounts.

3. Fees which were found to be hidden interest were properly spread over the term of the loan by the trial court in its determination that the interest rate was not usurious.

Affirmed.

Patterson & Patterson, Whitfield, Manikoff, Ternan & White (by *Gretel S. Robinson),* for plaintiff.

Kramer, Mellen, Wagner & Ishbia, P.C. (by *Donald A. Wagner* and *Douglas J. Golden),* for defendants.

Before: R. M. MAHER, P.J., and BRONSON and T. C. QUINN,[a1] JJ.

T. C. QUINN, J.

Plaintiff recovered a judgment in the amount of $68,185.79 on a promissory note. When executed August 21, 1967, the amount of the note was $110,000. Payments made through June 1, 1976, reduced the amount due to $58,772.75. The judgment entered includes interest accumulated to date of trial. Defendants appeal.

The defendants admit that the balance due on the face of the note is $58,772.75, but claim that only $4,311 is actually due because plaintiff must forfeit all interest due on the note. The defendants contend that a $1,100 commitment fee, paid July 28, 1967, a $50 escrow fee, a $550 service charge and a hidden charge of approximately $850 which defendant derived by calculating the interest that could have been paid on escrowed tax payments, constitutes hidden interest. Defendants contend ***497** that when this interest is added to the 6-3/4% interest called for by the note, the 7% statutory maximum limit is exceeded resulting in usury and that the statute mandates forfeiture of all interest. MCL 438.31; MSA 19.15(1).

The trial court found that the $50 escrow fee and the $550 service charge constituted hidden interest. It also found that the commitment fee and unpaid interest of $850 did not constitute hidden interest. The trial court calculated the interest called for by the note, added to it the $600 calculated to be hidden interest spread over the life of the note and held that the interest paid did not exceed the 7% statutory limit.

The commitment fee was paid more than three weeks prior to the loan. In consideration of that fee, the lender bound itself for 115 days to loan to the defendants $110,000 at 6-3/4% interest if defendants applied therefor. Defendants were not bound to apply for the loan. The trial

court properly held that this was a separate transaction distinct from the loan, and that for $1,100 defendants purchased the right to secure a loan if they so chose.

The trial court found no statutory or common law authority that required plaintiff to deposit escrowed monies in interest bearing accounts. Our search has revealed none. The parties agreed in the mortgage that the tax escrow account would be a 'non-interest bearing account'. The trial court correctly held that the $850 was not hidden interest.

We also agree that hidden interest should be spread over the term of the loan in determining if the interest rate is usurious. *Montgomery Federal Savings & Loan Ass'n v Baer,* 308 A2d 768 (CA DC, 1973).

Affirmed. Costs to plaintiff.

Footnotes

a1 . Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

END OF DOCUMENT

EXHIBIT 13

File No./Escrow No.: 216226218
Officer/Escrow Officer:

Equity National Title & Closing Services, Inc.
50 Jordan Street
Suite 100
East Providence, RI 02914

CLOSINGS done right equity NATIONAL TITLE

Property Address:

10431 AMERICAN STREET
DETROIT, MI 48204 (WAYNE)
(16024270)

12338 NORTHLAWN
DETROIT, MI 48204 (WAYNE)

13074 KILBOURNE STREET
DETROIT, MI 48213 (WAYNE)

13412 WADE STREET
DETROIT, MI 48213 (WAYNE)

13641 PFENT STREET
DETROIT, MI 48205 (WAYNE)

14053 PFENT STREET
DETROIT, MI 48205 (WAYNE)

14295 WADE
DETROIT, MI 48213 (WAYNE)

14870 LESURE
DETROIT, MI 48227 (WAYNE)

16028 LAPPIN
DETROIT, MI 48205 (WAYNE)

17803 ANNOTT
DETROIT, MI 48205 (WAYNE)

18846 SHERWOOD
DETROIT, MI 48234 (WAYNE)

19353 ROWE
DETROIT, MI 48205 (WAYNE)

19835 CARRIE
DETROIT, MI 48234 (WAYNE)

1982 VIRGINIA PARK
DETROIT, MI 48206 (WAYNE)

20125 GREELY
HIGHLAND PARK, MI 48203 (WAYNE)

3275 BLAINE
DETROIT, MI 48206 (WAYNE)

5315 LODEWYCK STREET
DETROIT, MI 48224 (WAYNE)

6403 BRACE STREET
DETROIT, MI 48228 (WAYNE)

8190 BRYDEN
DETROIT, MI 48204 (WAYNE)

8338 CARBONDALE
DETROIT, MI 48204 (WAYNE)

16589 BIRWOOD
DETROIT, MI 48221 (WAYNE)

7824 METTETAL STREET
DETROIT, MI 48228 (WAYNE)

18495 FAUST STREET
DETROIT, MI 48219 (WAYNE)

13106 HAMPSHIRE
DETROIT, MI 48213 (WAYNE)

14064 ROSSINI DRIVE
DETROIT, MI 48205 (WAYNE)

8867 ST. MARY'S
DETROIT, MI 48228 (WAYNE)

orrower: PARK STREET GROUP REALTY SERVICES, LLC

ettlement Date: 9-23-16
isbursement Date: 9-23-16

Description	Borrower		
	P.O.C.	Debit	Credit
osits, Credits, Debits			
5,000.00 to Soaring Pine Capital Real Estate and Debt Fund II, LLC		$26,000.00	
torney fees to Simon, PLC		$9,000.00	
paid Interest to Soaring Pine Capital Real Estate and Debt Fund II, LLC		$11,506.85	
Loans			
an Amount			$500,000.00
Charges			
le - Lender's Title Insurance to Equity National Title & Closing Services, Inc.		$1,223.00	
le - ALTA ENDORSEMENT 8.1-06 (Environmental Protection Lien) Endorsement(s) to Equity National Title & Closing Services,			
le - Settlement or closing fee to Equity National Title & Closing Services, Inc.		$695.00	
le - Abstract or title search to Equity National Title & Closing Services, Inc.		$5,070.00	
le - Recording Service Fee to Equity National Title & Closing Services, Inc.		$1,350.00	
ernment Recording and Transfer Charges			
cording fees: Deed $33.00		$33.00	
rtgage $2,349.00		$2,349.00	
	P.O.C.	Debit	Credit
totals	$0.00	$56,226.85	$500,000.00
To Borrower		$443,773.15	
ls	$0.00	$500,000.00	$500,000.00

cknowledgement

e/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts d disbursements made on my account or by me in this transaction and further certify that I have received a copy of the LTA Settlement Statement. We/I authorize Equity National Title & Closing Services, Inc. to cause the funds to be disbursed in ccordance with this statement.

RROWER(S)

RK STREET GROUP REALTY SERVICES, LLC

Lender:
E. Z. Herbert
Soaring Pine Capital Real Estate and Debt Fund II, LLC
By: Edwin Herbert

File # 216226218
Printed on 9/23/2016 at 9:33 AM

00308

EXHIBIT 14

American Land Title Association

FINAL ALTA Settlement Statement - Borrower
Adopted 05-01-2015

File No./Escrow No.: 218222965
Print Date & Time: 8/12/2016 2:49:04 PM
Officer/Escrow Officer:

Equity National Title & Closing Services, Inc.
50 Jordan Street
Suite 100
East Providence, RI 02914

CLOSINGS done right! equity NATIONAL TITLE

Property Address:
12845 JANE STREET
DETROIT, MI 48205 (WAYNE)

18811 CARRIE
DETROIT, MI 48234 (WAYNE)

13811 SARATOGA STREET
DETROIT, MI 48205 (WAYNE)

16257 MANNING
DETROIT, MI 48205 (WAYNE)

12559 ELMDALE
DETROIT, MI 48213 (WAYNE)

11470 INDIANA
DETROIT, MI 48204 (WAYNE)

9997 ARCHDALE
DETROIT, MI 48227 (WAYNE)

850 FREDERICK STREET
YPSILANTI, MI 48197 (WASHTENAW)

1572 MILLVILLE ROAD
LAPEER, MI 48446 (LAPEER)

1919 CARMANBROOK PARKWAY
FLINT, MI 48507 (GENESEE)

7629 DACOSTA
REDFORD, MI 48239 (WAYNE)

2322 ROBINWOOD AVENUE
SAGINAW, MI 48601 (SAGINAW)

5231 MARLBOROUGH STREET
DETROIT, MI 48224 (WAYNE)

1717 & 1719 BAILEY STREET
LANSING, MI 48910 (INGHAM)

Borrower:
PARK STREET GROUP REALTY SERVICES, LLC
100 West Long Lake Road
Suite 102
Bloomfield Hills, MI 48304

Settlement Date: 8/12/2016

Description	Borrower	
	Debit	Credit
New Loans		
Loan Amount		$500,000.00
Loan Commitment Fee to Simon Group Holdings	$25,000.00	
Legal Expense to Simon Group Holdings	$5,000.00	
Title Charges		
Title - Lender's Title Insurance to Equity National Title & Closing Services, Inc.	$1,223.00	
Title - ALTA ENDORSEMENT 8.1-06 (Environmental Protection Lien) Endorsement(s) to Equity National Title & Closing Services, Inc.		
Title - Settlement or closing fee to Equity National Title & Closing Services, Inc.	$595.00	
Title - Abstract or title search to Equity National Title & Closing Services, Inc.	$700.00	
Government Recording and Transfer Charges		

DJG1

Recording fees: 17 Deeds $294.00	$357.00	
14 Mortgages $1,008.00	$1,008.00	
State Deed Tax/Stamps re: Frederick Street	$98.90	
	Debit	Credit
Subtotals	$33,981.90	$500,000.00
Due To Borrower	$466,018.10	
Totals	$500,000.00	$500,000.00

Acknowledgement

We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize Equity National Title & Closing Services, Inc. to cause the funds to be disbursed in accordance with this statement.

BORROWER(S)

PARK STREET GROUP REALTY SERVICES, LLC

EXHIBIT 15

Tricia C. Mink

To: John W. Polderman; Robert S. Berg; Paul Schapira; 'Victor Simon'
Cc: Michael Evans; Dean J. Groulx (dean.groulxlaw@gmail.com)
Subject: RE: D Groulx - Loan Documents
Attachments: Park Street Group - Loan Agreement - redlined - revised on 8-11-2016 (00503901x9C60C).docx; Exhibit A to Loan Agreement - 8-11-16 (00503207x9C60C).doc

All,

Attached please find the revised Loan Agreement with Dean's revision in forest green and Rob's revisions highlighted in yellow.

Section 1.4 - "Collateral" shall mean the Premises now owned by Borrower and Guarantor which collectively have a value of $750,000.00, described in any of the Collateral Documents, including, but not limited to the following:

Section 1.6 - "Commitment Fee" shall mean Twenty-Five Thousand and 00/100 Dollars ($25,000.00) which is due and payable to lender at closing from the Loan.

Section 1.9 - "Guarantor(s)" shall mean unlimited personal guarantees of Dean J. Groulx, individually, and Park Street Group, LLC, a Michigan limited liability company.

Section 1.13 - "Lease(s)" shall mean all leases, licenses, land contracts, or occupancy agreements of any kind whatsoever on the Premises.

(b) Insurance. It is understood that the Premises properties at time of purchase will be "uninsurable" Borrower however while marketing any of the Premises to prospective purchasers after certificates of occupancy have been procured by the municipality will purchase all risk insurance for the full replacement value of the Premises and the improvements as well as public liability insurance in an amount acceptable to Lender naming Lender as a loss payee. In addition, Borrower agrees to purchase all risk insurance for the replacement value of the Additional Collateral listed in Exhibit A as well as public liability insurance in an amount acceptable to Lender naming Lender as a Loss Payee if the Premises are insurable in their current condition.

(a) Taxes. The Borrower agrees to pay all real estate taxes due and assessed against the Premises when due or in accordance with any payment plan approved by the applicable taxing authority.

SECTION 9 REPORTS:

9.1. Borrower shall provide to Lender ~~a monthly~~ Bi-Weekly reports identifying all homes purchased by Borrower with Loan,. and the cost of each home and approximate cost of renovations. The Bi-Weekly Reports will also include an updated valuation statement of the Premises pledged as Collateral pursuant to Exhibit A attached.

9.2. Sale of Homes Purchased with Loan Proceeds: The Borrower shall provide Lender with five (5) days prior written notice of a sale of any home purchased with the Loan (a "Home Sale"). Upon consummation of a Home Sale, Borrower shall to pay to Lender a success fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold ("Success Fee")..

9.3. Sale of Homes listed ~~as Additional Collateral~~ per Exhibit A: Upon the sale of any home listed in Exhibit A, Borrower agrees to provide Lender with substitute collateral via placement of a first priority mortgage on another home of equal value (per estimates of value listed) in which Borrower has fee title and in which Lender will be in a first lien position.

Exhibit A attached: ~~List of Additional homes~~ Premises pledges as Collateral.

Exhibit B attached: Mortgage Note

Exhibit C attached: A form of Mortgage

Exhibit D attached: Two (2) Guarantees

9.4 Discharge of Mortgages/Financing Statements. Upon the fulfilment of all of Borrower's obligations to Lender hereunder, Lender shall promptly (a) discharge all mortgages or liens in favor of Lender on the Premises or the substitute collateral described in paragraph 9.3, and (b) terminate all financing statements in favor of Lender in regards to Borrower or its assets.

If everyone accepts the

From: Dean Groulx [mailto:dean.groulxlaw@gmail.com]
Sent: Thursday, August 11, 2016 9:08 AM
To: Paul Schapira <pschapira@soaringpine.com>
Cc: Tricia C. Mink <TMink@SimonAttys.Com>; John W. Polderman <JPolderman@SimonAttys.Com>; Edwin Herbert <eherbert@atlasoil.com>
Subject: Re: Documents

Paul:

Attached, please find my proposed revisions to the Loan Agreement.

I have made revisions under the assumption that as we discussed yesterday, PSG will pledge collateral valued at roughly 150% of the loan amount as collateral security for the loan in lieu of first mortgages on each property acquired with the loan proceeds for efficiencies and convenience of both parties.

Best regards,

Dean J. Groulx
Law Offices of Dean J. Groulx, P.C.
100 W. Long Lake Road Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500 - Telephone
(248) 644-5640 - Facsimile
dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Wed, Aug 10, 2016 at 9:40 PM, Paul Schapira <pschapira@soaringpine.com> wrote:

Dean – Please see the attached documents.

Tricia/John – Please make sure that Dean has a complete set of the draft documents.

Thank you.

Regards,

Paul

Paul V. Schapira

Vice President

Soaring Pine Capital Management, LLC/Lone Pine Investments II, LLC

SOARING PINE CAPITAL

(248) 760-7299 c

(313) 662-3692 p

pschapira@soaringpine.com

pschapira@lonepineinvestments2.com

335 Maple Road

Birmingham, Michigan 48009

EXHIBIT 4 (Part 1)

STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, and DEAN J. GROULX, an Individual,

Jointly and severally,
Defendants.

Case No.: 2018 – 163298 - CB

Hon. Martha Anderson

/

ROSSMAN SAXE, P.C.
Mark C. Rossman (P63034)
Brian M. Saxe (P70046)
Alex E. Blum (P74070)
Attorneys for Plaintiff
2145 Crooks Road, Suite 220
Troy, MI 48084
(248) 385-5481
mark@rossmansaxe.com
brian@rossmansaxe.com
alex@rossmansaxe.com

PAUL L. NINE & ASSOCIATES, PC
Paul L. Nine (P18307)
Attorneys for Defendants
Paul L. Nine & Associates PC
100 W Long Lake Road, Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500
office@paulninepc.com

/

PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

FEE

Plaintiff Soaring Pine Capital Real Estate and Debt Fund II, LLC ("Plaintiff" or "Soaring Pine"), by and through its attorneys, Rossman Saxe, P.C., hereby moves the Court, under MCR 2.116(C)(10), for summary disposition of Plaintiff's contract claims (Counts I, II, and III of Plaintiff's Amended Complaint) and Defendants' Counterclaim (consisting of one contract claim and one fraud claim) as follows:

- Plaintiff's **Amended Complaint, Count I** is brought against Park Street Group Realty Services, LLC ("Park Street Realty") for its failure to repay Plaintiff on the Amended and Restated Mortgage Note (the "Mortgage Note") by the Maturity Date of September 23, 2017. Discovery has confirmed that there is no genuine issue of material fact that Park Street Realty breached its duty to repay the Mortgage Note, and therefore, summary disposition in favor of Plaintiff is appropriate;
- Plaintiff's **Amended Complaint, Count II** is brought against Park Street Group, LLC ("Park Street Group") for its breach of the Continuing Unlimited Guaranty (the "PSG Guaranty"), under which it promised to pay off the outstanding debt on the Mortgage Note in the event that Park Street Realty failed to repay the Mortgage Note, or if Park Street Realty otherwise breached its duties under the Mortgage Note. Discovery has confirmed that there is no genuine issue of material fact that Park Street Group breached its duty to repay the Mortgage Note after Park Street Realty defaulted on the Note, and therefore, summary disposition in favor of Plaintiff is appropriate;
- Plaintiff's **Amended Complaint, Count III** is brought against Dean J. Groulx (collectively, with Park Street Group and Park Street Realty, "Defendants") for his breach of the Continuing Unlimited Guaranty (the "Groulx Guaranty"), under which he promised to pay off the outstanding debt on the Mortgage Note in the event that Park Street Realty failed to repay the Mortgage Note, or if Park Street Realty otherwise breached its duties

under the Mortgage Note. Discovery has confirmed that there is no genuine issue of material fact that Dean Groulx breached his duty to repay the Mortgage Note after Park Street Realty defaulted on the Note, and therefore, summary disposition in favor of Plaintiff is appropriate;

- Defendants' **Counterclaim, Count I** is based on Plaintiff's alleged breach of an "email" contract, under which Dean Groulx claims that Plaintiff promised to loan him $2 million, whereas the only loan that the parties contractually agreed to in writing and executed was in the amount of $1 million. Discovery has revealed that there is no genuine issue of material fact that the "email" contract never existed – the parties' emails do not contain the agreement and Dean Groulx was unable to identify with any particularity when or how such contract was allegedly formed, or what the terms of the agreement consisted of – except that Defendants were to receive an extra million dollars without providing any additional collateral or other assurance of payment. In short, there is no genuine issue of material fact that such contract never existed and/or is unenforceable, because the parties never agreed to such a contract, and summary disposition in favor of Plaintiff is appropriate; and
- Defendants' **Counterclaim, Count II** is a fraud claim and is based on essentially the same allegations as Defendants' claim for breach of contract and asserts that Plaintiff purportedly told Defendants that they had been approved for a loan of $2 million when in fact Defendants had been approved for a loan of $1 million. Plaintiff's claim is subject to dismissal for a number of reasons, including the following: (1) Defendants failed to plead the claim with the requisite particularity and were not able to identify any of the elements of the claim with any greater particularity through discovery, and (2) there is overwhelming evidence that the loan agreed upon by the parties was for $1 million, which is reflected in

all the loan documents. Summary disposition in favor of Plaintiff on Defendants' fraud claim is therefore appropriate.

WHEREFORE, Plaintiff respectfully requests that the Court grant its Motion for Summary Disposition on the claims identified herein and issue an order: (1) finding that Defendants breached the Mortgage Note and Guaranties and that Plaintiff is entitled to damages arising therefrom; (2) dismissing Defendants' Counterclaim in its entirety; and (3) granting Plaintiff all other relief that is just and proper.

Plaintiff's Motion is supported by the accompanying Brief.

ROSSMAN SAXE, P.C.

Attorneys for Plaintiff

Date: February 7, 2019

By: /s/ Mark C. Rossman

Mark C. Rossman (P63034)
Brian M. Saxe (P70046)
Alex E. Blum (P74070)
2145 Crooks Rd., Suite 220
Troy, MI 48084
(248) 385-5481

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND/OR MCR 2.116(C)(10)

INTRODUCTION

Defendants in this action have taken $1 million from Plaintiff, for which they refuse to account. As Defendant Groulx revealed in his deposition, Defendants lack any legitimate justification for their admitted failure to comply with the terms of their agreements with Plaintiffs, including the Amended and Restated Mortgage Note ("Amended Mortgage Note"), the Continuing Unlimited Guaranty executed by Park Street Group, LLC ("PSG Guaranty"), and the Continuing Unlimited Guaranty executed by Dean Groulx in his personal capacity ("Groulx Guaranty"). **Exhibit 1**: Amended Mortgage Note; **Exhibit 2**: PSG Guaranty; **Exhibit 3**: Groulx Guaranty. Furthermore, these documents are clear and unambiguous and represent the meeting of the parties' minds – Defendant Groulx, an attorney himself, admitted at his deposition that he participated in revising many of the documents and read and understood all documents. He also admitted that Defendants are in default under the Amended Mortgage Note the PSG Warranty, and the Groulx Warranty. See, e.g. **Exhibit 4**: Groulx Deposition Transcript, p. 137:13-139:1.

By contrast, Groulx was unable to identify with any particularity, including how or when the alleged $2 million loan came to be. When asked if it was an oral agreement, Groulx answered that it was not. *Id.* at 67:15-17. When asked if there was a written agreement for the $2 million loan, Groulx testified that there was not:

Q: And so we're clear, there's no signed written agreement [for the $2 million loan] –

A: Correct.

Q: Is there – is this agreement a verbal agreement?

A: No, it's – you can see it through the emails.

Q: Okay. So it's an email agreement?

A: Yes.

Q: In that email series, do you ever use the word accept?

A: Well, I closed the first tranche [for $500,000], yes.

Q: And there [sic] integration clauses in the first tranche of loan documents?

A: The [sic] is as to the subject matter of that agreement and then three days later –

Q: Just – I understand you have some more to say on that subject, but if we can just take it step by step, I would appreciate it.

A: It depends – I don't know how you're defining an integration clause. It did not bar any prior oral agreements concerning the $2 million loan.

Q: And so it's your testimony that you have a prior verbal agreement to loan an additional $1.5 million in addition to the first tranche of funding?

A: No, it's my position that there is a written agreement through the course of dealings of the parties and the written emails stating what the loan amount would be.

Q: Did you say course of dealing?

A: Uh-hum, yes.

Q: So the course of dealing plus the emails between the parties constitute, in your opinion, agreement to loan Park Street Group, LLC, $2 million?

A: Correct.

Id. at 67:7-68:21. In this brief exchange, Groulx testifies that the contract is not written, that it is not oral, that it can be seen through emails, but that it also requires one to review and correctly interpret the parties' "course of performance" and to know that the integration clause contained in the loan documents bars all prior written and oral representations and agreements, except for those relating to the alleged $2 million loan. In short, Groulx cannot identify any contract for the $2 million loan – he cannot even identify where such a loan could have been offered or accepted.

Furthermore, at no time did any Defendant send any notice or email objecting to any alleged refusal to fund a $2 million loan. At no point did any Defendant object to the Plaintiff's notice of default – not when it was issued, not when Plaintiff filed this litigation, and not even

when Defendants' filed their usury motion. It was not until Plaintiff filed its amended complaint, that Defendants first raised the issue of a purported agreement to lend Defendants $2 million.

The reason that Groulx cannot identify where or in what form the agreement exists or how it was offered and accepted is because such a loan never existed. Instead the parties were engaged in negotiations which ultimately led to the $1 million loan, which is clearly reflected in all of the loan documents supporting this Motion and which were attached to Plaintiff's Amended Complaint.[1] And now, in an attempt to avoid liability, Groulx is attempting to go back and, out of the bits and pieces of the parties' negotiations, construct a $2 million loan, that in reality, never existed and was never agreed to by the parties. Finally, in his fraud claim, Groulx completely reverses course with respect to the veracity of the emails, asserting that they were false and that they misled him into believing Plaintiff was going to loan him $2 million. *See, e.g., Id.* at 68:22-69:1.

Defendants Counterclaim is not a competing interpretation of events susceptible of more than one explanation; instead, Defendants are attempting to use the negotiations between the parties, which took place in mid-2016, to argue that some of the statements made during negotiations, relating to the possibility of a loan in the amount of $2 million, entitle Defendants to ***double*** the loan amount that the parties finally agreed on and executed in two separate "tranches," neither of which made any mention of a loan in the amount of anything but the agreed upon $1 million. There is no genuine issue of material fact that Plaintiff never promised to loan Defendants more than the $1 million loan that was actually agreed upon by Plaintiff and Defendants, and which is evidenced by two mortgage notes (original and amended) and secured by, among other instruments, four guaranties (one original and one amended by Park Street Group; and one original and one amended by Dean Groulx).

[1] And which Groulx admits to signing, *see infra*.

The hotchpotch of assertions and interpretations in Groulx's deposition testimony fails to identify any valid or binding contract; furthermore, because Groulx testified that he read and understood the terms of the loan documents that he signed at the closings on the first and second "tranches," Groulx has no claim for fraud. Each of the documents contain integration clauses that limit the representations and information that Groulx could have reasonably relied on. And none of these documents contains any mention of a $2 million loan. Finally, the fraud claim is unsupported by the evidence. The only statements that Groulx has alleged to have been made in support of his spurious claims were from certain employees of Plaintiff who told him that they would submit a proposal for a $2 million loan to Plaintiff's loan committee. Nowhere has he identified a statement or promise that Plaintiff would ultimately approve a loan in any amount, let alone $2 million. Groulx's fraud claim is simply another attempt by Defendants to avoid liability for their undisputed default on the loan and the guaranties securing the loan.

As demonstrated in this Brief in support of Plaintiff's Motion for Summary Disposition on Plaintiff's contract claims and on Defendants' Counterclaim, there is no genuine issue of material fact that Defendants breached their agreements with Plaintiff and that Defendants' Counterclaim lacks any evidentiary support and should be dismissed. Thus, Plaintiff's Motion should be granted.

STATEMENT OF FACTS

A. The Loan.

Soaring Pine is the real estate investment arm of Simon Group Holdings, LLC a private equity firm located in Birmingham, Michigan. In August and September 2016 Soaring Pine loaned a total of $1,000,000.00 to Defendant Park Street Realty for use in that company's renovation and resale of properties that it acquires at tax foreclosure sales. The first half of Soaring Pine's loan is evidenced by the Mortgage Note, dated August 12, 2016 in the original amount of $500,000.00. *See* **Exhibit 5**. On the same date Park Street Realty also entered into a Loan Agreement with Soaring Pine. The Loan Agreement is attached at **Exhibit 6**. On September 23, 2016, Park Street

Realty also entered to an Amended and Restated Mortgage Agreement in the total amount of $1,000,000.00, and an Amendment to Loan Agreement. *See* Ex. 1; the Amendment to Loan Agreement is attached at **Exhibit 7**. The Mortgage Note dated September 23, 2016 matured as of September 23, 2017. *See* Ex. 1. Park Street Realty failed to timely repay the Amended and Restated Mortgage and was and remains in default of its obligations to Plaintiff. *See, e.g.,* Ex. 4, 138:2-139:1.

B. The Default.

Under the Amended Mortgage Note, Park Street Realty was required to make payments of principal and interest at various times throughout the year as set forth in the agreement. Ex. 1, Repayment, p. 1. Interest would accrue at a rate of 20.00% per annum. *Id*., Interest Rate, p. 1. A final balloon payment of all outstanding principal and interest was due on September 23, 2017. *Id*., Repayment, p. 1. An "Event of Default" is defined as

> the payment of principal or interest under this Amended and Restated Note is not made within five (5) days after the date when due under this Amended and Restated Note or the occurrence of any other Event of Default, as defined in the Loan Agreement.

Id., Definitions, p. 2. Furthermore,

> [u]pon the occurrence of of [sic] an Event of Default and during the continuance thereof, Lender may, subject to any notice and cure periods in this Loan Agreement, declare the entire unpaid and outstanding principal balance hereunder and all accrued interest, together with all other indebtedness of [Park Street Realty] to [Soaring Pine], to be due and payable in full forthwith….

Id., Events of Default; Remedies, p. 3. Park Street Realty also agreed to be responsible for all costs of collection incurred by Soaring Pine. *Id*., Costs of Collection, p. 3.

Soaring Pine sent notice of default, demanding payment in full on or about December 27, 2017.

C. The Guaranties Are Triggered.

The indebtedness of Park Street Realty is guaranteed by the Continuing Unlimited Guarantee executed by Park Street Group, dated August 12, 2016 and. Ex. 2.

The indebtedness of Park Street Realty is also guaranteed by the Continuing and Unlimited Guaranty of Groulx, dated September 23, 2016. *See* Ex. 3.3

Under the Guaranties, Park Street Group and Groulx:

> unconditionally and absolutely guarantee to [Soaring Pine]…irrespective of the validity, regularity, or enforceability of any instrument, writing, arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of…[all indebtedness and obligations of any kind]…(b) all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind [incurred by Soaring Pine in obtaining payment from Park Street Realty]

Ex. 7, p. 1; Ex. 8, p. 1.

Park Street Realty's default triggered the obligations of Park Street Group and Dean Groulx to pay the outstanding amount on behalf of Park Street Realty. They failed to do so and are thus in default of the Guaranties.

D. Plaintiff Has Sustained Damages.

As direct and proximate result of Defendants' numerous breaches of the agreements, as set forth above, Plaintiff has incurred substantial damages of at least $1 million. It is entitled to receive all monies owed it under the various loan documents. None of the facts set forth above is subject to any legitimate dispute. Indeed, Defendant Groulx, an attorney, who, when seeking approval of his request for a loan from Plaintiff, boasted as having been involved in over 1,500 real estate transactions since 2003 and admitted at his deposition that he reviewed all documents prior to their execution, and even made revisions to documents that were accepted by Plaintiff. Ex. 4, at 67:7-68:21. Based on the account set forth above, there is no genuine issue of material fact that Plaintiff is entitled to summary disposition on its breach of contract claims and that Defendants' claim for breach of contract and for fraud should be dismissed.

LEGAL STANDARD

Dismissal under MCR 2.116(C)(8) is appropriate where the plaintiff failed to state a claim on which relief can be granted. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315 (2000). All factual allegations are accepted as true, as well as any inferences which can reasonably

be drawn therefrom. *Id*. The motion should be granted only if the claim is clearly so unenforceable as a matter of law that no factual development could possibly justify recovery by the plaintiff. *Id.* Furthermore, the Court may only consider the pleadings when a motion is based on subrule (C)(8). MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich. 358; 547 N.W.2d 314 (1996).

Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. The moving party must specifically identify the alleged undisputed factual issues and support his or her position with documentary evidence. *Id*. The nonmoving party then has the burden to produce admissible evidence to establish disputed facts. *Id*.

The mere possibility that a party may be able to support a claim by producing evidence at trial is not sufficient for the trial court to deny summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 121.

ARGUMENT

Plaintiff's claims against Defendants arise out of the clear and unambiguous agreements of the parties and request only that the Court enforce the agreements after Defendants have admittedly breached the agreements. All of the subject agreements clearly and unambiguously require Defendants to timely pay monies owed to Plaintiff. Indeed, Defendants do not argue otherwise, but instead, admit to executing each of the documents, and that they are in default of each of the

documents. Ex. 4, p. 137-138, 166, 167, 169, 170, 197. Based on Defendant Groulx's own admission, Defendants have failed to make the payments under the Mortgage Note and have been in default at least since the Note matured on September 23, 2017. *Id*. In strict compliance with the agreements, Plaintiff is now entitled to payment and a judgment in its favor on the claims asserted in this lawsuit. Further, given the plain meaning of the agreements, Plaintiff is entitled to reimbursement of the legal fees and costs incurred in pursuing this matter.

A. Soaring Pines Is Entitled to Recover the Amounts Sought in Its Amended Complaint.

When adjudicating a breach of contract claim Michigan law dictates that an unambiguous contract should be construed according to its "plain and easily understood terms." *MLW Assoc, Inc v Certified Tool & Mfg Corp*, 106 Fed Appx 307, 313 (6th Cir July 6, 2004) citing *Hidrofiltros, de Mexico, SA de CV v Rexair, Inc*, 355 F3d 927, 930 (6th Cir 2004). It is improper for a court to ignore the plain meaning of contract language in favor of a technical or strained construction, such as that advocated in Groulx's tortured reading of the parties' emails, alleged course of conduct, and plain and unambiguous language of the agreements the parties actually signed. *Saint Paul Fire & Marine Ins Co*, 228 Mich App 101, 107, (1998). *See also MLW Assoc* at 313.

A contract is not ambiguous if it only admits one interpretation. *Fragner v American Community Mut Ins, Co*, 199 Mich App 537, 540 (1993). The fact that the parties may disagree as to the meaning of contract terms does not establish the existence of ambiguity. *Steinmetz Electrical Contractors v Local Union No 58 Int'l Bhd of Electrical Workers*, 517 F Supp 428, 432 (ED Mich 1981). *See also Wilkie v Auto Owners Ins Co*, 469 Mich 41, 59-60, (2003). Summary judgment is appropriate where the contract terms are clear and unambiguous, even if one party asserts that a result different from that embodied in the terms was intended. *Steinmetz*, *supra* at 432.

When Michigan law is applied to the subject breach of contract claims, it is clear that the loan documents unambiguously required Defendants to make timely monthly payments to

Plaintiff. It is equally clear that the vague and amorphous agreements that are advocated by Defendants are nothing more than a desperate attempt to avoid liability, after-the-fact, by dissecting emails exchanged with representatives of Plaintiff and trying to assign significance to innocent statements, hoping to convince this Court that somewhere buried in these is a commitment to give Defendants another $1 million. In reality, Defendants' claim that he was owed an additional $1 million is nonsense. The fact that Defendants may have regarded approval for a $2 million loan does not somehow give rise to a right to receive more the amount actually approved by Plaintiff, as a lender, and accepted by Defendants, as evidenced by the final written and signed loan documents for $1 million. Certainly, Groulx's tortured claim that hidden between the lines of emails is a secret code evidencing a $2 million does not alter the clear and distinct terms of the executed loan documents. In sum, Groulx is an experienced real estate attorney, having purportedly been involved in over 1,500 real estate transactions. He testified that he read and fully understood the loan documents, and that he had sufficient time to review and even make revisions to the documents. There is no genuine issue of material fact that the parties agreed to a loan in the amount of $1 million. Defendants cannot now escape liability by throwing a new theory against the wall, based on the magical appearance of a new agreement cobbled together from fragments of emails exchanged between the parties leading up to the execution of the $1 million loan.

B. Defendants' Admitted, Undisputed Breaches Make Them Strictly Liable to Plaintiff.

In the Amended and Restated Mortgage Note, Park Street Realty clearly and inconspicuously promises to pay the amounts owed on a monthly basis. See Ex. 1, p. 1. The Amended Mortgage provides as follows:

> For value received, the undersigned…promises to pay . . . the principal sum of One Million and 00/100 Dollars ($1,000,000.00) plus interest as hereinafter provided, in lawful money of the United States.

Id.

Under "Repayment," Park Street Realty promises to pay according to a monthly calculation provided in the Mortgage Note and promises to pay all outstanding amounts in a "balloon payment" on the Maturity Date of September 1, 2017. *Id*. Here, it is undisputed that Park Street Realty has failed to make timely payments under the Mortgage Note and that Defendants properly issued the default notice and demand for payment. Furthermore, in the event of Park Street Realty's default, Park Street Group and Dean Groulx promised to pay on Park Street Realty's behalf. The Guaranties are equally clear and unambiguous.

Specifically, Defendants Groulx and Park Street Group agreed to "unconditionally and absolutely guarantee to [Soaring Pine]" to pay all Park Street Realty's indebtedness and all Soaring Pine's costs and fees that it incurs in seeking payment. Exs. 2 and 3, p. 1. It is undisputed that Defendants have failed to make payment under the Mortgage Note or either of the Guaranties. Ex. 4, Groulx's Deposition Transcript Dep. Testimony of Dean.

This Court need not look any further than the "plain and easily understood terms" of the Amended and Restated Mortgage Note, Park Street Group's Guaranty, and Dean Groulx's Guaranty to decide this motion. *MLW Assoc* at 313. Under these agreements, Defendants were required to pay the amounts owed and if they failed to do so – they agreed to make the payments on behalf of Park Street Realty. In particular, Dean Groulx agreed to personally guarantee the outstanding debt obligation.

Equally clear and unambiguous is the fact that the parties never agreed to a loan in the amount of $2 million. At his deposition, Groulx could not even identify when such a contract was offered or accepted. Ex. 4, 67:7-68:21.

Plaintiff is now entitled to the relief sought in Counts I, II and III of its Amended Complaint. *See Steinmetz*, supra at 432 (summary judgment is appropriate where the contract terms are clear and unambiguous). Simply stated, Soaring Pine is entitled to summary judgment

in its favor, and against Defendants, based on the plain and unambiguous language of the parties' various loan documents.

C. Defendants' Fraud Claim Is Also Subject to Dismissal.

1. Defendants were not defrauded.

Dean Groulx testified that he is an attorney who has had significant experience in real estate, both in a representative capacity and as a party to various transactions. Ex. 4, p. 182-184. Groulx also testified that he reviewed each of the documents before signing and participated in the drafting and revising of several of the documents. Ex. 4, p. 137-138, 166, 167, 169, 170, 197. He testified that none of the documents required that Plaintiff loan him $2 million or contemplate such a loan in the language of the document. Ex. 4, p. 137-138, 166, 167, 169, 170, 197. He also admitted that there was an integration clause in the first "tranche" of loan documents. *Id*. at 67:7-68:21. Finally, all of the above is consistent with a factual scenario in which the parties engaged in negotiations over various loan amounts and terms, ultimately agreeing on the terms and amount that are reflected in the Amended Mortgage Note and secured by the PSG Guaranty and the Groulx Guaranty. In short, Defendants knew the precise terms of the agreement they executed with Plaintiff. There was no fraud.

2. Defendants have failed to plead or prove the claim with the requisite particularity.

Under Michigan law, fraud claims must be pled with particularity, addressing each element of the tort. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414 (2008). To properly plead a fraud claim, the plaintiff must allege that (1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant's representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. *Titan Ins Co v Hyten*, 491 Mich 547, 555 (2012).

Defendants failed to plead these items with particularity in their Counterclaim, and Groulx failed to identify them with particularity in his deposition testimony. As set forth above, Groulx could not precisely identify if the agreement was in writing, was created through one or more of the parties' conversations, or whether instead it was purportedly established through the parties "course of dealing." That is, he could not identify a particular fraudulent statement, testifying at times that the parties' emails and other statements formed the basis of his contract claim, and at other times, that all of Plaintiff's statements were false. Defendants' pleading and testimony are vague and ambiguous and do not come close to satisfying the particularity required under Michigan law.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court grant summary disposition in its favor and award Plaintiff its costs and attorney fees incurred in this action as provided for in the loan documents, as set forth above.

ROSSMAN SAXE, P.C.

Attorneys for Plaintiff

Date: February 7, 2019

By: /s/ Mark C. Rossman

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PROOF OF SERVICE

I, Mark C. Rossman, of the law firm of Rossman Saxe, P.C., hereby certify that the foregoing was filed with the Clerk of the Oakland County Circuit Court on the 30th day of January 2019, and served upon Counsel of record via electronic mail to: office@paulninepc.com, and by First Class Mail to the business address located at 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304.

/s/ Mark C. Rossman Mark C. Rossman

Dated: February 7, 2019

Exhibit 1

AMENDED AND RESTATED
MORTGAGE NOTE

Principal Amount: $1,000,000.00 **Birmingham, Michigan**

Maturity Date: September 23, 2017 **Dated: September 23, 2016**

FOR VALUE RECEIVED, the undersigned, PARK STREET GROUP REALTY SERVICES, LLC, a Michigan limited liability company ("Borrower"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304 promises to pay to the order of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), at its offices located at 335 East Maple Road, Birmingham, Michigan 48009, or at such other place as Lender may designate in writing, the principal sum of One Million and 00/100 Dollars ($1,000,000.00), plus interest as hereinafter provided, in lawful money of the United States. Subject to the terms and conditions of this Amended and Restated Note, the Lender will, during the term of this Amended and Restated Note, make available to the Borrower, and then the Borrower may borrow from the Lender, and repay and re-borrow, at any time prior to the Maturity Date, any amount up to a maximum principal amount at any one time outstanding of One Million and 00/100 Dollars ($1,000,000.00)

Interest Rate.

Interest on the outstanding principal amount of the Loan shall accrue interest at the Interest Rate of Twenty Percent (20.00%) ("Interest") per annum;

Repayment.

Commencing on October 23, 2016, and continuing on the twenty-third (23rd) day of each calendar month thereafter through the Maturity Date (each, a "Payment Date"), Borrower shall pay to Lender monthly payments as follows:

Months 1 & 2 – Interest accrues and will be capitalized and added to the loan balance, but no payments will be due. However, interest on the first Five Hundred Thousand and 00/100 Dollars ($500,000.00) advance made on August 12, 2016 shall be paid at the closing on this Amended and Restated Note.

Months 3, 4, 5 & 6 – Borrower shall pay to the Lender interest only payments on the outstanding principal balance of the Loan, at the Interest Rate and

Months 7, 8, 9, 10, 11 & 12 – Borrower shall pay to the Lender principal and Interest on a Fifteen (15) year amortization,

Final Payment shall be due on the Maturity Date of September 1, 2017 of a balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest.

DTG

Exhibit 2

CONTINUING UNLIMITED GUARANTY

THIS CONTINUING UNLIMITED GUARANTY dated as of August 12, 2016 (the "Guaranty"), is executed by Park Street Group, LLC, a Michigan limited liability company, (the "Guarantor"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304, to and for the benefit of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), whose address is 335 East Maple Road, Birmingham, Michigan 48009.

RECITALS:

A. Park Street Group Realty Services, LLC, a Michigan limited liability company, (the "Borrower"), desire or may desire at some time and/or from time to time to borrow funds and obtain other financial accommodations from the Lender (the "Loan").

B. Guarantor is directly or indirectly financially interested in the Borrower and desires the Lender to extend or continue the extension of credit to the Borrower and the Lender has required that Guarantor execute and deliver this Guaranty to the Lender as a condition to the extension and continuation of credit by the Lender.

C. The extension or continued extension of credit by the Lender is necessary and desirable to the conduct and operation of the business of the Borrower and will inure to the financial benefit of the Guarantor.

NOW, THEREFORE, FOR VALUE RECEIVED, it is agreed that the preceding provisions and recitals are an integral part hereof and that this Guaranty shall be construed in light thereof, and in consideration of advances, credit or other financial accommodation heretofore afforded, concurrently herewith being afforded or hereafter to be afforded to the Borrower by the Lender, the Guarantor, hereby unconditionally and absolutely guarantees to the Lender or other person paying or incurring the same, irrespective of the validity, regularity or enforceability of any instrument, writing, arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of: (a) any and all indebtedness, obligations and liabilities of every kind and nature of the Borrower to the Lender, howsoever evidenced, whether now existing or hereafter created or arising, direct or indirect, primary or secondary, absolute or contingent, due or to become due, joint, several or joint and several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise, including without limitation any sums due in connection with that certain Loan Agreement by and between Lender and Borrower of even date (the "Loan Agreement") plus (b) all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Lender, its parent or affiliates), paid or incurred by the Lender in endeavoring to collect all or any part of the foregoing indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing this Guaranty, or in defending against any defense, counterclaim, setoff or cross-claim based on any act of commission or omission by the Lender with respect to the foregoing indebtedness, any collateral therefor, or in connection with any Repayment Claim (as hereinafter defined) (the Borrower's obligations referred to above are hereinafter collectively referred to as

the "Borrower's Obligations") (the Guarantor's obligations undertaken hereunder are collectively referred to as the "Guaranteed Debt"). In addition, the Guarantor hereby unconditionally and absolutely guarantees to the Lender the prompt, full and faithful performance and discharge by the Borrower of each of the terms, conditions, agreements, representations and warranties on the part of the Borrower contained in any agreement, or in any modification or addenda thereto or substitution thereof in connection with any of the Guaranteed Debt (the "Guarantor Performance Obligations").

Upon an event of default under the Borrower's Obligations, beyond any applicable notice and cure periods, or in case of the death of the Guarantor or any bankruptcy, reorganization, debt arrangement or other proceeding under any bankruptcy or insolvency law, any dissolution, liquidation or receivership proceeding is instituted by or against the Guarantor, or any default by the Guarantor of any of the covenants, terms and conditions set forth herein, all of the Guaranteed Debt shall, without notice to anyone, immediately become due and all amounts due hereunder shall be payable by the Guarantor. The Guarantor hereby expressly and irrevocably: (a) waives, to the fullest extent possible, on behalf of itself and its successors and assigns (including any surety) and any other person, any and all rights at law or in equity to subrogation, reimbursement, exoneration, contribution, indemnification, set off or to any other rights that could accrue to a guarantor or to the holder of a claim against any person, and which the Guarantor may have or hereafter acquire against any person in connection with or as a result of the Guarantor's execution, delivery and/or performance of this Guaranty, or any other documents to which the Guarantor is a party or otherwise; provided, however, nothing in this Guaranty shall prohibit Guarantor form pursuing such claims after the Indebtedness is paid in full; (b) waives any "claim" (as such term is defined in the United States Bankruptcy Code) of any kind against the Borrower while the indebtedness has not been paid in full, and further agrees that it shall not have or assert any such rights against any person (including any surety), either directly or as an attempted set off to any action commenced against the Guarantor by the Lender or any other person; and (c) acknowledges and agrees (i) the foregoing waivers are intended to benefit the Lender and shall not limit or otherwise affect the Guarantor's liability hereunder or the enforceability of this Guaranty, (ii) the Borrower and its successors and assigns are intended third party beneficiaries of the foregoing waivers, and (iii) the agreements set forth in this paragraph and the Lender's rights under this paragraph shall survive payment in full of the Guaranteed Debt. Notwithstanding anything to the contrary herein, upon the death of any Guarantor, this Guaranty shall be binding upon such Guarantor's estate. In such event, the liability of such Guarantor under this Guaranty shall continue in effect against such Guarantor's estate and notice of such Guarantor's death shall be given to Lender no later than thirty (30) days after the date of such death. No later than the earlier to occur of (a) ninety (90) days after the date of such Guarantor's death or (b) the date on which any distribution of assets to any devisee, heir, or other beneficiary from such Guarantor's estate, a substitute guarantor acceptable to Lender, in its sole discretion, shall have executed a Guaranty in the form executed by Guarantor. Failure to comply with the terms hereof shall constitute an Event of Default under the terms of the Note and other loan documents and shall entitle Lender to exercise all remedies available to it thereunder.

Following an Event of Default (as defined in the Loan Agreement of even date), all dividends or other payments received by the Lender on account of the Borrower's Obligations, from whatever source derived, shall be taken and applied by the Lender toward the payment of the Borrower's Obligations and in such order of application as the Lender may, in its sole discretion, from time to time elect. The Lender shall have the exclusive right to determine how, when and

what application of payments and credits, if any, whether derived from the Borrower or any other source, shall be made on the Borrower's Obligations and such determination shall be conclusive upon the Guarantor.

This Guaranty shall in all respects be continuing, absolute and unconditional, and shall remain in full force and effect with respect to the Guarantor until: (i) written notice from the Lender to the Guarantor by United States certified mail of its discontinuance as to the Guarantor; or (ii) until all Guaranteed Debt created or existing before receipt of either such notice shall have been fully paid. If there is more than one Guarantor party hereto and if this Guaranty is discontinued as to any Guarantor, this Guaranty shall nevertheless continue and remain in force against any other guarantor until discontinued as to all other Guarantors. In the event of the death, incompetency or dissolution of the Guarantor, this Guaranty shall continue as to all of the Guaranteed Debt theretofore incurred by the Borrower even though the Borrower's Obligations are renewed or the time of maturity of the Borrower's Obligations is extended without the consent of the successors or assigns of the Guarantor.

No compromise, settlement, release or discharge of, or indulgence with respect to, or failure, neglect or omission to enforce or exercise any right against any other guarantor shall release or discharge the Guarantor.

The Guarantor's liability under this Guaranty shall in no way be modified, affected, impaired, reduced, released or discharged by any of the following (any or all of which may be done or omitted by the Lender in its sole discretion, without notice to anyone and irrespective of whether the Borrower's Obligations shall be increased or decreased thereby): (a) any acceptance by the Lender of any new or renewal note or notes of the Borrower, or of any security or collateral for, or other guarantors or obligors upon, any of the Borrower's Obligations; (b) any compromise, settlement, surrender, release, discharge, renewal, refinancing, extension, alteration, exchange, sale, pledge or election with respect to the Borrower's Obligations, or any note by the Borrower, or with respect to any collateral under Section 1111 or any action under Section 364, or any other section of the United States Bankruptcy Code, now existing or hereafter amended, or other disposition of, or substitution for, or indulgence with respect to, or failure, neglect or omission to realize upon, or to enforce or exercise any liens or rights of appropriation or other rights with respect to, the Borrower's Obligations or any security or collateral therefor or any claims against any person or persons primarily or secondarily liable thereon; (c) any failure, neglect or omission to perfect, protect, secure or insure any of security interests, liens, or encumbrances of the properties or interests in properties subject thereto; (d) any change in the Borrower's name or the merger of the Borrower into another entity; or (e) any act of commission or omission of any kind or at any time upon the part of the Lender with respect to any matter whatsoever, other than the execution and delivery by the Lender to the Guarantor of an express written release or cancellation of this Guaranty. The Guarantor hereby consents to all acts of commission or omission of the Lender set forth above and agrees that the standards of good faith, diligence, reasonableness and care shall be measured, determined and governed solely by the terms and provisions hereof.

In order to hold the Guarantor liable hereunder, there shall be no obligation on the part of the Lender, at any time, to resort for payment to the Borrower or to anyone else, or to any collateral, security, property, liens or other rights and remedies whatsoever, all of which are hereby expressly waived by the Guarantor.

The Guarantor hereby expressly waives diligence in collection or protection, presentment, demand or protest or in giving notice to anyone of the protest, dishonor, default, or nonpayment or of the creation or existence of any of the Borrower's Obligations or of any security or collateral therefor or of the acceptance of this Guaranty or of extension of credit or indulgences hereunder or of any other matters or things whatsoever relating hereto.

The Guarantor expressly agrees that the Guarantor shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing the Guaranteed Debt, whether or not the liability of the Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

The Guarantor represents and warrants to the Lender that the financial statements of the Guarantor furnished to the Lender at or prior to the execution and delivery of this Guaranty fairly present the financial condition of the Guarantor for the periods shown therein, and since the dates covered by the most recent of such financial statements, there has been no material adverse change in the Guarantor's business operations or financial condition. The Guarantor agrees to advise the Lender immediately of any adverse change in the financial condition, business operations or any other status of the Guarantor. Following an Event of Default, the Lender shall have the right at all times during business hours, upon forty-eight (48) hours written notice, to inspect the books and records of the Guarantor and make extracts therefrom. Except as expressly shown on the most recent of such financial statements, the Guarantor owns all of its assets free and clear of all liens; is not a party to any litigation, nor is any litigation threatened to the knowledge of the Guarantor which would, if adversely determined, cause any material adverse change in its business or financial condition; and has no delinquent tax liabilities, nor have any tax deficiencies been proposed against it. The Guarantor shall not sell, lease, transfer, convey or assign any of its assets, unless such sale, lease, transfer, conveyance or assignment will not have a material adverse effect on the business or financial condition of the Guarantor or its ability to perform its obligations hereunder. The Guarantor shall neither become a party to any merger or consolidation, nor, except in the ordinary course of its business consistent with past practices, acquire all or substantially all of the assets of, a controlling interest in the stock of, or a partnership or joint venture interest in, any other entity.

The Lender may, without demand or notice of any kind to anyone, apply or set off any balances, credits, deposits, accounts, moneys or other indebtedness at any time credited by or due from the Lender to the Guarantor against the amounts due hereunder and in such order of application as the Lender may from time to time elect.

AS FURTHER SECURITY, ANY AND ALL DEBTS AND LIABILITIES NOW OR HEREAFTER ARISING AND OWING TO THE GUARANTOR BY THE BORROWER, OR TO ANY OTHER PARTY LIABLE TO THE LENDER FOR THE BORROWER'S OBLIGATIONS, ARE HEREBY SUBORDINATED TO THE LENDER'S CLAIMS. THE GUARANTOR HEREBY AGREES THAT THE GUARANTOR MAY BE JOINED AS A PARTY DEFENDANT IN ANY LEGAL PROCEEDING (INCLUDING, BUT NOT LIMITED TO, A FORECLOSURE PROCEEDING) INSTITUTED BY THE BANK AGAINST THE BORROWER. THE GUARANTOR, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES IRREVOCABLY THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING COMMENCED BY OR AGAINST THE GUARANTOR IN WHICH THE GUARANTOR AND THE LENDER ARE ADVERSE

PARTIES. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE LENDERGRANTING ANY FINANCIAL ACCOMMODATION TO THE BORROWER AND ACCEPTING THIS GUARANTY.

Should a claim (a "Repayment Claim") be made upon the Lender at any time for repayment of any amount received by the Lender in payment of the Borrower's Obligations, or any part thereof, whether received from the Borrower, the Guarantor pursuant hereto, or received by the Lender as the proceeds of collateral, by reason of: (i) any judgment, decree or order of any court or administrative body having jurisdiction over the Lender or any of its property; or (ii) any settlement or compromise of any such Repayment Claim effected by the Lender, in its sole discretion, with the claimant (including the Borrower), the Guarantor shall remain liable to the Lender for the amount so repaid to the same extent as if such amount had never originally been received by the Lender, notwithstanding any termination hereof or the cancellation of any note or other instrument evidencing the Borrower's Obligations.

The Lender may, without notice to anyone, sell or assign the Borrower's Obligations, or any part thereof, or grant participations therein, and in any such event each and every immediate or remote assignee or holder of, or participant in, all or any of the Borrower's Obligations shall have the right to enforce this Guaranty, by suit or otherwise for the benefit of such assignee, holder, or participant, as fully as if herein by name specifically given such right herein, but the Lender shall have an unimpaired right, prior and superior to that of any such assignee, holder or participant, to enforce this Guaranty for the benefit of the Lender, as to any part of the Borrower's Obligations retained by the Lender.

Unless and until all of the Borrower's Obligations have been paid in full, no release or discharge of any other person, whether primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the institution of bankruptcy, receivership, insolvency, reorganization, dissolution or liquidation proceedings by or against the Guarantor or any other person primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the entry of any restraining or other order in any such proceedings, shall release or discharge the Guarantor, or any other guarantor of the indebtedness, or any other person, firm or corporation liable to the Lender for the Borrower's Obligations.

To secure Guarantor's obligation hereunder Guarantor grants to Lender a security interest in all of Guarantor's right, title and interest in and to any assets, goods, equipment, fixtures, inventory, accounts (including but not limited to accounts, deposits and accounts receivable held with Lender or other financial institutions); payment, intangibles, general intangibles, letter of credit rights, software, chattel paper, instruments, documents, investment property and deposit accounts, now owned or hereafter acquired, insurance proceeds, rents and all products and proceeds thereof (the forgoing terms being used with the respective meanings accorded such terms under Article 9 of the Uniform Commercial Code). Lender is hereby authorized to file a financing statement naming Guarantors as debtor and indicating "All Assets" or words of similar import as the collateral. If an event of default occurs under the Note, Lender may exercise all rights and remedies of a secured party after default as set forth in said Article 9 and all rights and remedies as set forth in Note, Mortgage and Guaranty. If any secured obligations remain unliquidated, contingent or in dispute at the time Lender exercises any such remedy, Lender may retain any cash realized upon the sale or collection of any such collateral hereunder until each such obligation is either paid or performed in full or otherwise satisfied.

or of the creation or existence of any of the Borrower's Obligations or of any security or collateral therefor or of the acceptance of this Guaranty or of extension of credit or indulgences hereunder or of any other matters or things whatsoever relating hereto.

The Guarantor expressly agrees that the Guarantor shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing the Guaranteed Debt, whether or not the liability of the Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

The Guarantor represents and warrants to the Lender that the financial statements of the Guarantor furnished to the Lender at or prior to the execution and delivery of this Guaranty fairly present the financial condition of the Guarantor for the periods shown therein, and since the dates covered by the most recent of such financial statements, there has been no material adverse change in the Guarantor's business operations or financial condition. The Guarantor agrees to advise the Lender immediately of any adverse change in the financial condition, business operations or any other status of the Guarantor. Following an Event of Default, the Lender shall have the right at all times during business hours, upon forty-eight (48) hours written notice, to inspect the books and records of the Guarantor and make extracts therefrom. Except as expressly shown on the most recent of such financial statements, the Guarantor owns all of its assets free and clear of all liens; is not a party to any litigation, nor is any litigation threatened to the knowledge of the Guarantor which would, if adversely determined, cause any material adverse change in its business or financial condition; and has no delinquent tax liabilities, nor have any tax deficiencies been proposed against it. The Guarantor shall not sell, lease, transfer, convey or assign any of its assets, unless such sale, lease, transfer, conveyance or assignment will not have a material adverse effect on the business or financial condition of the Guarantor or its ability to perform its obligations hereunder. The Guarantor shall neither become a party to any merger or consolidation, nor, except in the ordinary course of its business consistent with past practices, acquire all or substantially all of the assets of, a controlling interest in the stock of, or a partnership or joint venture interest in, any other entity.

The Lender may, without demand or notice of any kind to anyone, apply or set off any balances, credits, deposits, accounts, moneys or other indebtedness at any time credited by or due from the Lender to the Guarantor against the amounts due hereunder and in such order of application as the Lender may from time to time elect.

AS FURTHER SECURITY, ANY AND ALL DEBTS AND LIABILITIES NOW OR HEREAFTER ARISING AND OWING TO THE GUARANTOR BY THE BORROWER, OR TO ANY OTHER PARTY LIABLE TO THE LENDER FOR THE BORROWER'S OBLIGATIONS, ARE HEREBY SUBORDINATED TO THE LENDER'S CLAIMS. THE GUARANTOR HEREBY AGREES THAT THE GUARANTOR MAY BE JOINED AS A PARTY DEFENDANT IN ANY LEGAL PROCEEDING (INCLUDING, BUT NOT LIMITED TO, A FORECLOSURE PROCEEDING) INSTITUTED BY THE BANK AGAINST THE BORROWER. THE GUARANTOR, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES IRREVOCABLY THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING COMMENCED BY OR AGAINST THE GUARANTOR IN WHICH THE GUARANTOR AND THE LENDER ARE ADVERSE PARTIES. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE

This Guaranty has been delivered to the Lender at its offices in Michigan, and the rights, remedies and liabilities of the parties shall be construed and determined in accordance with the laws of the State of Michigan, in which State it shall be performed by the Guarantor.

TO INDUCE THE LENDER TO GRANT FINANCIAL ACCOMMODATIONS TO THE BORROWER, THE GUARANTOR IRREVOCABLY AGREES THAT ALL ACTIONS ARISING DIRECTLY OR INDIRECTLY AS A RESULT OR IN CONSEQUENCE OF THIS GUARANTY SHALL BE INSTITUTED AND LITIGATED ONLY IN COURTS HAVING SITUS IN THE COUNTY OF MACOMB, MICHIGAN. THE GUARANTOR HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY STATE OR FEDERAL COURT LOCATED AND HAVING ITS SITUS IN THE COUNTY OF WAYNE, MICHIGAN, AND WAIVES ANY OBJECTION BASED ON FORUM NON CONVENIENS. FURTHERMORE, THE GUARANTOR WAIVES ALL NOTICES AND DEMANDS IN CONNECTION WITH THE ENFORCEMENT OF THE LENDER'S RIGHTS HEREUNDER, AND HEREBY CONSENTS TO, AND WAIVES NOTICE OF THE RELEASE, WITH OR WITHOUT CONSIDERATION, OF THE BORROWER OR ANY OTHER PERSON RESPONSIBLE FOR PAYMENT OF THE BORROWER'S OBLIGATIONS, OR OF ANY COLLATERAL THEREFOR.

Wherever possible each provision of this Guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

It is agreed that the Guarantor's liability is independent of any other guaranties at any time in effect with respect to all or any part of the Borrower's Obligations, and that the Guarantor's liability hereunder may be enforced regardless of the existence of any such other guaranties.

No delay on the part of the Lender in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Lender of any right or remedy shall preclude other or further exercise thereof, or the exercise of any other right or remedy. No modification, termination, discharge or waiver of any of the provisions hereof shall be binding upon the Lender, except as expressly set forth in a writing duly signed and delivered on behalf of the Lender.

The execution, delivery and performance of this Guaranty by the Guarantor have been duly authorized by all necessary action on the part of the Guarantor and do not and will not (i) require any consent or approval which has not been obtained, (ii) violate any provision of organizational documents of the Guarantor or of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to the Guarantor; (iii) require the consent or approval of, or filing or registration with, any governmental body, agency or authority, or (iv) result in a breach of or constitute a default under, or result in the imposition of any lien, charge or encumbrance upon any property of the Guarantor pursuant to, any indenture or other agreement or instrument under which the Guarantor is a party or by which it or any of its properties may be bound or affected. The person(s) executing and delivering this Guaranty for and on behalf of the Guarantor, are duly authorized to so act.

This Guaranty: (i) is valid, binding and enforceable in accordance with its provisions, and no conditions exist to the legal effectiveness of this Guaranty as to the Guarantor; (ii) contains the

entire agreement between the Guarantor and the Lender; (iii) is the final expression of their intentions; and (iv) supersedes all negotiations, representations, warranties, commitments, offers, contracts (of any kind or nature, whether oral or written) prior to or contemporaneous with the execution hereof. No prior or contemporaneous representations, warranties, understandings, offers or agreements of any kind or nature, whether oral or written, have been made by the Lender or relied upon by the Guarantor in connection with the execution hereof.

This Guaranty shall inure to the benefit of the Lender and its successors and assigns.

The term "Guarantor" as used herein shall mean all parties signing this Guaranty, and the provisions hereof shall be binding upon the Guarantor, and each one of them, and all such parties, their respective successors and assigns. As to each other, the liability of Guarantors shall be joint and several.

IN WITNESS WHEREOF, the undersigned have caused this Guaranty to be executed all as of the day and year first above written.

"GUARANTOR"

Park Street Group, LLC,
a Michigan limited liability company

By: Dean J. Groulx
Name: Dean J. Groulx
Its: MEMBER

Exhibit 3

CONTINUING UNLIMITED GUARANTY

THIS CONTINUING UNLIMITED GUARANTY dated as of August 18, 2016 (the "Guaranty"), is executed by Dean J. Groulx, an individual (collectively the "Guarantor"), whose address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48304, to and for the benefit of Soaring Pine Capital Real Estate and Debt Fund II, LLC, a Delaware limited liability company ("Lender"), whose address is 335 East Maple Road, Birmingham, Michigan 48009.

RECITALS:

A. Park Street Group Realty Services, LLC, a Michigan limited liability company, (the "Borrower"), desire or may desire at some time and/or from time to time to borrow funds and obtain other financial accommodations from the Lender (the "Loan").

B. Guarantor is directly or indirectly financially interested in the Borrower and desires the Lender to extend or continue the extension of credit to the Borrower and the Lender has required that Guarantor execute and deliver this Guaranty to the Lender as a condition to the extension and continuation of credit by the Lender.

C. The extension or continued extension of credit by the Lender is necessary and desirable to the conduct and operation of the business of the Borrower and will inure to the financial benefit of the Guarantor.

NOW, THEREFORE, FOR VALUE RECEIVED, it is agreed that the preceding provisions and recitals are an integral part hereof and that this Guaranty shall be construed in light thereof, and in consideration of advances, credit or other financial accommodation heretofore afforded, concurrently herewith being afforded or hereafter to be afforded to the Borrower by the Lender, the Guarantor, hereby unconditionally and absolutely guarantees to the Lender or other person paying or incurring the same, irrespective of the validity, regularity or enforceability of any instrument, writing, arrangement or credit agreement relating to or the subject of any such financial accommodation, the prompt payment in full of: (a) any and all indebtedness, obligations and liabilities of every kind and nature of the Borrower to the Lender, howsoever evidenced, whether now existing or hereafter created or arising, direct or indirect, primary or secondary, absolute or contingent, due or to become due, joint, several or joint and several, and howsoever owned, held or acquired, whether through discount, overdraft, purchase, direct loan or as collateral, or otherwise, including without limitation any sums due in connection with that certain Loan Agreement by and between Lender and Borrower of even date (the "Loan Agreement") plus (b) all reasonable costs, legal expenses and attorneys' and paralegals' fees of every kind (including those costs, expenses and fees of attorneys and paralegals who may be employees of the Lender, its parent or affiliates), paid or incurred by the Lender in endeavoring to collect all or any part of the foregoing indebtedness, or in enforcing its rights in connection with any collateral therefor, or in enforcing this Guaranty, or in defending against any defense, counterclaim, setoff or cross-claim based on any act of commission or omission by the Lender with respect to the foregoing indebtedness, any collateral therefor, or in connection with any Repayment Claim (as hereinafter defined) (the Borrower's obligations referred to above are hereinafter collectively referred to as the "Borrower's Obligations") (the Guarantor's obligations undertaken hereunder are collectively

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referred to as the "Guaranteed Debt"). In addition, the Guarantor hereby unconditionally and absolutely guarantees to the Lender the prompt, full and faithful performance and discharge by the Borrower of each of the terms, conditions, agreements, representations and warranties on the part of the Borrower contained in any agreement, or in any modification or addenda thereto or substitution thereof in connection with any of the Guaranteed Debt (the "Guarantor Performance Obligations").

Upon an event of default under the Borrower's Obligations, beyond any applicable notice and cure periods, or in case of the death of the Guarantor or any bankruptcy, reorganization, debt arrangement or other proceeding under any bankruptcy or insolvency law, any dissolution, liquidation or receivership proceeding is instituted by or against the Guarantor, or any default by the Guarantor of any of the covenants, terms and conditions set forth herein, all of the Guaranteed Debt shall, without notice to anyone, immediately become due and all amounts due hereunder shall be payable by the Guarantor. The Guarantor hereby expressly and irrevocably: (a) waives, to the fullest extent possible, on behalf of itself and its successors and assigns (including any surety) and any other person, any and all rights at law or in equity to subrogation, reimbursement, exoneration, contribution, indemnification, set off or to any other rights that could accrue to a guarantor or to the holder of a claim against any person, and which the Guarantor may have or hereafter acquire against any person in connection with or as a result of the Guarantor's execution, delivery and/or performance of this Guaranty, or any other documents to which the Guarantor is a party or otherwise; provided, however, nothing in this Guaranty shall prohibit Guarantor form pursuing such claims after the Indebtedness is paid in full; (b) waives any "claim" (as such term is defined in the United States Bankruptcy Code) of any kind against the Borrower while the indebtedness has not been paid in full, and further agrees that it shall not have or assert any such rights against any person (including any surety), either directly or as an attempted set off to any action commenced against the Guarantor by the Lender or any other person; and (c) acknowledges and agrees (i) the foregoing waivers are intended to benefit the Lender and shall not limit or otherwise affect the Guarantor's liability hereunder or the enforceability of this Guaranty, (ii) the Borrower and its successors and assigns are intended third party beneficiaries of the foregoing waivers, and (iii) the agreements set forth in this paragraph and the Lender's rights under this paragraph shall survive payment in full of the Guaranteed Debt. Notwithstanding anything to the contrary herein, upon the death of any Guarantor, this Guaranty shall be binding upon such Guarantor's estate. In such event, the liability of such Guarantor under this Guaranty shall continue in effect against such Guarantor's estate and notice of such Guarantor's death shall be given to Lender no later than thirty (30) days after the date of such death. No later than the earlier to occur of (a) ninety (90) days after the date of such Guarantor's death or (b) the date on which any distribution of assets to any devisee, heir, or other beneficiary from such Guarantor's estate, a substitute guarantor acceptable to Lender, in its sole discretion, shall have executed a Guaranty in the form executed by Guarantor. Failure to comply with the terms hereof shall constitute an Event of Default under the terms of the Note and other loan documents and shall entitle Lender to exercise all remedies available to it thereunder.

Following an Event of Default (as defined in the Loan Agreement of even date), all dividends or other payments received by the Lender on account of the Borrower's Obligations, from whatever source derived, shall be taken and applied by the Lender toward the payment of the Borrower's Obligations and in such order of application as the Lender may, in its sole discretion, from time to time elect. The Lender shall have the exclusive right to determine how, when and what application of payments and credits, if any, whether derived from the Borrower or any other

source, shall be made on the Borrower's Obligations and such determination shall be conclusive upon the Guarantor.

This Guaranty shall in all respects be continuing, absolute and unconditional, and shall remain in full force and effect with respect to the Guarantor until: (i) written notice from the Lender to the Guarantor by United States certified mail of its discontinuance as to the Guarantor; or (ii) until all Guaranteed Debt created or existing before receipt of either such notice shall have been fully paid. If there is more than one Guarantor party hereto and if this Guaranty is discontinued as to any Guarantor, this Guaranty shall nevertheless continue and remain in force against any other guarantor until discontinued as to all other Guarantors. In the event of the death, incompetency or dissolution of the Guarantor, this Guaranty shall continue as to all of the Guaranteed Debt theretofore incurred by the Borrower even though the Borrower's Obligations are renewed or the time of maturity of the Borrower's Obligations is extended without the consent of the successors or assigns of the Guarantor.

No compromise, settlement, release or discharge of, or indulgence with respect to, or failure, neglect or omission to enforce or exercise any right against any other guarantor shall release or discharge the Guarantor.

The Guarantor's liability under this Guaranty shall in no way be modified, affected, impaired, reduced, released or discharged by any of the following (any or all of which may be done or omitted by the Lender in its sole discretion, without notice to anyone and irrespective of whether the Borrower's Obligations shall be increased or decreased thereby): (a) any acceptance by the Lender of any new or renewal note or notes of the Borrower, or of any security or collateral for, or other guarantors or obligors upon, any of the Borrower's Obligations; (b) any compromise, settlement, surrender, release, discharge, renewal, refinancing, extension, alteration, exchange, sale, pledge or election with respect to the Borrower's Obligations, or any note by the Borrower, or with respect to any collateral under Section 1111 or any action under Section 364, or any other section of the United States Bankruptcy Code, now existing or hereafter amended, or other disposition of, or substitution for, or indulgence with respect to, or failure, neglect or omission to realize upon, or to enforce or exercise any liens or rights of appropriation or other rights with respect to, the Borrower's Obligations or any security or collateral therefor or any claims against any person or persons primarily or secondarily liable thereon; (c) any failure, neglect or omission to perfect, protect, secure or insure any of security interests, liens, or encumbrances of the properties or interests in properties subject thereto; (d) any change in the Borrower's name or the merger of the Borrower into another entity; or (e) any act of commission or omission of any kind or at any time upon the part of the Lender with respect to any matter whatsoever, other than the execution and delivery by the Lender to the Guarantor of an express written release or cancellation of this Guaranty. The Guarantor hereby consents to all acts of commission or omission of the Lender set forth above and agrees that the standards of good faith, diligence, reasonableness and care shall be measured, determined and governed solely by the terms and provisions hereof.

In order to hold the Guarantor liable hereunder, there shall be no obligation on the part of the Lender, at any time, to resort for payment to the Borrower or to anyone else, or to any collateral, security, property, liens or other rights and remedies whatsoever, all of which are hereby expressly waived by the Guarantor.

The Guarantor hereby expressly waives diligence in collection or protection, presentment, demand or protest or in giving notice to anyone of the protest, dishonor, default, or nonpayment

LENDERGRANTING ANY FINANCIAL ACCOMMODATION TO THE BORROWER AND ACCEPTING THIS GUARANTY.

Should a claim (a "Repayment Claim") be made upon the Lender at any time for repayment of any amount received by the Lender in payment of the Borrower's Obligations, or any part thereof, whether received from the Borrower, the Guarantor pursuant hereto, or received by the Lender as the proceeds of collateral, by reason of: (i) any judgment, decree or order of any court or administrative body having jurisdiction over the Lender or any of its property; or (ii) any settlement or compromise of any such Repayment Claim effected by the Lender, in its sole discretion, with the claimant (including the Borrower), the Guarantor shall remain liable to the Lender for the amount so repaid to the same extent as if such amount had never originally been received by the Lender, notwithstanding any termination hereof or the cancellation of any note or other instrument evidencing the Borrower's Obligations.

The Lender may, without notice to anyone, sell or assign the Borrower's Obligations, or any part thereof, or grant participations therein, and in any such event each and every immediate or remote assignee or holder of, or participant in, all or any of the Borrower's Obligations shall have the right to enforce this Guaranty, by suit or otherwise for the benefit of such assignee, holder, or participant, as fully as if herein by name specifically given such right herein, but the Lender shall have an unimpaired right, prior and superior to that of any such assignee, holder or participant, to enforce this Guaranty for the benefit of the Lender, as to any part of the Borrower's Obligations retained by the Lender.

Unless and until all of the Borrower's Obligations have been paid in full, no release or discharge of any other person, whether primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the institution of bankruptcy, receivership, insolvency, reorganization, dissolution or liquidation proceedings by or against the Guarantor or any other person primarily or secondarily liable for and obligated with respect to the Borrower's Obligations, or the entry of any restraining or other order in any such proceedings, shall release or discharge the Guarantor, or any other guarantor of the indebtedness, or any other person, firm or corporation liable to the Lender for the Borrower's Obligations.

To secure Guarantor's obligation hereunder Guarantor grants to Lender a security interest in all of Guarantor's right, title and interest in and to any assets, goods, equipment, fixtures, inventory, accounts (including but not limited to accounts, deposits and accounts receivable held with Lender or other financial institutions); payment, intangibles, general intangibles, letter of credit rights, software, chattel paper, instruments, documents, investment property and deposit accounts, now owned or hereafter acquired, insurance proceeds, rents and all products and proceeds thereof (the forgoing terms being used with the respective meanings accorded such terms under Article 9 of the Uniform Commercial Code). Lender is hereby authorized to file a financing statement naming Guarantors as debtor and indicating "All Assets" or words of similar import as the collateral. If an event of default occurs under the Note, Lender may exercise all rights and remedies of a secured party after default as set forth in said Article 9 and all rights and remedies as set forth in Note, Mortgage and Guaranty. If any secured obligations remain unliquidated, contingent or in dispute at the time Lender exercises any such remedy, Lender may retain any cash realized upon the sale or collection of any such collateral hereunder until each such obligation is either paid or performed in full or otherwise satisfied.

This Guaranty has been delivered to the Lender at its offices in Michigan, and the rights, remedies and liabilities of the parties shall be construed and determined in accordance with the laws of the State of Michigan, in which State it shall be performed by the Guarantor.

TO INDUCE THE LENDER TO GRANT FINANCIAL ACCOMMODATIONS TO THE BORROWER, THE GUARANTOR IRREVOCABLY AGREES THAT ALL ACTIONS ARISING DIRECTLY OR INDIRECTLY AS A RESULT OR IN CONSEQUENCE OF THIS GUARANTY SHALL BE INSTITUTED AND LITIGATED ONLY IN COURTS HAVING SITUS IN THE COUNTY OF MACOMB, MICHIGAN. THE GUARANTOR HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY STATE OR FEDERAL COURT LOCATED AND HAVING ITS SITUS IN THE COUNTY OF WAYNE, MICHIGAN, AND WAIVES ANY OBJECTION BASED ON FORUM NON CONVENIENS. FURTHERMORE, THE GUARANTOR WAIVES ALL NOTICES AND DEMANDS IN CONNECTION WITH THE ENFORCEMENT OF THE LENDER'S RIGHTS HEREUNDER, AND HEREBY CONSENTS TO, AND WAIVES NOTICE OF THE RELEASE, WITH OR WITHOUT CONSIDERATION, OF THE BORROWER OR ANY OTHER PERSON RESPONSIBLE FOR PAYMENT OF THE BORROWER'S OBLIGATIONS, OR OF ANY COLLATERAL THEREFOR.

Wherever possible each provision of this Guaranty shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

It is agreed that the Guarantor's liability is independent of any other guaranties at any time in effect with respect to all or any part of the Borrower's Obligations, and that the Guarantor's liability hereunder may be enforced regardless of the existence of any such other guaranties.

No delay on the part of the Lender in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by the Lender of any right or remedy shall preclude other or further exercise thereof, or the exercise of any other right or remedy. No modification, termination, discharge or waiver of any of the provisions hereof shall be binding upon the Lender, except as expressly set forth in a writing duly signed and delivered on behalf of the Lender.

The execution, delivery and performance of this Guaranty by the Guarantor have been duly authorized by all necessary action on the part of the Guarantor and do not and will not (i) require any consent or approval which has not been obtained, (ii) violate any provision of organizational documents of the Guarantor or of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to the Guarantor; (iii) require the consent or approval of, or filing or registration with, any governmental body, agency or authority, or (iv) result in a breach of or constitute a default under, or result in the imposition of any lien, charge or encumbrance upon any property of the Guarantor pursuant to, any indenture or other agreement or instrument under which the Guarantor is a party or by which it or any of its properties may be bound or affected. The person(s) executing and delivering this Guaranty for and on behalf of the Guarantor, are duly authorized to so act.

This Guaranty: (i) is valid, binding and enforceable in accordance with its provisions, and no conditions exist to the legal effectiveness of this Guaranty as to the Guarantor; (ii) contains the

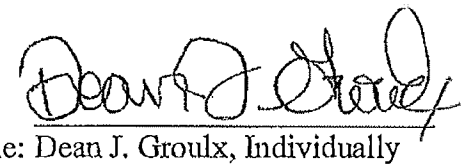
entire agreement between the Guarantor and the Lender; (iii) is the final expression of their intentions; and (iv) supersedes all negotiations, representations, warranties, commitments, offers, contracts (of any kind or nature, whether oral or written) prior to or contemporaneous with the execution hereof. No prior or contemporaneous representations, warranties, understandings, offers or agreements of any kind or nature, whether oral or written, have been made by the Lender or relied upon by the Guarantor in connection with the execution hereof.

This Guaranty shall inure to the benefit of the Lender and its successors and assigns.

The term "Guarantor" as used herein shall mean all parties signing this Guaranty, and the provisions hereof shall be binding upon the Guarantor, and each one of them, and all such parties, their respective successors and assigns. As to each other, the liability of Guarantors shall be joint and several.

IN WITNESS WHEREOF, the undersigned have caused this Guaranty to be executed all as of the day and year first above written.

"GUARANTOR"

By: 

Name: Dean J. Groulx, Individually

STATE OF MICHIGAN

IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

APPENDIX – VOLUME III
PLAINTIFF/COUNTER-DEFENDANT/CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 18, 2022

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EXHIBIT 4 (Part 2)

Exhibit 4

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC,

Plaintiffs,

-vs- Case No. 2018-163298-CB

PARK STREET GROUP REALTY SERVICES, LLC; PARK STREET GROUP, LLC; and DEAN GROULX,

Defendants.

_____/

DEPONENT: DEAN GROULX
DATE: Monday, January 7, 2019
TIME: 10:20 a.m.
LOCATION: PAUL L. NINE & ASSOCIATES, PC
100 West Long Lake Road, Suite 102
Bloomfield Hills, Michigan
REPORTER: Karen Fortna, CRR/RMR/RPR/CSR-5067
JOB NO: 8396

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SOARING PINE CAPITAL REAL ESTATE and DEBT FUND II, LLC,

Plaintiffs,

-vs- Case No. 2018-163298-CB

PARK STREET GROUP REALTY SERVICES, LLC; PARK STREET GROUP, LLC; and DEAN GROULX,

Defendants.

_____/

DEPONENT: DEAN GROULX

DATE: Monday, January 7, 2019

TIME: 10:20 a.m.

LOCATION: PAUL L. NINE & ASSOCIATES, PC
100 West Long Lake Road, Suite 102
Bloomfield Hills, Michigan

REPORTER: Karen Fortna, CRR/RMR/RPR/CSR-5067

JOB NO: 8396

APPEARANCES:

ROSSMAN SAXE, PC
By: Mr. Mark C. Rossman
Mr. Brian M. Saxe
2145 Crooks Road, Suite 220
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248.385.5481
mark@rossmansaxe.com
brian@rossmansaxe.com
Appearing on behalf of the Plaintiffs

PAUL L. NINE & ASSOCIATES, PC
By: Mr. Paul L. Nine
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248.644.5640
office@paullninepc.com
Appearing on behalf of the Defendants

INDEX

WITNESS

EXHIBITS

E X H I B I T S (continued)

(Exhibits retained by Mr. Rossman.)

(Exhibit No. 30 not offered.)

Monday, January 7, 2019

Bloomfield Hills, Michigan

10:20 a.m.

* * * *

DEAN GROULX,

having first been duly sworn, was examined and testified as follows:

MR. ROSSMAN: Mr. Nine, you indicated you saw some disputes on the horizon. What were you getting at there, sir?

MR. NINE: Well, I had a long conversation with your associate, Alex Blum, yesterday.

MR. ROSSMAN: He's a good man.

MR. NINE: Not yesterday, I'm sorry, Friday.

And under that, in that conversation, we agreed to a number of things.

MR. ROSSMAN: All right.

MR. NINE: For example, the receivership being terminated. I don't think that's a problem for here.

But the big issue was that all the depositions of non-parties were being canceled and that he was in the process of notifying those

potential deponents of the cancellation. Then I received your email today that talked about depositions of Mr. Prentice and Ms. Jasmine, I think it was, which we clearly object to.

MR. ROSSMAN: Okay.

MR. NINE: And my understanding was those were canceled in my conversation with Mr. Blum.

MR. ROSSMAN: Let me ask you this, if I may: If we cancel that one tomorrow, you have no objection to it occurring after the conclusion of the discovery deadline, which is Saturday?

MR. NINE: I absolutely do.

MR. ROSSMAN: Oh, you do?

MR. NINE: We already have written -- I think it was Steve Morris; I don't know who gets all the messages and whether you got them -- but we had written Mr. Morris, I don't know, a couple weeks ago, that we were not agreeable to any extension. This lawsuit has been pending forever and we want it over.

MR. ROSSMAN: Well, let me ask you this question: Why do you object to the depositions of Mr. Prentice and Jasmine?

MR. NINE: For two reasons: One, we've agreed not to take it; and No. 2, they weren't

timely noticed under the court rules. I received the first notice of any deposition on --

MR. ROSSMAN: Can I just stop you there and ask you when it was agreed not to be taken?

MR. NINE: Yesterday -- not yesterday; Friday.

MR. ROSSMAN: Okay.

MR. NINE: I keep saying yesterday. Friday.

MR. ROSSMAN: Okay. All right.

MR. NINE: And so the notice we received under the court rules was on last Thursday at 3:58, in other words, at the end of the day, so that we would have no time to respond to it and that simply is not timely notice.

If you want to get the court's approval -- but we're going to object.

MR. ROSSMAN: Why don't we do it this way: I would rather work on the file and prepare for trial rather than horse around on this issue.

So what I think we'll do is we'll go along with your plan logistically, but substantively, I do disagree with it, and I do believe that Mr. Prentice and Jasmine should be deposed in this matter before they're subpoenaed

to appear at the trial in this case, so -- but out of respect for your objection and because I do agree with you that there's been some degree of bumps in the road given that there's a late transition of attorneys in this file, which created some confusion on my part and also in the communication regarding non-party depositions to you, and so -- but out of respect for that objection, I'll indicate to those witnesses that they need not appear at my office tomorrow, as I indicated in my email; however, what I will do is I'll motion the court for permission to take those depositions even though the discovery period has ended on the grounds that you and I disagreed at this point in time, and substantively, if we should be permitted to take those depositions, then there's no prejudice or no delay or any problem with doing it after the discovery deadline.

So why don't we agree to disagree at this point in time and we'll let the court decide later.

MR. NINE: That's good.

MR. ROSSMAN: Okay.

MR. NINE: Secondly, the issue -- which is maybe more a question. You sent me an email on

the 4th, which was Friday, that indicated something about Mr. Groulx's testimony was going to be as an attorney and subject to the rules of professional conduct.

Is he being taken -- how is his deposition being taken, I guess? I thought he was a de bene esse witness, and he happens to be an attorney, but what would he -- why are you implying something about the rules of professional conduct?

MR. ROSSMAN: Well, in my estimation, Mr. Groulx is in a bit of predicament here because there's some allegations and some substantive proof of some dishonesty in connection with the procurement of a $1 million loan and there's a certain level of dishonesty in the argument that there was usury in that loan and he should be able to keep that or his company should be entitled to keep that $1 million and he not be responsible as a corporate guarantor, when he, as a lawyer himself, who was heavily involved in the drafting of that document, if he believes his argument and believes it to be true -- which I don't, and I disagree with it, and I think it's legally void on its face. I do believe that he was attempting to, you know, plant this poison pill or to somehow, you know,

embed terms in the documents which he would later argue somehow nullify that so that he has no liability on a $1 million loan, which he made with the representation -- and albeit there is a contract and there is an integration clause which we'll argue under the UAW/GM Human Resources case vitiates the integration clause and incorporates his representations that he made in writing, and we'll go through today, that these funds would be used for the specific purpose of funding this project.

We know that it hasn't and he has some artful interpretations of the contract, which probably will result in a trial and we'll have -- there's questions of facts to some extent. We're going to move for summary disposition. Some of the testimony today will establish whether the grounds for that, you know, are there, and are strong, and I believe that we will establish it and there won't be any question of fact on the contract claims, but there is fraud in this case.

And I was mentioning this to you because I thought it would behoove us all if you would instruct your client of the higher duty to tell the truth during this deposition because he is an

officer of the court.

MR. NINE: Well, you made your case, but your case is simply your discussions. You still haven't told me why the rules of professional conduct, but -- you seem to have some theory in mind, but let me just notice for the entire record that we do not believe this is subject to any particular matter like the rules of professional conduct. It's subject to one thing and one thing only, that he tell the truth, and he will tell the truth, as he always has.

MR. ROSSMAN: Well, a good attorney instructs his client to tell the truth, in my experience, and I trust you have and I heard you say it with your own mouth.

Okay. Are there further issues you would like to address?

MR. NINE: I think the other issues have all been discussed with Mr. Blum, things like you're going to be immediately filing an answer to our counterclaim which hasn't been filed yet, and we're holding off on any default, but only for next week because it was to be filed next week, according to Mr. Blum.

And then there are discovery requests

that you've indicated you thought we were behind the discovery, but you clearly are behind in discovery. And I might indicate I wrote you asking that you would send me a copy of whatever you thought we were behind on and I received nothing, so I presume you now agree with us that we are not missing any discovery.

MR. ROSSMAN: Well, I wouldn't want you to interpret the fact that you haven't received a deficiency letter as of today as indicating in any way, shape or form that we believe that your clients are current in their discovery obligations on this case. That will be forthcoming. And so there is no agreement that your discovery -- outstanding discovery obligations of your client are satisfied. So we reserve the right to compel any outstanding discovery that there is at the present time.

MR. NINE: And I guess just in terms of the receivership dismissal, my understanding was today, sitting in this meeting, we were going to have a proposed order, but apparently Mr. Blum didn't get that done either, so we don't have that, but that's your --

MR. ROSSMAN: What else didn't we get

done that we were supposed to have done by today?

MR. NINE: The notice of what discovery we're behind on.

MR. ROSSMAN: Yeah. We've been in the case couple of days, Mr. Nine. We're moving as quickly as possible. We're here for a deposition.

MR. NINE: You can't use the excuse that you just got it. You've had attorneys, they've been involved with --

MR. ROSSMAN: We are deficient in nothing, Mr. Nine, okay? We reached agreement that we discharged the receivership. The suggestion that we're somehow deficient because I didn't walk in here with an order for you to sign is a red herring. We have indicated that we believe that there are certain discovery that is outstanding. We are in the process of putting a deficiency letter together and you will get that in the due course. And there was never a representation by my office that I would walk into it -- by this morning or that you would have it by this morning, so the suggestion that we're deficient in anything is quite confusing to me. It doesn't make sense.

MR. NINE: I think we got it on the record. Why don't you proceed?

MR. ROSSMAN: Are there any other issues?
MR. NINE: Those are the major ones that I saw.
MR. ROSSMAN: The one issue that I think is worthy of discussion in addition to the issues that you raised is that there was some emails between us regarding what capacity Mr. Groulx was being produced to testify herein.
MR. NINE: I thought we just discussed that a minute ago, but okay.
MR. ROSSMAN: No, we didn't discuss whether he's being produced today as a corporate representative of Rubicon or whether he's here testifying in his individual capacity.
MR. NINE: I wrote him that he was here to testify on any matter, including Rubicon, including -- what's it called? -- Park Place and including Park Place Realty, and of course he's here individually, so any one of those matters are fair game for you.
MR. ROSSMAN: All right. But it's your position that you're not going to be producing him on Friday, January 11th, correct?
MR. NINE: That's absolutely true. And Mr. Blum agreed to that.

MR. ROSSMAN: Okay. Well, we'll reserve our right to petition the court for testimony after today of Mr. Groulx.

MR. NINE: You've always got that right.

EXAMINATION

BY MR. ROSSMAN:

Q. Mr. Groulx, can you state your full name for the record, please, sir?

A. Yes. Dean Joseph Groulx.

Q. And your date of birth?

A. 2-26-65.

Q. And the last four digits of your social security number?

A. 5248.

Q. And your P number?

A. 51262.

Q. Where do you presently reside?

A. 542 West Brown Street, Birmingham, Michigan.

Q. How long have you lived on West Brown Street?

A. Since November 1, 2017.

Q. And where did you live before that?

A. For two months, we lived at my mother-in-law's place.

Q. When you say "we," who are you referring to?

A. My wife and daughter.

Q. How long have you been married?
A. Fifteen years.
Q. What's your wife's name?
A. Wendy.
Q. What's your daughter's name?
A. Natalie.
Q. How old is your daughter?
A. Thirteen.
Q. You moved to Brown Street in 2017 then?
A. Correct.
Q. Okay. And where did you live before then?
A. My mother-in-law's.
Q. And where was that?
A. On Woodward in Bloomfield Hills in an apartment.
Q. Between what dates did you live with your mother-in-law?
A. Approximately September -- September 1st, 2017 through October 31, 2017.

MR. NINE: Let me just make clear, I don't mind you going off in any direction you want, but today is your time to take deps relevant to this case; if you use it up on things like that, it's your decision.

MR. ROSSMAN: Things like where he's lived?

MR. NINE: Yes.

MR. ROSSMAN: And things -- where he lived during the administration of the loan?

MR. NINE: Uh-hum.

MR. ROSSMAN: Okay. I'll use the time as I see fit, Mr. Nine.

MR. NINE: That's correct.

BY MR. ROSSMAN:

Q. And so you were living at your mother-in-law's in the fall, September, October of 2017, correct?

A. Correct.

Q. And where did you live before that?

A. 5998 Burnham Road, Bloomfield Hills.

Q. How long had you lived there?

A. Since 2009.

Q. Why were you living at your mother-in-law's house?

A. We were -- we had sold our house, we had gotten into a dispute with the landlord where we were going to rent a house in downtown Birmingham, and then had to take refuge at my mother-in-law's place until we could find another place to lease.

Q. Did you grow up in this area?

A. East side of Detroit.

Q. What city?

A. Sterling Heights.

Q. Where did you go to college?
A. Wayne State University.
Q. What year did you graduate?
A. 1990.
Q. And where did you go to law school?
A. Detroit College of Law.
Q. And when did you graduate?
A. 1994.
Q. Do you have any other degrees other than a JD and an undergraduate degree?
A. No.
Q. What's your undergraduate degree?
A. Speech and communication, BA.
Q. Can you list for me, earliest to most recent, where you've worked as a lawyer?
A. I'm sorry, most recent to earliest?
Q. Earliest to most recent.
A. Earliest to most recent.

Initially worked with Paul Nine from 1990 until 2003; from 2003 until 2005, I worked at Hyman Lippitt from 2005 until, I believe, approximately 2009; I had a joint venture with Frank Simon where we had an office part of the time in Chicago, and then from 2009 to present, I have been a solo practitioner.

Q. Now do you have any other -- is there any aspect of your professional life or your career through which you derive revenue that is outside of the practice of law?
A. Brokerage; real estate brokerage.
Q. Tell me about that. Where is it and what do you do?
A. I have an associate real estate broker's license through Park Street Group Realty Services, and it's based here in Bloomfield Hills.
Q. When did you get your license?
A. I don't remember.
Q. Was it more than ten years ago?
A. No.
Q. The joint venture that you were doing with Frank Simon, what did that entail?
A. We opened an office together in Chicago, 50/50 joint venture.
Q. What kind of law was it going to focus on?
A. It was a banking practice primarily.
Q. And it lasted approximately four years?
A. Yes.
Q. And what ultimately happened to it; was it dissolved, was it?
A. It was dissolved.

Q. Why?
A. Thought I had better opportunities other places.
Q. So you moved home from Chicago and opened up your solo practice?
A. Correct.
Q. And what kind of law were you -- have you been focusing on in that practice?
A. I would say real estate and commercial litigation.
Q. Do you spend more time in your capacity as broker or lawyer?
A. Lawyer.
Q. So it's fair to say lawyer is your principal occupation?
A. My principal occupation for the last several years has been primarily as a real estate investor.
Q. Is it in your capacity as a real estate investor that you came into contact with Soaring Pine?
A. I had met Soaring Pine through my prior representation of Atlas Oil Company.
Q. So you represented Atlas Oil as a solo practitioner?
A. And while Frank Simon and I had a joint venture. I believe I first started representing Atlas Oil in 2007 and then continued representing Atlas Oil through the last of the lawsuits in Chicago, which

I think were completed in 2016.
Q. And who at the Simon Group were you principally in contact with while you were working there -- let me rephrase that.
Who that is now involved with Soaring Pine were you principally involved with at Atlas Oil while you were representing that company?
A. Mike Evans and Victor Simon.
Q. Do you know both gentlemen well?
A. I don't know if I know them well, but I mean, I knew them over the course of nine years.
Q. And they were your principal contacts at the company?
A. At Soaring Pine, yes. I would not say they were my principal contacts at Atlas Oil.
Q. Describe for me time-wise when it was that you first approached someone at Soaring Pine in connection with procuring a loan.
A. I did not approach Soaring Pine about procuring a loan. Mike Evans was inquiring about some of the things that I was doing in my real estate investments while we were on a case in Chicago and he said that they had a fund where if I needed financing they might be interested in looking at funding a real estate project.

Q. So Mike knew that you were involved in real estate brokerage work?
A. Real estate investment, yes.
MR. ROSSMAN: Real estate investment.
Could you read back his answer?
(Whereupon the answer was read back by the court reporter.)
BY MR. ROSSMAN:
Q. When was that conversation?
A. I don't remember exactly. It would have been sometime, I think, in mid to late 2015. It would have been on the train ride back to the airport after we had a failed mediation in the Mac Patel case.
Q. And the ultimate loan that brings us here today was made in 2016, correct?
A. That's correct.
Q. So this is the preceding year, you're on a train with Mike Evans coming back from Chicago and he indicates that he has a fund that might be able to provide some investment, if necessary?
A. I don't know investment; financing. It was not coming in as equity. I view the term investment as meaning equity. It would be coming in as a debt financing source.

Q. That's a good distinction.

And so did you immediately -- did it immediately peak your interest or is it something you kind of filed away and brought out later and pursued?

A. I filed away.

Q. And about how long after that conversation on the train did you say to yourself, "Well, I'm going to, you know, take a look at that opportunity"?

A. Again, I don't remember exactly when the Mac Patel mediation was, but it would have been anywhere from eight to twelve months.

Q. Now in that eight to twelve-month timeframe between -- and actually, let me back up a little bit.

When you say Mac Patel mediation, is that the name of a case that you were handling in Chicago?

A. Yes, yes.

Q. Okay. And you were handling it for Atlas Oil?

A. Correct.

Q. All right. So in the eight to twelve months following the 2015 conversation on the train ride, could you describe for me the nature of your real estate investment business?

A. Yes.
Q. What were you involved in, what kinds of projects, the amount of time you were spending on it.
A. So outside of working on the Mac Patel case, I was devoting most of my time to real estate investments through Park Street Group, LLC, and from early 2015 through the time when I think I initially would have spoken with Mike Evans and Victor in June of 2016, we would have bought and sold 450, 500 houses, or notes or land contracts.
Q. And is that high quantity compared to, say, prior -- your prior involvement in real estate investment? I mean, is that a lot of houses bought and sold or assigned?
A. That's a lot of houses --
Q. And that's why --
A. -- and mortgages or notes that were bought and sold, yes.
Q. So that's high volume?
A. High volume.
Q. That's the word I was looking for.
So you're devoting the majority of your time to this business because it's experiencing this high volume, correct?
A. Correct.

Q. And is that when -- so you're looking for more financing to do some more of this work?
A. We actually -- I was going to transition into another project through a new company, Park Street Group Realty Services.
Q. Let's just talk about Park Street Group Realty Services. There's two Park Street entities, as I understand it, on the loan documents in this case, and one is Park Street Group Realty Services, LLC, correct?
A. Correct.
Q. All right. And the other entity is Park Street Group, LLC, correct?
A. Correct.
Q. Can you tell me what Park Street Realty, LLC -- what it does?
A. It held the brokerage license.
Q. And what does Park Street Group, LLC, do?
A. That was the operating company.
Q. Why was there a separate LLC holding the brokerage license; is that some requirement?
A. There's a requirement that if you buy and sell more than six homes on your own account in any twelve-month period, you must hold a brokerage license. For insurance and liability purposes, I

decided that having the brokerage license in a separate and distinct entity made sense.

Q. So the whole purpose of Park Street Group Realty Services is to hold the license, act as broker and perform those functions?

A. Correct.

Q. And Park Street Group, LLC, the operating company, what were its principal obligations?

A. Buying and selling properties or notes or land contracts, holding title to the properties or the notes.

Q. So the principal reason that there's separation between these two LLCs is simply to move the brokerage function into its own LLC, correct?

A. Correct.

Q. Now did you form these LLCs?

A. I formed Park Street Group Realty Services; I believe Mr. Nine formed Park Street Group, LLC.

Q. Okay. And who owns Park Street Group Realty?

A. I do.

Q. One hundred percent?

A. Yes.

Q. Who owns Park Street Group, LLC?

A. It's been dissolved. I am the remaining operating member of Park Street. The business operations

have been dissolved; I'm not sure the LLC has been dissolved.

Q. Meaning accounts closed --

A. Correct.

Q. -- doors closed, no employees, no acting agents other than yourself?

A. Correct.

Q. So it's fair to say it's not doing business as we sit here today?

A. Correct.

(Whereupon Mr. Saxe left the deposition proceedings.)

BY MR. ROSSMAN:

Q. When did it cease operations?

A. For the most part, sometime in 2017, I think was when we closed out the last of the investment properties or notes -- or for the most part the last of the investment properties and notes.

Q. I understand you had a business partner in these ventures or someone who you referred to as a business partner, correct?

A. Correct.

Q. Is that Mr. Prentice?

A. Correct. There was David Prentice --

MR. NINE: Which company are we talking

about?

THE WITNESS: Park Street.

BY MR. ROSSMAN:

Q. Understanding Park Street Group Realty is just you --

A. Correct.

Q. -- as a broker?

A. Correct.

Q. So Park Street Group, LLC?

A. There was David Prentice, Glenn Prentice, and then early on Larry McKenzie and Andy DeAngelis.

Q. What was the last name?

A. Larry McKenzie.

Q. And Andy?

A. DeAngelis. D-E-A-N-G-E-L-I-S.

Q. And David and Glenn, are they brothers?

A. Father and son. David is the son, Glenn is the father.

Q. Now did these -- any of these four gentlemen have an ownership interest in Park Street Group, LLC?

A. Early on, yes.

Q. And what was the percentage allocation in that interest?

A. I don't remember exactly. I believe Andy and Larry together were 50 or 51 percent and then I don't

remember the division between David and Glenn and myself.

Q. But the three of you would have held the other 49 or 50 percent, right?

A. Correct.

Q. At what point in time was there a shift in ownership interest such that either Messrs. McKenzie and DeAngelis left the business or otherwise?

A. They decided that they wanted to discontinue the business sometime in the spring or early summer of 2016.

Q. Who decided?

A. They decided.

Q. Meaning Larry?

A. And Andy.

Q. And Andy?

A. Correct.

Q. And so what happened corporate governance-wise; did they assign their shares to other members, were they redeemed? How did they forfeit their ownership interest?

A. Their capital was returned to them and then the investment properties were either divided up between parties or sold off to return capital to

the capital contributors.
Q. And for all intents and purposes at that point in time, Larry and Andy were no longer affiliated with the business, correct?
A. They had no ongoing active participation in the business beyond that point, correct.
Q. And when we say "that point," what date are we referring to there?
A. Spring, summer of 2016. They decided that they wanted to discontinue their involvement in the real estate venture.
Q. All right. So at that point, the three remaining members of Park Street Group, LLC, are Glenn Prentice, David Prentice and you, correct?
A. No, not necessarily. Glenn had suffered the third -- had suffered injuries for the third time as a result of a car accident in less than a year, year and a half, had pretty significant nerve damage in his neck and in his brain, so he discontinued active involvement in the company, I believe it was about that same time --
Q. Are we talking about David Prentice?
A. Glenn Prentice.
Q. So Glenn had the accident?
A. Correct.

Q. Okay.
A. So Glenn was removed from active operations as well. David and I then worked on wrapping up and closing out the partnership with me acting as the operating manager.
Q. And when was Glenn's accident?
A. Well, there were three. Which one are you referring to?
Q. The last one that prompted the winding down of the business.
A. I don't remember exactly. I want to say it was April or May of 2016.
Q. And was it before or after the first installment of the loan in this case?
A. Before.
Q. Okay. And so at the time you received the loan from Soaring Pine, the company was in an active wind-down phase?
A. The company was, correct. It still had assets, but the company was being wound down.

So when I was discussing the loan with Soaring Pine, there were assets available to pledge as collateral for security for the loan. Whatever wasn't pledged was then going to be liquidated to retire capital -- return capital.

Q. So with respect to the decision to wind down the company and deal with the outstanding issues there, when did you ask -- when did you next inquire regarding a loan from Soaring Pine?
A. As best as I recall, it was sometime in late June of 2016.
Q. And how did you make that inquiry and to whom; email, telephone call, face to face?
A. I think I called Mike Evans.
Q. What did you say?
A. I said, "Mike, I'm setting up a new real estate company. I need funding for the project. I have assets from the prior project that I can pledge as collateral for the loan. Is there a time that we can meet to talk about a loan?"
Q. And what was his response?
A. "Sounds great. Let's get together for lunch."
Q. Was it a couple minute telephone call?
A. Yeah, it wasn't a very long conversation as I recall.
Q. Okay. So does -- did you discuss exchanging any information before you got together or was it simply, "All right, let's meet, let's talk"?
A. "Let's meet, let's talk."
Q. And in between the time that you met and you had

that telephone conversation in late June 2016, were there any communications or interactions regarding the loan --

A. The loan hadn't been --

Q. -- or the prospect of receiving a loan or some level of financing?

A. No, I think we met either that day or within a day or two after the call. It happened pretty quickly.

Q. Where did you meet?

A. Social Restaurant, downtown Birmingham, a few doors down from Soaring Pine's offices.

Q. Who was at that meeting?

A. Mike Evans and Paul Schapira.

THE WITNESS: S-C-H-A-P-I-A-R-A [sic], I believe.

MR. NINE: Spell it again.

THE WITNESS: I don't think I can. Give me one second. I can find it. S-C-H-A-P-I-R-A.

BY MR. ROSSMAN:

Q. All right. About how long does this meeting last?

A. Hour.

Q. And at this meeting, you discussed this concept of setting up a new real estate company?

A. Correct.

Q. And why were you, at that point in time, setting up

a new real estate company?
A. Because the funding sources for the prior venture had decided to discontinue.
Q. And therefore you were in need of a new funding source for your new company?
A. Correct.
Q. And in this one-hour meeting at Social in Birmingham, how would you describe your new company and the concept of funding as it would apply in that context?
A. That -- I described for Mike again the type of real estate opportunities that I had been participating in for the last three or four years, that I was looking for new funding sources, splitting off from some of the partners that I had in the past and needed funding for the -- I think initially I was looking at a project possibly with David with the City of Highland Park, but --
Q. David who?
A. David Prentice.
Q. Okay.
A. But primarily I was looking for funding to go into the 2017 Wayne County Treasurer's auction of tax foreclosed properties.
Q. Other than the need for funding with respect to the

2017 auction of tax foreclosed properties and --
A. 2016.
Q. 2016?
A. Yes.
Q. So other than for that purpose and for a possible venture with the City of -- did you say Highland?
A. Highland Park.
Q. -- Highland Park with David Prentice, were there other prospects that you shared with these three gentlemen at this meeting?
A. There was the possibility of buying homes from the Detroit Land Bank.
Q. Anything else you discussed as a possible use for this funding?
A. No.
Q. And was your new company incorporated at that time?
A. It was Park Street Group Realty Services, so yes, it already existed.
Q. So you were going to use the brokerage company to pursue these opportunities?
A. Correct.
Q. But you weren't setting up a new LLC?
A. Correct. If I was going to be the sole venturer, it wasn't necessarily for liability and insurance purposes to have it separate and distinct from the

operating company.
Q. Were any representations made to you regarding funding at this meeting?
A. I don't know what you mean.
Q. Regarding levels of funding?
A. Yes.
Q. What representations were made to you at this meeting regarding levels of funding?
A. They said that the level of funding that I had originally discussed was something that was below their minimums, but it was something that they would still be interested in discussing, that they had been looking for opportunities to invest in the City of Detroit.
Q. All right. What level of funding did you originally mention that was below their levels?
A. $750,000.
Q. When was -- so you proposed $715,000?
A. $750,000, yes.
Q. I'm sorry. Thank you.

And when was the first time you talked about that number; was it at this meeting or was it on the telephone call with Mike Evans previously?
A. I think it was at that meeting and then in a follow-up email -- an exchange of follow-up emails

in the immediate aftermath of the lunch meeting.
Q. Was it represented to you what the typical minimums were?
A. No.
Q. But it was indicated that an exception would be made in this regard because of the use to which the funds were being put?
A. No, they didn't say that there were would be an exception that would be made.
Q. So this was --
A. It was left open.
Q. So, "It's lower than normal, but we'll explore it with you," is that a fair characterization?
A. Or, "We'll explore with you a larger credit facility."
Q. What did 750 do for your new business; how did you come up with that number?
A. The idea was that you would go into the 2017 auction of tax foreclosed properties.
MR. NINE: Sometimes you said '17 and sometimes '16. I just want to be sure which one --
THE WITNESS: '16.
BY MR. ROSSMAN:
Q. But is the auction in '16? Because twice you said '17.

A. I'm sorry. '16. It's 2016. I apologize. 2016. The auction was 2016. So you would take roughly half of the $750,000 credit facility to purchase properties at the auction, and then you would have the remaining half for working capital and renovations. About every 90 days, you would be able to complete a turn of the 20 properties that you could purchase and then you could go through another phase.

MR. ROSSMAN: Could you read back the answer?

(Whereupon the answer was read back by the court reporter.)

BY MR. ROSSMAN:

Q. Is there a limit on the number of properties that can be purchased at the auction of 20?

A. No, but there's a limit to the number of properties you can purchase with $750,000.

Q. So 750 would give you a 20-property turn?

A. Correct, correct. The average purchase price, including taxes and administrative fees, you were looking at anywhere from 12,500 to $17,500 a house, you would then have $375,000 for working capital in renovations, which would average out to be about $15,000 a house. Between, you know, seven or

eight different set of contractors, you could then renovate, lease, and then sell those properties to investors, typically out of state, about every 90 days.

Q. And at these some -- are these -- were these concepts discussed at this meeting, this first meeting?

A. I don't remember if we got into that level of detail, but the concept was discussed, yes.

Shortly after the lunch meeting, there were -- if I remember correctly, Mike Evans sent a follow-up email to me thanking me for lunch, saying he had already had preliminary discussions with some of the people at Soaring Pine, they had interest, would I then send him an email that would give a little more detail to what I was looking for and how the $750,000 would be used.

Q. Okay. And what you just described there, was that what they asked of you at the conclusion of the meeting?

A. They asked of me in the email I believe Mike sent to me thanking me for lunch and that they had further interest in discussing the opportunity.

Q. What other, if any, funding sources were you pursuing at the time when you were having these

discussions with Soaring Pine?
A. I was still talking with Andy and Larry about possibly being a funding source.
Q. Anybody else or any other entity as a funding source?
A. There was, but I don't remember the discussions getting very far, but yes, there were some other discussions. The discussions with Soaring Pine moved -- they seemed to be interested and they moved quickly, so there wasn't a reason to pursue other opportunities for funding.
Q. Now the $750,000 that you originally mentioned would have funded the acquisition of approximately 20 lots and then allowed for some cash flow for construction and operating. Why was it, though, that you had in your mind $750,000 as opposed to 1.5 and you could do 40 houses; what was it that caused you to talk about that number?
A. I don't remember.
Q. Now at the time when you were having this discussion and Park Street Group was in wind-down phase, there was a number of properties or assets that Park Street Group held title to, correct?
A. Or DMP Holdings, yes.
Q. Were these -- what was the plan with this corpus of

real estate assets that were in the company that was being wound down; were they going to be sold, were they going to be transferred to your company or DMP? How were those being disposed of or handled?

A. It depended on the liquidation plan that the partners ultimately agreed would take place. There was always the opportunity to simply sell whatever assets were titled in the name of Park Street Group, LLC, or DMP Holdings, LLC, whether they be single-family residential homes, duplexes, notes, mortgages or land contracts.

There was another opportunity where the asset -- some of the assets could be used as collateral to secure a loan, which would allow me to continue the operation, and then whatever assets were not pledged would then be sold to return capital to Andy and Larry if they chose not to continue with the venture.

Q. What is DMP Holdings and what is its role in this scenario; who owns it?

A. DMP Holdings is solely owned by David M. Prentice, DMP, and DMP had relationships with some of the vendors where we, through Park Street, had purchased some of the assets, and so the purchase

agreements were done in DMP's name, and then the title or the allonge or the assignment of land contract would be issued to DMP.

Q. So the properties that were held by DMP, they were titled with DMP, but is it fair to say that they were under the control of Park Street Group?

A. Yes.

Q. Okay. So it's within that Park Street Group umbrella, but it's titled in the name of DMP for purposes of dealing with certain vendors?

A. Correct.

MR. NINE: Let me just interrupt. Are we going to want to break for lunch or do you want me to get food in? If we want to get food in, I should order it now. It's up to you.

MR. ROSSMAN: I think I would rather just go across the street or something.

MR. NINE: Okay.

MR. ROSSMAN: Now I happened to eat just before I arrived, so I won't be hungry for a little while, but if you gentlemen want to break at any time, just let me know.

MR. NINE: Okay.

MR. ROSSMAN: All right?

MR. NINE: Yep.

BY MR. ROSSMAN:
Q. So DMP Holdings, the assets to which it holds title are under the control of Park Street Group, correct?
A. Yes.
Q. Was DMP a company that was owned by David Prentice coming into this venture with you?
A. Yes.
Q. So it wasn't formed specifically for the purpose of holding title to Park Street Group's real estate assets?
A. No. And DMP held assets independent of Park Street Group as well.
Q. Now at this first meeting at Social, was the nature of the collateral that would be posted as security for this -- for funding discussed?
A. Not that I recall.
Q. And did anybody at that point in time make any specific representations to you regarding levels of funding that would be available to you or your business in the future?
A. Not at that time.
Q. Are there any other statements made by the participants in this meeting that you recall being made to you at that time, at that meeting

at Social?
A. Not that I recall.
Q. Were any promises made to you?
A. No.
Q. And --
A. Not at that time.
Q. After you received the email following the lunch from Mr. Evans, what were your next steps?
A. I sent an email to Soaring Pine outlining the proposed loan and how the funds would be used.

MR. NINE: By the way, these documents are the documents that you've asked for. Just so you know, they're here.

MR. ROSSMAN: All right.

(Marked for identification:
Deposition Exhibit No. 3.)

BY MR. ROSSMAN:
Q. I'm showing you what I've marked as Exhibit No. 3. Sans the highlighting, is that the email that you sent?
A. Yes.
Q. Okay. In the second paragraph of this June 9, 2016, email that you sent to Mr. Evans, you state, "Since 2008, I have been involved in more than 1,500 residential property transactions in the

tri-county area and in parts of Ohio and Indiana," correct?

A. Yes.

Q. And the number, 1,500, what did you base that on?

A. The number of transactions I had been involved in.

Q. Was that a rough estimate or was that a specific number?

A. It was a rough estimate. I mean, we had done almost a third of that in just the last year, year and a half through Park Street Group, LLC.

Q. Can you describe for me how you came up with that number?

A. It was based on what I had estimated were the number of residential property transactions in which I had participated or been involved in in some capacity.

Q. By tri-county, you mean Oakland, Macomb and Wayne?

A. Yes.

Q. What level of business were you doing in Ohio and Indiana?

A. Hundreds.

MR. NINE: That's plural, "S"?

THE WITNESS: Yes.

BY MR. ROSSMAN:

Q. You state a few more paragraphs down, "Approved to

purchase directly from the Detroit Land Bank Authority." What does that mean?

A. Home Team Detroit had been invited as a preferred vendor to purchase properties in the right of first refusal pool that the Land Bank had been offering.

MR. ROSSMAN: Could you read that answer back, please?

(Whereupon the answer was read back by the court reporter.)

BY MR. ROSSMAN:

Q. Who is Home Team?

A. Home Team is a company that Glenn and David had formed years earlier -- I don't know exactly when -- and I had been working with them in the venture.

Q. What's the name of the company again, the legal name?

A. I think it's Home Team -- Home Team. I don't know if it's Home -- there's some iterations of that, but the entities are all affiliated.

Q. So Home Team is a company owned by David -- I'm sorry -- Glenn and David?

A. It's at least owned by David. Glenn played some role in it; I don't know if Glenn owned part of it or not.

Q. So it's a Prentice company?
A. It's a Prentice company.
Q. And what is the right of first refusal pool?
A. When a property goes into a tax forfeiture, the local municipality, via the Detroit Land Bank, have the opportunity to exercise a right of first refusal to purchase the property before it goes to and is included in the tax auction. If the local municipality forfeits its right of first refusal, then the property goes into the tax auction.
Q. All right. So on a tax forfeiture, the Land Bank has first dibs?
A. The municipality has first dibs.
Q. Meaning the City of Detroit if we're talking about --
A. Well, it's Wayne County, so it could be City of Detroit, City of Highland Park, Ecorse, River Rouge, Grosse Pointe, Plymouth, Northville, any city or municipality within the county.
Q. So the -- is it the municipality in which -- where the property sits --
A. Yes.
Q. -- that has the right?
A. Yes.
Q. So the City of Grosse Pointe, for example, has the

option to a buy a tax foreclosed property before it goes into the Land Bank -- or before it goes to public auction?

A. Correct. And then the Land Bank came up with a program with the municipalities where certain properties would -- after the municipality exercised a right of first refusal, they would be available to select investors.

Q. What is available to select investors?

A. The properties.

Q. No, but you said -- okay. Well, okay. Could you describe the program again?

A. Sure. The Land Bank, in conjunction with the local municipality, then developed a program that, for certain properties, certain select properties where a right of first refusal was exercised, select vendors would be offered the opportunity to bid on those properties and renovate those properties. It was not open to every Tom, Dick and Harry. You could only participate by invitation.

Q. Okay. And Home Team was one of those select vendors?

A. Correct.

Q. So the municipality owns the property subsequent to exercising their right of first refusal, and then

there are certain select vendors who can be employed to rehab the property, list the property for sale, is that --

A. Not list the property for sale. The vendor would come in, purchase the property and then would enter into a contract where they would have to rehabilitate or restore the property in accordance with code within a certain period of time -- I believe it was six months -- for single-family residential occupancy.

Q. Okay. Now so in these scenarios, Home Team would purchase the properties out of the Land Bank?

A. I think so, or one of its affiliates, yes.

Q. When you say one of its affiliates, what do you mean?

A. There could be -- sometimes there was an investor that we might include and so there might be a special purpose entity, so whereas Home Team would be offered the opportunity, there might be a special purpose entity that would be set up for the benefit of the investor in participating in that program.

Q. And that was permitted to use a special purpose entity in this program when the vendor itself was the one who was approved?

A. I think so.
Q. So when you say direct purchase from the Detroit Land Bank Authority, you're talking about Home Team or one of its special purpose entities exercising its right to purchase under this right of first refusal scenario?
A. Correct. We were operating under an umbrella of programs. We had Park Street Group, we had DMP Holdings, we had Home Team Detroit. I can't remember if there was another entity or not, but the idea was that they were asking for my overall experience and so I was discussing my overall experience and what opportunities we had. Park Street Group Realty Services had not been a part of us because it was a new company.
Q. Park Street Group Realty Services, however, didn't have the ability to purchase directly from the Detroit Land Bank Authority, did it?
A. It could through Home Team Detroit, yes.
Q. When you say through Home Team Detroit, what legal mechanism are you referring to there?
A. I would go to David Prentice and say, "David, we have funding to be able to participate in this program through Home Team Detroit," and we would participate in the program through Home Team

Detroit.
Q. Is there any contract or memorandum or any other document which memorializes Park Street Group Realty Services, LLC's, ability to purchase directly from the Detroit Land Bank Authority?
A. With Home Team Detroit you mean?
MR. ROSSMAN: As I asked the question.
MR. NINE: Repeat the question, please.
MR. ROSSMAN: I'll ask it again.
BY MR. ROSSMAN:
Q. Is there any legal document which entitles Park Street Group Realty Services, LLC, to purchase directly from the Detroit Land Bank Authority at any time?
A. No, I didn't make such a representation; in fact, I was making it clear that Park Street Group Realty Services was a new company and this was a new venture.
Q. So the answer to my question as to whether there is a legal document entitling Park Street Group Realty Services, LLC, to purchase directly from the Detroit Land Bank Authority is no?
A. Yes, I said that.
Q. And it indicates that -- this email indicates that Park Street Group Realty Services, LLC, purchases

from other sources as well, correct?
A. I wasn't making representations about Park Street Group Realty Services. They were asking me for my background related to these other transactions. Park Street Group Realty Services was a new company.
Q. What are the other sources that you reference in this paragraph?
A. They're secondary sources, such as people who have purchased properties at the tax auctions who are resellers who looked to just make a quick buck and flip the properties. You can purchase through vendors such as national vendors who've purchased from Fannie Mae and Freddie Mac in the thousands, like Harbour Portfolio, Vision Properties, I believe, out of South Carolina, any number of sources.
Q. The purchases directly from the Detroit Land Bank Authority, those are obviously run through Home Team, what -- how did Home Team get approved by the Detroit Land Bank Authority to purchase these directly from it?
A. David Prentice, along with some city officials, primarily Willie Dowell, who I believe was the tax assessor for Wayne County, went to the treasurer's

office and to the Land Bank to receive an invitation to participate.

Q. Do you know approximately how many vendors have this privilege of purchasing directly from the Land Bank?

A. Twenty or less.

Q. Is there some kind of documents or certification or letter of authority that entitles one to purchase directly from the Land Bank in this context?

A. I don't know.

Q. So the record is clear, Park Street Group Realty Services, LLC, did not itself have approval to purchase directly from the Detroit Land Bank Authority, correct?

A. Correct.

Q. And the paragraph immediately below, you're talking about a one-year term. We previously discussed the amount, $750,000. With respect to the term, why was it that you chose a one-year term in this context?

A. That, I think, came from my discussion with Mike Evans, that the loans they were typically doing that were real estate based were short-term loans, one year.

Q. There's no reference of any corporate entity in

this document other than Park Street Group Realty Services, LLC, correct?

A. Not by name, but it does in this third -- fourth full sentence, it says, "Our core business has been to buy and sell performing and non-performing notes through affiliated companies."

Q. And in that sentence, you're talking about your historical practices, correct?

A. And our current ones. Our core business has been to buy and sell, yes.

Q. And none of those affiliated companies are mentioned in here, are they?

A. No, they're not.

Q. Now in acquiring directly from the Detroit Land Bank Authority, you're not buying or selling performing and non-performing notes, are you?

A. No.

Q. You're actually taking title to real estate; you're purchasing real estate, correct?

A. Correct.

Q. So that's -- and there's no reference from taking title through affiliated companies, is there?

A. That was the intent of the discussion.

Q. Hold on. I'm not asking about your intent; I'm just asking about this letter.

A. Your interpretation of it is different than mine.

My intent in drafting this was to discuss our background, which included all of the affiliated entities. Park Street Group Realty Services was a new company. They knew it was a new company.

Q. Are there any -- is there any umbrella agreement or corporate governance rendering any entity an affiliate, formal affiliate of Park Street Group Realty Services, LLC?

A. No.

Q. It's just businesses who might do business together from time to time, correct?

A. Well, no, we weren't doing business together from time to time; we had been partners.

Q. Is there a partnership agreement?

A. Between Park Street -- between the affiliated companies? No.

Q. Who are the affiliated companies?

A. Park Street Group, LLC; DMP Holdings, LLC; Home Team Detroit.

Q. And neither DMP nor Home Team are referenced in this email, correct?

A. Not in this one, no; in subsequent ones, they are.

Q. And the new project with the Land Bank, is that the

acquisition of 20 properties?
A. I don't remember what the new project was with the Land Bank. I believe it was a discussion about the right of first refusal program and then there was a separate program involving the City of Highland Park that David and I had been working on.
Q. So you don't remember what you meant when you indicated that there was going to be a launch of a new project with the Land Bank?
A. I think the new project related to the City of Highland Park through the Land Bank. The City of Highland Park had its own -- because the City of Highland Park is a city within a city, it's kind of unique from the standpoint of the Detroit Land Bank, and so there was a program where the City of Highland Park was obtaining properties from the Land Bank in the City of Highland Park and then attempting to find investors to purchase those properties and rehabilitate them.

There was not a new project with the Land Bank independent of the City of Highland Park, in other words; it was a program with the City of Highland Park through the Land Bank or with the Land Bank.
Q. You state, "The funds would be used to fund

acquisitions and improvements to the properties, draws and other operating expenses," correct?

A. Correct.

Q. When you say that it's going to be used to fund acquisitions and improvements to the properties, what did you mean?

A. The money would be used to purchase the properties and then renovate the properties.

Q. And when you say "the properties," which properties are you referring to?

A. I was referring to the property -- at that time, to the properties from the City of Highland Park, but ultimately Soaring Pine did not fund in time to participate in that program, so we ended up shifting gears to acquisitions at the tax auction.

Q. At the tax auction or out of the Land Bank?

A. Tax auction.

Q. Was there any reason that the ability to purchase directly from the Land Bank wasn't utilized?

A. Yeah, the right of first refusal had passed.

Q. So it was a timing issue?

A. It was a timing issue. And there are emails between us where I'm saying, "Listen, if I'm going to take advantage of this, we need to fund," we passed that point, and so then the credit facility

was then designed to purchase properties at the tax auction.

Q. The reference to draws, what is that?

A. Payroll.

Q. Payroll of Park Street Group Realty Services?

A. Yes, and its independent contractors.

Q. And other operating expenses, what does that refer to?

A. That would refer to things like sometimes we would hire people to do due diligence on the properties, you might pay rent, overhead.

Q. So after this email in June of 2016, what's the next step toward securing this funding after you sent the email; did you hear back from somebody at Soaring Pine or...

A. Soaring Pine was very slow to react to the timing of this opportunity. This opportunity expired.

MR. NINE: And by "this opportunity," what are you referring to?

THE WITNESS: The City of Highland Park.

MR. NINE: Okay.

THE WITNESS: And so the next opportunity then was to purchase properties at the tax sale. At the same time, Paul Schapira was telling me that Soaring Pine was not interested in doing a loan of

only $750,000, but might be interested in doing something along the lines of $2 million if that's something I was interested in doing.

BY MR. ROSSMAN:

Q. All right. So was this a conversation you had with Paul Schapira or was what you just described in writing?

A. It was both conversation and in writing.

Q. Okay. Can you be specific in terms of what he told you with respect to this $2 million amount?

A. Yes.

Q. Okay. First of all, when was this conversation?

A. Late July. And the initial email outlining the $2 million credit facility would have been August 3rd of 2016.

Q. Now in late July, was it a telephone conversation you had with them?

A. No, we had lunch.

Q. Where did you have lunch with him?

A. Elie's.

Q. Where is that?

A. Downtown Birmingham. It's a Mediterranean restaurant.

Q. And it was just you and Paul Schapira?

A. Yes.

Q. And about how long was that meeting?
A. Hour and a half, two hours.
Q. Did you take any notes at meeting?
A. I did not take any notes at the meeting, no.
Q. Did you take any notes at the other meeting we discussed at Social?
A. I did not.
Q. And in this meeting, what -- first of all, why was the meeting called and who asked for it?
A. Paul asked for the meeting.

MR. NINE: Is this 2017 or '16?

THE WITNESS: '16. 2016.

MR. NINE: Still '16.

THE WITNESS: Paul asked to have the meeting to discuss the loan.

BY MR. ROSSMAN:

Q. And obviously you obliged. And what was discussed at this meeting?
A. I take it back. I may have followed -- I think Paul and I were going back and forth about trying to get together and I may have asked if he was available for lunch, now that I think about it.

We sat down, he said, "Dean, we're interested in making an investment in the city of Detroit. $750,000 is not the size of a loan that

we are in a position to do. If you would like to do a larger loan for $2 million, we can sit down and discuss that and discuss how you would use it and, you know, what the terms would be."

Q. And how did you respond to that concept of a $2 million loan?

A. I said, "It's something that we could talk about, so let's sit down and talk."

Q. And did you talk about it right then and there?

A. Yeah, we did. We ended up talking about it for an hour and a half, two hours.

Q. And was it your belief that any agreements or understandings were reached?

A. Not until he sent the follow-up email, but yes.

Q. And what was your understanding -- so your answer is no, leaving that meeting you didn't believe that there were any agreements or understandings?

A. Correct, not at that time, no.

Q. Okay. So staying at that meeting, what did you ultimately conclude about a loan and the $2 million amount?

A. I could certainly use a $2 million facility and have plenty of potential product to purchase at the 2016 tax auction.

Q. So you were very interested in the $2 million?

A. I was. The concern I had with the larger loan amount was finding enough contractors who are both available and capable in being able to rehabilitate and turn over a larger volume of houses than what I had originally proposed.
Q. All right. The subsequent email. Did that confirm or rebuke your understanding leaving that meeting?
A. It outlined accurately what we had discussed at the meeting.
Q. And what did you understand that to be exactly?
A. They were offering a $2 million loan with assets pledged by Park Street Group and DMP Holdings with a rough valuation of $3 million or 150 percent of loan to value.
Q. So you got this email on August 3, 2016, and how did you respond to that?
A. Well, there were a few more items.
Q. In terms of what was outlined?
A. Correct.
Q. Okay. So we got the $2 million loan --
A. Correct.
Q. -- assets pledged and now what's the third?
A. And then it was going to be funded in stages because I was not going to need all of the funding until after I had purchased the properties and had

received deeds from the Oakland County Treasurer.

So there were two stages to the auction, so we had discussed, I think, initially they were going to fund $350,000, then an additional 500 or $750,000, and then the remaining million dollars after I had completed the acquisitions at the tax sale and ended up deeding title to the properties.

MR. ROSSMAN: Where he starts reading numbers, can you just read that back?

(Whereupon the answer was read back by the court reporter.)

BY MR. ROSSMAN:

Q. So it was your understanding that, based on this August 3, 2016 email, that at some point in the future the total of $2 million would be funded?

A. Yes, although Paul was clear in the email that they would have to go back to the loan committee to seek approval before we could move forward, and they would also have to verify that there was collateral available in the amount of $3 million to secure the $2 million loan.

Q. So is it your position that that August 3, 2016, email bound Soaring Pine to loan $2 million to Park Street Group Realty Services?

A. No.

Q. And is it your position that representations made with respect to $2 million in ultimate funding constitute a basis of fraud?
A. Based on the subsequent emails that were exchanged, yes.
Q. And the subsequent emails you are referring to are between what periods of time?
A. August 15th and September -- sometime September before we closed the second tranche of the loan.
Q. And what statements were made to you or what facts were concealed from you that you believe constitute a basis of fraud in that regard?
A. Soaring Pine promised that they would loan $2 million, including after the initial funding of the $500,000 loan. They continued to say that we would close the follow-on loan for $1.5 million, when, in fact, they had concealed from me that the loan committee had only approved a $1 million loan.

MR. NINE: When you say "they said to me," are you talking verbal, written or what?

THE WITNESS: Verbal and written.

MR. ROSSMAN: Do you gentlemen mind if we took five minutes?

MR. NINE: That would be good.

(Whereupon a break was taken from 11:55 a.m. to 12:03 p.m.)

BY MR. ROSSMAN:

Q. So you indicated in your testimony before we went off the record that it was promised to you that Soaring Pine would loan in the future the sum of $2 million, correct?

A. They agreed to loan $2 million in three tranches, yes.

Q. Okay. When you say agreement, do you mean that it's a binding legal agreement?

A. Yeah.

Q. Okay. And that was in writing?

A. Yes.

Q. And that was signed by certain parties to the transaction to the agreement?

A. We didn't sign, no.

Q. Where is this agreement or what's it called; what's the title of the agreement?

A. I didn't say that there was an agreement with the title. What I did say is they had made a proposal, so they would take it to the loan committee, the loan committee did ultimately approve it, they moved forward with the closing of the initial $500,000 loan, three days later Paul Schapira was

asking to meet me for lunch to discuss the follow-up -- not to discuss -- to move forward with the follow-on loan for 1.5 million, and we continued to have those discussions in writing up until the second closing and then after the closing of the second 500,000.

Q. And so we're clear, there's no signed written agreement --

A. Correct.

Q. Well, let me finish the question.

There's no signed written agreement to loan $2 million to Park Street Group Realty Services, correct?

A. Correct.

Q. Is there -- is this agreement a verbal agreement?

A. No, it's -- you can see it through the series of emails.

Q. Okay. So it's an email agreement?

A. Yes.

Q. In that email series, do you ever use the word accept?

A. Well, I closed the first tranche, yes.

Q. And are there integration clauses in the first tranche of loan documents?

A. There is as to the subject matter of that agreement

and then three days later --
Q. Just -- I understand you have some more to say on that subject, but if we can just take it step by step, I would appreciate it.
A. It depends -- I don't know how you're defining an integration clause. It did not bar any prior oral agreements concerning the $2 million loan.
Q. And so it's your testimony that you have a prior verbal agreement to loan an additional $1.5 million in addition to the first tranche of funding?
A. No, it's my position that there is a written agreement through the course of dealings of the parties and the written emails stating what the loan amount would be.
Q. Did you say course of dealing?
A. Uh-hum, yes.
Q. So the course of dealing plus the emails between the parties constitute, in your opinion, an agreement to loan Park Street Group, LLC, $2 million?
A. Correct.
Q. And is it your testimony that the representations that were made to you in these emails constitute false statements that people knew were false when they made them?

A. Yes.
Q. Who made these statements to you?
A. Paul Schapira.
Q. Anybody else?
A. There may have been also some emails exchanged we with Tricia Mink, T-R-I-C-I-A, M-I-N-K.
Q. And what was it about these emails that led you to believe that you would ultimately be loaned $2 million and also what confirmed your belief that when Mr. Schapira made these statements that he knew them to be false?
A. So you're asking me a compound question? Is it okay if I take it in two steps?
Q. Sure.
A. Okay. First step, August 3, 2016, Mr. Schapira sends a confirmatory email confirming our discussion concerning a $2 million credit facility that included not only Park Street Group, LLC, but also its affiliate, DMP Holdings, LLC, with the condition that there would be sufficient collateral to pledge a security for the loan at $3 million and loan approval.

We then -- Paul then told me that we had approval for the loan, we were going to move forward with the initial $500,000 of the credit

facility, closed on the credit facility on August 12, 2016. Three days later, Paul Schapira sent me an email stating, "Are you available for lunch to move forward with the follow-on $1.5 million?"

Throughout the remainder of August, Paul requested lists of possible collateral with comparative market analysis valuations to verify that there was sufficient collateral for the $2 million loan. There was also emails, I think, exchanged with Tricia Mink to the same end, and then Paul said, "We'll move forward with the next $500,000 and we'll close on the million -- the remaining million dollars after you complete your acquisitions at the auction."

I believe in -- I don't remember the exact date, but we then had a conference call after we had closed on the second tranche of the loan and Paul Schapira --

Q. Can I stop you for one second?

So on August 15th you get an email that invites you to lunch and you described some of the subject matter of that lunch, but I'm not -- I think it might have extended beyond that. Let's just focus on the lunch on August 15th, 2016, for a

minute. Where was that lunch?
A. I don't remember.
Q. Was it in Birmingham somewhere?
A. Don't remember.
Q. It was with Paul?
A. Yes.
Q. Okay. And at that lunch, it's your testimony that the additional -- it was represented to you --
A. It was at Phoenicia.
Q. Okay. And it was represented to you, it's your testimony, that an additional 1.5 million would be funded?
A. Yes, that representation had already been made. All we were doing was moving forward with the follow-on 1.5 million. He wasn't saying at that point that, "You're approved." I was already approved. He was saying, "Let's go ahead and move forward with the next million and a half dollars. Let's schedule the next closing."
Q. All right. And then documents go back and forth with respect to the collateral --
A. Correct.
Q. -- that would secure this additional funding, and I'm assuming those are exchanged via email, correct?

A. Correct.
Q. And when is it communicated to you regarding the next level of funding; when does the next set of loan documents come out?
A. Tricia Mink contacted me.
Q. And she's -- is she an assistant to someone at Soaring Pine?
A. No, Tricia Mink is, I believe, the paralegal at Simon, PLC.
Q. So Tricia Mink contacts you?
A. Sends me an email, said, "Listen, we've been told that you're moving forward with the next tranche of the loan. Have you had discussions with Paul Schapira about setting the closing?" I said that I had been working with Paul on the remaining 1.5 million.

Simon, PLC, then sent over a set of closing papers for an additional $500,000 because, again, I didn't want to pay interest on funds that I didn't need yet, particularly given the size of the credit facility, so Paul said that we would close on the next 500,000 to participate in the second part of the tax auction in October, and then after we closed on that and I received the deeds to the tax auction properties, we would close on the

remaining $1 million.
Q. All right. That's what Tricia Mink told you?
A. No, Tricia Mink told me what I had initially said. She followed up with me and said, "We're getting ready to prepare on the closing papers for the next part of the loan. Have you been talking to Paul Schapira?"

I said that I had and that we were working on closing on the final $1.5 million of the loan and how we would do that.
Q. All right. And so then was the next communication you received the next $500,000 installment?
A. I don't remember if that was the next communication. There were still communications that were being exchanged back and forth concerning the collateral and then at some point I received a draft of the loan documents for the additional 500,000.

Let me put it to you a different way: There was never discussion ever that the loan was going to be limited to a million dollars. After they had told me that they weren't going to lend $750,000, every single communication we had was about a $2 million credit facility.
Q. Let me ask you this. And I'm going to turn back to

the initial set of loan documents that you received. What was your involvement in drafting those?

A. The initial set from the August 2016 closing?

Q. Yeah.

A. The initial set of loan documents were prepared by John Polderman and Robert Berg at Simon, PLC.

Q. And did you make any edits, any red lines, any requests for change?

A. I did.

Q. And how extensive was that?

A. I don't remember.

Q. Were you represented by a lawyer or did you represent your own interests in that regard?

A. I was not represented by a lawyer. I did the negotiating and the changes on my own.

Q. And that's within your expertise as a lawyer?

A. Yes, as well as their expertise as lawyers as well.

Q. And same thing hold true with the second set of loan documents in terms of you representing yourself and making changes to the documents and reviewing them?

A. Yes.

Q. And you had plenty of time to review these

documents and determine that the contents of these documents -- these loan documents met with your approval?

A. Yes.

Q. And when you were negotiating them and modifying them, did you find the folks with whom you were dealing to be amenable to your concerns and work with you?

A. Sometimes yes, sometimes no. It depended on the issue.

Q. And did you ever raise the concept of the $2 million number and indicate that this was something that you should have a written signed agreement on?

A. Raised with whom, the lawyers at Simon, PLC?

Q. Yes. Whomever -- Mr. Polderman, Mr. Berg, whoever else you were communicating with regarding these loan documents?

A. No.

Q. And it's your testimony that from the beginning, it was represented to you that the ultimate funding amount would be $2 million, correct?

A. Correct.

Q. And you never asked for that term, $2 million, to be included within the loan documents that were

prepared on two separate occasions, correct?
A. Correct, because it was being closed in tranches, and each time we closed there were follow-on communications between me and the ultimate client that Simon, PLC, was representing, the person who would make the decision, that it was a $2 million credit facility.
Q. Did you ever receive a signed letter of commitment for $2 million in funding?
A. No.
Q. What did you do in reliance upon the representations that were made to you concerning $2 million in funding?
A. I closed.
Q. Closed on what?
A. The initial $500,000 loan, the second $500,000 loan, and then made buying decisions at the auction based on a $2 million loan instead of a $1 million loan.
Q. The two $500,000 loans, is it your testimony that those were -- that was funding against the $2 million which you believe you were entitled to?
A. Yes.
Q. And was there a guarantee, in your opinion, that notwithstanding any conditions or events you would

have $2 million available to you?
A. I'm sorry, would you repeat the question?
Q. It was your understanding that Soaring Pine was legally bound to loan another million dollars to you?
A. Yes.
Q. And that's based on the emails that were exchanged?
A. The emails, the verbal discussions, yes.
Q. Okay. Now with that additional $1 million which you contend Soaring Pine was obliged to fund your business enterprise with, it was subject to the finalization of certain loan documentation, correct?
A. We had already finalized the framework for the loan documentation. There was nothing else to finalize, no.
Q. But there would have needed to be another set of loan documents prepared, agreed upon and signed, correct?
A. We had already agreed on what the loan documents looked like.
Q. There were drafts exchanged?
A. Yeah, you had a draft of the initial documents that set forth the terms, the interest rate, the commitment fee, the success fees, the closing

costs, the capitalized interest that was carried forward to the second tranche that would be carried forward to the next tranche as well.

Q. But there would still need to be -- before any money could change hands, there would need to be loan documents drafted, agreed upon and signed, correct?

A. The loan documents had already been agreed upon; all they had to do was send the loan documents and fund, yes.

Q. So your answer to my question is yes, loan documents would need to be prepared, agreed upon and signed, correct?

MR. NINE: No, that isn't --

THE WITNESS: No, that's not what I'm saying. I said they were already agreed upon. All they would have to do is send the amendment to the loan agreement for the $1 million, you would have to sign the amendment, the mortgages would have to be signed on the additional collateral, but they had already agreed to lend $2 million. We had already agreed on terms and conditions.

BY MR. ROSSMAN:

Q. And it was also understood and agreed that there would need to be signed loan documents, sufficient

collateral and mortgages in place before there would be any additional funding, correct?

A. And they had already agreed to that. They said they had gotten approval from the loan committee to move forward. If they didn't have approval from the loan committee, I wouldn't have closed on the first tranche of the loan.

Q. And the parties would have to execute, meaning sign, an amendment to the loan documents, correct?

A. Correct.

Q. And that would be with respect to, under your theory of the case, this additional $1 million, correct?

A. Correct.

Q. And there's nothing in any of the loan documents that were signed that guaranteed in any way an additional $1 million, correct?

A. Correct.

Q. When was the first you heard or realized or had it communicated to you that there would not be $2 million in funding?

A. Sometime late in October or early November.

Q. Who did you hear this from?

A. Paul Schapira and Victor Simon.

Q. Telephone call?

A. Yes.
Q. What exactly did they say to you?
A. I said, "Gentlemen, I have completed or am about to complete the last of the acquisitions through the county treasurer. I'm going to need the additional $1 million to fund operating capital and renovations."

And Victor Simon then said, "Well, the loan committee had met back in August before we closed on the first tranche of the loan and had agreed to only lend $1 million and to see how things went."

MR. NINE: When did the loan committee meet?

THE WITNESS: Before the initial tranche of $500,000 was closed on August 23, 2016, according to Victor.

BY MR. ROSSMAN:
Q. And what were Victor's exact words to you --
A. Those were the words.
Q. -- in that conversation?
A. Those were the words.
Q. So he represented to you, it's your testimony, that there wouldn't be $2 million, correct?
A. Correct. He said that they were not going to fund

the additional $1 million; that the loan committee had met prior to the August 23, 2016, closing, and had agreed to only fund $1 million, and said, "We'll see how things go before we lend any more money."

Q. And what did you say in response to that?

A. "Gentlemen, you promised that you would lend $2 million and I've made buying decisions based on a $2 million credit facility. You're going to leave me woefully undercapitalized."

Q. Did you ask about the loan committee and that approval that you mentioned a few times here?

A. I don't remember if it was in that conversation. I did have a conversation with Paul Schapira separately at some point where I said, "Paul, I don't understand. You told me that the $2 million loan had been approved before we closed on the initial $500,000 and then three days later you were contacting me in writing to say, 'Let's sit down and move forward with the follow-on $1.5 million.' Why didn't you tell me at that time that they had only approved a $1 million facility?"

Q. And what did he say?

A. He didn't really respond.

Q. He said nothing?

A. He said nothing.
Q. Did Paul say anything in this telephone conversation that you were on with Victor?
A. No, he was very quiet.
Q. What buying decisions did you make based on the belief that you would receive $2 million in total funding?
A. Well, if I was only going to receive $1 million, I probably -- well, I would not have purchased more than four or $500,000 in property assets because I would have wanted to have had at least another 400 or $500,000 available to me for rehab and operating capital.

MR. NINE: And I think these have been answered in your initial discussions of what the business plan was.

MR. ROSSMAN: Yeah, but I need to know what his buying decisions were.

MR. NINE: Same thing.

BY MR. ROSSMAN:
Q. And ultimately how much did you purchase based on the belief that you would receive $2 million?
A. I don't remember the exact figure. I had provided the bid receipts to Mike Evans and Steve Morris, but it was somewhere in excess of $700,000, but,

you know, when you had almost $100,000 in closing costs on a million dollars, that left me now with only, you know, 150, $200,000 for renovations and operating capital for six, $700,000 in assets, probably 40-some single-family residential homes.

MR. NINE: I presume this Exhibit 3 is entered?

MR. ROSSMAN: Yeah, I mean, we're just -- it's just a deposition.

MR. NINE: Yeah, no, I just wanted to make sure you weren't wanting it back.

MR. ROSSMAN: And I'll enter, one and two and several others.

MR. NINE: Yeah.

(Discussion off the record.)

BY MR. ROSSMAN:

Q. Now is your -- other than the statement that you professed to be made in late October by Mr. Victor Simon concerning the loan committee approval prior to the August 2016 closing, are you aware of any other facts which support your belief and your contention that less than -- what the loan committee actually approved at that point in time or is it only the statement of Mr. Simon?

A. And Mr. Schapira and the follow-on discussion, yes.

Q. You said earlier --

MR. NINE: And just so it's clear, we will have your people on the -- that the source of it is your people and their documents, I presume, that show $1 million approval and not a 2 million.

MR. ROSSMAN: Well, I'm asking for his personal knowledge.

MR. NINE: You didn't ask that. As long as you are asking what he knew personally.

MR. ROSSMAN: I asked him what he was aware of. I wouldn't -- all my questions are geared to what he knows personally.

MR. NINE: Yeah.

BY MR. ROSSMAN:

Q. Other than the -- okay. So you said that there's two things: Statements by Mr. Simon -- a statement by Mr. Simon, and then you indicated Mr. Schapira acknowledged it when you talked to him on the telephone subsequent to that conference call?

A. Correct.

Q. And previously you said he was quiet in that call, but now you're saying that he confirmed what you believed to be the case with respect to the loan committee?

A. You asked me what did Paul Schapira say during that

initial conference call with Mr. Simon. I said that he was quiet. I then said that there was a subsequent call with Mr. Schapira where I said, "Paul, if the loan committee had only approved the loan for $1 million before we closed on August 23, 2016, why didn't you say that?

Q. And what did he say to that?

A. "I know, I know."

Q. Just "I know"?

A. Yeah.

MR. NINE: And one other thing he testified to, and that is that he asked for the loan and it wasn't forthcoming.

MR. ROSSMAN: All right. I would appreciate it if we'd let the witness testify here.

MR. NINE: Except you were summarizing what he said.

MR. ROSSMAN: I don't need you pointing out facts. If you have an objection like it mischaracterizes testimony, feel free to advance it.

MR. NINE: That's what you did.

BY MR. ROSSMAN:

Q. Have you ever seen any documents relating to the loan committee approvals of which you are speaking?

A. No.
Q. Did you ever put into writing -- prior to this litigation being commenced and your claims being advanced herein, did you ever put into writing your disappointment concerning the level of funding?
A. Yes.
Q. When was the first time you did that?
A. I don't remember.
Q. Was it in an email?
A. Yes, to Mr. Schapira.
Q. And what was his response to that?
A. I don't think I got a response because I think it was -- I think I then learned that he had been let go.
Q. When was the last time you spoke with him?
A. Paul Schapira?
Q. Yes.
A. I don't remember. Before the loan matured on September 23, 2017.
Q. It hasn't been since this litigation has been commenced?
A. No, he sent me an email within the last four to six weeks asking if I knew of any employment opportunities and I didn't respond.
Q. Within the last four to six weeks?

A. Yeah, I would say within the last two months, yes.
Q. When is it your understanding he was let go from the company?
A. I don't remember. Sometime in 2017.
Q. You allege in your complaint that you believe that there was a concerted plan to deceive the defendants in this regard with respect to the $2 million loan. Why do you believe that there was a concerted and intentional plan to deceive you and the defendants?
A. Because Victor Simon and Paul Schapira all but admitted that they had knowingly concealed the fact that the loan committee had only approved a $1 million loan before we closed on the initial $500,000 loan on August 12, 2016.
Q. This conversation regarding the $2 million with Paul and Victor, when was that, late October; do you recall the date?
A. I want to say it was like October 16th, October 18th, something like that.
Q. 2016, correct?
A. Yes.
Q. Now were there any -- had Soaring Pine voiced any concern with respect to any component of this funding, whether it be collateral or anything else?

A. No.
Q. So at this point in time, you hadn't received any reason to believe that the lender was feeling insecure in any way, shape or form?
A. No, they closed on the second tranche of the loan. If they were feeling insecure, I would have thought they wouldn't have lent the additional $500,000. Like I said, there was never a discussion about a $1 million credit facility, it was always in the context of the $2 million facility.
Q. Are the emails that you believe constitute an agreement concerning this $2 million contained in the material that you've brought here today?
A. Yes.
Q. Can you identify those emails for me?
A. I think so.
MR. ROSSMAN: We'll take a couple minutes.
THE WITNESS: Tell you what I'm going to do --
MR. ROSSMAN: Let's go off the record for a few minutes.
(Whereupon a break was taken from 12:40 p.m. to 1:12 p.m.)

(Marked for identification:
Deposition Exhibit Nos. 31-38.)
BY MR. ROSSMAN:
Q. I've marked as exhibits to this deposition Exhibits 31 through 38, and those consist of documents that you marked with stickies and which reflect what you contend is an agreement between Park Street Group and Soaring Pine to extend $2 million in funding, correct?
A. Those are the ones that I was able to quickly identify and mark; there could be others, but yes.
Q. You believe there might be others?
A. There could be, yes.
Q. Okay. This Exhibit 31 is -- the first page of it shows an August 2 -- August 2, 2016, email, and it's you emailing Dean, stating, "Do you have time to discuss a larger credit facility?" correct?
A. It's not me emailing Dean, it's me emailing Paul, but yes.
Q. I'm sorry, you're Dean. You emailing Paul.
When you say "larger" in that email, what are you referring to; larger than what?
A. Larger than the $750,000 that had been originally proposed. As I had testified earlier, Paul Schapira had informed me that the $750,000 facility

was smaller than the typical loan that they made, so they discussed a larger facility.

Q. Okay. Did he respond to this email?

A. He did. If you -- I think -- I had those in chronological order. I think you got them out of order. But he did. He responded --

Q. Actually, I believe I kept them in the same order --

A. No, no.

Q. Okay.

A. Maybe you did.

Q. Okay. So the response to Exhibit 31 would be Exhibit 33?

A. No, I think it is 32. He responded with sending an invite.

Q. All right. Oh, 32 is the calendar invite.

A. He did respond. It's an exchange. So I sent him an email on August 2nd at 9:27 about lunch to discuss the larger credit facility.

Q. Oh, it's going down.

A. Correct. At 1:44, he said, "Lunch tomorrow works. Does somewhere in Birmingham work for you?"

Q. Okay. I'm just so used to reading them from the back forward.

So that's when you met at Phoenicia at

noon. You set up to meet him at Phoenicia at noon on the emails of August 2nd. And do you know when you ultimately had that meeting; was that August 3rd?

A. Yes, it was lunch tomorrow, so it would have been August 3rd.

Q. And I know we discussed that lunch, but so the record is clear chronologically, you had that lunch with Paul?

A. Yes.

Q. At Phoenicia?

A. Yes.

Q. And what was Paul Schapira's position with Soaring Pine at the time you were having these emails and lunch with him?

A. Managing director -- or managing partner, I don't remember which -- but he was in charge of the fund, as I understood it. I think his business card stated he was vice president; the website stated, like I said, either managing partner or managing director.

Q. And what is Exhibit 33? It's an August 3, 2016, email.

A. You marked the wrong -- you took too much.

Q. That's two exhibits?

A. This is two different email exchanges.
Q. Okay. So Exhibit 33 is an August 3, 2016, email between you and Mr. Schapira, correct?
A. Correct.
Q. And this is still before the lunch had happened? And I'm just looking at Exhibit 33.
A. Yes.
Q. Okay. And it looks like some information regarding various properties is being sent between the parties?
A. Correct.
Q. What is this information? It looks like Tricia Mink is emailing to Michael Evans, Robert Berg, John Polderman and you information regarding certain properties. Why is she doing that?
A. These were, based on the title examination that -- I believe Equity National was the title company that Simon, PLC, had handled to conduct the title search results. She was identifying some issues with title that needed to be resolved.
Q. So they were running title on the properties that would be pledged as collateral?
A. Correct.
Q. So this was just part of the due diligence into the funding?

A. Correct.
Q. And this was provided to you just FYI, as the email says?
A. Correct.
(Marked for identification:
Deposition Exhibit No. 39.)
BY MR. ROSSMAN:
Q. Okay. And Exhibit No. 39, that's a notification from your computer calendar that the lunch would be held on August 3, 2016, in about ten minutes hence, correct?
A. Yeah.
Q. That's an important one.
A. Yeah.
Q. So getting ready for lunch.
You have the lunch and this email, Exhibit 34, follows?
A. Correct. Later that -- after lunch later that evening, Paul sent me an email outlining the $2 million credit facility that we had discussed earlier in the day and was copying the Soaring Pine team on the email.
Q. I'm assuming we take this document as a whole, but when you refer to the $2 million, you were referring to point 3 down near the bottom of

Exhibit 34?
A. Correct.
Q. Can you please read that provision into the record?
A. "Once we receive the additional information above, we will seek to get investment committee approval for an additional 1.625 million for a total of 2 million, secured by the corporate guaranties of PSG and DMP, your personal guaranty and first real estate mortgages on at least $1.625 million of additional collateral. We would seek to get this approved, documented and funded by September 1, 2016, so you will be in a position to acquire properties from the auction as you are planning in early to mid September."
Q. Now where it says additional information about once we receive, was all of the information above provided?
A. Yes.
Q. Were organizational documents provided for David M. Prentice, LLC?
A. DMP Holdings, LLC, yes.
Q. And the Park Street Group?
A. Yes.
Q. And it states in this document -- it indicates that when this is received, they will seek to get

investment committee approval for an additional 1.625, correct?

A. Correct.

Q. This isn't a representation that that money is actually available or guarantied for funding, is it?

A. No, as I had testified earlier. They made it clear that they were going to have to seek approval before they committed to the larger facility.

Q. Was there ever a corporate guaranty from DMP provided?

A. No, because we ended up transferring properties from DMP Holdings to Park Street Group, LLC, which was, in part, the email that you had showed earlier from August 3rd on the title issues.

Q. And do you believe that there were -- there was at any point in time first real estate mortgages on at least 1.625 of additional collateral?

A. I'm not sure I understand your question. They were requesting first mortgages on an additional 1.625 million in collateral to secure the additional 1.625 million in funding above the 375,000.

Q. And at the point in time when you contend that you were entitled to receive the full $2 million, did

you or your entity, Park Street Group, have control over 1.625 million in additional collateral?

A. Yes.

Q. And what did that consist of?

A. Single-family residential homes. If you look earlier in the email, I believe -- the earlier point, Paul had requested via Dropbox a list of the properties with CMA Valuations, CMA standing for comparative market analyses, so that they could see the property and verify the valuation based on an independent, licensed real estate broker or agent who had prepared the CMAs.

MR. NINE: When was it the loan was turned down by the loan committee? I know you gave me that, but I lost track of it.

THE WITNESS: They told me that the $2 million loan was turned down before the initial tranche was funded on August 23, 2016, that apparently they had only approved $1 million.

BY MR. ROSSMAN:

Q. On August 1, 2016, it was your understanding that the loan committee would be approached for $2 million, not that it had approved it or that it would approve it, correct?

A. Correct.

Q. Exhibit 35 -- strike that.

I'm now turning your attention to Exhibit 38, which is Monday, August 22, 2016 email, and in this email, you're corresponding with Paul Schapira regarding a lunch at Elie's, which we discussed earlier, correct?

A. Correct.

Q. And in this email, Paul states, "Dean, let me know if you are available to grab lunch to discuss the 1.5 million loan follow-on. I am open today or Thursday of this week. Thank you."

Is that a fair reading of that?

A. Not only a fair reading, but an accurate reading.

Q. Well, it's not every day people say that when I read.

And so there's nothing in that document which evidences an agreement between Soaring Pine and Park Street Group to loan $2 million total, is there?

A. I would disagree.

Q. What is it about that document that suggests otherwise?

A. I would not have closed. So we closed on the initial tranche of the loan for $500,000 on August 12, 2016. I would not have closed for a

$375,000 loan if Paul Schapira had not represented beforehand that I was going to get more funding.

Q. So that's -- okay. So you're telling me he represented before August 12, 2016, that there would be additional funding?

A. Correct, that he --

Q. Was that in writing or verbally?

A. I don't remember. At the very least it was -- I don't remember.

Q. Is that representation in the emails that are before us now?

A. I don't see it in the emails that are before us now, but I would not have closed on the initial tranche of the loan for $500,000 if that's all they were going to lend.

Q. And what assurances did you have at that point in time, August 12, 2016, that they would lend more?

A. Paul Schapira representing that the investment committee had approved the $2 million facility, that we would close on the initial $500,000 of the loan, and we would then close in tranches going forward for the additional 1.5 million.

Q. All right. So as of August 3rd, though, there's an indication that there would have to be investment committee approval for the additional

1.625, right?
A. Correct.
Q. And as of August 3rd, it wasn't an agreement, it was a representation that they would seek approval?
A. Correct. They hadn't even agreed to 375,000, 750,000, or a million. They were seeking approval for the larger facility. I would not have closed on the first tranche if Paul hadn't said they had approved the $2 million facility.
Q. And you closed on the first tranche, was it August 6th?
A. The 12th.
Q. I'm sorry, August 12th.
And so sometime between August 3rd, which is that email, and August 12th, it's your position that Paul represented to you that the committee had actually approved -- had only approved $1 million?
A. No, exactly the opposite.
Q. What was his representation to you?
A. Paul had represented to me that the committee had approved $2 million and we would close in tranches or in stages, as I had requested.
Q. Okay. Now is there an email or a document that memorializes that?
A. I don't know if there is between August 3rd and

August 12th; I don't remember.
Q. It may have just been verbal?
A. It may have been.
Q. So your closing on the first tranche on August 12, it's your testimony that you're relying on a verbal representation that --
MR. NINE: I object. He did not say that. He said there may be verbal. There may be writing.
MR. ROSSMAN: Okay.
BY MR. ROSSMAN:
Q. Can you identify any writings that led you to believe that there was $2 million actually approved in funding prior to your closing on August 12, 2008 [sic]?
A. I don't know if it's in the documents or not. Like I said, I went through them quickly.
But all of the discussion was about a $2 million facility after August 3rd. There was never a discussion about only $500,000 or only a million. There isn't a single solitary writing or email or verbal conversation that we had to that effect.
Q. But nonetheless, as of August 3, 2016, you did understand that it wasn't a done deal, it hadn't

been approved, it hasn't even been submitted, correct?

A. Correct. I think I've said that now three or four times.

Q. The next email in this batch of emails in sequential order is August 23, 2016. We've marked it as Exhibit 37. Now as of August 23rd, you had already closed on the first two tranches, correct?

A. No, that's incorrect.

Q. You closed on the first one?

A. Correct.

Q. When was the second one?

A. September 23rd, 2016.

Q. Can you tell me what it is about Exhibit No. 37 that suggests that my client, Soaring Pine, had either agreed to lend a total of 2 million or that the loan committee had -- or that it's representing that the loan committee had approved that amount?

A. Well, the loan committee had already approved the $2 million loan prior to the closing on the August 12th, 2016, $500,000 loan, otherwise they wouldn't have closed. Because if they only loaned $500,000 --

Q. I understand that. I'm just asking about that document.

A. But you misspoke. I want to make sure the record is clear.

You asked me what about this document says they approved the $2 million. I already testified they approved the $2 million before we closed on the initial tranche.

Q. Let me rephrase the question.

A. Okay.

Q. What about that document -- what exhibit is that?

A. Thirty-seven.

Q. What about Exhibit 37 leads to the conclusion that there was an agreement to fund $2 million?

A. Because I'm re-sending him --

Q. Re-sending who?

A. Paul Schapira. I had already forwarded to Paul Schapira via Dropbox two different lists. One list was the collateral that was pledged for the $500,000 -- I'm sorry, two different lists.

The first list was a list of collateral totaling $3 million to collateralize the $2 million loan, a second list that included those properties plus the additional properties in Park Street Group name or control via DMP Holdings for $6 million, and basically said, "You can select whatever properties you want to secure the loan." So we had

lunch at Elie's, I was re-forwarding to him the information that he had previously requested and the CMAs via Dropbox.

Q. Okay. There's no statements in this document by any agent of Soaring Pine that suggests that they've agreed to $2 million or that $2 million has been approved, is there?

A. Well, it says, "Per your request." We were still talking about the $2 million loan. We never discussed just a $500,000 loan or a $1 million loan. That never happened.

Q. So you're discussing the $2 million loan?

A. No, that's not what I said. What I was saying is -- the point I was making is there was never a discussion ever about just a $500,000 loan or a million dollar loan. Prior to August 12, 2016, Paul Schapira represented that the $2 million loan had been approved. Otherwise I wouldn't have moved forward with the initial loan. Because if they hadn't approved the $2 million, what was the $500,000 going to do for me when I had already requested $750,000?

Q. Yet you had no written contract that obliged Soaring Pine to loan that much money to you, did you?

A. I disagree. I think between the original proposal, Paul's representation that the loan had been approved, closing on the initial tranche, him then asking a week later or so, "Let's meet to finalize the follow on $1.5 million," was an agreement. I would have never agreed to close for just $500,000. That was less than the amount they told me they wouldn't lend me because it was too small a loan.

Q. So Exhibit 35 is an email dated Saturday, August 27, 2016, a chain of email correspondence between you and Mr. Schapira, and in this document, you are providing some material regarding the collateral that you would post for a loan in the amount of $2 million, correct?

A. Correct, although I had already sent this material to him two, three weeks earlier.

Q. In that email, does Paul confirm affirmatively that $2 million has been approved and that Soaring Pine is obliged to loan said sum?

A. No, I don't think he would have had to have done that since he already said that they had approved the loan before the closing on the August 12, 2016, $500,000 loan. He wouldn't have to keep saying it.

Q. And Exhibit No. 36 is similar to Exhibit 35 in the sense that you're producing information regarding

the collateral that would be posted for the loan, correct?

A. Incorrect.

Q. What is it?

A. This is an email from Tricia Mink when she was asking for tax foreclosure avoidance agreements for the properties that had already been pledged as collateral for the initial loan.

She then states on August 24, "In reference to the other properties provided, are you working with Paul Schapira on increasing your loan and using those properties as collateral?"

I then responded to her and said, "I am hereby forwarding to you the tax plans and payment receipts in connection therewith for the properties pledged as collateral, as well as the properties that will serve as additional collateral for the next $1.5 million tranche of the loan."

Q. And you're writing that to whom?

A. Tricia Mink.

Q. And Tricia Mink is a paralegal at Simon Attorneys?

A. Correct.

Q. Did she confirm one way or the other the amount of the loan and how much would be funded?

A. She did not, but given that she asked about whether

I was working with Paul Schapira about increasing the amount of the loan, she was clearly aware that we were increasing the loan.

Q. Did you ever ask for a copy of the loan committee's approval on this loan?

A. No, I don't think I've ever heard of a borrower getting loan committee notes.

Q. Or through discovery?

A. Yes, we did.

Q. And is that something that you know to exist, a written approval below $2 million?

A. You haven't responded to the discovery yet.

MR. NINE: Which you promised to do this week through your associate, Alex Blum.

MR. ROSSMAN: We'll do our best to fulfill our discovery obligations, Mr. Nine.

MR. NINE: That's good.

MR. ROSSMAN: As I expect that you will, too.

MR. NINE: We have.

BY MR. ROSSMAN:

Q. Now other than these documents I'm looking at here and which we've talked about -- 31, 32, 33, 39, 34, 38, 37, 35, and 36, in that order -- are you aware or do you recall as you sit here today any other

documents that would support the contention that there was an amount in excess of $1 million promised or represented to you with respect to the amount of the funding that would be extended?

A. I believe there are. There's at least one other email that I can recall, the one I had mentioned earlier from me to Paul Schapira expressing disappointment about basically having the rug pulled out from underneath me. That was not one of the -- I don't believe that was one of the things that was in the requests to produce in the deposition with the deposition notices, but I would be happy to produce it to you once I locate it.

Q. And that's the only other email that you believe constitutes a contractually binding agreement between --

MR. NINE: Again, I object. Don't characterize it that way. He never said that's the only; he said he can remember another one right now and there may be others, he specifically said.

BY MR. ROSSMAN:

Q. How long have you known about your deposition being today?

A. Two weeks.

Q. And during that two weeks' time, you were assembling the documents that are in the room here today?
A. Correct.
Q. And you knew that one of the issues, based on the pleadings in this matter, would be that whether -- whether there is an agreement to extend a full $2 million in funding to Park Street, correct?
A. No. In part, both because your client hasn't responded to the counterclaim, and my knowledge of what the issues are is different than the document production requests that accompanied the notice for deposition, none of which related to the counterclaim.

MR. NINE: One other objection. You were supposed to, under the court rules, when you called for a corporate representative, indicate the subject matter in writing to us so that we know what he's going to do. You did not do that.

MR. ROSSMAN: Well, he's also appearing here as an individual pursuant to a deposition notice that's not issued under the court rule governing corporate representative where we are absolutely 100 percent not required to indicate whatsoever the subject matter that we are going to

be exploring.

MR. NINE: And he's not required to go through and study documents so that you may speculate on everything.

BY MR. ROSSMAN:

Q. Now it has been your contention in this litigation that there's an agreement, right, a contract?

A. Correct.

Q. And you -- actually one of your counter-complaints is a breach of contract claim, correct?

A. Correct.

Q. And the contract which you allege to have been formed, at least with respect to documentation and written representations by Soaring Pine and its agents, consists of the documents which we have identified here today, correct?

A. At least in part, yes.

Q. And there may be one more email that you can remember?

MR. NINE: Or others.

THE WITNESS: There's one more I can remember specifically; there could be others.

BY MR. ROSSMAN:

Q. When you pled the breach of contract claim, did you attach the contract to your agreement or to your

pleading, to the counterclaim?
A. I don't think so, but I think the court rule only requires that you identify the document if it's in the possession of the opposing party, which I believe we did.
Q. And were these documents identified?
A. I don't know if all of them were or not.
Q. What was the consideration for this alleged agreement?
A. Seriously? Twenty percent interest, $70,000 in success fees, $90,000 in closing costs, including the $50,000 commitment fee for which your client claims it never made a loan commitment.
Q. All consideration that's identified in the first two sets of loan documents that were signed and agreed upon by the parties, correct?
A. Correct.
Q. Okay. And is any of that consideration discussed anywhere in these emails?
A. Sure.
Q. Show me.
A. August 3, 2016, outlining the proposed loan.
Q. Show me where the consideration in that document exists.
A. Well, consideration is post corporate guaranties,

pledge collaterals to secure the loan, and then they would seek approval from the loan committee based on what we had discussed.

Q. They would seek; they didn't have it --

A. Correct.

Q. -- as of August 3rd, correct?

A. I agree. You asked me where did it outline the consideration for the loan.

Q. And are all of the terms of your agreement to receive $2 million outlined in this August 3rd agreement or August 3rd email?

A. All of the terms are not, but between that and the closing documents from the initial tranche, they are, yes, including the $50,000 loan commitment fees.

Q. And just so I'm clear, do you recall anything in writing from Soaring Pine stating affirmatively that $2 million had been approved by the loan committee?

A. I don't remember.

Q. And so the best you can testify today on that issue is that it was told to you by Paul Schapira, correct?

A. I don't know if that's the best I can testify to. I specifically remember Paul Schapira saying, "We

are closing; you've been approved to close on the $2 million loan." Whether there's something else in addition to that, like I said, I would have to go through the documents. That was not something within the scope of the document production requests that accompanied the notice of deposition.

Q. Why did you not insist on securing that commitment in writing other than these emails; a signed writing, something formal? Being a lawyer yourself, could you draw that up. Why did you not insist on a signed writing or a written contract that the parties signed securing that funding?

A. Well, first off, I believed they made a commitment to make the loan and the documents show that. Secondly, I mean, you're suggesting then that I should have not taken Paul Schapira at his word.

Q. I'm just asking why you didn't --

A. Yeah, you're saying that I --

Q. -- draft documentation securing that amount of funding so that people could sign it and there would be no misunderstanding.

A. Well, first off, that would have never happened because Soaring Pine was represented by counsel and they were drafting the loan documents. I was not responsible for drafting the loan documents for

Soaring Pine.
Q. Were you involved in editing and revision of those documents?
A. I was. But you asked me about why I didn't ask -- why I didn't insist on drafting a loan commitment or something else.
Q. Or anybody draft it. Why didn't you insist on it? Before would you proceed to --
A. Because they had already agreed.
Q. -- accept the loan, why didn't you ask for something specific and in writing that was signed by them?
A. It wouldn't have occurred to me that I would have had to have gotten something signed by them to do that. The only thing we had discussed was a $2 million loan facility. There was nothing else that we were discussing. It would not have occurred to me to insist that they sign something to state that the loan was something different than what was the only thing we had discussed.
Q. Something different than what was contained in the loan documents?
A. The loan documents are consistent with what we had proposed for the loan.
Q. So is it your position that there was actually an

agreement to extend a full $2 million credit facility or that there was an agreement to agree on that pursuant to another set of loan documents in the future?

A. There was an agreement to loan $2 million. I would not have proceeded with the initial tranche of the loan not knowing that they were going to fulfill the remaining part of the $2 million loan. Because if they had only funded $500,000, based on what you're saying, they wouldn't have even been required to fund the second $500,000 after the initial tranche, which would have done me no good.

MR. NINE: And that's the basis of our damages, by the way.

MR. ROSSMAN: Is that an objection?

MR. NINE: Yep. Just --

MR. ROSSMAN: What is it, so the record is clear? Should we put you under oath, Mr. Nine?

MR. NINE: You may proceed if you want.

BY MR. ROSSMAN:

Q. Okay. So you proceed to close on the second tranche of the loan, correct, the second and final tranche of the loan?

A. Well, I wouldn't say final; the second tranche.

Q. It was the final, correct?

A. It wasn't supposed to be the final.
Q. But it was. There was no tranche after that?
A. I'm not going to agree it was the final.
Q. It was the final one that occurred, correct?
A. I'm not going to agree it was the final one. There was supposed to be --
Q. Did another one occur?
A. No.
Q. Was there anymore funding?
A. No, there wasn't.
Q. $1 million?
A. Correct, that's true, but it was not the final tranche.
Q. So September 23rd, the second $500,000 comes in, and what's the nature of the communication between the parties between September 23rd and the late October telephone call that you had with Mr. Simon and Paul; is it steady, is there a lot of talk and chatter, is there back and forth or is it pretty much quiet?
A. No, there's still -- there were emails that we were exchanging, bringing them up to speed on the properties that were being acquired at the auction, what the status of getting the deeds issued was and how we were moving forward and getting geared

up.
Q. And that email correspondence will be in the documentation brought to the deposition today?
A. I don't know if that was part of the documents that were requested or not, but I think there are documents in there that deal with those communications, yes.
Q. All right. Now prior to this conversation in late October, is there any discussion about $2 million and more money coming, more funding coming?
A. I'm sorry, say that again.
Q. Prior to this October discussion with Paul and Victor, is there any discussion regarding additional funding?
A. I don't remember. I think the purpose of the conference call on whatever day that was, the 16th, 18th, was to discuss the follow-on funding because I was getting to the point now where I had completed the purchase of the initial properties at the two auctions, the deeds were going to be issued by the Oakland County Treasurer's Office to those properties imminently, and I was going to need the next $1 million in order to start renovations.
Q. And did you send out any written request for the

additional funding or was it brought up only in this telephone call?

A. I believe I had had -- I believe I had a conversation with Paul Schapira about the final installment of the million of the $2 million and he said, "Let's schedule a conference call," so we scheduled the conference call.

Q. Now so the record is clear, when was it -- on what date was it that Paul Schapira, you allege, represented to you that $2 million had already been approved?

A. I don't remember without going back and looking through the emails and the timeline, but it was somewhere before -- it was sometime before August 12, 2016.

Q. Was it at one of the in-person meetings you had with him?

A. I don't think so. I think it was a telephone conversation that we had. In fact, if I remember correctly, my wife and I were out to dinner at Talula's in downtown Birmingham. Paul called me in the evening and pulled me away from -- well, I chose, I guess, to pull myself away from my wife -- and I talked to Paul and he told me, "I have good news for you. The loan or investment committee has

approved the $2 million loan. We'll close on the initial $500,000 now and then we'll close the remainder of the loan in stages as you requested so that you didn't have to pay the additional interest on the money you didn't immediately need."

Q. And was that before or after the August 3rd email exchange?

A. That was after.

Q. So his calling you would have been after August 3rd?

A. Correct.

Q. And so it would have been between August 3rd and August 12th?

A. Correct.

Q. And it's your testimony that based on that communication to you, a telephone call on an evening between August 3rd and August 12th, that you closed on the first tranche of the loan?

A. Correct. I mean, there were other email exchanges that were then taking place with the loan documents and things like that, but yes, if it hadn't been approved, they wouldn't be moving forward with the initial tranche of the loan.

Q. And so we're clear, you never received an actual document stating that it was approved?

A. How many times do you want to ask me this? I mean, honestly, Mark. I think the record is pretty clear at this point. The answer is no.
Q. So after the conversation with Paul and Victor, you send an email expressing your displeasure, correct?
A. No, I sent -- I had a conference -- I then called Paul Schapira and expressed my displeasure.
Q. And that's when you contend he said, "I know, I know"?
A. Correct.
Q. Did he ever concede to you, did he state to you in that telephone conversation that he had in fact told you or somehow agreed on behalf of the lender that it would be $2 million?
A. Well, he had agreed to do that before the August 12th, 2016, tranche, and in the context of the conversation, yeah, when he was saying, "I know, I know," he was admitting that he had told me it had been approved and that they had reversed course and no one had told me about it.
Q. Did he say anything else in that conversation other than, "I know, I know"?
A. The only other thing that I remember him saying over and over is, you know, "Please, please, let's just try and make the best of this situation."

Q. You can remember nothing else from the phone call?
A. No, those were the two things that stood out to me the most.
Q. How long was the phone call?
A. Not very long.
Q. What were your exact words that he said, "I know, I know," in response to?
MR. NINE: Oh, I object. Nobody can know exact words from 2016. That's absurd.
MR. ROSSMAN: Well, he's contending that it's the basis of a breach of contract and a fraud claim and particularity does require that.
MR. NINE: Particularity is different than exact.
BY MR. ROSSMAN:
Q. Well, I would like to know, to the best of your recollection, what the exact words preceding the exact words that you're contending he said to you.
A. I said, "Paul, we had discussed all along a $2 million loan. You told me before we closed on the initial $500,000 loan that the loan committee had approved the $2 million. You have left me woefully undercapitalized."
Q. Do you have any notes regarding this telephone conversation?

A. I don't think so.
Q. Did you record the conversation?
A. No.
Q. Did you ever record any conversations between yourself and anybody from Soaring Pine concerning the subject matter of this case?
A. No.
Q. You laugh, but these days you would be surprised, people actually have apps on their phone that record all of them.
A. No, I realize that. I wasn't laughing at you, it was more laugh at disgust that people do that now. It's just not something that I do.
Q. It's incredibly common. It surprises me.
A. It's just not something that I do. These were -- except for Paul Schapira who I had just met as part of this, these were guys I knew. I mean, I'm not saying they were close friends, but these were people that I had worked with since 2007. I mean, it's just not something I would have done.
Q. Now you indicated you sent a follow-up email after the conference call and after your other call with Paul, correct?
A. I mean, this was well after. This was in 2017 sometime.

Q. Okay. So the email you referenced earlier where you're saying, "Hey, what's up with this," you know, you're telling me that was all the way out into '17?
A. Correct, because it was about the time that Paul Schapira had lost his job.
Q. In the more immediate aftermath of the conversations between yourself and Victor and Paul and subsequently Paul, what communications did you make with Soaring Pine regarding the amount of the credit facility?
A. Paul and I would have updates periodically and I would keep bringing this up to him because they would press me on why I wasn't making progress faster and I would keep reminding him it's because you cut the legs out from underneath me by cutting the loan facility in half without telling me about it before the first or initial tranche of the loan.
Q. And in October 2016, though, after you had these telephone conversations, you didn't follow up more immediately in writing on the subject of the amount of the funding?
A. I did not.
Q. Why did you not do that?
A. I had consulted with a lawyer and we collectively

decided that it would not be a good idea.
Q. From your personal perspective, why did you believe that it wouldn't be a good idea?
A. I had worked with these guys since 2007, I knew the corporate culture of the organization, and it would have created a very difficult situation because the only other option would have been for me to say, "Look, you either lend me the additional $1 million on the same terms and conditions as you had loaned before, as we had agreed, or here are a bunch of properties in Detroit, this satisfies the loan, you figure it out." That would not have gone over well.
Q. So what was your plan at that point in time?
A. The plan was I was going to try and rehab the properties with what little capital I had left over as quickly as I possibly could and to also see if I could supplement the capital that I might have available to me for that purpose.
Q. The money that was loaned through these loan documents, how was it used?
A. Acquire properties at the auction, to rehab some of the properties that were purchased at the auction, it was also used to rehab some other properties that were not purchased at the auction,

and then some operating expenses.

MR. NINE: When you say acquired at the auction, does that mean taxes and water or whatever else has to be paid at the auction?

THE WITNESS: Correct. You don't have to pay water, but you do have to pay bid price plus the summer taxes plus there's like an administrative fee.

BY MR. ROSSMAN:

Q. Have you produced the documents which would show the expenditures of these funds?

A. Yes.

Q. And are those in the materials provided here today?

A. I think I already provided them to Mike Evans, so I didn't produce them a second time; Mike Evans and Steve Morris.

Q. And what would those documents consist of?

A. The e-confirmation payment receipts from the Oakland County Treasurer, quotes from contractors, invoices and service agreements from independent contractors, and I also believe there were some bank statements that corresponded to the wire transfers into the account and wire transfers out of the account to the Wayne County Treasurer and the payments to the contractors.

Q. Now when you then, a few months into 2017, sent this correspondence outlining your position regarding the funding amount, was that by email?
A. Yes.
Q. Okay. And do you have a copy of that email here today?
A. I don't think it's here today, but I will produce it to you.
Q. Just generally, what did you say in that email?
A. I don't remember exactly. I remember the project was not going as planned at all in large part because it was undercapitalized. Soaring Pine was frustrated that the project was not moving along faster and I was frustrated and disappointed that they didn't seem to understand that when they promised to lend $2 million and then only loaned $1 million, how that would have a profound material negative impact on how quickly you could turn over the properties and how much you would have available to you for operating capital.
Q. And what was the response to that?
A. I didn't get a response from Paul. I ended up getting a telephone call from Paul saying that he was leaving Soaring Pine, that he had enjoyed the relationship and wished me the best of luck.

Q. You might have mentioned this, but who did you write that email to?
A. Paul Schapira.
Q. Oh, just Paul?
A. Just Paul. Paul was the managing director of the fund. He was, by far, my primary contact on this. I mean, it was very unusual to have any contact with anyone else about the loan until after Paul left and then I started talking with Mike Evans.
Q. About what period of time did you start talking with Mike Evans?
A. It would have been sometime in the spring of 2017. I think Mike -- I can't remember if Mike called me or if I called Mike after I had had the discussion with Paul Schapira and then Mike had filled me in on some, if true, very disturbing things about Paul Schapira.
Q. And what did he tell you about Paul Schapira?
A. He told me that Paul had contracted syphilis from sleeping with strippers and passed it along to his wife, who had a liver disorder, and that the syphilis had coffered some mental and emotional problems for Paul Schapira and he had been either voluntarily or involuntarily institutionalized because of it.

MR. NINE: That's always interesting in your transcript.

MR. ROSSMAN: Just when you're about to doze off.

THE WITNESS: Simple business dispute...

BY MR. ROSSMAN:

Q. Did you discuss any matters concerning the funding and the loan?

A. Yes.

Q. And with Mike Evans during these subsequent phone calls?

A. Yes.

Q. And what was the nature of those discussions?

A. Mike's a very reasonable guy, very likable guy, straight-forward guy. He was saying, "Dean, what do we need to do to get this back on track?" because there had been problems with the loan. I said, "Mike, I wish that it had gone better," I said, "but here's the basic problem: Paul told me I had been approved for $2 million loan, I only then received a million dollars. I've now been, you know, swimming against the stream trying to have enough operating capital to be able to renovate these properties and I'm having trouble selling the properties to investors because the

investors want a completely turnkey operation. They want a renovated property with a tenant who is already paying rent, and if you can't renovate the properties, it's difficult to pull the properties together to do that."

And Mike said -- Mike didn't say anything about whether or not the $2 million had been discussed or approved, although he had to have known that it was being discussed because he was copied on that initial August 3, 2016, outline, but he did say to me, "I'm not surprised."

Q. And what did you take that to mean?

A. That he wasn't -- based on what he had learned about Paul Schapira, he wasn't surprised by anything that Paul had done or not done, that they -- he didn't get into -- well, other than the juicy part, he didn't get into specifics about how any of these things may have affected Paul's job performance.

Q. And in this early 2017 telephone call or series of telephone calls where you were discussing this subject matter, what ultimately was the understanding between you and Mr. Evans on how the parties would proceed?

A. We didn't come up with a plan as part of that

conversation. We agreed that we would talk again later after we both had a chance to think about it, but he told me that he was under pressure from Soaring Pine's investors to be able to find a solution to this and to get the interest payments flowing again, that they were not as concerned about the maturity of the note as they were about the income stream from the monthly interest payments, and then we could figure out how to retire the loan.

Q. And what was your perspective at that point in time with respect to the possibilities of retiring the loan?

A. I thought the chances of retiring the loan were slim to none. There was no way you were going to be able to generate enough money to be able to pay off the loan along with all of the juice and carrying costs and closing costs that had gone along with it.

Q. And did you express that to Mr. Evans?

A. I did.

Q. And what was his response?

A. "Dean, we've got to figure out a way to get this resolved. The investors are putting pressure on me to get this loan performing again."

Q. And did you tell him that you believed it couldn't be done?
A. I told him I thought it was going to be exceedingly difficult to get done, that I might be able to get the interest payments flowing again, but the chances of getting this thing retired and back on track were going to be really difficult without additional capital.
Q. And at this point in time, Park Street was in a state of default, correct?
A. Yes.
Q. When did Park Street's default under the loan documents arise?
A. I don't remember exactly, but I think it would have been either July or August of 2017. Basically it was the last two interest payments under the loan before the note matured.

MR. NINE: Before you start, can we take a restroom break?

MR. ROSSMAN: Yeah, yeah, for sure.

(Whereupon a break was taken from 2:18 p.m. to 2:33 p.m.)

BY MR. ROSSMAN:

Q. So the defaults initially arise in July or August of 2017, correct?

A. I believe so, yes.
Q. And do you have a discussion with Soaring Pine at that point?
A. Mike and I were having ongoing discussions beginning about the time that Paul Schapira had left or been let go from Soaring Pine.
Q. What was the nature of the conversation at the time when the defaults first arose?
A. Well, like I said, Mike said that he thought the investors were less concerned about the maturity date of the note than they were about getting the return on investment that they had expected.
Q. So that's when you're trying to make those payments, at that point in time?
A. Correct.
Q. And nobody is very worried about the maturity date, it's like, "Let's get this thing cash flowing"?
A. Correct.
Q. And does that ever happen?
A. No.
Q. During this process, are you working alone at Park Street or do you have employees, people working with you, contractors? I mean, outside of the people in the field doing the work, who are obviously hired -- I mean, are you running this

operation single-handedly?
THE WITNESS: So which timeframe are you talking about?
MR. NINE: Timeframe, yeah.
MR. ROSSMAN: Around the time of the default.
THE WITNESS: Yeah, essentially, I am -- yes, I am operating this project by myself independent of any, as you said, contractors who may be doing any renovations or rehabilitation work for any, like, outside brokers or agents that I might be utilizing to try to help me sell the properties in whatever state of condition they were in at the time.
BY MR. ROSSMAN:
Q. Now at the beginning of the term of this loan in August of 2016, were you on your own then or were you working with others?
A. I was essentially on my own. The only other person that was assisting me was David Prentice. I think you'll see from some of the emails that were being exchanged, he was providing information for me to pass along to Soaring Pine. David ended up leaving to spread his wings and do his own thing, I think, as of about October 1st.

MR. NINE: '17?

THE WITNESS: '16.

MR. NINE: '16.

BY MR. ROSSMAN:

Q. Did you say October 1st?

A. Yeah, right around October 1st, 2016, he opened an office downtown and then devoted his time and attention almost exclusively to Home Team Detroit at that point.

Q. Now as I understand it, Park Street acquired a certain number of properties out of the 2016 tax foreclosure auction, correct?

A. I had paid for them. I think they ended up going into Brittany McGee or Dean Groulx's names because of an administrative mistake, but yes, Park Street paid for the properties at the auction.

Q. How many were acquired at the auction?

A. I don't remember the exact number, but for some reason, 42 comes to mind.

Q. So that approximately 40, give or take, 40-plus properties, were acquired at the 2016 tax foreclosure sale with the funds that Soaring Pine advanced on credit, correct?

A. Correct.

Q. Now was it also simultaneously your responsibility

while you were managing these properties, the tax foreclosure properties that were purchased in 2016, to manage certain of the real estate assets that had previously been acquired in the Park Street Group, LLC, enterprise?

A. No.

Q. Okay. That body of property, how is that being administered or handled?

A. The pool of -- the pool of properties that were not pledged as collateral for the loan were being administered and liquidated by Glenn Prentice and David Prentice; primarily Glenn.

Q. And was it liquidation of those properties that was the effort -- the effort was to sell them and be done with it?

A. Correct, correct; the properties, the notes, the mortgages. Any assets that had not been pledged as collateral for the Soaring Pine loan were supposed to be liquidated.

Q. The properties that were pledged, am I correct that it was a certain number of the properties that had been acquired previous to the tax foreclosure properties, plus the tax foreclosure properties that were acquired in 2016?

A. No, that understanding is incorrect.

Q. Can you correct my understanding?
A. Yeah, the only properties that were pledged as collateral security for the loan were properties that Park Street Group already owned before the August 12, 2016, closing. Soaring Pine never had a lien or a security interest in any of the properties that were acquired at the tax auction.
Q. Why was that?
A. A, there was already sufficient collateral based on the loan-to-value ratio that Soaring Pine had established; B, with the larger credit facility that we had discussed, they would have had $3 million in assets securing $2 million in loans, and Soaring Pine was satisfied with that, and ultimately the idea was that we would be moving relatively quickly in and out of these purchases as we rehabbed the properties and sold them. This was not supposed to be a project where we purchased the properties and then held onto them for a year. We were renovating them, trying to get them leased and then sold to investors so that we could then turn over the cash and go to other sources to buy more properties and keep turning over.
Q. And I'll get into the concept of substitute

collateral a little more specifically in the documents shortly, but in the meantime, can you explain to me what happens -- the pledged properties are those properties that are income-deriving, are they rental properties, are they properties that are on the block and you're trying to sell or are they on lockdown and they can't be sold; what was your view there?

A. The vast majority of the properties that were pledged as collateral were not income-producing.

Q. What would be the plan with those properties; were they for sale, were they under development?

A. They were for sale.

Q. Okay. And so the idea was that if one would sell, then it would be replaced, if necessary, to achieve the required debt ratios, loan-to-debt ratio, right?

A. Correct.

Q. And was -- what would you say David Prentice's role was before he left in October 2016; was it limited to dealing with the properties that weren't pledged or was he also assisting with the pledged properties and perhaps the development of the tax foreclosure properties?

A. The short answer is I guess it depends on -- I

guess it depends on perspective. What I didn't know is that David had decided to leave to do his own thing. He had been working with his father since he was 15 or 16 and I think wanted to kind of go off and do his own thing and see if he could sow his oats and make his own mistakes and make his own fortune.

My expectation was that David and I were working on this together and that we were -- he was going to help me both manage this project that I had undertaken as well as liquidate the non-pledged assets to close out that partnership.

Q. Now as I understand, a default notice was issued on the loan in December, correct?

A. Of 2017, correct.

Q. Okay. So six or so months go by, interest payments aren't even being made and Soaring Pine calls the loan in, right?

A. Yes.

Q. Did you have any discussions leading up to that with Mike Evans or anyone else at Soaring Pine?

A. Mike and I had ongoing discussions from, like I said, about the time Paul Schapira was left or was let go up until the filing of the lawsuit really. He did not tell me that a notice of default was

being sent.
Q. And that notice of default was sent from Frank Simon's office, correct?
A. Correct.
Q. And did you respond in writing to that notice of default?
A. I didn't respond at all.
Q. Why not?
A. There was nothing to say. I was already having discussion with Mike Evans; he already knew what the position was.
Q. Did you have any discussions between the time the notice of default was issued and the time when the lawsuit was filed?
A. I don't remember.
Q. Not many, though? Was it pretty quiet at that point?
A. I don't remember one way or the other, in all honesty.
Q. After the default was issued --
A. By then we had pretty much reached an impasse. They had an expectation that I wasn't going to be able to meet, I had an expectation that they weren't going to -- that they were unwilling to fulfill and there was not a solution to the

problem.
Q. And what were you doing business-wise in this period of default; were you continuing on business as usual, were you selling properties off, or what was happening there?
A. So I was trying to sell the properties, like I said, in any condition in any way possible with any reasonable offer.
Q. And how was it going?
A. Well, it was a tough slug because most of the properties had not been renovated, they were now -- you know, these were already -- these were nice properties in nice neighborhoods in Detroit, but these were still properties that had gone to tax sale, so they all had problems, and you were now, you know, a year and a half further along from when the tax forfeiture had happened, and, you know, some of the properties were -- most of the properties were vacant, they had not had work done on them, they had not had utility service, they had another year and a half of taxes, water and sewage fees that had been added to the tax rolls.
Q. And who were the typical buyers for these properties; was it outside investors, was it people who were going to live in the homes?

A. All of them were outside investors.

(Marked for identification:
Deposition Exhibit No. 1.)

BY MR. ROSSMAN:

Q. I'm going to show you what I've marked as Exhibit 1. It's a letter from the receiver in this case, dated May 30, 2018. Have you seen that document before, sir?

A. I don't remember seeing this document.

Q. The information that's identified in there, do you know whether that documentation has been produced to the receiver?

A. I believe it wasn't produced because we concluded that the receiver wasn't entitled to it.

Q. How did you determine that he wasn't entitled to it?

A. The receiver had only been appointed a receiver over the collateral, not any of the business entities, and at that, only took title from Park Street Group, LLC, had no receivership responsibilities in regards to Park Street Group Realty Services.

Q. Would you agree with the statement after the numbered paragraphs that provides, "Even if the assets were not encumbered, the liquidation value

is substantially less than the debt"?
A. I don't know what he's referring to. What assets is he referring to? The assets your client -- I don't know what assets he's referring to that I provided to the court. I didn't provide any assets to the court.
Q. At the point in time that the receiver was appointed, did Park Street Group Realty Services or Park Street Group, LLC, have any assets?
A. Park Street Group, LLC, did, yes.
Q. But Park Street Group Realty Services did not have any assets, correct?
A. Correct, it never did. It never held title to any of the properties, which is the reason why Soaring Pine asked that Park Street Group guaranty the loan to the extent of the collateral.
Q. The collateral that was pledged, do you believe that the liquidation value of that collateral was substantially less than the debt?
A. I'm not sure about that.
Q. What makes you say that?
A. Well, for one thing, this particular receiver, it was pretty clear, was ill-equipped to be able to liquidate what collateral was available to satisfy the indebtedness. Despite the receiver claiming

in a report to the court, I believe in May of 2018, that he could not liquidate the collateral except at a loss, I was able to liquidate some of the collateral for a pretty significant profit.

Q. And the proceeds of the collateral that was liquidated, how were those applied?

MR. NINE: Could I ask you just to make sure we're talking about the same thing? Are you talking after or without rehabbing? Because the plan was rehab. Are you asking that?

MR. ROSSMAN: I'm talking about the pledged collateral and it's -- whatever state it was in.

MR. NINE: Okay. In whatever state it was in.

MR. ROSSMAN: I'm not talking about the foreclosure assets.

MR. NINE: Okay.

MR. ROSSMAN: I'm just talking about the pledged collateral.

THE WITNESS: Yeah, I mean, there were all sorts of liquidation strategies for the collateral. You could sell the collateral as is, which the receiver said he couldn't do, and I was

able to do in a few instances as just a gesture of good faith when we were trying to settle the case; you could have rehabbed some of the properties that were pledged as collateral and significantly increased their fair market value and sold them for a significant amount of money to pay down the indebtedness.

The receiver, for whatever reason, was ill-equipped to be able to understand these assets in their location or various strategies to be able to liquidate the collateral.

BY MR. ROSSMAN:

Q. So do you believe, as of May 30th, 2018, that the pledged collateral was or was not less than the debt outstanding at that point in time?

A. Well, the adjective used in this letter is substantially less than the debt. I would not agree that it was substantially less than the debt. There were various liquidation strategies that the receiver could have employed to raise a significant amount of money from the sale of those pledged properties to reduce the indebtedness.

Q. And what happened with those pledged properties; what's the state of them, are they still there and pledged or were a certain portion of them sold off?

A. You would have to ask the receiver.
Q. You have no knowledge of that?
A. I don't. My assumption is that the receiver has done nothing with regards to the pledged assets and they are still encumbered by Soaring Pine's lien.

(Marked for identification:
Deposition Exhibit No. 2.)

BY MR. ROSSMAN:
Q. I'll show you what we've marked as Exhibit 2, a Thursday, May 31, 2018, email, from your prior attorney to the receiver, Brian Fitzgibbons -- Dan Newman and Brian Fitzgibbons, the receiver. Have you seen those emails before?
A. I think I did see these emails before.
Q. Now if you look at the May 23rd at 9:45 and you have the receiver email --
A. I'm sorry, what --
Q. There's no page numbers, but May 23rd, 9:45 a.m. I think it's a couple of pages in?
A. From Mr. Yeomans to Mr. Ribiat?
Q. Yeah.

Now there's reference to the 40 properties, and those would be the 40 properties pledged as collateral, correct?

A. I don't know, you would have to ask Mr. Yeomans.
Q. But there were approximately 40 properties pledged as collateral, correct?
A. There were.
Q. And you would agree with me that certain of those properties, there were recorded mortgage releases, correct?
A. Yes.
Q. Does four instances in that regard ring a bell?
A. I don't remember.
Q. Why were certain of the mortgages on those properties released?
A. We were in -- I was anticipating that those properties were going to be sold and that the proceeds were then going to be used to pay down the loan or substitute collateral would have been offered.
Q. Now the mortgages, were those the mortgages held by Soaring Pine?
A. I don't know, you would have to ask Mr. Yeomans.
Q. Well, under the way that these deals were structured, would Soaring Pine have a mortgage, a first lien mortgage, on the collateral properties?
A. The structure of the transaction, they were supposed to have a first lien mortgage.

Q. Now are you aware of any instance in which Soaring Pine's first lien mortgage was released with respect to any of the collateral properties?
A. Yes, Mike Evans did sign releases to some of the properties, yes.
Q. Okay. And were there ever any instances where the properties were released and someone from Soaring Pine didn't execute the release itself?
A. Not as far as I know. I did hear from Sam Abdu that Queshua Investments' representatives had indicated when they were approached that they had closed on the purchase of whatever properties they had acquired through a title company and that they had obtained mortgage releases.

Soaring Pine, as far as I know, had never provided mortgage releases, I had never requested mortgage releases, and if it were closed through a title company, I don't believe the title company would have closed without the mortgage releases and insured title, so that was the only instance where I was aware where there might be an issue with a forged or bogus mortgage release.

And when Mike and I were trying to resolve this case, I told Mike that if he had copies of whatever the bogus mortgage releases were, that

could very well provide you with leverage to get money out of Queshua Investments to be able to satisfy the indebtedness.

Q. So you think -- is it Queshua?

A. I honestly don't know how it's pronounced.

Q. Queshua Investments, you believe, may have been involved in some kind of bogus mortgage release?

A. According to Sam Abdu. I don't have any personal knowledge of it independent of what Sam Abdu had told me.

Q. And what exactly did he tell you?

A. That the Queshua representatives had told him that they had obtained mortgage releases and closed the transaction through a title company, but they could find no evidence that the mortgage releases had in fact been recorded, which led me to believe that it was a bogus claim.

Q. Okay. Now certain of the properties, and in this correspondence purports to be all but one, were deeded to third parties; are you aware of that?

A. That was not true.

Q. Okay. So that's incorrect?

A. That is incorrect.

Q. Okay. So the collateral properties --

A. There were some properties that had been deeded to

third parties, but it wasn't all but one.
Q. Now when you say third parties, you mean parties other than Park Street Group, LLC, correct?
A. I'm just referring to what they said in the email, but yes, they were deeded to someone. They were not -- park Street Group already held title, so it had to have been titled to someone other than Park Street Group. It was someone unaffiliated or unattached to Park Street Group.
Q. And why were these properties deeded to -- outside of Park Street Group?
A. What I learned after the fact is that David Prentice, who is now in an office in Detroit separate from me, was keeping lists of when the Park Street properties may face tax forfeiture. The properties that were deeded were facing tax forfeiture. Without recalling or knowing that they had been pledged as collateral for the loan, he then deeded the properties for $500 a piece to third parties, who then agreed that they would pay, on their own, the delinquent taxes on the properties or else they would face losing the properties.
Q. And is it your testimony that that was done without your knowledge?

A. It was absolutely done without my knowledge. I did not know about it ahead of time.
Q. Would you have approved of that if you had known?
A. I would not have. I would have, however, contacted either Paul Schapira -- well, Paul Schapira -- and said, "Listen, these properties are at risk of tax forfeiture. If you want to preserve your lien, you're going to have to pay what would have been at that time the 2015 taxes."
Q. What would have been the incentive of a third party to take title to this property when it's subject to the Soaring Pine mortgage?
A. I don't know if they knew about the Soaring Pine mortgage. They took -- again, I wasn't involved, it would be pure speculation on my part, but I think all of the properties were transferred pursuant to quitclaim deeds. I don't know what was said or disclosed or anything at all about the Soaring Pine lien, or, like I said, David, I think, for whatever reason, lost track of what properties had been pledged as collateral and transferred the property to avoid tax forfeiture.
Q. Did you ever talk with David about this?
A. When it was brought to my attention -- after it was brought to my attention by Simon, PLC, I had an

immediate conversation with David.
Q. And what did David tell you?
A. "Oh, shit."
Q. What was the level of David's authority to do that? Obviously the properties were originally titled in Park Street Group, correct?
A. Or DMP Holdings and then transferred to Park Street Group.
Q. Okay. So he would have had legal authority to sign a quitclaim deed on behalf of either of those entities?
A. Yes.
Q. And you recognized this would be a problem because it would violate the loan covenants, right?
A. I recognized that it was a problem straight away.
Q. And when did you learn about it?
A. Simon, PLC, sent me an email in May or June of 2017.
Q. So they would have been looking at title and seen it and they emailed you about it?
A. Correct. They were doing -- they were periodically reviewing taxes, water, status of title. They saw the transfers and brought it to my attention.
Q. All right. And how did you respond to it?
A. "Oh, shit."

Q. But you emailed them back, correct, and explained what had happened?
A. I didn't know at that time what had happened. I was still trying to get information. They had told me -- initially all they said was they wanted to set up a meeting without disclosing what the topic was. I then said, "Can you tell me what the topic is?"

They then told me that there were some -- I don't remember what it was -- some vague reference to the administration of the loans or something. I said, "Well, can you be more specific?"

They then finally told me what had happened, and I said, "Well, would you please forward to me copies of the deeds to the third parties so that I can investigate this?"

Q. Okay. This is right around the same time that the monetary defaults arose, correct?
A. A little before, yes. It would have been 60 days before.
Q. And what was then to rectify the diminished collateral value because of the transfers?
A. Well, there was no diminishment in the collateral value.

Q. Well, the overall amount of the collateral that held the security for the loan would have diminished because certain assets were being transferred out of the portfolio.

A. But without the mortgage being discharged. You just asked me earlier why would someone take title without a mortgage discharge and they didn't take a transfer with the mortgage discharge. Every single one of those properties is still subject to Soaring Pine's mortgage.

Q. So in your opinion, it's no harm, no foul?

A. I don't know if I would say no harm -- look, in substance, yes, Soaring Pine is in exactly the same position whether Park Street Group holds title or a third party holds title who took title subject to Soaring Pine's mortgage.

Is there a contextual problem? Yeah, there was a contextual problem. I had my lender coming back to me and saying, "What in the world is going on that 23 properties or however many it was had been transferred to third parties? Why was it for $500 as the stated consideration on the deeds?"

Q. This concept of substitute collateral, what was that?

A. Well, the concept of substitute collateral was really only for -- was that if one of the properties was -- that was subject to a lien was sold, that we would offer up substitute collateral of equal or greater value to replace that property.

Q. But it wasn't -- the concept of substitute collateral didn't factor into the properties that were deeded out of the portfolio?

A. No, mostly because I didn't know about it. I had no prior knowledge or premonition that this was happening or that it had happened.

Q. Now your lawyer seems to echo something that you said a couple of pages up on May 31st. He says, "My fear is that many of those transactions were initiated by Dean's former partner." Now that would be a reference to David Prentice?

A. Yes. And it became clear that David's overarching consideration was that these properties were going to be forfeited for an imminent loss for tax forfeiture and he did not put into context that they had been pledged as collateral for the loan. I don't know why he overlooked it; I mean, I have my own suspicions that -- I don't know how much you know about David or people have shared with you, but David was diagnosed with the same type of brain

tumor that Senator McCain had, and had surgery, and the tumor clearly affected his motor skills, memory, his ability to recall, and at this time, I'm not even sure he knew that he had -- at this time he did not know he had the tumor.

Q. Okay. So fair to say there were some physical issues he was dealing with, psychological?

A. Yes, without him -- without him knowing that it was related to a tumor. He ultimately collapsed in his home, and fortunately his wife was there and they rushed him to the hospital, and after performing a CAT scan, they discovered the tumor.

MR. ROSSMAN: Can I just pop that exhibit on here?

THE WITNESS: Sure.

MR. NINE: What number is that one?

MR. ROSSMAN: That exhibit was No. 2.

(Marked for identification:
Deposition Exhibit No. 4.)

BY MR. ROSSMAN:

Q. I'm going go show you what we've marked as Exhibit No. 4. Do you recognize that document?

A. I do not.

Q. Have you ever seen that before?

A. No.

Q. And you weren't aware that a press release was issued by Soaring Pine upon the closing of the loans that were actually made?
A. I did not.
MR. ROSSMAN: What are you laughing at?
THE WITNESS: They even attribute a quote to me that I never made.
MR. NINE: As long as they spelled your name right, no problem.
THE WITNESS: Yeah.
(Marked for identification:
Deposition Exhibit No. 5.)
BY MR. ROSSMAN:
Q. I'll show you what's been marked as Exhibit No. 5. Exhibit No. 5 is a June 17, 20 -- June 7, 2017, email from you to an attorney at the Simon Law Firm. Do you recognize that document?
A. Yes.
Q. Why did you send this email?
A. This was in response to the email I had received from Simon, PLC, notifying me about the transfers of some of the collateral properties to third parties.
Q. And in that document, it indicates that eighteen of the properties were transferred, correct?

A. Yes, in the email that I believe Ms. McKeever had sent to me, she had said that 18 had been transferred, so I was parroting what she had said.
Q. And in the second paragraph, you indicate that none of the properties were actually transferred out of the collateral pool because the lender's mortgage is still intact?
A. Correct.
Q. So what's your definition of a property actually being within the collateral pool?
A. Still subject to the lender's lien.
Q. So it's not that the borrower or the guarantor actually held title to it?
A. It would be immaterial from the lender standpoint in being able to enforce and foreclose on its lien whether it was titled in the borrower's name or the guarantor's name. The lien was still in place.
Q. But the transfer, nonetheless, did breach the loan documents?
A. Yes.
Q. But it's your position that it's an immaterial breach?
A. I believed it was an immaterial breach. I understood why they were upset about it, but as far as their lien position, it remained unchanged.

Q. On the next page, the third -- one sentence -- paragraph down, you write, "All of the properties pledged as collateral to Soaring Pine are titled in the name of PSGRS and not Park Street Group, LLC." Is that a correct statement?
A. No, that was incorrect. I meant the opposite and for some reason got confused with the two entities.
Q. Same with the following paragraph --
A. Correct.
Q. -- that's confused?
A. Correct. The remainder of the statements, I think, are accurate.
Q. "Therefore, Park Street Group did not and could not convey title." That's in error, too, correct?
A. Correct.
Q. Do you think it's an accurate statement, second from the bottom, where you state, "Thus, the lender's security interest has not been impaired or devalued in any way"?
A. Yes.
Q. So you don't believe the transfer of the property in violation of the loan documents impairs or devalues the security interest in any way?
A. Not in any way. Soaring Pine still has a lien, the lien position is exactly the same as it was prior

to the transfer, Soaring Pine still retains the right to enforce the lien and to foreclose upon it if it elects to do so.

Q. In the following paragraph, you reference that certain real estate taxes were paid and so this actually resulted in an increase of the value of the collateral, correct?

A. Correct.

Q. Where -- is there evidence that the taxes were paid upon the transfer of these properties?

A. Yes. If you -- if one looked up on the Wayne County Treasurer's tax delinquent payment website, they would see that the 2015 taxes had been paid.

MR. NINE: Is that true of all the properties that were transferred or only some of them?

THE WITNESS: As far as I know, it was true of all.

BY MR. ROSSMAN:

Q. What do you base that knowledge on?

A. I looked up some of them and was told that the transferees had, in fact, paid the taxes or entered into tax payment plans with the city treasurer.

Q. Who told you that?

A. David Prentice.

Q. So you're relying on David's representations to conclude that, at least with respect to the properties that you didn't look up, that the taxes were paid on these properties?
A. Yes. If they hadn't been paid, Soaring Pine's lien would have been wiped out with the tax forfeiture. Presumably the receiver would have discovered that and wouldn't have continued to file a report saying that the lien was in force if that weren't true.
(Marked for identification:
Deposition Exhibit No. 6.)
BY MR. ROSSMAN:
Q. I'll show you what we've marked as Exhibit 6. It's a March 17, 2017, email from you in which you're providing CMA reports for three separate properties, correct?
A. Correct.
Q. And in there, you indicate that the value is $239,500, more than 236,448, and CMA value of the collateral these properties would replace. So in this instance, you're talking about the substitute collateral for properties that had been sold, correct?
A. In anticipation of properties being sold. They had not been sold as yet.

Q. Why are you sending this email at this point in time?
A. To inform Soaring Pine that some of the collateral pledged to security for the loan might be sold and that there would be -- and the offer of replacement collateral. I don't believe these ever closed.

(Marked for identification:
Deposition Exhibit No. 7.)

BY MR. ROSSMAN:
Q. Okay. I'll show you what we've marked as Exhibit 7, a Thursday, June 15, 2017, email from you. Have you seen that email before?
A. Yes.
Q. The three properties serving as substitute collateral that's referenced five paragraphs into the letter, what properties are you referring to; are they the properties in the previous email?
A. Yeah, if you look back at Exhibit 6, it's referring to 16744 Oakfield, 15762 Gilchrist and 17320 Fielder.
Q. So what you're saying there is those properties went up for sale and they wouldn't be available as replacement security, correct?
A. Correct.
Q. Was Soaring Pine satisfied with the substitute

collateral that was being offered at that point in time?

A. I don't think they made a decision one way or another because I had indicated to them that it was no longer available to serve as substitute collateral.

(Marked for identification: Deposition Exhibit No. 8.)

BY MR. ROSSMAN:

Q. I'll show you Exhibit 8 --

A. But coming back to that, Mike Evans did go out and look at all three of the properties back in March of 2017.

Q. On the last page of this email chain between you and Mike Evans in what we've marked as Exhibit No. 8, you indicate that the title company is still waiting for some quiet title judgments to be returned, but it shouldn't be much longer. What are you referring to there?

A. So when you purchase properties at a tax sale, in order for a title company to ensure title, they have to be able to satisfy themselves that all interested parties received notice of the tax forfeiture or foreclosure, otherwise, their interest is not extinguished under the General

Property Act.

So when the title company does a title search, it will also serve a Freedom of Information Act request to the treasurer's office and ask for the treasurer to provide verification that all interested persons in record title have received notice. If the title company concludes that they have not received notice, then they have to start a quiet title action to extinguish that person's interest.

Q. Okay. And the quiet title action, was that pertaining to those -- the judgments that you were waiting on, did that pertain to the three properties you were proposing to serve as substitute collateral?

A. I don't think so, but I don't know for sure. There isn't a reference in this to what properties it's referring to.

(Marked for identification:
Deposition Exhibit No. 9.)

BY MR. ROSSMAN:

Q. In Exhibit 9, you reference that Wayne County debited your account three times and that created some kind of issue. Do you recall what that was?

A. Yes.

(Marked for identification:
Deposition Exhibit No. 10.)
BY MR. ROSSMAN:
Q. And before you explain that, is that the same issue that's referenced in Exhibit 10, the $760,000?
A. Yes.
Q. Okay. And can you describe for me what that is?
A. Yes. At the -- I think it was sometime in October of 2016, in connection with the tax auction, I had scheduled an online payment to purchase the properties. The enter button was particularly temperamental, and so when I pressed it, it appeared as if it hadn't gone through. I then clicked it two more times and so the treasurer's office then debited my account three times for the same transaction.
Q. Okay. And what did you do to resolve that?
A. Contacted the treasurer's office and asked for the charges to be reversed.
Q. And how did that affect the administration of the collateral property under the loan documents?
A. I don't know that it affected the administration of the collateral properties because these were properties that were being purchased at the tax

auction. What it did do is take much needed capital out of the company to be able to move forward with renovations on a timely basis.

(Marked for identification:
Deposition Exhibit No. 11.)

BY MR. ROSSMAN:

Q. Exhibit 11 is a page from your responses to plaintiff's second discovery requests directed to all defendants and you indicate in there that you and Mr. Prentice decided to end your business -- your partnership. Can you give me an exact date on when that partnership ended?

A. I think the official date would have been probably October 1, 2016.

Q. What made that date official?

A. That was the date he moved out of the office here in this building. I had been renting the space immediately next door to the law office as the real estate office and David left not only himself, but with all of the administrative staff.

Q. Does the name Leo Brown mean anything to you?

A. I think Leo Brown called me after the receivership appointed me, but otherwise, no.

(Marked for identification:
Deposition Exhibit No. 12.)

BY MR. ROSSMAN:
Q. Do you know why there's a deed in Exhibit -- what we have marked as Exhibit 12 deeding property to Leo Brown? Was that property sold to him?
A. I have no idea. Never met Leo Brown as best -- I don't know.
(Marked for identification:
Deposition Exhibit No. 13.)
BY MR. ROSSMAN:
Q. Does Exhibit 13 look familiar to you?
A. No, never seen it before.
Q. Does the form of the document -- have you ever seen that type of document before?
A. I have never seen this form document before.
Q. Do you know what the mortgage help for hardest hit is?
A. No idea.
THE WITNESS: Could we stop for a second so I can get a bottle of water?
MR. ROSSMAN: Sure.
(Whereupon a break was taken from 3:31 p.m. to 3:36 p.m.)
(Marked for identification:
Deposition Exhibit No. 14.)
***

BY MR. ROSSMAN:
Q. Let me show you what's been marked as Exhibit No. 14. Is that the mortgage note reflecting the first $500,000 advanced by Soaring Pine to Park Street Group?
A. Park Street Group Realty Services, yes.
Q. And that's your signature at the end of that document?
A. Yes.
Q. And you were involved in the drafting of that document?
A. No.
Q. Did you make edits or revisions to that document?
A. I don't remember making edits or revisions to this document.
Q. Did you have an ample opportunity to review it before you executed it?
A. Yes.
Q. Did you consult with counsel in connection with that document?
A. No.
Q. You relied on your own legal expertise?
A. Yes.
Q. And you executed it on behalf of Park Street, correct?

A. Park Street Group Realty Services, yes.
Q. And the date of that document is August 12, 2016, correct?
A. Correct.
Q. And is there any mention in that document of any additional funding subsequent to this $500,000?
A. I don't think so.
Q. Take a minute to look through it.
A. Again, I don't think so.

(Marked for identification:
Deposition Exhibit No. 15.)

BY MR. ROSSMAN:
Q. I'm showing you what's been marked as Exhibit 15. That's a loan agreement of the same date, August 12, 2016. Have you seen that document before, sir?
A. Yes.
Q. And you executed that document on behalf of Park Street Group Realty Services, LLC?
A. Yes.
Q. And that document, again, pertains to the original $500,000 advance of funds, correct?
A. Correct.
Q. And is there anything in that document which references additional funding?

A. No.
Q. And did you have a chance to review that document before you executed it?
A. Yes.
Q. Did you review it?
A. Yes.
Q. Did you have any involvement in editing or making changes to it?
A. I think I did, yes.
Q. And you relied on your own professional expertise in interpreting and reviewing that document, correct?
A. Yes.
Q. If you could turn your attention to page 14, Section 818, please. Can you tell me what that provision is?
A. Commonly referred to as an integration clause.
Q. Can you read that into the record, please?
A. "This agreement, the note and other collateral documents constitute the entire agreement between lender and borrower considering the subject matter of this agreement and supersede any conflicting terms and conditions set forth in any other agreement between the parties."
Q. Okay. And does that document reference any

additional funding anywhere in it?
A. No.
(Marked for identification:
Deposition Exhibit No. 16.)
BY MR. ROSSMAN:
Q. Let me show you what we've marked as Exhibit 16, the amended and restated mortgage note. And do you recognize that document, sir?
A. Yes.
Q. And the amendment that occurs in that document is to increase the loan amount to $1 million, correct?
A. Correct.
Q. And Park Street Group Realty Services received that $1 million, correct?
A. It received the additional $500,000 represented by this amendment, yes.
Q. And it received the original $500,000 under the loan documents we just discussed, correct?
A. Well, less closing costs, yes.
Q. But the loan funded in the full amount of a thousand dollars?
A. The full amount of a million dollars.
Q. I'm sorry, a million dollars. Right. Forgot a zero.
A. If you want to stipulate it's a thousand, I'll

agree. Yes.

(Marked for identification:
Deposition Exhibit No. 17.)

BY MR. ROSSMAN:

Q. Okay. And there was a commensurate amendment to the loan agreement reflected in Exhibit 17, correct?

A. Correct.

Q. Can I just see that again when you get a chance?

A. You may.

Q. And did you sign the amendment to loan agreement on behalf of Park Street Group Realty Services?

A. I did.

Q. And did you have the opportunity to review this document before you signed it?

A. Yes.

Q. And did you consult with an attorney?

A. No.

Q. And you relied on your own professional expertise?

A. Yes.

Q. And does this document in any way reference additional monies that would be advanced?

A. No.

Q. Were you under coercion or duress in the execution of any of these documents?

A. No.
Q. Now you have alleged in your pleadings in this matter that the terms pursuant to the loan documents -- which we've just identified constitute both criminal and civil usury, correct?
A. Just criminal usury; I don't think it makes an allegation that it constitutes civil usury.
Q. So it's your position that it only constitutes criminal usury?
A. It constitutes criminal usury. I don't recall making the allegation that it constitutes civil usury. It may or may not, I don't know.
Q. What is it -- when did you come to the conclusion that those agreements contained usurious terms?
A. After consulting with an attorney in January of 2018 after I had received the notice of default.
Q. And which attorney did you consult with in that regard?
A. Steve Ribiat.
Q. And what terms do you believe caused those documents to be usurious?
A. The stated interest rate, plus the commitment fees, plus the capitalized interest, plus the success fees, plus the closing costs.
MR. ROSSMAN: Can you read those back,

that list?

(Whereupon the answer was read back by the court reporter.)

BY MR. ROSSMAN:

Q. And so it's your position that when that lined up, it results in a 33 percent interest rate?

A. No, it's higher than that.

Q. And what is it?

A. I don't know exactly.

Q. Okay. And you believe that obviates your obligation or Park Street Group's obligation and Park Street Group Realty's obligation to pay back the amounts that have been loaned?

A. Yes.

(Marked for identification: Deposition Exhibit Nos. 23-27.)

MR. ROSSMAN: I'll show you what we've marked as Exhibits 23, 24, 25, 26 and 27.

MR. NINE: What was the first number?

MR. ROSSMAN: It's 23 to 27.

BY MR. ROSSMAN:

Q. And there are four mortgages. And are those the only four mortgages which were given pursuant to the loan documents?

A. No.

Q. Okay. What were the other ones, are they -- actually, can you just go through those and identify for me what they are and what they represent?
A. Exhibit 23 represents -- I'm sorry, give me one moment.
Q. Yes, take your time.
A. Exhibit 23 represents what I would term a wraparound mortgage for the second loan on the properties located in the city of Detroit pledged as collateral for the loan. The mortgage is represented as a future advanced mortgage, which would imply there would be more funds than just the $1 million advanced to the borrower.
Q. What's the date of that mortgage that --
MR. NINE: By the way --
THE WITNESS: September 23, 2016.
MR. NINE: Let's make sure the record shows that this is additional proof of the further advance being required.
MR. ROSSMAN: Is that an objection, Paul?
MR. NINE: Sure.
MR. ROSSMAN: Okay. All right.
MR. NINE: Deal with it any way you want.

MR. ROSSMAN: Okay.
BY MR. ROSSMAN:
Q. And in your experience, have you ever received -- ever pledged a future advanced mortgage and not received additional funds?
A. No, not in my experience.
Q. Is there any statement in there requiring the advancement of additional funds?
A. I would say the fact that it states that it constitutes a future advanced mortgage would mean that it would advance more money, yes.
Q. Okay. And is there any provision in there that states that it's obligated, legally obligated to advance more money?
MR. NINE: Take your time.
THE WITNESS: I don't know.
MR. ROSSMAN: Take your time. Take a look through it.
MR. NINE: Are these all three the same? Let me look at one while you're looking at that.
THE WITNESS: Yes.
BY MR. ROSSMAN:
Q. Okay. What provision are you looking at?
A. Well, for one, the provision on page 5.
Q. What's it say?

A. I'm sorry, I read the wrong part. Hold on.

Yes, page 11, where it states future advances.

Q. And what does it say there?

A. "In addition to securing the repayment of the indebtedness hereinbefore mentioned, this mortgage shall also secure the payment of all obligations of the mortgagor to the mortgagee and successors or assigns, however created, arising or evidenced with a direct or indirect, absolute or contingent or now or hereafter existing or due to become due, including, without limitation, of the generality of the foregoing future advances."

Q. And is there any reference to amounts to be advanced?

A. No.

Q. Is there any mandate that future amounts be advanced or requirement?

A. I would say based on the other documents that we had looked at, yes, it would say it would serve as a future advance mortgage for the $2 million facility; otherwise, you wouldn't include that this mortgage is a future advanced mortgage.

MR. NINE: And by the way, so we're clear --

MR. ROSSMAN: All right, come on now, Paul. Seriously, you can't coach this witness.

MR. NINE: Wait. We have not looked back at the loan agreement and the others to see whether this language exists.

BY MR. ROSSMAN:

Q. Now this document itself, within the four corners of this document, does it mandate that future advances be made?

A. I think it does.

Q. Can you underline the language that you think mandates that an additional $1 million will be advanced?

A. But because what ended up happening is because you filed two mortgages with a future advance mortgage. The first mortgage, which I believe is Exhibit 26, is for $500,000, the second mortgage is for a million. That would secure a $1.5 million note, not a $1 million note.

Q. May I see Exhibit 26?

A. You may. It's one million plus 500,000.

Q. Well, the notes evidence distributions of how much or loans of how much?

A. It doesn't matter if it's a future advanced mortgage. The mortgages themselves encumber the

properties for $1.5 million; otherwise, you would have discharged the prior mortgage.

Q. You would agree with me Exhibit 23 references the August 12, 2016, loan agreement, correct?

A. I don't know what you're referring to. I have to see the document.

Q. Referring to the first page. It refers to -- it indicates that this is security for that amendment which increases the amount to $1 million, correct?

A. That's not what this says. It says it's further secured by the August 12, 2016, document, which means it's encumbering the property for 1.5 million, and in fact, Regent's Title will tell you that when they did the property search on this, it was for $1.5 million, not $1 million. Because there's two separate mortgages, one for 500,000 and one for a million.

Q. So it's your position this mortgage, Exhibit 23, requires the advancement -- the advanced funds of a total of $1.5 million?

A. No, that's not what I said. I said it encumbers the property to the tune of $1.5 million which --

Q. Go ahead.

A. Okay. Which, consistent with all of the other discussions we would have had, I believe is

consistent with what I'm saying, that Soaring Pine agreed to advance up to $2 million.

Q. So is it your position that this mortgage mandates an additional $500,000 be advanced?

A. No, that's not what I said. I said it only encumbers the property for $1.5 million. The unfulfilled obligation would be an additional million dollars.

Q. Do you know why Exhibit 26 wasn't discharged?

A. Because Soaring Pine had agreed to loan $2 million.

Q. Is this the only amount of $1 million -- if your testimony is that it's cumulative, where is the $2 million you've been talking about in here?

A. I didn't say that. First off, how Soaring Pine's lawyer prepared the mortgage documents is something for Soaring Pine's lawyers. Those two documents encumber the properties to the tune of $1.5 million.

Q. And you believe that's evidence that additional monies should have been funded?

A. Yes, clearly the parties had contemplated that there would be future advances as evidenced by the fact that every single one of these mortgages you've presented to me -- 23, 24, 25 and 26 -- are all future advance mortgages.

Q. You don't think that the $1 million that's stated in here is meant to comport with the loan modification, which increased the amount of debt to $1 million and amended and restated the original mortgage note?
A. If it were going to comport with it, then you would have had to have discharged the prior mortgage in connection with the August 12, 2016, loan and/or the additional funds would have only been for $500,000 so that the combined total between the August 12, 2016, note and mortgage and the September 23, 2016, note and mortgage were only a million dollars.
Q. Would you agree with me that had the original $500,000 mortgage been discharged or that it could have been legally discharged, do you believe that the original mortgage could have been discharged?
A. I don't know.
Q. Would you agree that the second mortgage for $1 million is consistent with the terms of the amended and restated note?
A. No, it's consistent with the promise that Soaring Pine had made to loan Park Street Group Realty Services $2 million. It was always anticipated, always discussed, always agreed that it would be a

$2 million credit facility.

Where I think Soaring Pine got confused, if you go back and look at the email I exchanged with Tricia Mink, I mentioned the follow-on $1.5 million loan. I think they got confused that it was a million, five instead of 2 million, that it was a million, five in addition to the $500,000 that had been originally loaned.

Q. You're speculating on how they might have interpreted the emails?

A. Correct.

Q. And so it would stand to reason, if you're basing your argument on those emails, that there was no meeting of the minds because there was a misunderstanding?

A. Incorrect. Incorrect.

Q. Can you go through each of those mortgages beginning with Exhibit -- let's just go through them in order. And can you just tell me what they are, what they represent? We dealt with 23 and 26. If you could tell me what...

A. Exhibit 24 appears to be the mortgage note that was recorded on the property in Lapeer that was pledged as security. Again, it's a future advanced mortgage.

Q. That's with respect to a single property, correct?
A. Correct. Exhibit 26 -- we have to go back and correct the record because of another error on the part of Simon, PLC.

Exhibit 23 and -- no. You're missing a mortgage.

Q. Which mortgage am I missing?
A. You're missing the August 12, 2016, mortgage that would encumber the properties in the city of Detroit.

Exhibit 23 is a wraparound mortgage for the properties in the city dated September 23, 2016. Exhibit 24, which is a mortgage dated August 12, 2016, though it describes the premises as being in the city of Detroit and Wayne County, the legal description actually relates to the property on Millville Road in Lapeer County.

MR. NINE: Where was that recorded, by the way?

THE WITNESS: Lapeer Register of deeds.

Exhibit 25, which is a future advanced mortgage dated August 12, 2016, is a mortgage that encumbers 85 Frederick Street in Ypsilanti.

Exhibit 26, again, though, the premises are described on page 1 as being in the city of

Detroit, the legal description states that it's a property located in Saginaw, Michigan.

Exhibit 27 --

MR. NINE: Wait. Is 26 a future advanced mortgage?

THE WITNESS: Yes.

Exhibit 27 is a future advanced mortgage effective as of August 12, 2016. Again, page 1 describes the property as being situated in the city of Detroit, but the legal description relates to a property located in Flint, Michigan.

BY MR. ROSSMAN:

Q. And what is a future advanced mortgage?

A. A future advanced mortgage is a mortgage that serves as collateral for a loan where the lender has agreed to make future advances to the borrower.

Q. Or is it a document whereby the parties agree that if the lender makes future advances to the borrower, it will serve as security and that there would be documentation that would go along with those advances indicating that it is so secured?

A. Typically it's my experience that a lender would not file a future advanced mortgage unless it was in anticipation of making future advances. You would simply file a mortgage.

Q. And you being an expert in real estate, it's fair to say, correct?
A. I don't know if I would say I'm an expert in --
Q. You have a deal of experience in it, correct?
THE WITNESS: Are you going to let me finish or...
MR. ROSSMAN: You answered the question. You said you wouldn't know that you were an expert and I asked you if you had a good deal of experience --
MR. NINE: He was trying to finish.
THE WITNESS: First off, I didn't say I wouldn't know if I'm an expert; I said I don't know if I'm an expert in real estate law.
BY MR. ROSSMAN:
Q. Let me ask you this: You've practiced real estate law, correct?
A. Yes.
Q. And you've done it for a number of years?
A. Yes.
Q. And you've actually done business in real estate also, correct?
A. Yes.
Q. And so you've probably done hundreds of mortgages if not more, 1,500 maybe, dealt with encumbered

assets and seen mortgages, it's a part of what you do?

A. I don't know that it's true that I would have seen 1,500 mortgages because every property -- that 1,500 properties includes properties where -- fee simple title, some of which are land contracts, but yes, I have dealt with mortgages.

Q. And you've dealt with future advanced mortgages, correct?

A. Not very often, but yes, I have dealt with future advanced mortgages.

Q. And you do understand that unless the future advanced mortgage requires additional funding that it's not implicit in its terms that additional funding will occur?

A. It sounds to me like you're making assumptions that aren't necessarily true.

Q. Do any of these future advanced mortgages specifically require Soaring Pine to loan you up to a total of $2 million?

A. I would say yes.

Q. No, I'm talking about within the four corners of those documents.

A. You've already asked me this question. I've already pointed out to you the provisions in the

mortgages that I believe require --

MR. ROSSMAN: I'm talking about the specific number of 2 million. Is that anywhere in those documents?

THE WITNESS: Are you going to let me finish or are you going to keep interrupting me because you don't like the response?

MR. ROSSMAN: No, you're not being responsive.

MR. NINE: Quit arguing. Quit arguing.

THE WITNESS: That's not true.

MR. ROSSMAN: I'll withdraw the question and I'll ask a new question.

BY MR. ROSSMAN:

Q. Do any of those documents have the numbers $2 million in them?

A. I don't think so.

Q. And if they don't, then those mortgages do not mandate that $2 million be advanced, correct?

A. No, that's incorrect.

Q. You think that those future advanced mortgages require, contractually, the advancement of $2 million?

A. I just said yes. I've said that --

Q. Were those documents attached to your complaint?

A. These documents were not attached to my complaint.
Q. Did you allege in those complaints that those mortgages constituted the basis of a breach of contract action?
A. I don't know, but I don't think the court rules require that you attach every piece of discovery that you have that might support your claim.
MR. ROSSMAN: That's non-responsive. Please strike it from the record.
MR. NINE: Don't strike it. He wants you to strike it, but his answer stays.
MR. ROSSMAN: Can you read that -- read back the question and his statement, please.
(Whereupon the requested portion was read back by the court reporter.)
MR. ROSSMAN: I'll represent to you that the court rules don't require you to attach any discovery to your complaint, but it does require you to attach contracts or specifically reference them, and so my question to you is do you --
THE WITNESS: That's incorrect unless --
MR. ROSSMAN: As we sit here today --
THE WITNESS: Unless --
MR. ROSSMAN: My question is as we sit here today --

THE WITNESS: No, no, no. You make an assumption; your assumption is wrong. If the opposing party is in possession of the documents, you do not have to attach them.

BY MR. ROSSMAN:

Q. Did you allege that the opposing party is in possession of those mortgages?

A. You attached them to your complaint and I filed a counterclaim.

Q. Are you going to answer the question? Are you going to answer the question?

A. It's an answer to the plaintiffs' amended complaint which attaches the mortgages, yes.

(Marked for identification:
Deposition Exhibit No. 19.)

BY MR. ROSSMAN:

Q. Can you tell me what Exhibit 19 is, please, if you know?

A. I don't know.

Q. You've never seen that document before?

A. I don't know if I have or I haven't. I haven't seen it in this context.

Q. Does that look like a list of the collateral properties, the original collateral properties?

MR. NINE: How would he even know

that?

THE WITNESS: No, it is not a list of the original --

MR. ROSSMAN: Well, he seems to know that it's not.

THE WITNESS: It's not a list of the original collateral properties, no.

BY MR. ROSSMAN:

Q. Do you know if it's a list of the collateral properties at the time this litigation was commenced?

A. I believe so, but this would have been a list of the collateral properties, I believe, not for the first loan, but the second loan because there was additional collateral pledged.

(Marked for identification: Deposition Exhibit No. 20.)

BY MR. ROSSMAN:

Q. Have you ever seen Exhibit No. 20?

A. I don't recall.

(Marked for identification: Deposition Exhibit No. 21.)

BY MR. ROSSMAN:

Q. Have you ever seen Exhibit 21?

A. I don't recall.

(Marked for identification:
Deposition Exhibit No. 22.)
BY MR. ROSSMAN:
Q. What about Exhibit 22?
A. I don't recall.
(Marked for identification:
Deposition Exhibit No. 29.)
BY MR. ROSSMAN:
Q. Exhibit 23 [sic], UCC financing statement, do you know what that pertains to?
A. Yes, this appears to be the financing statement filed in connection with a loan.
MR. ROSSMAN: Can I see that for one second?
THE WITNESS: Sure.
BY MR. ROSSMAN:
Q. What was the timeframe when you were looking to secure the initial installment of the funding by which you could purchase the properties directly from the treasurer; when did that expire?
A. I'm sorry, are you speaking the City of Highland Park project?
Q. Let's rewind it a little bit. We're talking about the right of first refusal that was available through Home Team, and I believe you testified that

the loan didn't fund quickly enough to purchase directly through Home Team.

A. I believe you're confused. The right of first refusal is something that's offered once a year; the project we were talking about was with the City of Highland Park and the Land Bank.

(Marked for identification: Deposition Exhibit No. 18.)

BY MR. ROSSMAN:

Q. Can you take a look at Exhibit No. 16 -- or 18, which is an email that you authored?

A. Correct. This is through the Oakland County Treasurer. This isn't a Land Bank or a City of Highland Park program.

Q. What's the July 1st deadline; is that the date of an auction or...

A. July 1st, I believe, is the last date that the local municipality can exercise a right of first refusal. That's the last date -- I'm sorry, that's not true. Strike that.

I believe under the General Property Tax Act, the county treasurer has the right to be able to sell tax foreclosed properties to third parties before they're offered at the tax auction.

Q. Okay. And there was a cutoff of July 1st for that?

A. No, beginning July 1st, I can offer to purchase homes directly from the treasurer for the full amount of the delinquent taxes.
Q. And you're referring to Oakland County there?
A. No, this would have been Wayne County. I don't see -- where does it say Oakland County?
Q. I thought you referenced a few minutes ago the Oakland County treasurer.
A. If I said Oakland County, it was in error. It's Wayne County.
Q. And you indicated that you offered to purchase them directly from the treasurer for the full amount of the delinquent taxes, which would mean that they didn't need to go to the foreclosure sale, correct?
A. No, if they had already gone to foreclosure sale, they wouldn't go to auction.
Q. Okay. And so at that point in time, who would own title to the properties?
A. If they had been purchased from the treasurer?
Q. Yes. The municipalities?
A. No, I believe at that time the treasurer holds bare legal title to the properties. I think under the General Property Tax Act, Eric Sabree had concluded that he had discretion to sell tax foreclosed properties to purchasers for the full amount of the

delinquent taxes without having to offer them at the auction.

Q. Where was the money that funded deposited; what bank?

A. Bank of America.

Q. And was that an account held in the name of Park Street Group Realty Services, LLC?

A. I don't remember if it was Park Street Group or Park Street Group, LLC. I would have to check and let you know.

Q. Are any of those bank statements in the document production here today?

A. I think I had said that I had produced them previously, so I didn't reproduce them now.

Q. Who is Michael Alioto?

A. Michael is a former partner.

Q. Did you have litigation with him?

A. No.

Q. Did you have a dispute with him?

A. Yes.

Q. And how was it resolved?

A. With a settlement.

Q. What was the nature of the dispute?

A. I don't think I can disclose that without violating the confidentiality provision contained in the

settlement agreement.
Q. What was the nature of the business between you?
A. Mike was an investor with me in properties that we purchased and leased in Pontiac. I was working and residing in Chicago at the time, Mike was here, and we had a property management company managing the properties.
Q. What period of time was that?
A. At least ten years ago.
Q. Are you presently the named party in any litigation right now?
A. Yes.
Q. And can you identify the name of that case, please?
A. Hemlock Apparel.
Q. Procedurally, where does that case stand?
A. It was just filed, so no answers have been filed.
Q. And you were sued for conversion in that case?
A. Yes.
Q. Generally speaking, what does that dispute arise out of?
A. It was a joint venture between Hemlock Apparel and initially DMP and then Rubicon Realty Group.
Q. When was that joint venture formed?
A. Which joint venture? There are two.
Q. So there's one between DMP and Hemlock and then one

between Rubicon and Hemlock?
A. Yes.
Q. Did the second -- did the Rubicon subsume the first one or is it two separate joint ventures?
A. Well, there's a dispute over that.
Q. And who are the principals of Hemlock Apparel?
A. Eric and Jay Paige.
Q. What were the nature of your business dealings with Hemlock Apparel; what did it concern?
A. Detroit properties.
Q. And what are the allegations against you?
A. The allegation is that I did not disclose to Eric Paige back taxes and delinquent water on the initial ten properties in the joint venture between DMP and Hemlock Apparel and that somehow I converted funds that I never had possession or control over.
Q. Those funds being which funds; are they funds that were supposed to be -- they're alleging supposed to be used for making these payments?
A. Making what payments?
Q. The back taxes and the back water.
A. No, they claimed that monies that they had contributed to the JVs had been entrusted to me when in fact not a single penny did I have control

over or access to. They were in a separate, segregated account at all times over which Eric and Jay Paige solely and exclusively had authority and control.

Q. Are you presently a party to any other litigation?

A. A dispute with a landlord in 48th District Court.

Q. Have you ever been a named party, plaintiff, defendant or otherwise, in any litigation other than what we've just discussed?

A. Yes.

Q. On approximately how many occasions?

A. I think twice.

Q. Can you identify those two times?

A. Yeah. One, I was the president of a condo association and an employee that had been discharged filed a wrongful termination case against the condo association along with all the members of the board of directors.

Q. Okay.

A. And the other case was an adversary proceeding in a bankruptcy.

Q. And were you a creditor in that case?

A. No.

Q. You were -- were you a debtor?

A. No.

Q. Can you describe your position in that case?
A. Yes. Paul Nine and I were partners.
Q. Sounds good.
A. And the trustee filed a preferred conveyance claim in an adversary proceeding against me because Paul and I were partners in the law office.
Q. Who was the debtor in this case?
A. I think the IRS -- or the debtor was Paul Nine.
MR. NINE: No, the debtor was the Grand Traverse Resort.
THE WITNESS: No, the follow-on.
MR. NINE: Oh, I don't remember.
BY MR. ROSSMAN:
Q. How long ago was this?
A. Twenty-five years.
Q. Another life.
Other than what we've just identified, no other litigation?
A. Not that I recall.
Q. In terms of the representations of the value of the collateral when you did the loan originally, can you describe for me how you ascertained the value of that collateral?
A. I didn't make any representations as to the value of the collateral or ascertain the value.

Q. Can I see those documents?
A. You may.
(Marked for identification:
Deposition Exhibit No. 28.)
BY MR. ROSSMAN:
Q. I handed this to you, but we didn't discuss it. Is Exhibit 28 the Park Street Group, LLC, guaranty?
A. Yes.
Q. And you signed that on behalf of Park Street Group, LLC?
A. Yes.
Q. And you had the opportunity to review it before you did?
A. Yes.
Q. And does that document contain any reference to additional monies being loaned other than as specifically set forth in the original loan documents?
A. I don't think it mentions the loan documents. It's a continuing guaranty.
Q. So it covers all monies loaned to either -- or all monies loaned to Park Street Group Realty, correct?
A. Correct.
Q. And that's your signature on that document?

A. Yes.

(Marked for identification:
Deposition Exhibit No. 40.)

BY MR. ROSSMAN:

Q. And I'm going to show you what we're now marking as Exhibit 40. And that's the continuing unlimited guaranty signed by you personally, correct?

A. Yes.

MR. NINE: We'll read this later. I hate those documents.

MR. ROSSMAN: Let the record reflect Mr. Nine is communicating with his client and pointing to a provision of the guaranty.

MR. NINE: You want to see it?

MR. ROSSMAN: I've read it; I know what it says.

MR. NINE: Okay.

MR. ROSSMAN: I know what it says.

MR. NINE: Nothing wrong with me communicating with a client when a question isn't pending.

MR. ROSSMAN: Unless it involves a question of privilege, it's absolutely improper to communicate with your client while the record is

open, and you know that, Mr. Nine.

(Marked for identification:
Deposition Exhibit No. 41.)

BY MR. ROSSMAN:

Q. I'm marking as Exhibit 41 the notice of taking deposition duces tecum, dated December 14, 2018. Have you seen this before, sir?

A. Yes.

Q. Have you seen the duces tecum request attached to that notice of deposition?

A. Yes.

Q. And can you describe what you did in order to comply with that?

A. Searched my records and email.

Q. And the documents in the room today are what you produced in that regard?

A. Yes.

Q. Who is John Fiorito (ph)?

A. CPA.

Q. And do you intend to call him as an expert in this case?

A. Don't know yet.

Q. Have you communicated with him regarding this case?

A. I have.

Q. Is he retained?

A. He is.
Q. What's the nature of the retention?
A. Pursuant to Judge Potts' direction at the motion for summary disposition hearing, what, in May of 2018, we retained John to be able to calculate the total amounts charged under the loan documents and the effective annual interest rate.
Q. Okay. And did he do any computations in that regard?
A. He did.
Q. Did he issue an opinion or a report?
A. He has not issued an opinion or a report, but he has produced the calculations.
Q. Okay. And did he communicate -- did you receive a copy of that?
A. Yes.
Q. And is that what you rely on with respect to your usury argument?
A. In part. I mean, you can determine the amounts from the loan documents, the closing statements.
Q. Why is Paul -- strike that.

The documents that you have produced, there's some -- I see four red ropes on the table. Those are produced -- or five, correct?
A. Correct.

Q. And then some clear boxes also? Three of them?
A. No, you have -- one, two, three, four, five -- about eight.
Q. So all those documents over there?
A. Yeah.
Q. Okay.
A. There are five red ropes and about eight banker-plus size boxes of documents.
Q. Can you describe for me generally how they're organized?
A. In the ordinary course of business by property or subject.
Q. The red ropes that are on the table, are those all emails or -- I just looked through a few of them.
A. No.
Q. What do the red ropes consist of?
A. It depends on which red rope you're referring to. One of the red ropes has the closing documents from the August 12, 2016, transaction, one -- it also contains the closing documents from the September 23, 2016, transaction. One of the red ropes includes the interest invoices, amortization schedule and calculations.

There are two red ropes that contain emails exchanged between the parties responsive to

the document production requests. There is, I think, two other red ropes referring to Rubicon Realty Group, and then those eight boxes refer to the pledged and non-pledged collateral that were titled in either Park Street Group, LLC, or DMP Holdings' names.

Q. Would you have any objection to a third party taking possession of these to copy them and return them?

A. No, not at all.

MR. ROSSMAN: Okay. Well, I'm not taking them with me today for obvious reasons, but I suppose I can coordinate that through your office, that would work and you would be comfortable with that?

MR. NINE: Yep; no problem.

MR. ROSSMAN: Then we'll talk about that tomorrow. And can we just keep them here until they're retrieved?

MR. NINE: Yeah; no problem.

MR. ROSSMAN: I have nothing more at this time. I do reserve the right -- and I recognize you will have an objection and we might have to discuss that with the judge -- subsequent to the production of this documentation to continue this

deposition, but we'll cross that bridge when we get to it.

That's all I have for now.

MR. NINE: Sounds good.

(Deposition adjourned at 4:41 p.m.)

STATE OF MICHIGAN)

COUNTY OF OAKLAND)

Certificate of Notary Public

I do hereby certify the witness, whose attached testimony was taken in the above matter, was first duly sworn to tell the truth; the testimony contained herein was reduced to writing in the presence of the witness, by means of stenography; afterwards transcribed; and is a true and complete transcript of the testimony given. I further certify that I am not connected by blood or marriage with any of the parties, their attorneys or agents, and that I am not interested directly, indirectly or financially in the matter of controversy.

In witness whereof, I have hereunto set my hand this day at Royal Oak, Michigan, State of Michigan.

I hereby set my hand this day, January 12, 2019.

_____

Karen Fortna, CRR/RMR/RPR/CSR-5067

Notary Public, Oakland County, Michigan

My Commission expires 4/30/2019

EXHIBIT 5

Elyse Palombit

Subject: RE: Park Street Realty Group Realty Services, LLC

From: Dean Groulx <dean.groulxlaw@gmail.com>
Sent: Thursday, July 21, 2016 2:42 PM
To: Paul Schapira <pschapira@soaringpine.com>
Cc: Michael Evans <MEvans@atlasoil.com>; Victor Simon <fsimon@spcrealestate.com>
Subject: Re: Park Street Realty Group Realty Services, LLC

Paul:

Attached, please find a true copy of the articles of organization, as well as the IRS letter assigning an Employer Identification Number to the company.

Park Street Group Realty Services, LLC is, among other things, a licensed real estate brokerage. Given that I, and I alone, hold the associate broker's license for the company, I am the sole-member of the company. As a result, I do not have an operating agreement.

If you have any questions or if I may be of any further assistance, please feel free to contact me.

Best regards,

Dean J. Groulx
Law Offices of Dean J. Groulx, P.C.
100 W. Long Lake Road Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500 - Telephone
(248) 644-5640 - Facsimile
dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Thu, Jul 21, 2016 at 2:12 PM, Paul Schapira <pschapira@soaringpine.com> wrote:

> Dean:
>
> Please send me copies of all of your organizational documents for Park Street Realty Group Realty Services, LLC such as Operating Agreement, etc. Thank you.
>
> Regards,
>
> **Paul**
>
> **Paul V. Schapira**
>
> **Vice President**
>
> Soaring Pine Capital Management, LLC/Lone Pine Investments II, LLC

Elyse Palombit

Subject: FW: Park Street Group Realty
Attachments: Loan Agreement - redlined (revd. DJG 7.25.2016).doc

From: Dean Groulx <dean.groulxlaw@gmail.com>
Sent: Monday, July 25, 2016 8:30 PM
To: John W. Polderman <JPolderman@simonattys.com>
Cc: Edwin Herbert <eherbert@atlasoil.com>; Paul Schapira <pschapira@soaringpine.com>; Victor Simon <FSimon@atlasoil.com>; Robert S. Berg <RBerg@simonattys.com>; Michael Evans <MEvans@atlasoil.com>
Subject: Re: Park Street Group Realty

Gentlemen:

In light of my conversation with Faiz this morning, attached, please find my proposed revisions to the Loan Agreement. The mortgage note, mortgage, and guaranty all look acceptable to me. Best regards,

Dean J. Groulx
Law Offices of Dean J. Groulx, P.C.
100 W. Long Lake Road Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500 - Telephone
(248) 644-5640 - Facsimile
dean.groulxlaw@gmail.com

Admitted to Practice in Illinois and Michigan

On Fri, Jul 22, 2016 at 7:36 AM, John W. Polderman <JPolderman@simonattys.com> wrote:

> Dean,
>
> We made redlined changes to the loan agreement and the mortgage. The note and guarantee stayed the same, all documents are attached in word format.
>
> My understanding is that you are under the impression that after the sale of each home, you are only to pay $1,000.00 "success fee" to our client for a full release of our client's mortgage lien on the premises. However I left our client's approval language for releasing any lien on a sold property, without this provision by the time the loan is paid in full our clients would be totally unsecured as to the properties purchased with the monies they loaned.
>
> Please advise if you have any questions.
>
> Thanks,
>
> John
>
> **John Polderman**
>
> Senior Attorney

EXHIBIT 6

OPERATING AGREEMENT
FOR
PARK STREET GROUP, LLC

This OPERATING AGREEMENT ("Agreement") is made on July ___, 2015, but is effective as of April 1, 2015, between Park Street Group, L.L.C., a Michigan limited liability company, and DEANGELIS PROPERTIES, LLC, L.S. MACKENZIE PROPERTIES, LLC, RUBICON REALTY GROUP, LLC, PRENTICE ENTERPRISES, LLC, and DOWNTOWN BROWN, LLC, the sole initial Members.

PREAMBLE

Park Street Group, L.L.C. (the "Company") is a startup company in the business of purchasing distressed loans secured by residential real estate and related matters.

ARTICLE I
DEFINITIONS

1. In this Agreement,

A. "Act" means the Michigan Limited Liability Company Act, 1993 PA 23, being MCL §450.4101, *et seq.*, as amended, from time to time.

B. "Articles" means the Articles of Organization for the Company, as amended, from time to time.

C. "Company" means Park Street Group,, L.L.C., a Michigan limited liability company, whose registered address is 100 W. Long Lake Road, Suite 102, Bloomfield Hills, MI 48304.

D. "Company Minimum Gain" means the same as the term company minimum gain as used in Treasury Regulation 1.704-2(b)(2).

E. "Company Nonrecourse Deductions" means the same as the term company nonrecourse deduction as used in Treasury Regulation 1.704-2(b)(1).

F. "Member" means any Member of the Company.

G. "Member Minimum Gain" means an amount, with respect to Member Nonrecourse Debt, as determined in accordance with Treasury Regulation 1.704-2(i)(3).

H. "Member Nonrecourse Debt" means the same as the term *member nonrecourse debt* as used in Treasury Regulation 1.704-2(b)(4).

I. "Member Nonrecourse Deduction" means the same as the term *member nonrecourse deduction* as used in Treasury Regulation 1.704-2(i)(2).

J. "Mr." or "Mrs." when before a Members last name means that individual Member so identified.

K. "Operating Agreement" means this Operating Agreement for Company, and, if any, Special Resolutions of the Members of the Company.

L. "Profits" and "Losses" mean, respectively, for each fiscal year of the Company, the Company's taxable income or loss for the fiscal year determined in accordance with Internal Revenue Code § 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be stated separately pursuant to IRC § 703(a)(1) shall be included in taxable income or loss), adjusted as set forth in Section 4.6 of this Operating Agreement.

M. "Tax Matters Member" means the same as the term *tax matters partner* as used in Internal Revenue Code § 6231(a)(7).

ARTICLE II
ORGANIZATION

2.1 Formation. . The Members have formed a Michigan limited liability company under the laws of the State of Michigan by causing Articles of Organization to be filed with the Secretary of State and enter into this Agreement. The rights and liabilities of the Members will be determined under the Act and this Agreement. To the extent that the rights or obligations of any Member or Manager are different by reason of any provision contained in this Agreement than they would be in the absence of such provision, this Agreement will, to the extent permitted by the Act, control.

2.2 Name. The name of the Company is Park Street Group, L.L.C. The business of the Company may be conducted under that name or, upon compliance with applicable laws, under one or more assumed names, as determined by the Manager. The Company may also conduct business in states other than Michigan, in accordance with applicable laws, as determined by the Manager.

2.3 Purpose. The Company may engage in any activity for which limited liability companies may be formed under the Act. Specifically, but without limiting the scope of the Company's activities now or in the future, the Company is engaged as set forth in the Preamble.

2.4 Registered Office and Registered Agent. The Registered Office and the Resident Agent of the Company shall be designated in the initial or amended Articles. The Registered Office and the Resident Agent may be changed from time to time, in accordance with the Act. If the Resident Agent resigns or is otherwise removed,

the Company shall promptly appoint a successor and file the necessary papers formalizing the change, as required by the Act.

2.5 Intention of Company. The Members have formed the Company as a limited liability company for the purpose(s) set forth in this Operating Agreement. The Members specifically intend and agree that the Company is not a partnership (limited or otherwise) and not a joint venture but, rather, a limited liability company under and pursuant to the Act. The Members are not partners (limited or otherwise) with the Company or each other. Nothing contained in this Operating Agreement will be deemed or construed to create a partnership or a joint venture between the Members and the Company, or the Members themselves. Nonetheless, the Members hereby elect to be taxed as a partnership.

2.6 Term. The term of the Company shall commence on the date of the filing of the Articles and continue indefinitely; provided, however, that the term shall end, and the Company shall dissolve, on the first to occur of:

A. A sale or disposition of all or substantially all of the Company's assets unless the Members otherwise elect;

B. The occurrence of any event which, under the Act or the terms of this Operating Agreement, result in the dissolution of the Company; provided, however, that the term of the Company not end upon the occurrence of such an event if the Company is reconstituted or otherwise continues as provided in this Operating Agreement;

C. Upon the determination to dissolve by the affirmative vote of Member(s) holding 50% or more of the Membership Interests of the Company (as defined in Section 3.1 below).

2.7 Title to Company Property. All property owned by the Company, whether real, personal, tangible or intangible, shall be deemed to be owned by the Company as an entity, and not the Members. No Member shall be deemed to own or construed to be the owner of the Company's property unless otherwise indicated in writing. The Company may hold its assets in its own name or in the name of a nominee.

ARTICLE III
CAPITAL CONTRIBUTIONS, MEMBERSHIP SHARES, CAPITAL ACCOUNTS, AND LOANS

3.1 Members. Company shall be composed of Equity Members and Income Members as shown in **EXHIBIT 1**.

A. Equity Members.

1. Equity Members shall provide all the equity for the Company and receive all of the Equity Members Interest which shall be equal to 50% of the total Membership Interest of the Company.

2. The Equity Members shall serve as the Manager of the Company.

3. Upon a majority vote of the Members, the Company may elect to raise additional funds to acquire additional Pools as defined in Section 3.1 E below.

a. In the event the Members elect to raise additional funds to acquire additional Pools, the Equity Members shall first be offered the right to fund such acquisition. If, within two (2) business days, or such other time as the Members unanimously agree, of being offered the right to fund the additional Pools, the Equity Members elect not to fund the acquisition of the additional Pool, then in such an event, the Company may offer the right to fund the acquisition of such Pool to any other entity.

b. If the right to fund the acquisition of another pool is offered as provided above to another entity, that entity shall not become a Member of the Company, but shall have a contractual/lending relationship with the Company.

c. The purpose of the Company is to acquire from various entities non-performing residential notes, specifically, land contracts or mortgage loans secured by residential properties. Each Member agrees that while it is a member of the Company, it and its affiliates will not, directly or indirectly, conduct any acquisition or financing of any such non-performing notes, except as a Member of Company and in the manner described in this Operating Agreement, unless otherwise agreed in writing by the Members.

4. Twenty-Five Thousand Dollars ($25,000.00) is hereby contributed as equity by the Equity Members with each Equity Member contributing his proportionate share based on their Equity Member's Interest, receipt of which is hereby acknowledged. All such contributions are shown on **EXHIBIT 1**.

5. Five Hundred Twenty-Five Thousand Dollars ($525,000.00) is hereby advanced by the Equity Members as a loan at 0% per annum interest, as provided in 3.7. Each Equity Members contribution has contributed his proportionate share based on their Equity Members Interest, receipt of which hereby acknowledged. All such loans are

shown on **EXHIBIT 1.**

B. Income Members.

1. Income Members shall provide no equity or loans to the Company unless pursuant to a subsequent written agreement executed by the Company and the affected Income Member.

2. The Income Members interest shall be equal to fifty (50%) percent of the total Membership Interests of the Company as shown on **EXHIBIT 1.**

3. The following representatives of the Income Members shall provide services to the Company and receive separate compensation as follows:

   a. DEAN GROULX shall basically serve as the Member responsible for locating, negotiating, and acquiring the distressed loans for the Company. In addition, GROULX shall provide, at no cost to the Company, (except for sums owed to unrelated third parties) his legal services for such matters as evictions and foreclosures related to the distressed loans and the attempt to obtain title and possession (provided, however, that attorneys other than GROULX may be retained to handle foreclosure, forfeitures, evictions, and similar matters and will be paid by the Company). Further, GROULX shall provide, at no cost to the Company, legal services in connection with the documentation of the acquisition of the distressed loans.

4. DAVID PRENTICE and GLENN PRENTICE shall both basically assist in the selection of the distressed loans which will be acquired by the Company and manage the properties/loan after they are acquired. Upon acquisition, they shall be primarily responsible for negotiating with the title holder (in the case of land contracts) and mortgagor (in the case of mortgages) to acquire title and possession of the property (e.g., surrender the properties and the equity of redemption by forgiving the land contract holder of past-due amounts owed, or by payment of sums to facilitate their moving), for the maintenance of the properties, and administering the loans/land contracts.

5. In general, the Income Partners will not receive payments from the Company except for reimbursement for sums paid to or owed to unrelated third parties or from distributions pursuant to Section 3.1D.

3.2 Additional Capital Contribution. No Member shall have an obligation to make an additional contribution (i.e., equity or loan) to the Company unless the Member agrees to do so, in writing, and on terms and conditions acceptable to the Member. No Member is required to lend funds to the Company or be required to further guarantee or otherwise incur a recourse obligation for or on behalf of the Company, unless the Member agrees, in writing, to do so.

3.3 Members' Capital Accounts.

A. The Company shall maintain a separate capital account for each Member. Each capital account shall be:

1. Increased (i) for the amount of the cash (or cash equivalent) and the fair market value of any property, net of any liabilities secured by the property that the Company assumes or takes subject to such liabilities, that the Member contributes, and (ii) for the Member's share of any of the Company's income or gain.

2. Decreased (i) for the amount of any cash (or cash equivalent) and the fair market value of any property, net of any liabilities secured by the property that the Company assumes or takes subject to such liabilities, distributed to the Member, (ii) for the Member's share of any losses and deductions of the Company, and (3) for any expenditures under Internal Revenue Code §705(a)(2)(b).

B. If a Member transfers all or part of his membership interests in accordance with the provisions of this Operating Agreement, the transferee shall succeed to the Member's capital account or a portion of the account, in proportion to, *pro rata*, the overall percentage of membership interests transferred by the Member to the transferee.

C. Sections 3.3(A) and (B) of this Operating Agreement regarding the establishment and maintenance of capital accounts are intended to comply with Treasury Regulation 1.704-1(b)(2)(iv) and shall be interpreted and applied in such a manner as to comply with that Treasury Regulation including any amendments thereto. The Members agree to adjust the Members' capital accounts, as necessary or appropriate, to comply with the foregoing Treasury Regulation.

D. Except as otherwise provided in this Operating Agreement or under the Act, no Member is entitled to receive interest or a return on his capital contributions to the Company or on the Member's capital account unless otherwise agreed, in writing, by the unanimous consent of the Members.

3.4 Membership Interests. The Company has authorized the total of one thousand

(1,000) membership interests in the Company to be allocated among the Members as shown on **Exhibit 1**. If new investors are brought into the Company, new members shall be admitted on terms and conditions approved by a unanimous vote of the Members.

3.5 Personal Loans. Any Member, in his sole judgment and discretion, may, but is not obligated to, loan or guarantee loans to the Company, upon such terms and conditions as may be agreed by the Members at the time of such a loan or loan guarantee.

3.6 Non-Competition/Corporate Opportunity Doctrine. Except for the business contemplated in 3.1(A)(3)(c), the Members and their affiliates may participate, engage or invest in any business activity of any type or description. Members have the right to pursue and participate in any non 3.1(A)(3)(c) ventures or activities, and to the income or proceeds therefrom. The Members are NOT obligated or required to present any business or investment opportunity or prospective economic advantage to the Company, except those described in 3.1(A)(3)(c).

3.7 Equity Members' Loans/Capital Contributions. Equity Members may withdraw their loans or capital contributions to the Company at any time.

ARTICLE IV
ADMINISTRATIVE PROVISIONS

4.1 Books of Account. The Company shall establish and maintain true and accurate books of account and records of its operations showing the assets, liabilities, costs, expenditures, receipts, profits, and losses of the Company. These books of account and records shall include a separate provision for the Members' capital accounts and such information as any Member may, from time to time, reasonably request.

4.2 Financial Statements. The Company shall create or cause to be created at the end of the fiscal year an unaudited balance sheet and a statement of income and cash flows for each such annual period.

4.3 Tax Returns. The Company shall issue or cause to be issued a Partnership Income Tax Schedule K-1 to each Member within 90-days after the end of each calendar year; provided that the Company has sufficient information on hand at the time to determine the profits or losses of the Company attributable to each Member. The Company shall file or cause to be filed U.S. Partnership Income Tax Returns for the Company and may apply for extensions, as necessary.

4.4 Inspection. Upon request by a Member, the Company shall make available for inspection and duplication a full and complete set of the books of account and records, financial statements, and tax returns of the Company to the Member; provided, however, that the Member has a legitimate purpose in reviewing or duplicating the books and records, financial statements, and tax returns.

4.5 Fiscal Year. The Company's fiscal year shall be the calendar year. The Company's books and records shall be kept on a cash or accrual method, as the Manager directs.

4.6 Tax Matters Member. LAWRENCE MACKENZIE is designated the Tax Matters Member of the Company.

4.7 Tax Returns of Members. Each Member shall reflect on his tax return all items of income, gain, loss, deduction, or credit relating to the Company in a manner that is consistent with the preparation and filing of the Company's tax returns.

ARTICLE V
TAX ALLOCATIONS

5.1 Allocation of Profits and Losses. After the application of Sections 5.2 and 5.3 of this Operating Agreement, the Company's Profit and Losses shall be allocated among the Members in proportion to, *pro rata*, their capital accounts (see Section 3.1D above).

5.2 Regulatory Allocations. The following regulatory allocations apply and shall be taken into account:

A. Minimum Gain Chargeback. To the extent and in the manner required by Treasury Regulation 1.704-2(f), if there is a net decrease in Company Minimum Gain for any fiscal year, each Member shall be allocated items of Company income or gain in such fiscal year (and, if necessary, succeeding fiscal years) equal to such Member's share of the net decrease in Company's Minimum Gain determined under Treasury Regulation 1.704-2(g). This Section 5.2(A) shall be interpreted and applied in a manner consistent with the minimum-gain chargeback requirements of Treasury Regulation 1.704-2(f).

B. Member Minimum Gain Chargeback. To the extent and in the manner required by Treasury Regulation 1.704-2(i)(4), if there is a net decrease in Member Minimum Gain, each Member with a share of Member Minimum Gain shall be allocated items of Company income or gain for such fiscal year (and, if necessary, succeeding fiscal years) in an amount equal to such Member's share of the net decrease in Member Minimum Gain. This Section 5.2(B) shall be interpreted and applied in a manner consistent with the minimum-gain chargeback requirements of Treasury Regulation 1.704-2(i)(4).

C. Qualified Income Offset. Any Member who unexpectedly receives any adjustment, allocation or distribution described in Treasury Regulation 1.704-1(b)(2)(ii)(d)(4), (5), or (6) shall be allocated items of Company income and gain (consisting of a *pro rata* portion of each item of income, including gross

income and gain for such fiscal year) in an amount and manner sufficient to eliminate, as quickly as possible, any deficit in the Member's capital account.

D. Company Nonrecourse Deductions. Any Company Nonrecourse Deductions shall be used to allocate among the Members in accordance with Treasury Regulation 1.704-2(i)(1).

E. Member Nonrecourse Deductions. Member Nonrecourse Deductions shall be allocated to the Members who bear the economic risk of loss with respect to the Member Nonrecourse Debt to which Member Nonrecourse Deductions are attributable. This Section 5.2(E) shall be interpreted and applied in a manner consistent with Treasury Regulation 1.704-2(i)(1).

5.3 Interpretation. The Members intend that the allocations of the Company's Profits and Losses shall be applied in a manner consistent with Internal Revenue Code §704 and the Treasury Regulations promulgated thereunder. The provisions of this Article V shall be interpreted in a manner consistent with Internal Revenue Code §704 and the Treasury Regulations promulgated thereunder. To the fullest extent possible, Section 4.6 of this Operating Agreement shall be interpreted in a manner consistent with this Section 5.3.

ARTICLE VI
DISTRIBUTIONS

6.1 Operating Expenses. All operating expenses associated with the Company will be paid by the Company and before any Distribution. Operating expenses include, but are not limited to, draws, payroll, payroll taxes, rent, telephones, office supplies, travel and lodging, and other expenses reasonably related to the Company's operations.

6.2 Non-Liquidating Distributions. The Members may, in their sole judgment and discretion, make distributions to the Members from time to time. Distributions may be made only after repayment of all personal loans (see Sect. 3.5) unless the lender waives such repayment and only after the Members determine that the Company has cash on hand exceeding the Company's current and anticipated needs (including operating expenses, debt service, working capital, and capital expenditures). All distributions shall be made to the Members in proportion to, *pro rata*, their membership interests in the Company. No distribution shall be made if, after giving it effect, the Company would not be able to pay its debts as they become due in the usual course of business or the Company's total assets would be less than the sum of its total liabilities. Subject to the foregoing limitations and qualifications, the Members shall endeavor to make distributions to the Members at the times and in

the amounts sufficient to allow the Members to pay their share of income taxes due on the operations of the Company.

6.3 Liquidating Distributions. In the event the Company is dissolved or liquidated within the meaning of Treasury Regulation 1.704-1(b)(2)(ii)(g), then in compliance with Treasury Regulation 1.704-1(B)(2)(ii)(b)(2), all liquidating distributions shall be made to the Members who have positive capital accounts, in proportion to, pro rata, the balance of each such positive capital account, but only after such capital accounts have been adjusted for all prior contributions and distributions and all allocations under Article V of this Operating Agreement and further, only after the repayment of any personal loans made by any Member or entities related to a Member pursuant to this Operating Agreement and in accord with Section 3.1D above.

ARTICLE VII
MANAGEMENT

7.1 Management. The business of the Company shall be managed by the Equity Members who, by majority vote of their Equity Members' Interest (i.e., over 50% of the Equity Members' Interest) appoint, delegate, or otherwise elect to manage the Company and make all decisions regarding the Company except as specifically provided herein; provided, however, all decisions must be in accord with the terms of this Agreement including specifically Section 3.1D. Without limiting the generality of the forgoing sentence, the parties appoint the following (until removed by a majority vote of the Equity Members' Interest) to manage the Company as follows:

A. PRESIDENT/CEO. The President shall be the chief executive officer ("CEO") of the Company, and in the recess of the Equity Members shall have the general control and management of its business and affairs, subject, however, to the right of the Equity Members to delegate any specific power except such as may be by statute exclusively conferred upon the President, to any other officer or officers of the Company. He shall preside at all meetings of the Members, unless otherwise determined by a majority of all of the Equity Members' Interest. He shall review and approve all budget matters. ANDREW DEANGELIS is hereby appointed President/CEO.

B. VICE-PRESIDENT - FINANCE. In case the office of President shall become vacant by death, resignation, or otherwise, or in the case of the absence of the President, or his disability to discharge the duties of his office, such duties shall, for the time being, devolve upon the Vice-President - Finance who shall do and perform such other acts as the Equity Members may, from time to time, authorize him to do. He will have authority to supervise and manage the financial affairs, bank accounts, payables, receipts,

supervise and manage the financial affairs, bank accounts, payables, receipts, financial statements and in general perform the duties expected of a Chief Financial Officer. LAWRENCE MACKENZIE is hereby appointed Vice-President-Finance.

C. CHIEF OPERATING OFFICER ("COO"). The COO will have the responsibility for locating, developing and implementing the acquisition, negotiation and closing of the distressed loans and providing all appropriate legal services. In addition, the COO will be responsible for the sale of the properties to unrelated third parties, after obtaining title and possession. GROULX is heteby appointed COO.

D. VICE PRESIDENT(S). The Vice President(s) will have the responsibility for dealing with the land contract holders or mortgagees to obtain title and possession and assist the COO in the sale activity for the properties once title has been obtained. D. PRENTICE and G. PRENTICE are hereby each appointed Vice President.

E. OTHER OFFICES. The Equity Members may, from time to time, appoint other officers. It is anticipated that the functions normally handled by the Treasurer will be handled by the Vice President - Finance, with the assistance of the Company's outside Certified Public Accountant. Likewise, the duties normally performed by the Secretary shall also be handled by the Vice President - Finance.

F. Any decisions of the Company shall be made by majority vote of the Equity Members' Interest except as provided elsewhere in this Operating Agreement.

G. All of the Members including the Income Members recognize that all of the funds for operating the Company have been provided by the Equity Members. The Management powers therefore, granted to the Equity Members have been specifically reviewed, approved and understood by the Income Members, which Equity Members management powers include the right to terminate the operations of the Company, for any reason or no reason as determined solely by the Equity Members.

7.2 Signatures of Members Required. All decisions of the Company shall be made by the Equity Members in accordance with Section 7.1, hereof. However, any non-member entity may rely upon the Company's signature when evidenced by the signature of any one of the Equity Members.

7.3 Discharge of Managerial Duties. A Equity Member acting on behalf of Company shall discharge his/her duties in good faith, with the care an ordinarily prudent

person in a like position would exercise under similar circumstances, and in a manner he reasonably believes to be in the best interests of the Company; provided all Members recognizes the unusual powers granted to the Equity Members and stipulate and agree with such grant and concur that the grant is appropriate,

7.4 Elimination/Limitation of Monetary Damages. The Member(s) are not liable for an action on behalf of the Company or the failure to take action if he/she performs such duties in accordance with Section 404 of the Act, being MCL §450.4404. Presuming the Member acts or fails to act in the discharge of his duties in accordance with Section 404 of the Act, the monetary liability of the Member to the Company or its Members is hereby eliminated for breach of any duty established in Section 404 of the Act, except that this provision does not eliminate liability of the Member for any of the following:

A. The receipt of a financial benefit to which the Manager is not entitled;

B. Liability under Section 308 of the Act, being MCL §450.4308;

C. A knowing violation of law;

D. An act or omission occurring before the date when this provision becomes effective.

ARTICLE VIII
MEMBERSHIP

8.1 Matters Subject to A Vote of Members. Except as specifically provided in this Operating Agreement, the Members of the Company shall have the right to represent and vote their Membership interests in the Company on any matter affecting the Company, including the right to vote on the following matters which required vote is as shown below:

A. The cessation of business or dissolution of the Company. 50% Membership Interest vote required.

B. A transaction involving an actual or potential conflict of interest between a Member and the Company; provided, however, nothing in this Agreement may prohibit any Member from engaging in any business provided no Member may compete against the Company as provided in Section 3.6 hereof.

C. The sale, exchange, lease, or other transfer of all or substantially all of the assets of the Company other than in the ordinary course of business. 51% Membership Interest vote required.

D. A merger, share or membership exchange involving the Company. Unanimous Membership Interest vote required.

E. An amendment to this Operating Agreement. Unanimous Membership Interest vote required.

F. The delegation of any matter or power to a Member or any other entity. Unanimous Membership Interest vote required.

G. The admission of a new member or the transfer, assignment, gift, donation, grant of a security interest in, or pledge of all or part of a Member's membership interests to a third-party. Unanimous Membership Interest vote required.

H. All other matters not listed in Section 8.1 A thru G above shall require a 51% vote of the Members Interest.

8.2 Voting Without A Meeting. Any action required or permitted to be taken at a meeting of Members may be taken without a meeting, without prior notice, and without a vote, if consents in writing, setting forth the action taken or to be taken, are signed (either before or after such action) by the Members. Every written consent will bear the date and signature of each Member. Consents may be dated and signed in counterparts by Members, which, taken together, will be deemed an original document and a valid authorization. Electronic and facsimile signatures will be treated as originals for any purpose, including the execution of this Operating Agreement.

8.3 Meetings. Annual and special meetings of the members may be called from time to time at the request of the Member. Notice of the date, time, and place of the meeting shall be given at least 10-days before the meeting unless the Members consent, in writing or by fax or e-mail, to a shorter time or to waive such notice.

8.4 Divestiture of Membership Interests. In the event that a Member enriches himself at the expense of the Company, steals assets or misappropriates opportunities of the Company, then such a Member shall be divested of all of his membership interests and interest in a special purpose or other entity holding Acquired Properties without consideration of any kind and shall forfeit his capital contribution and all outstanding loans to the Company.

ARTICLE IX
LIABILITY AND INDEMNIFICATION

9.1 Liability. No Member is liable for the acts, debts, or obligations of the Company.

9.2 Indemnification. All matters in this Article IX shall be subject to the reasonable decision of the Equity Members to determine the facts and applicability to any given act for which indemnification hereunder is sought.

A. Non-Derivative Actions. The Company shall indemnify a Member who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal, against expenses, including attorneys' fees, judgments, penalties, fines, and amounts paid in settlement actually and reasonably incurred by the Member in connection with the action, suit, or proceeding if the person acted in good faith and in a manner the Member reasonably believed to be in or not opposed to the best interests of the Company or its members, and with respect to any criminal action or proceeding, if the person had no reasonable cause to believe that conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that the Member did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the Company or its members and, with respect to any criminal action or proceeding, had reasonable cause to believe that conduct was unlawful.

B. Derivative Actions. The Company shall indemnify the Member who was or is a party to or is threatened to be made a party to a threatened, pending, or completed action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, manager, employee, or agent of the Company, against expenses, including actual and reasonable attorneys' fees, and amounts paid in settlement incurred by the Member in connection with the action or suit if the Member acted in good faith and in a manner the Member reasonably believed to be in or not opposed to the best interests of the Company or its members. However, indemnification shall not be made for a claim, issue, or matter in which the Member has been found liable to the Company unless and only to the extent that the court in which the action or suit was brought has determined upon application that, despite the adjudication of liability but in view of all circumstances of the case, the Member is fairly and reasonably entitled to indemnification for expenses which the court considers proper.

C. Indemnification. To the extent that a member, employee, manager, or agent of the Company has been successful on the merits or otherwise in defense of an action, suit, or proceeding referred to in Sections 9.2 (A) or (B), or in defense of a claim, issue, or matter in the action, suit, or proceeding, the

successful party shall be indemnified against expenses, including actual and reasonable attorneys' fees, incurred in connection with the action, suit, or proceeding and in any action, suit, or proceeding brought to enforce the mandatory indemnification provided in this Article IX.

D. Determination that Indemnification is Proper. An indemnification under Section 9.2(A) or (B), unless ordered by a court, shall be made by the Company only as authorized in the specific case upon a determination that indemnification of the member, manager, employee, or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in Sections 9.2(A) and (B). This determination shall be made in any of the following ways:

1. By independent legal counsel in a written opinion; or

2. By an affirmative of Members holding more than 50% of the total authorized membership interests in the Company. In voting, regarding this provision 9.2 D, all voting shall be done in good faith.

E. Proportionate Indemnity. If a Member or Manager is entitled to indemnification under Sections 9.2(A) or (B) for a portion of expenses including attorneys' fees, judgments, penalties, fines, and amounts paid in settlement but not for the total amount thereof, the Company may indemnify the Member or Manager for the portion of the expenses, judgments, penalties, fines, or amounts paid in settlement for which the person is entitled to be indemnified.

F. Advancement of Expenses. Expenses incurred in defending a civil or criminal action, suit, or proceeding described in Section 9.2(A) or (B) may be paid by the Company in advance of the final disposition of the action, suit, or proceeding upon receipt of an undertaking by or on behalf of the manager, employee, or agent to repay the expenses if it is ultimately determined that the person is not entitled to be indemnified by the Company. The undertaking shall be by unlimited general obligation of the person on whose behalf advances are made but need not be secured.

G. Non-Exclusivity of Rights. The indemnification or advancement of expenses provided under Sections 9.2 (A) and (B) is not exclusive of other rights to which the person seeking indemnification or advancement of expenses may be entitled under the articles of in Company, bylaws, or a contractual agreement. However, the total amount of expenses advanced or indemnified from all sources combined shall not exceed the amount of actual expenses incurred by the person seeking indemnification or advancement of expenses.

H. Former Managers, Members, Employees or Agents. The indemnification

provided in this Article IX continues as to a person who ceases to be a manager, member, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of the person.

I. Reduction of Indemnity Amount. The Company's indemnity of any person who is was serving at its request as a manager, member, employee, or agent of another foreign or domestic Company, business Company, partnership, joint venture, trust or other enterprise shall be reduced by any amount such person may collect as indemnification from such other foreign or domestic Company, business Company, partnership, joint venture, trust or other enterprise.

J. Additional Indemnification. The Company may, but is not required to, purchase and maintain insurance on behalf of any person who is or was a manager, member, employee, or agent of the Company, or is or was serving at the request of the Company as a manager, member, employee, or agent of another Company, business Company, partnership, joint venture, trust, or other enterprise against any liability asserted against the person and incurred by the person in any such capacity or arising out of the person's status as such, whether or not the Company would have power to indemnify the person again such liability under Sections 9.2(A) or (B).

ARTICLE X
TRANSFER OF SHARES

10.1 Restrictions on Transfers. Except as otherwise provided in this Operating Agreement, a Member may not sell, assign, transfer, exchange, mortgage, pledge, grant, hypothecate, donate, gift or dispose of his membership interests in the Company unless approved, in writing, by the other Equity Members; provided, however, that a Member may make provision for estate planning purposes, i.e., will, trusts, and other testamentary instruments, to transfer his membership interests to members of his immediate family provided that the transferee/beneficiary is subject to, and must comply with, Section 10.4 of this Operating Agreement. Any attempted disposition of membership interests in violation of this Operating Agreement will be deemed null and void and unenforceable, *ab initio*. In such an event, the assignee or transferee will not be recognized as a member of the Company for any purpose, including, without limitation, voting, distributions, and requesting or inspecting the Company's books and records, and will not have any rights with respect to such membership interests. Upon the death, disability, incapacitation or refusal to act by one of the Members, the other Members shall have all Management and voting rights as set forth in Article VII and VIII hereof which management rights shall be exercised in good faith and the deceased, disabled, incapacitated or non- acting Equity Member shall have no voting or management rights. The only rights for such deceased, disabled, incapacitated or refusing to act Member (or their

estate, trust, assignees, etc.) shall be the right to the pro rata share distribution(s) pursuant to Section 3.1 D above.

10.2 Right of First Refusal. In the event that a Member proposes or contemplates selling all or part of his membership interests in the Company ("Selling Member"), the other members ("Non-Selling Members") are hereby granted a first right of refusal to purchase all such membership interests before such membership interests are sold, assigned or transferred to another person or entity, provided however, only an Equity Member may buy an Equity Members interest. The Selling Member shall provide the Non-Selling Members, a copy of the written Offer to Purchase (there may be no sale except pursuant to a written Offer to Purchase) by certified mail, return receipt requested, of his intent to sell his membership interests, the number of membership interests he proposes selling, the total purchase price ("Purchase Price"), and all other material terms and conditions of the sale, including payment terms, contingencies, etc. ("Written Offer'), including providing the Non-Selling Members with a copy of the offer itself, if there is one. Upon receipt of an Written Offer, the Non-Selling Member shall have the right to elect, in their sole judgment and discretion, to exercise their right of first refusal and to purchase the Selling Member's membership interests in proportion to, pro rata, their respective membership interests, at the Purchase Price either on the terms and conditions set forth in the Written Offer, or upon payment of 25% of the Purchase Price within 90-days after receipt of the Written Offer with the balance of the Purchase Price paid in 3-equal annual installments. Within 30-days after receipt of the Written Offer, the Non-Selling Members must inform the Selling Member, in writing, by certified mail, return receipt requested, of their intent to exercise their right of first refusal and their election; otherwise, the Non-Selling Members will be deemed to have waived their right and, in such an event, the Selling Member will have the right to sell his membership interests to third-parties at the exact Purchase Price and on the exact terms and conditions set forth in the Written Offer. In the event that the Selling Member does not sell his membership interests to a third-party on the terms and conditions set forth in the Offer within 45-days after the Non-Selling Member is deemed to have waived his right of first refusal, then the Written Offer shall be deemed null and void and the Selling Member shall not be entitled to sell all or part of his shares to a third-party, irrespective of whether the terms and conditions of the sale are the same as in the Offer, unless he complies once again with Section 10.2 of this Operating Agreement.

10.3 Dispositions in Violation of Section 10.2. If, after complying with the procedures set forth in Section 10.2 of this Operating Agreement, the Selling Member sells, or attempts to sell, his membership interests at a price or on terms and conditions which deviate in any respect from the Purchase Price and/or the Written Offer, the sale will be deemed null and void and unenforceable, *ab initio*. In such an event, the assignee or transferee will not be recognized as a Member of the Company for any purpose and will not have any rights with respect to such membership interests.

10.4 Assignees. If, after compliance with Sections 10.1, 10.2, 10.3, and 11.2 of this

Operating Agreement, membership interests are sold, assigned, transferred, exchanged, donated or gifted to a third-party, the third-party will be required, as a condition of such assignment or transfer, to execute this Operating Agreement, as amended from time to time, and such other agreements, documents, or instruments as the Company, its Members and its legal and financial advisors may require.

ARTICLE XI
INVESTMENT AND SECURITIES MATTERS

11.1 No Registration. The membership interests of the Company have not been registered under the Securities Act of 1933, the Michigan Uniform Securities Act, or any other federal or state securities laws. The Company has not agreed to register any of its membership interests under federal or state laws or to comply with any exemption from registration under federal or state laws for the sale or transfer of any of its membership interests. Consequently, Members may be required to hold their membership interests indefinitely, unless and until registered under the Securities Act of 1933, the Michigan Uniform Securities Act, or any other applicable state securities laws or unless and until an exemption from registration is available, in which case Members may still be limited as to the amount of membership interests that may be sold or transferred. In any case, each Member agrees that he will not sell, assign, encumber, pledge, mortgage, pledge, hypothecate, donate, or otherwise transfer any shares of membership interests of the Company unless any such transaction complies with this Agreement and, in no case, whether or not for consideration, unless and until the membership interests is registered or determined to be exempt from registration on the basis of a favorable legal opinion of the Company's counsel, in writing, that such a transaction will not violate the Securities Act of 1933, the Michigan Uniform Securities Act, or any other applicable state securities laws.

11.2 Restrictions on Transferability. There are restrictions on the transferability of the membership interests of the Company. There is no established public or private market for the shares of membership interests and, accordingly, it might not be possible to liquidate or sell the shares of membership interests readily, or at all, in case of an emergency or otherwise.

11.3 Risk. An investment in the Company involves a certain degree of risk, and each Member fully understands all of the risks associated with the investment. The investment is highly speculative, and no assurance has or can be given with respect to the investment's suitability or performance.

11.4 Investment Knowledge. Each Member has the knowledge and experience in financial and business matters to be fully and completely capable of evaluating the merits and risks associated with the investment in the Company or, if not, has

obtained the advice of an attorney, certified public accountant, or registered investment advisor with respect to the investment.

11.5 Suitability. Each Member has adequate means of providing to his own needs and possible personal contingencies, has no need for liquidity in his investment or Member interests in the Company, and is able to bear the risks of the investment for an indefinite period, without any assurance of success or performance.

11.6 Additional Investment Representations. Each Member represents that he has acquired the Member interests in the Company for his own account and for investment purposes only. He has not acquired these Member interests in the Company for the account of others or with a view to reselling or distributing the Member interests.

11.7 Conflict of Interests.

A. The Company and each of its Members acknowledges that the law firm of Paul L. Nine & Associates, P.C. and its attorneys (collectively, "PLN") currently and formerly have represented several of the Members and various entities in which they are involved. Therefore, in preparing the (i) Articles of Organization, (ii) this Operating Agreement, (iii) any Special Resolutions of the Members of Company, and (iv) any documents related thereto, PLN represents neither the interests of the Company nor any of its Income Members. PLN prepared the foregoing documents at the request of the Members for each of their individual attorneys to review. The Company and each Income Member have been advised by PLN that a conflict exists, between the interests of the Equity Members and the Income Members as well as the Company.

B. The Company and each of its Members acknowledge that PLN has previously and will in the future render legal services and representations to any of the Equity Members of the Company, to entities owned or controlled by Equity Members of the Company or to the Company. Thus, the Company and Income Members acknowledge that there can exist or may exist, because of this representation, a conflict of interest between the interests of the Income Members and the Company. Further, PLN has a close relationship to GROULX and all parties waive such conflict for purposes of this transaction and all related matters.

C. **The Company and individual Members each has been advised by PLN to obtain the advice of independent legal counsel before making a decision about this investment in or admission as a member of the Company, or signing any documents related thereto, including those identified in Section 11.7 A. By signing this Operating Agreement, the Company and each Member represent and warrant that it/he has had a reasonable opportunity to obtain the advice of independent legal**

counsel and has obtained such advice or is knowingly, voluntarily, and willingly waiving its/his right to do so.

D. Each of the Members represents and warrants that he has not relied on any representations of PLN in making a decision to invest in the Company or in signing or approving the foregoing documents and has had access to all information he believes he needs to make an informed decision to do so. PLN has not offered or provided investment, legal, or business advice to the Company or its Members. **The Company and each of the Members hereby agrees to waive all claims against PLN or its attorneys arising under, in connection with, or incident to or existing or possible conflicts of interest regarding its involvement in this transaction and the preparation of documents related thereto.**

E. The provisions of this Section 11.7 A through D shall apply to all previous and subsequent work performed by PLN for the Company, for individual Members of the Company, and/or for entities owned or controlled by individual Members of the Company, whether or not reoccurring notices of this conflict of interest is provided to the Company, its individual Members, or entities, owned or controlled by the individual Members.

ARTICLE XII
CONFIDENTIALITY

12.1 Confidentiality. Each Member will be entrusted with material, nonpublic information about or concerning the Company and the acquired distressed loans which is intended to be used, and should be used, solely in connection with the performance of his duties as a member and/or officer of the Company.

12.2 Loan Files. Each Member will have access and be privy to, among other confidential information, private information about the purchasers of the properties securing the non-performing notes (*e.g.*, social security numbers, credit information, tax returns, IRS Forms W-2 and 1099, payroll checks and stubs, financial data, *etc.*),(hereinafter referred to as "Loan File Information"). Except in the performance of their duties as a Member, Members are strictly prohibited from using, disclosing, or disseminating Loan File Information.

12.3 Sources. Dean Groulx, David Prentice, and Glenn Prentice have expended considerable time, money, and effort in identifying, developing, and maintaining relationships with Real Estate Investment Trusts, hedge funds, and asset managers for the purpose of purchasing distressed properties and non-performing notes, including land contracts and mortgages ("Sources"). "Sources" includes seller lists, the names, addresses, telephone numbers, email addresses, and bidding procedures and processes for these REITs, hedge funds, and asset managers. Except in the

performance of their duties as Members of the Company, each Member is prohibited from using, disclosing, or disseminating Sources in relation to the non-performing notes described in section 3.1(A)(3)(c), except as provided in section 12.5

12.4 Confidential Business Information. "Confidential Business Information" includes the Company's strategic plans and objectives, financial statements, sales reports, client lists, vendor lists, and prospects, marketing and business plans, pricing, national and regional advertising, promotional campaigns, supplier and vendor lists, and marketing information in relation to non-performing notes described in section 3.1(A)(3)(c). Other than in the performance of his duties as a Member of the Company, each Member is strictly forbidden from using, disclosing, disseminating, duplicating, or reproducing Confidential Business Information, except as provided in section 12.5.

12.5 Member Rights on Termination or Withdrawal. In the event that a Member withdraws from the Company as a member or the Company is terminated or ceases operations, then the Member(s) may acquire non-performing notes, as contemplated in section 3.1(A)(c)(3), in its own name or with, for, or on behalf of others, without regard to the Company or the other Members and without the restrictions set forth in section 3.1(A)(c)(3) or Article 12.

ARTICLE XIII
GENERAL PROVISIONS

13.1 Termination or Amendment of Operating Agreement. This Agreement may not be terminated or amended except in writing as provided in Section 8.1 above, provided, further, this Agreement may not be amended or modified in a manner that would adversely affect a Member's interests as a Member (e.g., voting rights, membership interests, distributions) without consent in writing from the affected Member.

Upon the termination for any reason, all pending activities of the Company shall be promptly wrapped up in a commercially reasonable manner.

13.2 Conflicts or Inconsistencies. In the event of a conflict or inconsistency between the terms of this Operating Agreement and any provision in the Articles, then this Operating Agreement shall take precedence, with all conflicts and inconsistencies being decided in favor of this Operating Agreement.

13.3 Execution. This Agreement may be signed in counterparts each of which is an original. Facsimile and electronic signatures will be treated as originals.

13.4 Successors and Assigns. This Agreement will bind and inure to each Member's successors and assigns, respectively.

13.5 Reformation. This Operating Agreement is enforceable to the fullest extent permissible under the Michigan law, excluding its choice of law provisions. To the extent that any portion of this Operating Agreement shall be held to be invalid, illegal or unenforceable, then a court of competent jurisdiction may rewrite that portion of this Operating Agreement to make it reasonable under the facts and circumstances or, if it cannot be rewritten to make it valid, legal, or enforceable, then to exclude it and enforce the remaining provisions of this Operating Agreement.

13.6 Michigan Law. This Operating Agreement will be governed, construed and enforced in accordance with the laws of the State of Michigan, excluding its choice of law provisions. This Operating Agreement was negotiated, executed, and to be performed, at least in part, in Oakland County, Michigan. All disputes or controversies arising under, in connection with, or incident to this Operating Agreement shall be resolved, if at all, in Oakland County Circuit Court in Pontiac, Michigan, or the U.S. District Court for the Eastern District of Michigan, to the exclusion of all other courts or forums in the world. Personal service may be made by certified mail, return receipt requested, served on each Member at his last known address, as shown on the Company's books and records. The prevailing party shall be entitled to an award of reasonable fees and costs, including reasonable attorneys' fees.

13.7 **Waiver of Jury Trial. Each Member understands that he has a constitutional right to trial by jury, but nevertheless, is voluntarily, knowingly, and willfully hereby waiving such right with respect to all disputes or controversies arising under, in connection with, or incident to this Agreement or the relationship between each Member in relation thereto.**

13.8 Ambiguous Terms. This Operating Agreement is the by-product of arms-length negotiations between the Members. Each Member has had a reasonable opportunity to review the terms and conditions of this Operating Agreement with an attorney of his choosing. Thus, this Operating Agreement will be deemed to have been drafted by all of the Members, irrespective of who was the scriber. Thus, ambiguous terms shall not be construed for or against either party.

13.9 Entire Agreement. This Agreement, together with the Exhibit attached hereto and/or incorporated herein by reference, is an integrated agreement and as such, represents the final and complete expression of the agreement between the parties concerning the subject matter hereof. Except as otherwise expressly set forth herein, this Agreement replaces, supersedes, nullifies, and voids all other agreements, contracts, representations, discussions, negotiations, term sheets, letters of intent, drafts, and iterations of the parties concerning this Agreement or the subject matter hereof whether oral, written or electronic. The parties hereby acknowledge and represent that they have not relied on any representation, assertion, guarantee,

warranty, promise, contract, agreement, silence, omission, or assurance in making the decision to enter into this Agreement except for those expressly set forth in this Agreement. The parties hereby unconditionally waive all rights and remedies, at law or in equity, arising under, in connection with, or incident to any party's reliance on any representation, assertion, guarantee, warranty, promise, contract, agreement, silence, omission, or assurance which is not expressly set forth in this Agreement. This Agreement may only be amended by a writing signed by all parties.

13.10 No-Reliance. As a material condition of entering into this Agreement, the parties to this Agreement represent to each other that except for the matters specifically as set forth herein, they have not relied on any other documents or information disclosed to them whether written, oral or electronic. In entering into this No-Reliance provision and hereby disclaiming reliance upon any matter not contained in this Agreement, the parties each further represent to the other that they are sophisticated and have experience in entering into contracts of the general type of this Agreement. Further, in entering into this No-Reliance provision each party has either consulted with an independent attorney of their choosing or has knowingly elected not to consult with an independent attorney.

DEANGELIS PROPERTIES, LLC –
EQUITY MEMBER

By: _____
Andrew DeAngelis, Member
Dated: ~~July~~ ___, 2015
August 17, 2015

RUBICON REALTY GROUP, LLC –
INCOME MEMBER

By: _____
Dean J. Groulx, Member
Dated: ~~July~~ ___, 2015
August 13,

L.S. MacKENZIE PROPERTIES, LLC –
EQUITY MEMBER

By: _____
Lawrence MacKenzie, Member
Dated: ~~July ___, 2015~~
AUGUST 17, 2015

PRENTICE ENTERPRISES, LLC -
INCOME MEMBER

By: _____
David Prentice, Member
Dated: ~~July~~ ___, 2015
August 13

DOWNTOWN BROWN, LLC –
INCOME MEMBER

By: _____
Glenn Prentice, Member
Dated: ~~July~~ ___, 2015
August 13

EXHIBIT 1
ALLOCATION OF MEMBERSHIP INTERESTS

Equity Members	Initial Capital Contribution	Loan Amount	Number of Membership Interests	Member Interest %
DeAngelis Properties, LLC	$12,500	$262,500	250	25%
L.S. MacKenzie Properties, LLC	$12,500	$262,500	250	25%
Income Members				
Rubicon Realty Group, LLC	-0-	-0-	166.7	16.67%
Prentice Enterprises, LLC	-0-	-0-	166.7	16.67%
Downtown Brown, LLC	-0-	-0-	166.6	16.66%

STATE OF MICHIGAN

IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

APPENDIX – VOLUME IV
PLAINTIFF/COUNTER-DEFENDANT/CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 18, 2022

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EXHIBIT 7

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SOARING PINE CAPITAL REAL EST Plaintiff,
V
PARK STREET GROUP REALTY SI Defendant,

NO: 2018-163298-CB
HON. MARTHA D. ANDERSON

In the matter of:

ORDER REGARDING MOTION

Motion Title: Defendants' Motion for Summary Disposition, pursuant to MCR 2.116(C)(10)

The above named motion is:

- ☐ granted.
- ☒ granted in part, denied in part.
- ☐ denied.
- ☒ for the reasons stated on the record.

In addition:

* Defendants' request for attorney fees and costs is GRANTED, pursuant to MCL 438.32.

* The Bench Trial shall proceed in this matter relative to the issue of the principal amount of the subject loan due and owing to Plaintiff and the costs and attorney fees to which Defendants are entitled to recover in this matter from Plaintiff, pursuant to MCL 438.32.

* This Order does NOT resolve the last pending claim and does NOT close the case.

DATED: 06/26/2019

Martha D Anderson

HON. MARTHA D. ANDERSON
Circuit Court Judge

EXHIBIT 8

STATE OF MICHIGAN

6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SOARING PINE CAPITAL REAL ESTATE,

Plaintiff,

v File No.: 2018-163298-CB

PARK STREET GROUP REALLY SERVICES and DEAN GROULX,

Defendants.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MARTHA D. ANDERSON, CIRCUIT COURT JUDGE

Pontiac, Michigan - Wednesday, June 26, 2019

APPEARANCES:

For the Plaintiff:
BRIAN M. SAXE (P70046)
ELYSE E. PALOMBIT (P82066)
Rossman Saxe PC
2145 Crooks Road, Suite 220
Troy, MI 48084-5539
(248) 385-5481

For the Defendant:
PAUL L. NINE (P18307)
Paul L. Nine & Associates PC
100 W. Long Lake Road, Suite 102
Bloomfield Hills, MI 48304
(248) 644-5500

TRANSCRIBED BY:
THERESA'S TRANSCRIPTION SERVICE
Sally Fritz, CER #7594
P.O. Box 21067
Lansing, Michigan 48909-1067

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Pontiac, Michigan

Wednesday, June 26, 2019 - 11:40:56 a.m.

THE CLERK: Your Honor, calling number nine on the call, Soaring Pine Capital versus Park Street Group, case number 2018-163298-CB.

MR. SAXE: Your Honor, Brian Saxe for the plaintiffs.

MS. PALOMBIT: Elyse Palombit for plaintiff.

MR. NINE: Paul Nine for the defendants.

THE COURT: All right. Counselors, I have reviewed everything, I'm ready to rule. If you want to make any statements, keep the brief and I will --

MR. NINE: My client actually said that might well be the case and so we agree to that.

MR. SAXE: Okay. Your Honor, with that in mind we will agree to that as well.

THE COURT: All right. Thank you. This matter is before the court on defendant's motion for summary disposition as to plaintiff's complaint pursuant to MCR 2.116(C)(8) and (10). This litigation involves loan agreements secured by mortgages encumbering multiple real properties located in the counties of Wayne, Washtenaw, Lapeer, Saginaw and Genesee, and guaranteed by continuing unlimited guarantees. On August 12th, 2016 defendant Park Street Group Realty Services, LLC executed a loan agreement

with a principal amount of 500,000 with plaintiff, Soaring Pine Capital Real Estate and Debt Fund II, LLC secured by a mortgage in favor of plaintiff on the subject real properties. On that same date defendant Park Street Group, LLC executed a continuing unlimited guarantee with plaintiff which guaranteed the indebtedness of defendant, Park Street Group Realty Services, LLC.

According to the loan agreements the loans were to provide defendants with working capital to inter alia acquire and renovate single family residential homes in the city of Detroit. On September 23rd, 2016 defendant Park Street Group Really Services, LLC executed an amendment to the loan agreement with a principal amount of one million with plaintiff secured by an amended and restated mortgage note in favor of the plaintiff on the subject real properties.

On that same date defendant Groulx executed a continuing unlimited guarantee with plaintiff which guaranteed the indebtedness of defendant Park Street Group Really Services, LLC. As of September 23rd, 2017 said amended and restated mortgage note matured. However, defendant Park Street Group Realty Services, LLC has not made a payment in full. Consequently, on December 27th, 2017 plaintiff declared a default and demanded payment from defendants herein. When plaintiff -- when payment was not

forthcoming this lawsuit ensued where plaintiff alleges in its second amended complaint against defendants three separate counts of breach of contract, a claim for fraudulent inducement and a claim for innocent misrepresentation.

Defendant now brings the pending motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). A motion under (C)(8) may be granted if the opposing party fails to state a claim on which relief may be granted and only if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko versus Blake*, 448 Mich 648 (1995).

The motion is tested on the pleadings alone and all factual allegations contained in the complaint must be accepted as true by the court. *Id.* and MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual basis of a plaintiff's complaint and shall be granted if no genuine issue of material fact exists except as to damages. A court must examine the pleadings, affidavits, depositions, admissions and any other evidence in favor of the opposing party granting the benefit of any reasonable doubt to the opposing party. *Smith versus Globe Life Insurance Company*, 460 Mich 446 at 454 (1999).

Initially, the moving party retains the burden of supporting its position by the above evidentiary

proofs but the burden then shifts to the opposing party to establish a genuine issue of material fact. *Id.* at 455.

The non-moving party is not permitted to rely on mere allegations in his or her pleadings. *Id.*

The court shall grant summary disposition if the opposing party fails to present documentary evidence to establish the existence of a genuine issue of material fact. *Id.*

Defendant's motion is premised upon two arguments. Initially, defendants argue that the loans plaintiff seeks to collect upon provides for an interest rate in excess of 25 percent, thereby violating Michigan's criminal usury statute citing MCL 438.31 in support. It is undisputed that plaintiff is a private equity firm and not a regulated lender, and as such, defendants argue that all fees by it, other than the principal reduction payments, are considered interest under Michigan usury laws. See MCL 438.31a, MCL 438.31c(6), MCL 438.61(3) and *Scalici versus Bank One NA*, unpublished per curiam opinion of the Michigan Court of Appeals dated September 20th, 2005, docket numbers 254632, 254633 and 254634.

Furthermore, the Michigan Limited Liability Company Act expressly provides that a lender may not enter into a loan agreement that charges a limited liability company, such as defendants, with more than 25 percent

interest without violating the criminal usury statute. See MCL 450.4212.

Thus, the absolute most plaintiff could lawfully charge or receive in interest from the borrow (ph) on a one-year, one million dollar loan at the maximum rate of 25 per annum is $250,000.00. However, according to defendants the loan documents and mortgage notes show that plaintiffs charged $365,851.56 in connection with the subject loans as follows: $205,642.81 for interest and capitalized interest; $11,506.85 for accrued interest from August 12th of 2016 through September 9th -- 23rd of 2016; $50,000.00 for loan commitment fees at closing; 70,000 for success fees; 1,000 house -- $1,000.00 per house sold (ph) for each acquired with loan proceeds; 14,000 legal fees incurred by plaintiff in connection with the loan, and $14,701.90 title insurance, abstract title searches and examination reporting fees.

To determine whether a transaction falls within the usury statute the court must look beyond form to characterize the real nature of the transaction. *Paul versus Mutual Financial Corporation*, 150 Mich App 773 at 780 (1986), citing *Wilcox versus Moore*, 354 Mich 499 at 504 (1958).

In further support of their position defendants cite *McKenna versus Wilson*, 280 Mich 227 at 229

(1937) providing recording fees and mortgage taxes charged to the borrow (ph) constitute interest on loan. *Leaf (sp) versus Citizens Commercial and Savings Bank*, 304 Mich 508 at 509 (1943) providing recording fees and mortgage taxes charged to borrow (ph) constitute interest on loan. *Miller versus Ashton*, 241 Mich 46 at 51 (1927), providing service fees for examining property to be mortgaged or title examination fees are usual incidents to the mortgaging of real estate and included in interest rate, and *Wright versus Traver*, 73 Mich 493, 94-95 (1889), providing legal fees charged to borrow constitute interest on the loan.

In following, defendants argue that under the wrongful conduct rule plaintiff is barred from recovering on any of its claims given that the claims are based in whole or in part on plaintiff's illegal conduct. That is, plaintiff is precluded from recovering any interest or principal owed relative to the subject loans. In support, defendants cite *Orzel verse -- by Orzel versus Scott Drug Company*, 449 Mich 550 at 558 (1995), *Scalici, supra* and *Wellman versus Bank One NA*, unpublished per curiam opinion of the Michigan Court of Appeals dated September 20th, 2005, docket number 253996.

For the wrongful conduct rule to apply two requirements must be satisfied: the plaintiff's conduct must be prohibited or entirely -- or almost entirely prohibited

under a penal or criminal statute, and secondly, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Orzel by Orzel, supra*, at 561 and 564.

Here, defendants take the position that both requirements have been met and thus, plaintiff cannot benefit from its own criminal conduct barring plaintiff's recovery of any principal interest, fees or other damages related to the elicit loan. Defendants also seek attorney fees and costs under MCL 438.32.

In response, plaintiff denies that the loan agreement at issue violates the Michigan criminal usury statute because the interest rate on the loan is 20 percent. Plaintiff claims that the default rate of interest, 5 percent, are viewed as late fees and not interest under Michigan law, and furthermore, the interest limitation provision in the mortgage note shows that the parties agreed that the note complies with applicable law.

Plaintiff takes issue with defendant's position that the commitment fees and success fees do not constitute interest. However, plaintiff fails to cite any authority in support of its position. This court will not search for authority either to sustain or reject a party's position. Where a party fails to cite any supporting legal authority for its position the issue is effectively

abandoned. *Schellenberg versus Rochester Michigan Lodge No 2225* at 228 Mich App 20, page 49 (1998).

Moreover, plaintiff's argument on this point is spurious. First, plaintiff argues that the 50,000 commitment fee is essentially a down payment on the principal. However, plaintiff's own amortization table shows that defendants loaned one million dollars but only received $950,000.00, and thus, plaintiff pocketed (ph) that the extra 50,000.

Second, plaintiff argues that the success fees are contingent on the sale of homes, and therefore, not interest, citing a 2015 Michigan Attorney General opinion, Attorney General opinion 2015 number 7283.

However, this Attorney General opinion defines a contingency as one which is -- is a percentage of future revenues or profits, not a sum certain, as is the case here. Plaintiff also disputes the applicability of the case law cited by defendants relative to the legal fees, recording fees, title fees and examination fees but fails in its attempt to distinguish those cases from the facts before this court. See *McKenna, supra, Lee, supra, Miller, supra* and *Wright, supra*.

Finally, plaintiff argues that even if the court finds that plaintiff's loan to defendants was usurous, the principal on the alleged usurious loan is nonetheless

recoverable from defendants herein. In support, plaintiffs cite several cases, however, only one case is factually on point with those before this court, that being *Karel versus JRCK Corporation*, unpublished per curiam opinion of the Michigan Court of Appeals dated May 10th, 2012, docket number 304415, which involves a criminally usurous loan and the wrongful conduct rule.

Plaintiff argues that a similar result should occur in this case as held in *Karel, supra*, whereby plaintiff is entitled to recovery of the principal loan in this matter.

The court having reviewed the parties' respective submissions, as well as the court record, finds that no genuine issue of material fact exists that plaintiff violated MCL 438.41 by charging a usurious interest rate in excess of 365,000 considering the interest fees and expenses outlined herein.

Nevertheless, applying the holding in *Karel, supra* to the facts before this court the court finds that the subject mortgage notes are not facially usurious. The plain language of the contract in paragraph five entitled Interest Limitation provides that should any interest or other charges charged, paid or payable by the borrower in connection with this note, or any other document delivered in connection herewith, result in the charging,

compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and hereby is waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this note.

Contracts shall be construed so as to give effect to every word or phrase as far as practicable. *Klapp versus United States Group Agency, Incorporated*, 468 Mich 459 at 467 (2003).

To find the mortgage notes to be facially usurious would require this court to ignore the interest limitation paragraphs in the mortgage notes and thus render this part of the contract surplusage or nugatory contrary to law. *Id.* at 468.

However, for the criminal act of charging an interest rate that is usurious to bar recovery of the principal on the note under the wrongful conduct rule a sufficient causal nexus must exist between the charging of the illegal interest rate and plaintiff's asserted damages. *Orzel by Orzel, supra* at 564. This court does not so find. Adopting the reasoning in *Karel, supra* the court finds that while the mortgage notes are obviously related to plaintiff's attempt to collect usurous interest it is only incidentally related because the usurious rate of interest

was not authorized by the terms of said notes. Plaintiff is therefore entitled to recover the principal due and owing from defendants. However, it is prohibited from recovering any other interest, fees or damages from defendants.

Consequently, defendants motion for summary disposition is granted in part and denied in part pursuant to MCR 2.116(C)(10) for the reasons set forth herein.

The bench trial shall proceed in this matter on August 12th, 2019 at 8:30 a.m. relative to the issue of the principal amount due and owing to plaintiff and the costs and attorney fees to which defendants are entitled in this matter for plaintiff's criminally usurous loan pursuant to MCL 438.32, and the court will issues its order accordingly. Thank you.

MR. NINE: Thank you, your Honor.

MR. SAXE: Thank you, your Honor.

(At 11:55:52 a.m., hearing concluded)

CERTIFICATION

This is to certify that the attached electronically recorded proceeding, consisting of fourteen (14) pages, before the 6th Judicial Circuit Court, Oakland County, Michigan:

SOARING PINE CAPITAL REAL ESTATE

v

PARK STREET GROUP REALLY SERVICES

_____/

Location: Pontiac, Michigan

Date: Wednesday, June 26, 2019

was held as herein appeared and that this is testimony from the original transcript of the electronic recording thereof, to the best of my ability.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the electronic recording of the proceedings.

/s/ **Sally Fritz**
Sally Fritz, CER #7594
Certified Electronic Recorder

Dated: June 29, 2019

EXHIBIT 9

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

SOARING PINE CAPITAL REAL ESTATE
AND DEBT FUND II, LLC,

Plaintiff/Counter-Defendant,

v.

Case No. 18-163298-CB

Hon. Martha D. Anderson

PARK STREET GROUP REALTY SERVICES, LLC and
PARK STREET GROUP, LLC and DEAN J. GROULX,

Defendants.
_____/

ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION
OF THE COURT ORDER DATED JUNE 26, 2019

This matter is before the Court on Defendants' Motion for Reconsideration of the Order dated June 26, 2019, wherein the Court granted in part and denied in part Defendants' Motion for Summary Disposition, pursuant to MCR 2.116(C)(10). Pursuant to MCR 2.119(F)(2), there will be no oral argument.

The applicable court rule, MCR 2.119(F)(3), provides in pertinent part:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

MCR 2.119(F)(3) is not mandatory, but rather, provides the trial court with some guidance on when it may wish to deny motions for rehearing. *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723 (1986). Indeed, if a trial court wants to provide a "second chance" to a motion it has previously denied, it has every right to do so, and MCR 2.119(F) does nothing to prevent the exercise of this discretion. *Smith, supra.* "The grant or denial of a motion for

reconsideration rests within the discretion of the trial court." *Charbeneau* v *Wayne County General Hosp*, 158 Mich App 730, 733 (1997).

Upon thorough review of the record, the Court finds that Defendants' motion merely presents the same issues already considered and rejected by this Court, either expressly or by reasonable implication. Defendants failed to demonstrate a palpable error by which the Court and the parties have been misled, and furthermore, show that a different disposition of the underlying motion must result from correction of the alleged error as set forth in MCR 2.119(F)(3).

THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration of the Order dated June 26, 2019 is **DENIED**, pursuant to MCR 2.119(F)(3).

IT IS SO ORDERED.

This Order does NOT resolve the last pending matter and does NOT close the case.

Martha D Anderson

HON. MARTHA D. ANDERSON
Chief Circuit Judge Pro Tempore

Dated: 7/19/2019.

EXHIBIT 10

INTERIOR RATES
Act 326 of 1966

AN ACT to regulate the rate of interest of money; to provide exceptions; to prescribe the rights of parties; and to repeal certain acts and parts of acts.

History: 1966, Act 326, Eff. Mar. 10, 1967.

Popular name: Usury Act

The People of the State of Michigan enact:

438.31 Legal interest rate; scope; limitation; construction; foreign obligations.

Sec. 1. The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum. This act shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person, the issue and rate of interest of which have been expressly authorized by the public service commission or the securities bureau of the department of commerce, or is regulated by any other law of this state, or of the United States, nor shall it apply to any time price differential which may be charged upon sales of goods or services on credit. This act shall not be construed to repeal section 78 of Act No. 327 of the Public Acts of 1931, as amended, being section 450.78 of the Compiled Laws of 1948. This act shall not render unlawful, the purchase of any note, bond or other evidence of indebtedness theretofore issued by any borrower not then domiciled in this state, which bear any rate of interest which is lawful under the law of the domicile of the borrower at the date of issue thereof, and in such case any such rate of interest may be charged and received by any person, firm, corporation or association in this state.

History: 1966, Act 326, Eff. Mar. 10, 1967;—Am. 1970, Act 227, Imd. Eff. Nov. 25, 1970.

Popular name: Usury Act

438.31a Payment of reasonable and necessary charges in addition to interest; exceptions.

Sec. 1a. A state or national bank, except as federal law and regulation provide otherwise, insurance company, or lender approved as a mortgagee under the national housing act, 12 U.S.C. 1701 to 1750g, or regulated by a federal agency, may require a borrower to pay reasonable and necessary charges which are the actual expenses incurred by the lender in connection with the making, closing, disbursing, extending, readjusting, or renewing of a loan. The charges shall be in addition to interest authorized by law, and are not a part of the interest collected or agreed to be paid on the loan within the meaning of a law of this state which limits the rate of interest which may be exacted in a transaction. Reasonable and necessary charges shall consist of recording fees; title examination or title insurance; the preparation of a deed, appraisal, or credit report; plus a loan processing fee. The charges shall be paid only once by the borrower to either the seller of the mortgage or the lender. A charge for inspection required by a local unit of government shall be paid by the seller and shall not be charged to the borrower. This section does not apply to a corporation organized under Act No. 156 of the Public Acts of 1964, as amended, being sections 489.501 to 489.920 of the Michigan Compiled Laws, or a federally chartered savings and loan association.

History: Add. 1968, Act 266, Imd. Eff. July 1, 1968;—Am. 1969, Act 255, Imd. Eff. Aug. 11, 1969;—Am. 1978, Act 27, Imd. Eff. Feb. 24, 1978.

Popular name: Usury Act

438.31b Loan settlement statement.

Sec. 1b. A state or national bank, insurance company, or lender approved as a mortgagee under the national housing act or regulated by a federal agency, shall furnish a loan settlement statement to a borrower upon closing of the loan, indicating in detail the charges the borrower has paid or obligated himself to pay the lender or to any other person in connection with the loan. A copy of the statement shall be retained in the records of the lender. This section does not apply to a corporation organized under Act No. 156 of the Public Acts of 1964, as amended, or a federally chartered savings and loan association.

History: Add. 1968, Act 266, Imd. Eff. July 1, 1968;—Am. 1969, Act 255, Imd. Eff. Aug. 11, 1969;—Am. 1978, Act 27, Imd. Eff. Feb. 24, 1978.

Compiler's note: Act 156 of 1964, referred to in this section, was repealed by Act 307 of 1980.

Popular name: Usury Act

438.31c Interest charged by securities broker or dealer for carrying debit balance in

customer account; written agreement for payment of interest on evidence of indebtedness; prohibitions when security is single-family dwelling unit; validity of transaction or rate of interest; limitation on rate of interest; loans to which subsection (2) applicable; mortgage loans or land contracts by lenders or vendors not qualified under subsection (5); rate of interest on purchase money mortgage or second mortgage; interest on extension of credit secured by lien on mobile home; interest not to be added or deducted in advance; computation of interest; injunction; agreement by certain parties for payment of interest; interest charged by certain trusts excepted; interest bearing deposit account; limitation; maintaining interest bearing account as condition of making mortgage loan or land contract providing for biweekly payments.

Sec. 1c. (1) Interest charged by a broker or dealer registered under title I of the securities exchange act of 1934, chapter 404, 48 Stat. 881, 15 U.S.C. 78a to 78o, 78o-3 to 78dd-1, 78ee to 78hh, and 78*ll* for carrying a debit balance in an account for a customer is not subject to the limitations of this act if the debit balance is payable on demand and secured by stocks or bonds.

(2) The parties to a note, bond, or other evidence of indebtedness, executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements, or the parties to a land contract, may agree in writing for the payment of any rate of interest, but the note, mortgage, contract, or other evidence of indebtedness shall not provide that the rate of interest initially effective may be increased for any reason. In connection with the transaction, except a loan, insured or guaranteed by the federal government or any agency of the federal government, if the security is a single family dwelling unit, the lender shall not do any of the following:

(a) Directly or indirectly require as a condition of the making of the loan, a deposit to be maintained by the borrower, other than an escrow account or a deposit account which is established pursuant to subsection (13).

(b) Directly or indirectly impose or collect, as a condition of the making of the loan, a payment from a seller or borrower in the nature of a discount, point, or similar system, except that a lender may impose and collect, as a condition of making a loan, all fees, discounts, points, or other charges that lenders are permitted or required to impose, collect, or pay in order to qualify the loan for sale, in whole or in part, or in order to obtain a purchase commitment, under any program authorized by federal statute or regulation.

(c) Charge a prepayment fee or penalty in excess of 1% of the amount of any prepayment made within 3 years of the date of the loan, or any prepayment fee or penalty at all thereafter, or prohibit prepayment at any time.

(3) Subsection (2) shall not impair the validity of a transaction or rate of interest lawful without regard to subsection (2).

(4) Subsection (2) shall not authorize or permit a rate of interest in excess of the rate set forth in Act No. 259 of the Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Compiled Laws.

(5) The provisions of subsection (2) shall apply only to loans made by lenders approved as a mortgagee under the national housing act, chapter 847, 48 Stat. 1246, or regulated by the state or by a federal agency, who are authorized by state or federal law to make such loans.

(6) Notwithstanding subsection (5), lenders or vendors not qualified to make loans under subsection (5) may make, or may have made, mortgage loans and land contracts specified in subsection (2) on or after August 16, 1971, which mortgage loans and land contracts provide for a rate of interest not to exceed 11% per annum, which interest shall be inclusive of all amounts defined as the "finance charge" in section 106 of the truth in lending act, title I of Public Law 90-321, 15 U.S.C. 1605, and the regulations promulgated under that act, 12 C.F.R. part 226.

(7) The parties to a purchase money mortgage or a second mortgage may agree in writing for the payment of a rate of interest not to exceed 11% per annum. A second mortgage made pursuant to this subsection shall be made in compliance with Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, except for section 2 of that act. As used in this subsection:

(a) "Purchase money mortgage" means a mortgage secured by a first lien or junior lien taken or retained by the seller of real property to secure all or part of the purchase price of the property.

(b) "Second mortgage" means a mortgage from which the proceeds of a loan or other extension of credit made by a third person are secured by a mortgage on the real property for which the mortgagor has used the proceeds of the loan or other extension of credit to pay all or part of the purchase price of the property.

(c) "Third person" means:

(*i*) A salesperson acting as an agent for a residential builder, or a residential builder, licensed under article 24 of the occupational code, Act No. 299 of the Public Acts of 1980, as amended, being sections 339.2401 to 339.2412 of the Michigan Compiled Laws, when made or negotiated in connection with the sale of a

residential structure constructed by that builder.

(*ii*) A real estate broker or real estate salesperson licensed under article 25 of the occupational code, Act No. 299 of the Public Acts of 1980, as amended, being sections 339.2501 to 339.2515 of the Michigan Compiled Laws, and engaged in the sale of real estate as a principal vocation, when made or negotiated in connection with a real estate sale where the real estate broker or salesperson affiliated with the broker represents either the buyer or seller.

(8) Subject to the title transfer provisions of sections 30c and 30d of the mobile home commission act, Act No. 96 of the Public Acts of 1987, being sections 125.2330c and 125.2330d of the Michigan Compiled Laws, the parties to an extension of credit which is secured by a lien on a mobile home taken or retained by the seller of a mobile home to secure all or part of the purchase price of the mobile home and which is not a retail installment transaction may agree in writing to a rate of interest not to exceed 11% per annum, which interest shall be inclusive of all amounts defined as the "finance charge" in section 106 of the truth in lending act, 15 U.S.C. 1605, and the regulations promulgated under that act, 12 C.F.R. part 226. This subsection shall not prohibit an extension of credit secured by a lien on a mobile home and made on terms and at a rate of interest specifically authorized by another law of this state or the United States. As used in this subsection:

(a) "Mobile home" means mobile home as defined in section 2 of the mobile home commission act, Act No. 96 of the Public Acts of 1987, being section 125.2302 of the Michigan Compiled Laws.

(b) "Retail installment transaction" means retail installment transaction as defined in section 2 of the retail installment sales act, Act No. 224 of the Public Acts of 1966, being section 445.852 of the Michigan Compiled Laws.

(9) A mortgage loan or land contract made under this act shall not provide for a rate of interest added or deducted in advance and interest on the mortgage loan or land contract shall be computed from time to time only on the basis of unpaid balances.

(10) A party to a transaction subject to this act shall be entitled to have his or her rights under this act enforced or protected by injunctive order of a court.

(11) The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest.

(12) Interest charged by a trust created or organized in the United States forming a part of a stock bonus, pension, or profit sharing plan which satisfies the requirements of section 401(a) of the internal revenue code on a loan to a participating employee or beneficiary of the trust is not subject to the limitations of this act.

(13) In the case of a mortgage or land contract, an interest bearing deposit account held in a depository financial institution may be established as a condition of the making of the mortgage or land contract, subject to the conditions specified in this subsection. The deposit account shall be pledged to the lender or seller as additional security for the mortgage or land contract. The lender or seller shall withdraw from the deposit account agreed upon specified amounts at agreed upon periodic times and the withdrawals shall be applied against the periodic payments otherwise due from the borrower or buyer pursuant to the terms of the mortgage or land contract. All interest earned on the pledged deposit account shall be credited to the deposit account. This subsection shall only apply to a loan the primary security for which is a dwelling to be occupied by the owner, or a land contract given as consideration for the sale of a dwelling which is to be occupied by the owner. The mortgage or land contract shall specifically state the amounts by which the payments are supplemented by withdrawals from the pledged account, the amounts required from the borrower or buyer to make up the difference, and the period of time during which withdrawals from the pledge account shall be utilized.

(14) A lender or seller who offers 5 or more mortgages or land contracts in any 1 calendar year may not require a deposit account established pursuant to subsection (13) as a condition of making a mortgage or land contract on more than 20% of the mortgages or land contracts made by the lender or seller in any 1 calendar year.

(15) Notwithstanding subsections (2), (2)(a), (13), and (14), in the case of a mortgage loan or land contract providing for biweekly payments, a regulated depository financial institution or its service corporations, subsidiaries or affiliates may require, or may have required, as a condition of the making of the mortgage loan or land contract, that the borrower maintain an interest bearing account with any depository institution for the purpose of making the biweekly payments by automatic withdrawals from the account, electronically or otherwise. If an institution does not offer interest bearing transaction accounts, or if an institution does not generally offer automatic withdrawals from interest bearing accounts, a noninterest bearing checking account may be maintained for the purpose of making the biweekly payments. However, the borrower shall not be required to maintain funds in the account in excess of an amount sufficient to meet the required biweekly loan payments, including required escrow payments for taxes and insurance, if any, as they become due. As used

in this subsection, "regulated depository financial institution" means a state or nationally chartered bank, or a state or federally chartered savings and loan association or savings bank, or a state or federally chartered credit union. "Affiliate" means a person other than a natural person that directly or indirectly through 1 or more intermediaries is controlled by or is under common control of a regulated depository financial institution.

History: Add. 1969, Act 305, Imd. Eff. Aug. 12, 1969;—Am. 1970, Act 75, Imd. Eff. July 16, 1970;—Am. 1971, Act 94, Imd. Eff. Aug. 16, 1971;—Am. 1971, Act 228, Imd. Eff. Jan. 3, 1972;—Am. 1973, Act 6, Imd. Eff. Apr. 2, 1973;—Am. 1973, Act 21, Imd. Eff. May 16, 1973;—Am. 1974, Act 311, Imd. Eff. Dec. 9, 1974;—Am. 1977, Act 56, Imd. Eff. July 6, 1977;—Am. 1978, Act 440, Imd. Eff. Oct. 9, 1978;—Am. 1980, Act 238, Imd. Eff. July 24, 1980;—Am. 1981, Act 190, Imd. Eff. Dec. 29, 1981;—Am. 1982, Act 193, Imd. Eff. June 28, 1982;—Am. 1982, Act 322, Imd. Eff. Dec. 3, 1982;—Am. 1983, Act 1, Imd. Eff. Mar. 1, 1983;—Am. 1984, Act 6, Imd. Eff. Feb. 1, 1984;—Am. 1985, Act 7, Imd. Eff. Mar. 29, 1985;—Am. 1987, Act 186, Imd. Eff. Dec. 2, 1987;—Am. 1990, Act 94, Imd. Eff. June 6, 1990.

Popular name: Usury Act

438.31d Waiver of defense of usury by nonprofit corporation.

Sec. 1d. Notwithstanding the provisions of section 78 of Act No. 327 of the Public Acts of 1931, as amended, being section 450.78 of the Compiled Laws of 1948, a charitable, religious or other nonprofit corporation may waive the defense of usury without regard to the amount borrowed.

History: Add. 1971, Act 94, Imd. Eff. Aug. 16, 1971.

Popular name: Usury Act

438.32 Violation of act; attorney fees and court costs, recovery.

Sec. 2. Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

History: 1966, Act 326, Eff. Mar. 10, 1967.

Popular name: Usury Act

438.33 Repeal.

Sec. 3. Act No. 156 of the Public Acts of 1891, as amended, being sections 438.51 to 438.53 of the Compiled Laws of 1948, is repealed.

History: 1966, Act 326, Eff. Mar. 10, 1967.

Popular name: Usury Act

CRIMINAL USURY
Act 259 of 1968

AN ACT to define and regulate the practice of criminal usury and to provide a penalty.

History: 1968, Act 259, Eff. Nov. 15, 1968.

The People of the State of Michigan enact:

438.41 Criminal usury; definition; penalty.

Sec. 1. A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

History: 1968, Act 259, Eff. Nov. 15, 1968.

438.42 Usurious loan records; possession, penalty.

Sec. 2. A person is guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by this act. Any person guilty of possession of usurious loan records may be imprisoned for a term not to exceed 1 year or fined not more than $1,000.00, or both.

History: 1968, Act 259, Eff. Nov. 15, 1968.

EXEMPTION OF LOANS TO BUSINESS ENTITIES FROM USURY STATUTE (EXCERPT)
Act 52 of 1970

438.61 "Business entity" and "related entity" defined; extension of credit to business entity; agreement in writing to rate of interest.

Sec. 1. (1) As used in this act:

(a) "Business entity" means a corporation, trust, estate, partnership, cooperative, or association or a natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will be used. An exemption under this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated on the sworn statement.

(b) "Related entity" means a business entity other than a natural person whose members, owners, partners, or limited partners include a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, an insurance carrier, or finance subsidiary of a manufacturing corporation.

(2) Notwithstanding Act No. 326 of the Public Acts of 1966, being sections 438.31 to 438.33 of the Michigan Compiled Laws, and Act No. 259 of the Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Compiled Laws, but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest.

(3) Notwithstanding Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest not exceeding the rate allowed under Act No. 259 of the Public Acts of 1968.

History: 1970, Act 52, Imd. Eff. July 10, 1970;—Am. 1978, Act 15, Imd. Eff. Feb. 8, 1978;—Am. 1983, Act 20, Imd. Eff. Mar. 31, 1983;—Am. 1996, Act 501, Imd. Eff. Jan. 9, 1997.

MICHIGAN LIMITED LIABILITY COMPANY ACT (EXCERPT)
Act 23 of 1993

450.4212 Interest rate; agreement.

Sec. 212. A domestic or foreign limited liability company, whether or not formed at the request of a lender, may agree in writing to pay any rate of interest as long as that rate of interest is not in excess of the rate set forth in Act No. 259 of the Public Acts of 1968, being sections 438.41 to 438.42 of the Michigan Compiled Laws.

History: 1993, Act 23, Eff. June 1, 1993.

EXHIBIT 11

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5740

July 17, 1980

CORPORATIONS:

Interest on loans to corporations

CRIMINAL LAW:

Prosecution for criminal usury

MORTGAGES:

Maximum interest rate on first lien mortgages

USURY:

Maxium interest rate on first lien mortgages

Percentage of profits of borrower as part of interest cost

A lender who makes a loan to a corporation and charges more than 25 percent annual interest may be prosecuted for criminal usury.

If a lender, in addition to full payment of principal and interest, also receives a percentage of profits from a business as consideration for making a mortgage loan to such business, the percentage of profits from the business constitutes additional interest on the loan.

A lender making a loan in the amount of $100,000 or more prior to December 31, 1981 secured by a lien against real property other than a single family residence may agree in writing for the payment of any rate of interest and such a loan is not subject to the criminal usury penalty.

The Honorable Gary G. Corbin

State Senate

State Capitol

Lansing, Michigan 48909

You have raised a number of legal issues concerning permissible interest rates. The following specific questions have been formulated based upon your correspondence:

1. Whether a lender who makes a loan to a corporation pursuant to the Business Corporation Act, 1972 PA 284; MCLA 450.1101 et seq; MSA 21.200(101) et seq, Sec. 275, is subject to penalties for criminal usury pursuant to 1968 PA 259; MCLA 438.41 et seq; MSA 19.15(51) et seq.

2. Whether, in addition to full payment of principal and interest, receipt by a lender of a percentage of profits from a business as consideration for making a mortgage loan to such business constitutes interest on the loan so as to make the loan usurious, assuming the legal rate of interest is exceeded.

3. Whether a loan made pursuant to 1966 PA 326; MCLA 438.31 et seq; MSA 19.15(1) et seq, Sec. 1c(9), is subject to penalties for criminal usury pursuant to 1968 PA 259, supra, and to the limitation on interest calculation specified in 1966

PA 326, supra, Sec. 1c(7)

1966 PA 326, supra, Sec. 1 sets forth the general interest rate limitation as follows:

> 'The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum. This rate shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person, the issue and rate of interest of which have been expressly authorized by the public service commission or the securities bureau of the department of commerce, or is regulated by any other law of this state, or of the United States, . . .'

That statute sets forth the general rule on interest rates for purposes of civil law. Whether the charging of a higher interest rate is a crime is determined by reference to 1968 PA 259, supra.

1968 PA 259, Sec. 1, supra, prohibits as criminal usury the charging of an annual rate of interest of more than 25 percent unless some other law authorizes the lender to charge more than 25 percent:

> 'A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at a simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.' (Emphasis added.)

It is well established that when a statute is subject to such limitation or exception, the function of the proviso qualifying the statute is to:

> '. . . limit, modify or explain the main part of the section to which it is appended . . . a proviso is to be accepted according to its natural, common, and obvious meaning. . . .' Saginaw County Township Officers Association, Inc. v City of Saginaw, 373 Mich 477, 482; 130 NW2d 30 (1964).

Therefore, given the plain meaning of the proviso set forth in 1968 PA 259, supra, a lender may not charge a rate of interest in excess of 25 percent per annum unless a law can be found which authorizes the lender to do so.

You ask whether the Business Corporation Act, 1972 PA 284, supra, Sec. 275, is such a law authorizing a lender to charge a corporation more than 25 percent annual interest.

1972 PA 284, Sec. 275, supra, provides as follows:

> 'A domestic or foreign corporation, whether or not formed at the request of a lender, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and in such case the defense of usury is prohibited.' (Emphasis added.)

As the plain language of the statute discloses, its purpose is to deny corporations use of the usury defense in a proceeding on a written agreement. Bob v Holmes, 78 Mich App 205; 259 NW2d 427 (1977). Even though a corporation may otherwise be able to assert that an interest rate exceeds the lawful limits and should not be enforced, 1972 PA 284, Sec. 275, supra, prevents a corporation from raising that defense. The language of the statute assumes that the defense of usury would otherwise be available. It should also be noted that while 1972 PA 284, Sec. 275, supra, prevents a corporation from asserting the defense of usury in a proceeding on a written agreement, a corporation would not be a party to a prosecution brought against a lender under the criminal usury statute. Such a prosecution would be brought by the Prosecuting Attorney or the Attorney General and the charge would be that the people of the State of Michigan are aggrieved by the illegal acts of a lender. The offense would be against public policy rather than against the contractual rights of a corporation.

Finally, 1972 PA 284, Sec. 275, supra, does not contain any language stating that a lender may charge any rate of interest whatsoever. Rather than setting forth the rate of interest which a lender may charge, the statute is addressed to the legal rights of a corporation.

Based on the above, it is my opinion that 1972 PA 284, Sec. 275, supra, does not authorize a lender to charge more than 25 percent annual interest, and a lender who does so in a loan to a corporation is subject to prosecution pursuant to 1968 PA 259, supra.

You next ask whether requiring payment of a percentage of profits from a business, in addition to specified interest and principal, as consideration for making a mortgage loan to such business constitutes additional interest on the loan so as to make the loan usurious if the legal rate of interest is exceeded.

Interest has been defined as:

> '. . . compensation paid for the use of money . . .' OAG, 1975-1976, No 5085, p 717 (December 16, 1976).

In accord, Balch v Detroit Trust Co., 312 Mich 146, 152; 20 NW2d 138 (1945); Coon v Schlimme Dairy Co., 294 Mich 51, 56; 292 NW 560 (1940); Marion v City of Detroit, 284 Mich 476, 484; 280 NW 26 (1938). Consequently:

> '[a]ny fee imposed upon the borrower, other than the reasonable and necessary charges, such as recording fees, title insurance, deed preparation and credit reports recognized in section 1(a) of the Usury Statute, supra, in exchange for the lending of money must be taken into consideration in determining the rate of interest being charged.' OAG, 1975-1976, No 5085, supra, p 717.

In the transaction described in your question, the fee imposed by the lender as consideration for making the loan would consist, in part, of a share in profits of the borrower's business. Being part and parcel of the loan agreement, therefore, it is clear that such compensation constitutes interest on the loan. A similar matter was considered in Brown v Cardoza, 67 Cal App 2d 187, 192; 153 P2d 767 (1944), wherein the Court stated:

> '. . . The law is well settled in most jurisdictions, . . . that where there is a loan of money to be compensated for by a share in earnings, income or profits, in lieu of or in addition to interest, in determining whether the transaction is usurious the share of earnings, income or profits must be considered as interest. . . .'

Thus, in a transaction wherein a lender receives a percentage of profits of the business in addition to payment of principal and a specified interest rate as consideration for making the loan, the amount of those profits must be added to the specified interest rate to determine the actual interest rate charged as consideration for the loan. If the loan is to a corporation and the actual rate of interest exceeds 25 percent, the lender would be subject to prosecution pursuant to 1968 PA 259, supra.

Note should also be taken of a related statute which authorizes certain lenders to charge a 'business entity' a higher rate of interest than would otherwise be permissible under the general civil interest rate statute, 1966 PA 326, supra. Thus, 1970 PA 52; MCLA 438.61; MSA 19.15(71), provides as follows:

> '(1) As used in this act 'business entity' means: (a) A corporation, trust, estate, partnership, cooperative, or association; or (b) A natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan will be used, but the exemption provided by this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated.
>
> '(2) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966, as amended, being sections 438.31 to 438.33 of the Michigan Compiled Laws, but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with the extension of credit to a business entity by a state or national chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest.' (Emphasis added)

That provision represents an exemption from the general civil interest rate statute. However, as the underlined language indicates, such a loan is subject to other applicable laws. The criminal usury statute is such another applicable law so that 1970 PA 52, supra, does not authorize the charging of interest in excess of 25 percent per annum. (1)

Your third question concerns whether a transaction made pursuant to 1966 PA 326, supra, Sec. 1c(9), is subject to the application of the criminal usury statute, 1968 PA 259, supra, and to the limitation on interest calculation specified in 1966 PA 326, supra, Sec. 1c(7).

1966 PA 326, Sec. 1c(9), supra, provides an exception to the general limitation on interest rates for a note, bond, or other indebtedness of $100,000.00 or more:

> 'For the period ending on December 31, 1981, the parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of a rate of interest.' (2)

No limit is placed by that statute on the rate of interest to which the parties may agree. Another subsection of that statute appears to set forth a similar exemption. 1966 PA 326, supra, Sec. 1c(2), provides that with regard to a loan made by a regulated lender secured, e.g., by a first lien on real property, the parties may agree to payment of 'any rate of interest':

> 'For the period ending on December 31, 1981, it is lawful for the parties to a note, bond, or other evidence of indebtedness, executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements thereon, or the parties to a land contract, to agree in writing for the payment of any rate of interest, . . .' (Emphasis added.)

However, 1966 PA 326, supra, Sec. 1c(4), specifically makes the criminal usury statute applicable to such loans by regulated lenders:

> 'Nothing contained in subsection (2) shall authorize or permit a rate of interest in excess of the rate set forth in Act No. 259 of the Public Acts of 1968, being sections 438.41 and 438.42 of the Michigan Compiled Laws.' (3)

The fact that the legislature enacted 1966 PA 326, Sec. 1c(4), supra, to make such loans subject to the 25 percent interest ceiling is indicative of a legislative understanding that otherwise the authority to charge 'any rate of interest' would not be subject to the 25 percent limitation. Had the legislature intended to also apply the criminal usury rate to loans made pursuant to 1966 PA 326, Sec. 1c(9), supra, it could have cited subsection (9) as well as subsection (2) in 1966 PA 326, Sec. 1c(4), supra. The legislature chose not to do so.

Based upon the foregoing, it is my opinion that loans made pursuant to 1966 PA 326, Sec. 1c(9), supra, may bear any rate of interest and are not subject to the 25 percent criminal usury ceiling.

With respect to the limitation on interest calculation provided for in 1966 PA 326, Sec. 1c(7), supra, that statute regulates the method of interest computation regardless of the particular rate charged if the loan obligation consists of a mortgage or land contract made pursuant to 1966 PA 326, supra.

> 'A mortgage loan or land contract made under this act shall not provide for a rate of interest added or deducted in advance and interest on the mortgage loan or land contract shall be computed from time to time only on the basis of unpaid balances.'

Pursuant to 1966 PA 326, Sec. 1c(9), supra, until December 31, 1981, the parties may agree to a loan obligation of $100,000.00 or more in the form of a mortgage or land contract so long as the loan is secured by real property other than a single family residence. Since the loan instrument would consist of a mortgage or land contract, interest on the loan would be subject to the required computation scheme of 1966 PA 326, Sec. 1c(7), supra.

In summary, it is my opinion that the sanctions for criminal usury are applicable to a lender who enters into a loan agreement with a corporation pursuant to 1972 PA 284, Sec. 275, supra, if the agreement requires payment of an annual interest rate in excess of 25 percent. In contrast, a loan of $100,000.00 or more, the primary security for which is a lien against real property other than a single family residence in accordance with 1966 PA 326, Sec. 1c(9), supra, is not subject to the criminal usury statute and the parties may agree to payment of any rate of interest. Further, where a loan of money is repaid through a percentage of business profits as consideration for making the loan in addition to full payment of principal and interest, the amount of such profits must be included in the calculation of the actual interest rate for purposes of statutory limitations. Finally, a loan made pursuant to 1966 PA 326, Sec. 1c(9), supra, must comply with the interest calculation requirements provided for in 1966 PA 326, Sec. 1c(7), supra.

The foregoing are the general rules applicable to your questions. However, it is important to bear in mind that the maximum rate of interest for any particular transaction may vary, depending upon the nature of: the lender, the borrower, the security and various other factors as they are set forth in specific state and federal interest rate laws. To avoid charging an unlawful interest rate a person should assume that a loan is subject to the general interest rate limitation unless specific authority can be found to authorize a higher rate of interest.

Frank J. Kelley

Attorney General

> (1) Note that the Depository Institution Deregulation and Monetary Control Act of 1980, Public Law 96-221, Sec. 511, ---- USC ----; ---- Stat ----, preempts state law for certain business and agricultural loans in the amount of $25,000.00 or more to the extent necessary to allow charging a rate of not more than 5 percent in excess of the discount rate, including any surcharge thereon, on 90-day commercial paper in effect at the Federal Reserve Band in the Federal Reserve District where the person is located.

(2) Prior to a housekeeping amendment by 1978 PA 440, 1966 PA 326, Sec. 1c(9), supra, ended with the words 'any rate of interest' instead of 'a rate of interest.' That change from 'any' to 'a' did not alter the fact that the subsection provides an exception to the otherwise applicable interest rate limitation. Any other interpretation would result in the subsection having no meaning. Moreover, the words 'any' and 'a' are frequently synonymous. People v One 1940 Buick Sedan, 71 CA 2d 160; 162 P2d 318 (1945); State ex rel Roberts v Snyder, 140 Ohio St 333; 78 NE2d 716 (1948).

(3) It should be noted that the Depository Institution Deregulation and Monetary Control Act of 1980, Public Law 96-221, Sec. 501, ---- USC ----; ---- Stat ----, preempts the application of any state limitation on the rate of interest for such loans by regulated lenders secured by a first lien on residential real property made after March 31, 1980.

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http://opinion/datafiles/1980s/op05740.htm
State of Michigan, Department of Attorney General
Last Updated 11/10/2008 15:49:34

99 Mich.App. 754
Court of Appeals of Michigan.

KANSAS CITY LIFE INSURANCE COMPANY,
Plaintiff-Appellee,
v.
Donald W. DURANT, Claire S. Durant, Alex Dandy, and Lilah Dandy, Defendants-Appellants.

Docket No. 44285.
|
Sept. 2, 1980.
|
Released for Publication Dec. 9, 1980.

Synopsis
Upon default by borrowers, lender foreclosed two mortgages it held as security for loan and brought action for deficiency. The Circuit Court, Oakland County, Robert L. Templin, J., entered judgment in favor of lender on deficiency claim. Borrowers appealed as of right, and lender filed motion for delayed cross appeal which was granted by the Court of Appeals. The Court of Appeals, Kelly, J., held that: (1) where loan totalled $450,000, and was secured by mortgages on two industrial plants, statute providing in part that parties to note or other indebtedness of $100,000 or more, the bona fide primary security for which is lien against real property, may agree in writing for payment of a rate of interest, and which did not distinguish between first and second liens, and which did not contain restriction against increased interest rates, was applicable, and thus lender was not barred from recovery of interest due to fact that it increased rate of interest charged from eight and three-quarters percent to ten percent upon default, and (2) failure to supply borrowers with financial disclosure statement was not basis for denying interest payments due to lender.

Affirmed in part and reversed in part.

Attorneys and Law Firms

****631 *756** Howard R. Grossman, Flint, for defendants-appellants.

Robert G. Waddell, Bloomfield Hills, for plaintiff-appellee.

Before CYNAR, P. J., and KELLY and GILLESPIE,* JJ.

* Tyrone Gillespie, 42nd Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

Opinion

KELLY, Judge.

This action arose out of a loan by plaintiff to defendants. Defendants defaulted, and plaintiff subsequently foreclosed two mortgages it held as security. Plaintiff then brought this action for the deficiency and for damages arising out of breach of an alleged oral contract under which defendants were obliged to care for the properties between the time of foreclosure and the date plaintiff took possession. Following a bench trial, the court found no cause of action as to the breach of contract claim and awarded plaintiff $100,629.53 on the deficiency claim. Defendants appeal as of right, and plaintiff filed a motion for delayed cross-appeal which was granted by this Court.

****632** Defendants executed a promissory note payable ***757** to plaintiff in the amount of $450,000. As security for the note, defendants executed mortgages covering certain properties in Ferndale and Marine City, Michigan. Defendants stopped making payments on the note after January 20, 1975. At that time, the principal balance due on the note was $426,648.48, with interest paid to January 1, 1975. Defendants failed to pay the 1973, 1974, and 1975 real estate taxes on the properties. Plaintiff later paid these taxes. At foreclosure sales, the Ferndale property was sold for $251,000, and the Marine City property was sold for $150,000. Plaintiff itself bid in the properties at the foreclosure sales.

Benjamin Beyer, a real estate appraiser, appraised the Ferndale and Marine City properties at plaintiff's request. Beyer placed the cash market value of the Ferndale property at $255,000 and of the Marine City property at $160,000. Donald J. Hartman, also a real estate appraiser, appraised the properties at defendants' request. Hartman's conclusion as to the fair market value of the Ferndale property was $295,000 and as to the fair market value of the Marine City property, $180,000.

William Schalekamp, a member of plaintiff's legal department, testified as to the deficiency. His computation as to the deficiency was as follows:

"($) 426,648.48 is the beginning balance. Interest up-I'll try to divide this so I don't get it mixed up.

"Interest from 1-1-75 to 12-

(Argument of counsel omitted)

"Is ($)37,331.74. Then interest from 12-31-75 to 2-27-76 which is the date of the sale at Ferndale, $5,932.17; total of ($)469,912.39, less the price of the Ferndale property ($)251,000; ($)218,912.34 (sic, $218,912.39) then is the balance after that sale. And interest then at ***758** -excuse me. This is a slightly different calculation inside the board. Then I have taxes of $6,405.54, interest to 6-28-76 of $6,349.66 and interest on the taxes for that period of $96.74. Leaves a total of ($)231,764.33, and that is as of 6-28-76 at which time the Marine City property was sold for $150,000 at foreclosure leaving then a balance of $81,764.33. Per diem interest at $19.60 to today is $18,865.20 for a total as of 2-13-79 of $100,629.53."

The trial court found that plaintiff had violated the usury statute M.C.L. s 438.31c; M.S.A. s 19.15(1c), by increasing, upon defendants' default, the rate of interest charged from 83/4% to 10%. The trial court held that plaintiff could only recover interest at 83/4%. Defendants argue that the trial court should not have allowed plaintiff to recover any interest, citing M.C.L. s 438.32; M.S.A. s 19.15(2):

> "Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns."

If, in fact, plaintiff violated the interest statute by charging a higher rate upon default, defendants are correct in claiming that the appropriate statutory remedy is to deny any interest to plaintiff. However, plaintiff submits that the default rate, included within the loan agreement from its inception, does not constitute excess interest and therefore does not trigger application of M.C.L. s 438.32; M.S.A. s 19.15(2). Resolution of the threshold question, then, requires interpretation of M.C.L. s 438.31c(2), M.S.A. s 19.15(1c)(2), which provides:

> ***759** "(2) For the period ending on December 31, 1981, it is lawful for the parties to a note, bond, or other evidence of indebtedness, executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements thereon, or the parties to a land contract, to agree in writing for the payment of any rate of interest, but the note, mortgage, contract, ****633** or other evidence of indebtedness shall not provide that the rate of interest initially effective may be increased for any reason whatsoever. (Emphasis added).

and M.C.L. s 438.31c(9); M.S.A. s 19.15(1c)(9), which provides:

> "For the period ending on December 31, 1981, the parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of a rate of interest."

Careful examination of the above two subsections and M.C.L. s 438.32; M.S.A. s 19.15(2) leads us to conclude that the trial court erred in two respects. If, in fact, the present agreement violated subsection 2, defendant may not recover any interest. We are convinced, however, that subsection 9 is controlling here. The loan totaled $450,000, secured by mortgages on two industrial plants. Subsection 9 clearly applies to this amount and nature of security, does not distinguish between first and second

liens, and does not contain the restriction against increased interest rates provided in subsection two.

Defendants next contend that plaintiff is barred from recovery of any interest according to M.C.L. s 438.32; M.S.A. s 19.15(2) due to its noncompliance ***760** with the loan disclosure requirements of M.C.L. s 438.31b; M.S.A. s 19.15(1b), which provides:

> "A state or national bank, insurance company or lender approved as a mortgagee under the national housing act or regulated by a federal agency shall furnish a loan settlement statement to a borrower upon closing of the loan, indicating in detail the charges the borrower has paid or obligated himself to pay the lender or to any other person in connection with the loan. A copy of the statement shall be retained in the records of the lender."

There is some dispute between the parties as to whether defendants' attorney, who solely represented defendants at closing in their absence, received such a document at closing or several months later and whether his receipt on their behalf constituted sufficient statutory compliance. Defendants also argue that the statement itself was deficient for failure to include the cost of life insurance which was a prerequisite to obtaining the loan. We need not address these particular questions since, assuming arguendo that plaintiff did fail to comply with the above disclosure statute, such non-compliance does not trigger application of M.C.L. s 438.32; M.S.A. s 19.15(2). The statute clearly delineates only two circumstances which mandate forfeiture of interest: (1) where the agreement does not comply with the provisions of the Regulation of Interest Act and (2) where the seller or lender charges interest in excess of that allowed by the Act. Failure to furnish a loan settlement statement does not fall within either of the above categories. The statement itself is to consist of a detailed list of charges already agreed upon by the parties. It does not affect the validity of the loan agreement. Therefore, failure to supply the borrowers ***761** with such a statement is not a basis for denying interest payments due to plaintiff. Cf. Michigan Loan Ass'n v. Cahill, 253 Mich. 358, 235 N.W. 182 (1931). While we agree with defendants in the sense that non-compliance with the disclosure requirement ought to result in some form of sanction against the lender, such a provision must originate with the Legislature.

Finally, in an attempt to defeat the deficiency judgment against them, defendants assign error to the trial court's decision that the prices bid on the property at the foreclosure sale were "reasonable." It is defendants' position that their challenge under M.C.L. s 600.3280; M.S.A. s 27A.3280, dealing with mortgage foreclosures, requires a preliminary finding of fact by the trial court as to the market value of the premises subject to foreclosure, rather than a determination that the "bid-in" price was reasonable. Before addressing the merits of this issue, we first decide that the issue was properly preserved for appeal, ****634** in spite of defendants' failure to move for a new trial. Such procedure is not required. Bunda v. Hardwick, 376 Mich. 640, 672, 138 N.W.2d 305 (1965), GCR 1963, 517.1.

At issue here is the following finding of the trial court:

> "Even though there is a conflict of testimony as to what the property was worth (and admittedly, a foreclosure sale is not ideal as far as it tends to obtain optimum results pricewise as an open sale on the market) the Court is of the opinion that in light of all the testimony, weighing the testimony of the experts, the bid-in price was a reasonable price; the Court has ruled earlier as to the interest rate to be maintained at the eight and three quarters per cent interest, not ballooning to the ten per cent interest indicated in the contract."

***762** Although it would have been preferable for the trial court to frame its decision in language borrowed from M.C.L. s 600.3280; M.S.A. s 27A.3280, i. e., whether "* * * the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value," its failure to do so does not obscure its finding. The court referred to the expert testimony offered by both parties as to the market value of the property and held that, based upon that evidence, the bid-in price was reasonable. The fact that the court recognized that foreclosure sales do not generally result in the seller obtaining the highest possible price for the property does not negate the fact that its decision was based on the

testimony of experts concerning the market value of the properties. A finding that the offer was "reasonable" clearly indicates that the amount of the bid was not substantially less than the true value of the property, which is all that the statute requires.

Affirmed in part, reversed in part.

All Citations

99 Mich.App. 754, 298 N.W.2d 630

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119 Mich.App. 150
Court of Appeals of Michigan.

Paul HEBERLING and Mary Heberling,
Plaintiffs-Appellants,
v.
PALMER'S MOBILE FEED SERVICE, INC., a Michigan Corporation, Defendant-Appellee.

No. 56680.
|
Submitted April 19, 1982.
|
Decided June 28, 1982.
|
Released for Publication Dec. 3, 1982.

Synopsis
Plaintiffs brought action against defendant, claiming that 11 percent interest rate on promissory note plaintiffs executed in favor of defendant was usurious. The Sanilac Circuit Court, Allen E. Keys, J., entered judgment for defendant, and plaintiffs appealed. The Court of Appeals held that where mortgage executed by plaintiffs in favor of defendant provided that it secured repayment of $110,000, an $80,000 promissory note executed by plaintiffs in favor of defendant plus a $30,000 loan obtained by plaintiff from third party and guaranteed by defendant, the $80,000 and $30,000 obligations could not be aggregated to come within exception to usury statute for indebtedness of $100,000 or more, because plaintiffs were unconditionally obligated to pay the $30,000 note to third party, not defendant; because the 11 percent interest paid by plaintiffs on the $80,000 promissory note exceeded the seven percent ceiling in usury statute, plaintiffs were entitled to recover from defendant the interest on that note.

Reversed.

Attorneys and Law Firms

**405 *151 Cubitt, Cubitt & Trowhill, Bad Axe, for plaintiffs-appellants.

Walpole, Holmes & Schrope, Caro, for defendant-appellee.

Before M.J. KELLY, P.J., and CYNAR and COOK*, JJ.

* George R. Cook, 17th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict of no cause of action in favor of defendant.

Plaintiffs owned a dairy farm in Sanilac County. Defendant corporation sold cattle feed to area farmers. Sometime in 1974, plaintiffs became indebted to defendant for $30,000 worth of feed. Plaintiff Paul Heberling obtained a loan for the amount of indebtedness from Sanilac County Bank. The money received from plaintiff from the bank was paid to defendant to discharge the debt.

William Palmer, president and sole shareholder of defendant corporation, testified that when the loan was obtained, he was required by the bank to sign a separate document as guarantor of the note. ***152** Palmer's testimony was corroborated by Cecil Hamill, executive vice-president of Sanilac County Bank. Plaintiff Paul Heberling stated that William Palmer never guaranteed the debt, or at least Heberling was not aware of a guarantee. The loan guarantee was not produced at trial. Later, the note was paid to Sanilac County Bank by plaintiffs and discharged.

By April, 1976, plaintiffs were indebted to defendant corporation for an additional $80,000 worth of cattle feed. On April 30, 1976, plaintiffs signed a promissory note for $80,000 in favor of defendant-corporation. That note was to be due two years from April 30, 1976, and was to bear interest at the rate of 11 percent per annum. Plaintiffs also executed a mortgage, second to another mortgage, in favor of defendant. The mortgage provided:

> "[Plaintiffs mortgage and warrant certain real property to defendant] to secure the repayment of $110,000.00 * * * [namely,] $80,000.00 with interest at Eleven Percent (11%) [and] $30,000.00 with interest at Nine Percent (9%) (Given as collateral security for a

> note in this amount due Sanilac County Bank of which mortgagee is a guarantor)."

At the trial, plaintiff Paul Heberling stated that when he signed the mortgage his intent was to give William Palmer a total of $110,000 security for two feed bills.

The first mortgage was foreclosed and the property was sold at a sheriff's sale. In order to obtain financing to redeem the property, it was necessary to remove defendant's second mortgage. Plaintiffs paid defendant the principal balance due on the $80,000 and interest computed at 11 percent, but reserved the right to contest payment of the interest.

***153** Plaintiffs sued defendant for the interest, claiming that the 11 percent interest rate on the promissory note was usurious, pursuant to M.C.L. § 438.31; M.S.A. § 19.15(1). Defendant claimed that the second mortgage secured an indebtedness of $110,000, namely the $80,000 note and $30,000 guarantee, and was therefore within the exception set out in M.C.L. § 438.31c(9); M.S.A. § 19.15(1c)(9).

At the close of proofs, plaintiffs moved for a directed verdict, arguing that the obligation secured by the mortgage was for $80,000. Further, plaintiffs argued that the $30,000 note was an obligation to Sanilac County Bank and could not be added to the $80,000 note to reach the $100,000 exemption. Plaintiffs' motion was denied, and the jury found in favor of defendant.

M.C.L. § 438.31; M.S.A. § 19.15(1) sets out a 7 percent per annum ceiling on interest rates. Exceptions are set out in M.C.L. § 438.31c; M.S.A. § 19.15(1c). At the time of the transaction at issue, subsection (9) provided:

> "(9) For the period ending on December 31, 1977, the parties to any note, ****406** bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest." 1973 PA 22.

We find as a matter of law that the mortgage at issue did not secure any bond, note, or indebtedness over $100,000 within the meaning of the statute. Further, plaintiffs' obligation to defendant corporation on the $80,000 promissory note and conditional obligation to its president and sole shareholder on the $30,000 guarantee cannot be aggregated to reach the $100,000 exemption.

***154** We reject defendant's claim that the mortgage, in and of itself, represents "other indebtedness" within the meaning of subsection (9). A mere recital of the obligation to be secured by the mortgage, as in the present case, does not represent a covenant to pay and set the terms of the obligation. Further, in determining whether a particular transaction is usurious, the entire transaction must be considered. The substance of the transaction, rather than the form, governs. Otherwise, the effect of usurious transactions may be avoided by other paper or security for the indebtedness. See, *Continental National Bank v. Fleming,* 170 Mich. 624, 643, 134 N.W. 656 (1912); *Hillman's v. Em'N Al's,* 345 Mich. 644, 652, 77 N.W.2d 96 (1956).

Assuming *arguendo* that obligations of indebtedness to one creditor can be aggregated to reach the $100,000 exemption, we find that the Legislature did not intend to include a conditional obligation to a guarantor within the meaning of "note, bond, or other indebtedness". A careful reading of the statute reveals that the Legislature intended to exempt notes, bonds, or other instruments representing indebtedness similar to notes or bonds from the 7 percent ceiling, where the amount borrowed exceeds $100,000. A note or bond represents an unconditional obligation to pay a sum certain. Plaintiffs were unconditionally obligated to pay the $30,000 note to Sanilac County Bank, not defendant. Their obligation to defendant corporation as guarantor of the $30,000 note would not arise until and unless defendant is held liable on the note.

Because the 11 percent interest paid by plaintiffs on the $80,000 promissory note exceeds the 7 percent ceiling set out in M.C.L. § 438.31c, we reverse. Due to the disposition of the first issue, we do not reach plaintiffs' claim of instructional error.

Reversed.

All Citations

119 Mich.App. 150, 326 N.W.2d 404

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128 Mich.App. 696
Court of Appeals of Michigan.

MANUFACTURERS NATIONAL BANK OF DETROIT, Plaintiff-Appellee,
v.
Dave PINK and Cypora Pink, his wife, Defendants-Appellants.

Docket No. 61470.
|
Submitted Jan. 19, 1983.
|
Decided Sept. 13, 1983.
|
Released for Publication Dec. 15, 1983.

Synopsis
Bank brought suit seeking foreclosure against borrowers separately. The Circuit Court, Wayne County, Patrick J. Duggan, J., granted summary judgment for bank against both of the borrowers, and appeal was taken. The Court of Appeals held that: (1) trial court did not abuse its discretion in failing to set minimum price at which property could be sold at foreclosure sale, and (2) interest rate charged on loan was not usurious.

Affirmed.

Attorneys and Law Firms

****182 *698** Bodman, Longley & Dahling by Alfred C. Wortley, Jr. and David W. Hipp, Detroit, for plaintiff-appellee.

Daniel B. Burress, Brighton, for defendants-appellants.
Before V.J. BRENNAN, P.J., and GRIBBS and HOEHN,* JJ.

* Clair J. Hoehn, 47th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

Opinion

PER CURIAM.

Prior to 1974, defendant Dave Pink was indebted to plaintiff Manufacturers National Bank of Detroit on an unsecured debt. In 1974, the plaintiff demanded security for a renewal of the said loan and was given a mortgage on 77.67 unimproved acres of real estate in Flat Rock. The mortgage sum was $250,000. Defendant Cypora Pink, Dave Pink's wife, was required to sign the mortgage as a condition of the loan extension agreement on the part of the plaintiff. No separate consideration ran to Cypora Pink's estate.

On June 15, 1979, the obligation was again renewed, and the interest rate was agreed to be one and one-half percent above plaintiff's prime rate but not less than eight and one-half percent.

Defendants defaulted on the payment of their obligation and a complaint for foreclosure was filed by the plaintiff in February, 1980, against both defendants. Plaintiff proceeded separately against the defendants and eventually arrived at a judgment of foreclosure under which the property was sold. The amount owed by defendants to the plaintiff, as established by the judgment, was $188,202.74. At the foreclosure sale, plaintiff purchased the real property for the sum of $79,939.14 resulting in a deficiency balance of $108,263.60.

The trial court affirmed the mortgage foreclosure sale and awarded a deficiency judgment ***699** jointly and severally, against both defendants. The defendants appeal from that final order, raising the following questions.

> I. Did the Constitution of 1963, art 10, § 1 abrogate the rights of the married women act, MCL 557.1, *et seq.;* MSA 26.261 *et seq.,* such that a married woman can be held jointly and severally liable on a promissory note which she and her ****183** husband executed and from which no consideration passed to her separate estate?
>
> II. Did the trial judge abuse his discretion in failing to set the minimum price at which the property could be sold at the foreclosure sale?
>
> III. Did the trial judge err in ruling as a matter of law that the interest rate on the loan to defendant Dave Pink was not usurious?

These issues will be considered *seriatim.*

I. A married woman can be held jointly and severally liable on a promissory note which she and her husband executed even though no consideration passed to her

separate estate.

This Court has adopted contrary positions on whether Const.1963, art. 10, § 1 supersedes the married woman's separate property act. M.C.L. § 557.1; M.S.A. § 26.161. *City Finance Co. v. Kloostra,* 47 Mich.App. 276, 209 N.W.2d 498 (1973), holds that the married woman's act was not superseded by the Constitution of 1963. *Michigan National Leasing Corp. v. Cardillo,* 103 Mich.App. 427, 302 N.W.2d 888 (1981), holds that the woman's property act is superseded by the Constitution of 1963. See also *Schenck v. Seamon,* 124 Mich.App. 438, 335 N.W.2d 63 (1983).

The requirement that a separate consideration pass to a married woman's estate in order for her to be liable upon contract is not, strictly speaking, one of the common law disabilities of coverture. ***700** Nevertheless, the language of the constitutional provision clearly expresses an intent that women should have the same right to negotiate and contract as men. We hold with *Michigan National Leasing Corp. v. Cardillo, supra,* that a married woman can be bound by contracts executed by her and her husband even though no consideration passes to her separate estate.

II. The trial judge did not abuse his discretion by failing to fix an upset price.

During the July 10, 1981, oral argument on plaintiff's motion for summary judgment against Cypora Pink, an oral request was made to the court to fix an upset price of at least $250,000. The request was not supported by affidavits or evidence.

The court's right to set an upset price is grounded in M.C.L. § 600.3155; M.S.A. § 27A.3155:

> "In any forfeiture, foreclosure, or specific performance case based upon a mortgage on real estate or land contract the court *may* fix and determine the minimum price at which the real property covered by the mortgage or land contract may be sold at the sale under the forfeiture, foreclosure, or specific performance proceedings." (Emphasis added.)

The trial judge held that the request for an upset price was not timely made and that defendants' rights were protected by the redemption period and the ability to sell the real estate. We agree. *Mutual Benefit Life Ins. Co. v. Wetsman,* 277 Mich. 322, 333, 269 N.W. 189 (1936).

Defendant, on September 11, 1981, also made a motion for an evidentiary hearing to establish the value of the property so that the court could make an upset price. This the court refused to do since summary judgment had already been entered ***701** against the defendant Dave Pink and since the request of Cypora Pink was not accompanied by supporting evidentiary affidavits or testimony. We find no error.

III. The trial court did not err in ruling as a matter of law that the interest rate on the loan to the defendant Dave Pink was not usurious.

Defendants contend that the interest rate of one and one-half percent above plaintiff's prime rate, but not less than eight and one-half percent, violates stricture of the statute against increasing the interest for any reason whatsoever. Defendants argue that, when the prime rate rises, the plaintiff will have increased the interest rate to defendants.

> "For the period ending on December 1, 1982, it is lawful for the parties to a note, bond, or other evidence of indebtedness, ****184** executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements thereon, or the parties to a land contract, to agree in writing for the payment of any rate of interest, but the note, mortgage, contract, or other evidence of indebtedness shall not provide that the rate of interest initially effective may be *increased for any reason whatsoever.*" M.C.L. § 438.31c(2); M.S.A. § 19.15(1c)(2). (Emphasis supplied.)

First, we hold that plaintiff's prime interest rate is controlled by the market. We hold that the reference to the plaintiff's prime interest rate is a reference to an objective standard outside of the control of the parties. While a variation in the prime interest rate may result in defendants paying a greater amount of interest, nonetheless, the interest rate remains the same, to-wit: one and one-half percent above the prime rate.

In our recent financial history, many financial institutions have faced bankruptcy by being tied to ***702** a fixed

interest rate in the face of an advancing prime rate. The device of tying the interest rate to the prime rate was an effort to avoid this difficulty. Now, in the face of a declining prime interest rate, such a clause would be advantageous to the customers of the financial institution. This Court must be aware of the commercial practices of the day. Notice is taken of the large amount of commercial paper that has been tied to the interest rate and the disastrous effect of holding such paper violative of the above-cited statute. We hold that, where the interest rate is tied to an objective standard beyond the control of either party, the advancing or declining of such standard and, ergo, the amount of interest which the debtor must pay, does not constitute a change in the *rate of interest* charged and hence, does not violate the cited statute.

Defendant also contends that the interest rates charged were usurious; however, the trial court found, and this Court agrees, that the security for the note was primarily a real estate obligation.

> "For the period ending on December 1, 1982, the parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of *any* rate of interest." M.C.L. § 438.31c(10); M.S.A. § 19.15(1c)(10). (Emphasis added.)

The restriction against increased interest rates in subsection 2 does not apply to subsection 10. *Kansas City Life Ins. Co. v. Durant,* 99 Mich.App. 754, 759, 298 N.W.2d 630 (1980). The obligation in the instant case was in excess of $100,000, and the bona fide primary security was a lien against real ***703** estate, which was not a single family residence. Consequently, subsection 10 was applicable, and the interest rate charged was not usurious.

Affirmed. Costs to plaintiff.

All Citations

128 Mich.App. 696, 341 N.W.2d 181

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150 Mich.App. 773
Court of Appeals of Michigan.

Robert E. PAUL and Karen B. Paul,
Plaintiffs-Appellants,
v.
U.S. MUTUAL FINANCIAL CORPORATION, a Michigan corporation, Defendant-Appellee.

Docket No. 85024.
|
Submitted Dec. 10, 1985.
|
Decided April 9, 1986.
|
Released for Publication July 8, 1986.

Synopsis
Promissory note makers brought action for declaratory relief against assignee of promissory note alleging that assignee was barred from recovering interest and costs due to usurious interest rate of note, and requesting that assignee be barred from forfeiting or foreclosing on associated land sale contract. On cross motions for summary judgment, the Washtenaw Circuit Court, Henry T. Conlin, J., granted summary judgment for assignee based upon lack of usurious interest in original transaction and upon assignee's holder in due course status, and note makers appealed. The Court of Appeals held that: (1) genuine issue of material fact existed as to whether note makers were furthering their joint business interests through purchase of store such that business entity exception to usury statute applied, so as to preclude summary judgment and require further factual development; (2) even if usury defense were available to note makers due to status of lenders prior to enactment of amendatory statute which brought lenders into qualified lenders category of the business entity exception to usury statute, once the amendment became effective, the usury defense was extinguished as to future proceedings; and (3) genuine issue of material fact existed as to whether assignee justifiably relied upon business entity exception in taking note so as to qualify as holder in due course entitled to note free from usury defense, such that summary judgment was precluded.

Reversed and remanded.

Attorneys and Law Firms

****489 *776** Hendley & Datsko, P.C. by James R. Datsko, Manchester, for plaintiffs-appellants.

Bodman, Longley & Dahling by David W. Hipp, Detroit, for defendant-appellee.

***777** Before HOLBROOK, P.J., and T.M. BURNS and HOOD, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from an order of the trial court granting summary judgment in favor of defendant on the basis that plaintiffs were not entitled to assert the defense of usury on a promissory note. We reverse.

This case had its genesis on April 1, 1979, when plaintiffs purchased a business known as "Doug's Party Store" from Douglas and Arlene Sindlinger. This business was located in Manchester, Michigan, and consisted of a party store and gasoline filling station. The sale was evidenced by: (1) a land contract secured by the real estate on which the business was located and carrying an interest rate of 10% per annum; (2) a promissory note with a 10% per annum interest rate given in exchange for the good will of the business as a going concern, the liquor license, furniture, fixtures, equipment and other property; and (3) a security agreement contained in the promissory note covering all equipment, fixtures and inventory of the business. The documents provided that default on either the land contract or promissory note would be deemed a default on the other document. The 10% interest rates were subject to readjustment after October 6, 1982.

On April 22, 1981, the Sindlingers sold and assigned the three documents to United States Mutual Real Estate Investment Trust. The Sindlingers were required to sign a guaranty agreement in April, 1981. This assignee and plaintiffs amended the promissory note in June, 1983, and specified that the interest rates should not be readjusted for any reason. United States Mutual Real Estate Investment Trust assigned its interest ***778** in the three documents to defendant, U.S. Mutual Financial Corporation on July 29, 1983.

On December 12, 1983, plaintiffs filed a complaint for declaratory relief against defendant alleging that defendant was barred from recovering interest and costs on the promissory note pursuant to M.C.L. § 438.32; M.S.A. § 19.15(2), because the note's 10% per annum

interest rate on the unpaid balance exceeded the lawful rate of 7% per annum. The complaint also asserted that defendant refused to accept tender of plaintiffs' monthly payment on December 1, 1983, at the 7% interest rate, and refused to accept the monthly payment made on the related land contract. A motion for a preliminary injunction was filed the same day, requesting that the court order defendant to accept plaintiffs' payment, that all interest on the promissory note be paid into escrow pending resolution of these proceedings, and that defendant be barred from forfeiting or foreclosing on the land contract. ****490** The preliminary injunction was granted on May 30, 1984.

On May 14, 1984, plaintiffs filed a motion for summary judgment, asserting that there was no genuine issue of material fact and that they were entitled to relief as a matter of law pursuant to GCR 1963, 117.2(3), presently MCR 2.116(C)(10). On May 22, 1984, defendant moved for summary judgment in its favor asserting that the rate on the promissory note was not usurious because the "business entity" and real estate exceptions applied to the note and that plaintiffs failed to do equity by tendering payment of all principal plus 5% interest.

On April 30, 1985, the trial court granted summary judgment in favor of defendant based upon a lack of usurious intent in the original transaction and upon defendant's holder in due course status **779** (hereafter "HIDC"). Neither of these issues were specifically raised by the parties.

I

The first issue we address is whether the plaintiffs are entitled to a judgment as a matter of law because the promissory note was usurious when entered into in 1979.

The trial court granted summary judgment under GCR 1963, 117.2(3) on the basis that no genuine issue of material fact exists. Motions under this court rule test whether there is factual support for a claim and should not be granted when there is an issue of material fact. *Soderberg v. Detroit Bank & Trust Co.,* 126 Mich.App. 474, 479, 337 N.W.2d 364 (1983), *lv. den.* 419 Mich. 867 (1984).

The trial court must consider the affidavits, pleadings, depositions, admissions and documentary evidence. GCR 1963, 117.3, now MCR 2.116(G)(5). Unlike the moving party, the opposing party is not obligated to make a showing by affidavits. However, there must be some showing by opposing affidavits, testimony, depositions, admissions or documentary evidence that a genuine issue of fact exists. *Rizzo v. Kretschmer,* 389 Mich. 363, 373–374, 207 N.W.2d 316 (1973). The test is whether the kind of record which may be developed, giving the benefit of any reasonable doubt to the opposing party, will leave an issue upon which reasonable minds may differ. The courts are liberal in finding that a genuine issue of fact exists. *Rizzo, supra,* p. 372, 207 N.W.2d 316. However, the trial court must avoid substituting a trial by affidavit and deposition for a trial by jury. A court is not allowed to make findings of fact or to weigh the credibility of affiants or deponents. *Durant v. Stahlin,* 375 Mich. 628, 135 N.W.2d 392 (1965).

***780** The plaintiffs herein contend that the promissory note is in violation of M.C.L. § 438.31; M.S.A. § 19.15(1), which sets forth a 7% per annum ceiling on interest rates. Exceptions to this rule are set forth in the act. See *e.g.,* M.C.L. § 438.31c; M.S.A. § 19.15(1c); M.C.L. § 438.61; M.S.A. § 19.15(71). M.C.L. § 438.32; M.S.A. § 19.15(2) provides that the lender or seller shall forfeit any interest, costs or fees if the act is violated and that the borrower or buyer is entitled to recover attorney fees and court costs from the seller, lender or assigns.

The instant trial court relied in part on *Wilcox v. Moore,* 354 Mich. 499, 93 N.W.2d 288 (1958), and *Domboorajian v. Woodruff,* 239 Mich. 1, 214 N.W. 113 (1927), in concluding that the promissory note was not usurious because the facts did not reveal that the original transaction between the plaintiffs and the Sindlingers was unfair and overreaching or that the Sindlingers had a usurious intent. The trial court's reliance on these decisions was misplaced.

First, the facts and circumstances surrounding the original transaction were not disclosed in the pleadings or documentary evidence. Therefore, the trial court's determination had no basis in the record.

Second, *Wilcox* does not stand for the proposition that a court must ascertain whether the agreed-upon interest was fair because there was no overreaching by the lender. Rather, the actual holding of *Wilcox* was that the court must look beyond form to characterize the real nature of the ****491** transaction in order to determine whether the transaction falls within the usury statute. M.C.L. § 438.31; M.S.A. § 19.15(1). See *Farley v. Fischer,* 137 Mich.App. 668, 358 N.W.2d 34 (1984); ***781** *Heberling v. Palmer's Mobile Feed Service, Inc.,* 119 Mich.App. 150, 326 N.W.2d 404 (1982), *lv. den.* 417 Mich. 995 (1983).

Similary, usurious intent need only be ascertained when it is not clear from the face of the instrument whether the

usury statute is applicable. See *Domboorajian v. Woodruff, supra; Ferguson v. Grand Rapids Land Contract Co.,* 242 Mich. 314, 218 N.W. 685 (1928). Where, as here, the instrument is patently in violation of the usury statute, there is no need to determine a usurious intent. Indeed, it appears that the intent of the parties is totally irrelevant where the instrument is usurious on its face. *Union Trust Co. v. Radford,* 176 Mich. 50, 141 N.W. 1091 (1913); *Houghteling v. Gogebic Lumber Co.,* 165 Mich. 498, 131 N.W. 109 (1911).

In the case at bar, it is undisputed that a promissory note with a 10% interest rate per annum was signed in conjunction with the sale of a business. Aside from the fairness of the original transaction between the plaintiffs and the Sindlingers, the interest rate is patently usurious under M.C.L. § 438.31; M.S.A. § 19.15(1) unless an exception applies. Whether an exception applies is determined by looking beyond form to characterize the real nature of the original transaction. *Wilcox, supra.* Defendant asserts the applicability of two statutory exceptions and one equitable defense.

A*Is the "Business Entity" Exception Applicable?*

Defendant argues that the "business entity" exception of M.C.L. § 438.61; M.S.A. § 19.15(71) should apply. The statute provides in pertinent part:

> "(1) As used in this act 'business entity' means: (a) A corporation, trust, estate, partnership, cooperative, or association; or (b) A natural person who furnishes to ***782** the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will be used, but the exemption provided by this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated."
>
> "(3) Notwithstanding the provisions of Act No. 326 of the Public Acts of 1966, it is lawful in connection with an extension of credit to a business entity by any person other than a state or nationally chartered bank, insurance carrier, or finance subsidiary of a manufacturing corporation for the parties to agree in writing to any rate of interest not exceeding 15% per year."

Defendant's first basis for contending that this exception is applicable is that plaintiffs constitute a partnership because they jointly acquired and operated a business as co-owners for profit. M.C.L. § 449.6; M.S.A. § 20.6. Defendant contends that the receipt of profits or losses is prima facie evidence of a partnership. M.C.L. § 449.7(4); M.S.A. § 20.7(4). Plaintiffs assert that plaintiffs purchased the business as individuals and not as a business entity. Defendant admits no discovery has been performed in this area.

Defendant's second basis for claiming that plaintiffs are a business entity is the 1983 amendment to the promissory note which contained a sworn statement of business purpose relating back to the 1979 transaction. Plaintiffs assert that the amendment was not intended as a sworn statement of business purpose, but merely to confirm that interest was no longer adjustable was not fixed at 10% per annum. They further contend that the 1983 amendment merely described the transaction and was never provided to the extenders of credit, namely, the Sindlingers. Consequently, the extenders of credit were not provided with a sworn statement of business purpose.

****492 *783** As was stated earlier, this Court must look beyond form to the real nature of the transaction in order to determine whether the exception is applicable to the instrument at bar. *Wilcox v. Moore, supra.* We note that this statutory provision is similiar to the provision enacted to regulate corporate interest agreements, M.C.L. § 450.1275; M.S.A. § 21.200(275), in that it requires a written agreement in order to exceed the legal interest rate. This Court, in *Allan v. M & S Mortgage Co.,* 138 Mich.App. 28, 40, 359 N.W.2d 238 (1984), discussed the corporate statute and concluded that it was necessary to look beyond the corporate form and ascertain the true character of the transaction:

> "We believe that in Michigan, as in New York, where an individual borrows money through a dummy corporation, to further his own personal or commercial enterprises, the defense of usury is not available. However, where the loan is made to an individual borrower to discharge his personal debts and obligations, and not in furtherance of a corporate or business enterprise, the individual borrower may assert the defense of usury. This doctrine protects both consumers and lenders. Consumers are protected from the practice of second-mortgage lenders insisting that the consumer form a corporation in order to demand usurious rates of interest. On the

> other hand, innocent lenders would not be subject to claims of usury by borrowers who were in business, but merely did not engage in corporate formalities."

Consequently, whether the defense of usury was available to the borrower in *Allan* depended upon resolution of a question of fact: "whether the corporate form was used to conceal a usurious loan to an individual borrower made to discharge personal debts and obligations of the individual borrower." *Id.* Analogously, if the plaintiffs in the ***784** instant case were, in fact, furthering their joint business interests through the purchase of the party store, then they should be treated as a business entity within M.C.L. § 438.61; M.S.A. § 19.15(71). Giving plaintiffs the benefit of a reasonable doubt, we conclude that further factual development is necessary to resolve this issue.

Plaintiffs point out that the business entity exception relied upon by defendant was enacted as an amendment to M.C.L. § 438.61; M.S.A. § 19.15(71) in 1983. 1983 P.A. 20. Before that time, the statute allowed only banks, insurance carriers and finance subsidiaries of manufacturing companies to take advantage of the business entity exception. According to plaintiffs, since the Sindlingers were not a qualified lender under the statute when the transaction was executed, regardless of plaintiffs' status as a business entity, the business entity exception is inapplicable. We disagree.

Usury is a defense which is enforceable through the penal provisions of M.C.L. § 438.32; M.S.A. § 19.15(2). *Michigan Mobile Homeowners Ass'n v. Bank of the Commonwealth,* 56 Mich.App. 206, 223 N.W.2d 725 (1974), *lv. den.* 393 Mich. 809 (1975). As a statutory defense, it is a valuable right, but not a vested right. The holder may be deprived of this by legislative action. *Lahti v. Fosterling,* 357 Mich. 578, 588–589, 99 N.W.2d 490 (1959). As a statutory penalty, it is ineffective if removed before judgment. See *Bay City & E.S.R. Co. v. Austin,* 21 Mich. 390 (1870); *Engle v. Shurts,* 1 Mich. 150 (1848).

Usury is available as a defense only if the instant transaction is subject to the usury statute. M.C.L. § 438.31; M.S.A. § 19.15(1). Because the amendatory language of 1983 P.A. 20 brings the Sindlingers into the qualified lenders category of the business entity exemption, even if the defense of usury was available prior to the enactment of ***785** 1983 P.A. 20, once that amendment became effective, that right as to future cases was extinguished. See *Michigan Mobile Homeowners Ass'n, supra,* 56 Mich.App. pp. 219–220, 223 N.W.2d 725. Therefore, if plaintiffs were in fact a business entity, then this section is applicable.

****493** B*Is the "real estate" exception applicable?*

The next exception argued by defendant is M.C.L. § 438.31c(11); M.S.A. § 19.15(1c)(11), which provides in part that:

> "the parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest."

Defendant contends that real estate was the primary security of the promissory note because it secured over 55% of the total purchase price of the business. Plaintiffs assert that the promissory note is explicitly secured by personal property.

Primary security was construed in *Macklin v. Brown,* 111 Mich.App. 110, 114, 314 N.W.2d 538 (1981), as meaning security which the creditor would sell first and to which he would look for the greatest yield on the indebtedness due. However, primary security is not necessarily tied to a certain percentage of the indebtedness. *Id.*

It is undisputed that the promissory note explicitly states that it is secured by a security agreement covering personal property. Therefore, the personal property would be the primary security for the note. See generally, M.C.L. § 440.9101 *et seq.;* M.S.A. § 19.9101 *et seq.* The cross-default terms would ***786** not change this result since nothing in the promissory note gives the holder of the note the right to look to the real estate for satisfaction upon default of the promissory note. Therefore, the real estate exception does not apply to this promissory note as a matter of law.

C*Does the equitable defense of "failure to do equity" bar plaintiffs' relief?*

Defendant argues that plaintiffs failed to do equity

because they have not tendered payment of all principal plus 5% interest. Therefore, according to defendant, plaintiffs' unclean hands bar them from equitable relief because "one who seeks equity must do equity". See *e.g., Hogan v. Hester Investment Co.,* 257 Mich. 627, 241 N.W. 881 (1932); *Michigan Mobile Homeowners Ass'n, supra.* Defendant's argument is without merit. The equitable defense of unclean hands is not available in a case such as this where plaintiffs have not brought an equitable action to set aside the usurious obligation but have brought a declaratory action for determination of their legal rights pursuant to M.C.L. § 438.32; M.S.A. § 19.15(2). *Waldorf v. Zinberg,* 106 Mich.App. 159, 307 N.W.2d 749 (1981).

II

Having found that the transaction could be found to be usurious if further factual development is conclusive of plaintiffs' non-business entity status, we must review the trial court's determination that the plaintiffs are nonetheless barred from asserting a usury defense because defendant is a holder in due course (HIDC) of the promissory note.

***787** The trial court determined that defendant was a HIDC because defendant purchased the land contract and promissory note in good faith, relying on the fact that both instruments constituted the sale of a business which could have been accomplished solely by a single land contract. Therefore, pursuant to M.C.L. § 438.5; M.S.A. § 19.3, defendant took the promissory note free of a usury defense.

We conclude that defendant's HIDC status was a question of disputed fact so as to preclude its determination in a summary disposition procedure.

A HIDC takes a note free from any usury defense if he takes the note in good faith, for valuable consideration and without actual notice of the usurious taint. M.C.L. § 438.5; M.S.A. § 19.3. A note which is usurious on its face gives actual notice of the usury defense thereby precluding ****494** a HIDC status. See *Bird Finance Corp. v. Lamerson,* 303 Mich. 422, 6 N.W.2d 732 (1942) (discussing the notice provision under pre-Uniform Commercial Code Law). Moreover, a finding of good faith is precluded by a party's failure to make appropriate inquiries where something appears on the face of the instrument or a fact is communicated such that the party could not honestly purchase without inquiry. *Muskegon Citizens Loan & Investment Co. v. Champayne,* 257 Mich. 427, 241 N.W. 135 (1932).

In the case at bar, two separate and distinct documents were executed with separate and distinct collateral. The promissory note clearly identified the transaction as relating to the sale of a business and as being secured by personal property. The fact that separate and distinct collateral was the security for each note was underscored by the guaranty agreement signed by the Sindlingers. Defendant had actual notice of the 10% interest ***788** rate on the promissory note and actual notice that this note was not secured by real estate. Thereore, defendant was not justified in relying on the real estate exception to the usury statute and could not qualify as a HIDC on this basis.

However, there remains the question of whether plaintiffs constitute a business entity calling into play the business entity exception. M.C.L. § 438.61; M.S.A. § 19.15(71). Also, regardless of plaintiffs' business entity status and giving the benefit of a reasonable doubt to defendant, there is also a question of whether defendant justifiably relied upon the business entity exception, thus potentially qualifying defendant as a HIDC entitled to take the note free from a usury defense. Therefore, summary judgment on defendant's HIDC status cannot be granted in favor of either party.

Reversed and remanded for proceedings not inconsistent with this opinion. We retain no further jurisdiction.

All Citations

150 Mich.App. 773, 389 N.W.2d 487

End of Document

138 B.R. 854
United States Bankruptcy Court,
W.D. Michigan.

In re CADILLAC WILDWOOD DEVELOPMENT CORPORATION, Debtor.

Bankruptcy No. HG 82–00358.
|
March 4, 1992.

Synopsis
Debtor sought reconsideration and recalculation of allowed secured claim. The Bankruptcy Court, Laurence E. Howard, J., held that loan, which came within exception to Michigan usury statute, was not made usurious by lender's charging of interest in excess of what was called for in written agreement.

Relief denied.

Attorneys and Law Firms

***855** Harold E. Nelson, Clary, Nantz, Wood, Hoffius, Rankin & Cooper, Grand Rapids, Mich., for the debtor.

Jack E. Boynton, Murchie, Calcutt & Boynton, Traverse City, Mich., for Northwestern Sav. Bank & Trust.

OPINION

LAURENCE E. HOWARD, Bankruptcy Judge.

This matter is before the Court to decide the motion brought by the Debtor, Cadillac ***856** Wildwood Development Corporation, to reconsider and recalculate the allowed secured and unsecured claim of Northwestern Savings & Loan Association (hereinafter, "Northwestern"). The Debtor's request is made pursuant to § 502(j) of the Bankruptcy Code (sometimes referred to, generally, as "the Code") and FED.R.BANKR.P. 3007 and 3008. I have jurisdiction to decide the issues raised pursuant to 28 U.S.C. § 1334(b) and § 157(b)(2)(B).

The Debtor first requests that I reconsider the previously allowed claims of Northwestern. Assuming reconsideration is granted, the Debtor argues that the amount of Northwestern's claim should be recalculated and a large portion of it disallowed due to the erroneous inclusion of post-petition interest in Northwestern's proof of claim in violation of § 506(b) of the Code and due to the charge of usurious interest. Northwestern has agreed that it improperly included post-petition interest in its proof of claim and failed to credit two payments made by the Debtor. The parties have stipulated to the amount of Northwestern's claim absent a finding that usurious interest was charged. This leaves the Debtor's defense of usury as the remaining objection to the claim of Northwestern.

FACTS
The Debtor is a Michigan corporation engaged in the construction and selling of condominium residences. On January 11, 1980, the Debtor entered into a $400,000.00 construction loan (hereinafter, the "loan") with Northwestern to finance the construction of condominium units. The loan was evidenced by a promissory note (referred to as the "note") and secured by a real estate mortgage. The note provided for payment "with interest on unpaid principal from time to time outstanding at the rate of sixteen and one-half percent (16½%) per annum." The loan was guaranteed by stockholders of the Debtor and their spouses.

It is undisputed that the Debtor agreed, in addition to the repayment of principal plus interest, to pay an $8,000.00 commitment fee and $4,000.00 in closing costs as part of the loan transaction. The $4,000.00 in closing costs included a $2,000.00 charge for attorney fees. The Debtor paid the $8,000.00 commitment fee and wound up paying $4,003.00 in closing costs; that is, three dollars extra in closing costs than what was agreed upon by the parties at the onset of the loan.[1] At the loan closing, Northwestern failed to furnish a loan settlement statement indicating the loan costs paid or to be paid by the borrower.[2]

[1] Northwestern agrees that the Debtor actually paid three dollars extra in loan costs than what was agreed to by the parties. (*See,* Tr. November 26, 1991 at 22.) Northwestern contends, however, that it did not demand such payment and did not know such payment was made until the defense of usury was raised by the Debtor. *Id.*

[2] Again, this fact is undisputed by Northwestern who has argued against the Debtor's legal conclusions but has not presented any different factual conclusions.

On February 5, 1982, the Debtor filed a voluntary petition seeking relief under Chapter 11 of the Code. Northwestern filed its proof of claim on January 7, 1985 in the total amount of $743,146.84. Northwestern now admits that this proof of claim was too high for several reasons. First, Northwestern failed to credit the balance owing on the loan with two payments made by the Debtor totalling $10,906.69. Northwestern also admits that it included post-petition interest in the value of its claim in violation of § 506(b) of the Code. The parties agree that after crediting payments made by the Debtor and by the guarantors, and taking into account the admitted elimination of post-petition interest, Northwestern now possesses a secured claim for $386,488.72 plus interest. Northwestern's unsecured claim has been reduced to zero. (Letter from Mr. Boynton to the Court of December 4, 1991 and letter from Mr. Nelson to Mr. Boynton of December 3, 1991.) The value of this secured claim is subject to further adjustment depending on how I rule on the Debtor's defense of usury.

The Debtor's Fourth Amended Plan of Reorganization was confirmed by the Court ***857** on June 5, 1985. The Plan provides for Northwestern's allowed secured claim in Class Three and any remaining claim in Class Four as a general unsecured claim. In light of the parties' stipulation, only the value of the claim included in Class Three is in dispute.

Procedural History

On December 21, 1981, Northwestern commenced a suit in the Circuit Court for Kent County, Michigan against the Debtor and the loan guarantors to recover unpaid principal and interest. Proceedings against the Debtor were stayed by the filing of its petition for relief, but continued against the guarantors. Trial before the Circuit Court for the County of Kent was held on January 27, 1986. In this state court action, the guarantors asserted the defense of usury against the claim of Northwestern.

The Circuit Court found that the $8,000.00 commitment fee and the $2,000.00 in attorney fees were in fact additional interest charges and needed to be considered in determining the actual rate of interest Northwestern required the parties to pay.[3] The Circuit Court held that the additional interest charges raised the rate of interest in the written loan agreement above the percentage called for thereby rendering the transaction usurious. The Circuit Court concluded that since the transaction was infected with usury, all interest payments made thus far should be applied toward the principal balance owing. A copy of the Circuit Court decision was attached to the Debtor's Motion for consideration by this Court.

[3] The Circuit Court based its conclusion on MICH.COMP. LAWS ANN. § 489.779 which provided that a federal savings & loan may require borrowing members to pay all reasonable and necessary charges incurred in connection with the loan and that these charges shall be in addition to interest. The Circuit Court found an $8,000.00 commitment fee and $2,000.00 in attorney fees to be unreasonable charges outside of the statute's protection and therefore included as interest when considering whether Northwestern acted usuriously. The statute cited by the Circuit Court has since been repealed and replaced by MICH.COMP. LAWS ANN. § 491.730 without any significant change.

The Michigan Court of Appeals found that the commitment fee and the $4,000.00 in loan costs were agreed to in writing as part of the loan transaction. In support of its conclusion, the Court of Appeals referred to the promissory note evidencing the indebtedness as well as a series of letters exchanged between the Debtor and Northwestern expressing the parties' concurrence that the Debtor would pay the additional costs. Finding that the 16½% per annum interest rate and the loan costs and commitment fee were all agreed to in writing, the Court of Appeals held that the guarantors were precluded from raising the defense of usury by an exception for corporations from the general usury prohibition.[4] The Court of Appeals concluded that the guarantors were liable for all interest charges. The Court of Appeals reversed the Circuit Court and remanded the case for a new computation of the amount owing to Northwestern under the loan agreement. Again, a copy of this decision was provided by the Debtor. The Michigan Supreme Court denied leave to appeal and subsequently denied a motion to reconsider the decision by the Court of Appeals. *Northwestern Savings & Loan Association v. Cadillac Wildwood Development Corporation,* 431 Mich. 870 (1988) (denying leave to appeal); *Northwestern Savings & Loan Association v. Cadillac Wildwood Development Corporation,* No. 83140(37), 1988 Mich. LEXIS 2165 (Nov. 30, 1988) (denying reconsideration).

[4] The exception for corporations is found in MICH.STAT.ANN. § 21.200(275) [450.1275] stating that:

> [a] domestic or foreign corporation, whether or not

> formed at the request of a lender or in furtherance of a business enterprise, may be [sic] agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

The Debtor filed the present motion to reconsider the allowed secured claim of Northwestern on October 16, 1991. A hearing was held on November 26, 1991.

LAW AND ARGUMENT

With the Debtor's § 506(b) objection to Northwestern's claim settled, the remaining ***858** issues concern whether Northwestern charged usurious interest in the loan transaction. If it is found that Northwestern violated the usury statute, the amount of the Class Three secured claim will have to be recomputed based on the penalty imposed for the commission of usury under Michigan law.

11 U.S.C. § 502(j) provides, in part, that "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case." In order to grant the Debtor's request for reconsideration, sufficient cause must be shown. Upon the showing of cause, the objection to the claim of Northwestern, raised as the defense of usury, can then be considered. 11 U.S.C. § 502(b)(1) provides that upon the filing of an objection to a claim the court shall determine the amount of such claim and disallow all or part of the claim to the extent that it is unenforceable against the debtor by applicable law.[5]

[5] 11 U.S.C. § 502(b)(1) states that:

> [e]xcept as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.

The general prohibition against the charge of usurious interest is set forth in MICH.STAT.ANN. § 19.15(1) [438.31] which states:

> The interest of money shall be at the rate of $5.00 upon $100.00 for a year ... except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum.

As could be expected, due to modern lending practices and the general escalation of interest rates, this statute has become littered with exceptions. The Debtor concedes that two exceptions are applicable to the proceedings before me. As already noted, MICH.STAT.ANN. § 21.200(275) [450.1275] provides that a domestic corporation may by agreement in writing "agree to pay in excess of the legal rate." Similarly, under MICH.STAT.ANN. § 19.15(1c)(2) [438.31c(2)] the parties to a note secured by a first lien against real property "may agree in writing for the payment of any rate of interest." The Debtor agrees that the loan implicates these exceptions. Additionally, MICH.STAT.ANN. § 19.15(1c)(11) [438.31c(11)] provides that parties to a note of $100,000.00 or more "the bona fide primary security for which is a lien against real property other than a single family residence" may agree in writing for the payment of any rate of interest. It seems likely that MICH.STAT.ANN. § 19.15(1c)(11) [438.31c(11)] would also apply as an exception to the loan. To make this determination, however, I would have to make a factual conclusion as to whether the collateral was a single family residence. The Debtor was not given an opportunity to argue this point. Therefore, since the two other exceptions are sufficient, I will cease consideration of MICH.STAT.ANN. § 19.15(1c)(11) [438.31c(11)].

Taken together, these exceptions serve to remove the loan formalized on January 11, 1980 from the prohibition against charging greater than 7% interest per annum. The Note entered into between the Debtor and Northwestern, calling for 16½% interest meets and is protected by the statutory exceptions.

Likewise, the agreement calling for the payment of $4,000.00 in loan costs and an $8,000.00 commitment fee is also removed from the general usury prohibition under the two exceptions. How these two fees are considered to be interest charges requires explaining. Generally, a savings & loan institution may require a borrower to pay reasonable and necessary closing costs or loan processing fees which are actually incurred. These charges are not considered interest and therefore are not subject to any law which limits the rate of interest that can be exacted.

***859** MICH.STAT.ANN. § 23.602(730)(1) & (2) [491.730(1, 2)]. This same statutory provision mandates that the association furnish a loan settlement statement to each borrower upon the closing of the loan. MICH.STAT.ANN. § 23.602(730)(3) [491.730(3)]. The Debtor maintains, and Northwestern has offered no argument in rebuttal, that by failing to furnish the Debtor with a loan closing statement, Northwestern lost the ability to require a borrower to pay reasonable costs without having such costs considered to be interest. Without any argument against such a conclusion, I must concur that the charge for closing costs and the commitment fee constituted additional interest. But, I would again reinforce what has already been admitted by the Debtor, (*See* Debtor's Motion to Reconsider Allowed Secured Claim and Objecting to Unsecured Claim of Northwestern Savings & Loan Association ¶ 7(C) at 3–4), that both charges were agreed to in writing and fall under exceptions to the usury prohibition.

The effect of charging usurious interest is found in MICH.STAT.ANN. § 19.15(2) [438.32] as follows:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

Under the statutory penalty, a lender is barred from collecting any interest.

The Debtor argues that despite the exceptions, Northwestern still charged usurious interest and is subject to the statutory penalty. The Debtor refers to three factual incidents in support of its contention. All begin with the assumption that the loan agreement satisfies and is not in violation of any Michigan statute because it is a written agreement falling under the exceptions listed. But, the Debtor argues that if Northwestern required the payment of any interest greater than what was called for in the loan agreement, this interest charge would be outside the statutory exception thereby rendering the entire transaction usurious. Basically, the Debtor asserts that the amount of interest set forth in the loan agreement now serves as the maximum rate of interest allowable. By charging amounts greater than what was called for in the written loan agreement, Northwestern has exacted usurious interest and its secured claim is subject to reduction in accordance with the terms of MICH.STAT.ANN. § 19.15(2) [438.32].

Also essential to the Debtor's position is its reading of the penalty statute for usury. The Debtor finds two ways a lender can be subject to the statutory penalty in MICH.STAT.ANN. § 19.15(2) [438.32]. The Debtor asserts that usury can be established either by entering into an agreement calling for excessive interest or by charging unlawful interest.

The Debtor alleges that Northwestern charged excessive interest in three ways. First, the Debtor points to the fact that the proof of claim filed by Northwestern was too high. By including excess and unjustified amounts in its proof of claim, the Debtor concludes that Northwestern charged excessive interest. Next, the Debtor argues that the loan only called for the payment of $4,000.00 in closing costs while the Debtor in fact paid $4,003.00. The Debtor claims that the extra three dollars it was required to remit for the benefit of Northwestern rendered the entire transaction usurious. Finally, the Debtor argues that by computing interest on a 360 day year rather than on a 365 day year, Northwestern raised the interest rate called for in the loan above the 16½% figure agreed to in writing. The loan provided that interest would accrue at the rate of 16½% per annum. The Debtor contends that per annum means 365 days in a year or 366 in a leap year. By actually computing interest on a 360 day year, the Debtor alleges that excessive interest, outside of what was agreed to, was charged.

This last contention is the one on which most argument has been expended. Both ***860** sides have submitted exhibits reflecting the computation of interest under the loan agreement based on the two different views of what per annum means. Northwestern computed interest from the date of the loan until the date the Debtor filed its petition in bankruptcy. According to Northwestern's figures, computing interest on a 360 day year results in actually less interest needing to be paid. The Debtor responds that the proper date to compute is from the loan inception to the date of the proof of claim filed by Northwestern. Taking these dates, the Debtor's exhibits reveal that the 360 day year results in a higher interest charge than one based on a 365 day year. The resolution of this issue involves a decision as to what per annum means and what dates should be examined for

determining whether Northwestern usuriously charged excessive interest.

Northwestern begins its argument by disputing whether the usury statutes are even applicable to this situation or available to the Debtor as a defense.

In response to the Debtor's first point as to the proof of claim, Northwestern concedes that a computational error occurred and has already agreed to correct the figure. But, Northwestern disputes whether a computational error can render a transaction usurious. Northwestern argues that the three dollar extra charge was again due to error but did not represent an additional interest charge and was de minimis in any event.

Finally, at the November 26, 1991 hearing, Northwestern raised the issue of whether the decision rendered by the Michigan Court of Appeals has any preclusive effect. I will consider this last issue raised first, and then deal with the substance of the Debtor's usury defense.

EFFECT OF STATE COURT DECISION

At the outset it needs to be determined whether the decision rendered by the Michigan Court of Appeals has any preclusive effect upon the issues before this Court. Both the Debtor and Northwestern reference the state court decision. Northwestern argues that the Court of Appeals' decision is conclusive and binding on the ultimate factual and legal issue of whether the loan transaction was tainted by usury with respect to the loan cost charges and the 360 day year for the computation of interest. Paragraph Seven of Northwestern's response to the Debtor's motion states "[t]he usury issue which Debtor seeks to raise has been repeatedly raised, ultimately without success, by the guarantors in the state court action against them." (Resp. of Northwestern Savings & loan Association to Debtor's Mot. to Reconsider Allowed Secured Claim and Objecting to Unsecured Claim ¶ 7 at 2.) In its oral argument, Northwestern again asserted that the Michigan Courts already decided the merit of the usury defense with respect to two of the issues raised by the Debtor. (Tr., November 26, 1991 at 8–9).

The Debtor, in the brief in support of its motion, cites to the Court of Appeals' decision to support its argument that three dollars extra in loan costs were in fact paid, in addition to the commitment fee. (Debtor's Brief in Support of Mot. to Reconsider Allowed Secured Claim and Objecting to Unsecured Claim of Northwestern Savings & Loan Association at 3.) A factual finding of a state court precludes further litigation when it was necessary to support the judgment. *NLRB v. Master Slack and/or Master Trousers Corp.,* 773 F.2d 77 (6th Cir.1985).

Full faith and credit is given by the federal courts to state court determinations under 28 U.S.C. § 1738. The question here is whether the factual and legal conclusions of the Michigan Court of Appeals have any preclusive effect upon this proceeding. The doctrine of collateral estoppel, or issue preclusion, needs to be discussed with respect to the Court of Appeals' conclusions.

Collateral estoppel, or issue preclusion, "has the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co., v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). Four conditions must be satisfied for issue preclusion, as follows:

> ***861** 1) the issue precluded must be the same one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; 3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and 4) the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue.

Central Transport, Inc. v. Four Phase Systems, Inc., 936 F.2d 256, 259 (6th Cir.1990). The fourth requirement reflects the conclusion that collateral estoppel can only be asserted against a party to the prior action or one in privity with a prior party.

Looking at the first two conditions, the decision by the Court of Appeals cannot be used to completely preclude the Debtor's defense of usury. The Court of Appeals decided that $4,000.00 in loan costs and an $8,000.00 commitment fee was agreed to in writing and thus fell under the corporate exception to the usury statute. In this proceeding, the Debtor argues that it was the three dollars extra in loan costs, paid in addition to what was called for in the written agreement, that rendered the transaction

usurious. The Court of Appeals does not mention the three dollar issue. Further, the Court of Appeals makes no conclusion as to the argument that computing interest on a 360 day calendar year constitutes usury. Neither of these issues are precluded from subsequent litigation. Northwestern's argument that the Court of Appeals' decision precludes the Debtor from re-litigating the issue of usury cannot be accepted.

The Debtor seeks to use collateral estoppel to preclude further litigation of various fact questions involving the loan costs and commitment fee. Since Northwestern has admitted these factual conclusions, discussion of the applicability of collateral estoppel is unnecessary. Northwestern, in response to the Debtor's request, admits that the commitment fee of $8,000.00 was required and paid for by the Debtor. (Resp. to Debtor's Request for Admissions and Interrogatories, ¶ 17 at 5.) Northwestern also admits that the Debtor paid $4,003.00 in loan costs. (Resp. ¶ 18 at 5). Finally, as already noted, Northwestern does not object or argue against the conclusion that both these charges can be considered as interest.

Based upon the first two requirements for collateral estoppel and Northwestern's admissions, I need not discuss issue preclusion any further, especially as to the question of whether the Debtor was in privity with the guarantors.

DISCUSSION

11 U.S.C. § 502(j) provides that I may reconsider a claim previously allowed for cause. Once deciding to reconsider the claim, § 502(j) goes on to state that the claim may be allowed or disallowed according to the equities of the case. Here, if the Debtor's argument is correct and Northwestern has charged usurious interest in violation of Michigan statutory law, the Debtor and its bankruptcy estate will be relieved of the payment of Northwestern's secured claim. With the application of all payments made thus far toward principal, the secured claim could possibly be fully satisfied. The possibility of such windfall to the Debtor's bankruptcy estate warrants granting reconsideration. Further, the beneficence of resolving the Debtor's objection on the merits also supports a decision to grant reconsideration. With these two factors in mind, the Debtor's motion to reconsider is granted, and I will proceed to examine the merits of the Debtor's assertions.

Michigan law prohibits a lender from charging greater than 7% interest per annum. MICH.STAT.ANN. § 19.15(1) [438.31]. A lender who enters into a contract which calls for interest greater than allowed by statute, or charges interest in excess of what is allowed is barred from the recovery of any interest. MICH.STAT.ANN. § 19.15(2) [438.32]. Any interest previously paid by the debtor is credited toward the satisfaction of the principal amount owing. *In Re Goehring,* 23 B.R. 323, 325 (Bankr.W.D.Mich.1982); *Osinski v. Yowell,* 135 Mich.App. 279, 287, 354 N.W.2d 318 (1984); *Waldorf v. Zinberg,* 106 Mich.App. 159, 164, 307 N.W.2d 749 (1981); *Union Guardian* ***862** *Trust Co. v. Crawford,* 270 Mich. 207, 211, 258 N.W. 248 (1935). The lender, however, need not surrender any payment voluntarily made on a usurious contract or note. *Bebee v. Grettenberger,* 82 Mich.App. 416, 423, 266 N.W.2d 829 (1978). The debtor receives a credit toward principal but cannot recover from the lender since usury can only be asserted as a defense to payment and not as a cause of action.

The purpose of the Michigan usury statute is to "protect the necessitous borrower from extortion." *Wilcox v. Moore,* 354 Mich. 499, 504, 93 N.W.2d 288; *Cullins v. Magic Mortgage Inc.,* 23 Mich.App. 251, 178 N.W.2d 532 (1970). The statute is remedial for the purpose of public protection. The prohibition against the charge of usurious interest reflects a statutory decision to protect the public from being compelled by the need of credit and by the superior bargaining power of financiers to engage in loan transactions, defined broadly, calling for an excessive rate of interest. The Michigan statute prohibiting the charge of usurious interest is broader than most and deserves liberal application. *Id.* 354 Mich. at 504, 93 N.W.2d 288; *Hillman's v. Em 'N Al's,* 345 Mich. 644, 651, 77 N.W.2d 96 (1956). Courts enforcing Michigan's usury prohibition need to be diligent in determining whether usurious interest has been charged, examining the full nature of the transaction and not limiting itself to the representations of the parties.

Michigan's statutory penalty calling for the forfeiture of any right to interest can only be invoked upon the attempted enforcement of a usurious obligation. The Michigan statutes establish only a defense, a shield that the debtor can utilize against a lender seeking to recover on a usurious obligation. *Allan v. M & S Mortgage Co.,* 138 Mich.App. 28, 41, 359 N.W.2d 238 (1984); *Michigan Mobile Homeowners Ass'n v. Bank of the Commonwealth,* 56 Mich.App. 206, 216, 223 N.W.2d 725 (1974).

In this matter, Northwestern, by filing a proof of claim, has attempted to enforce its right to payment under the construction loan. The Debtor's objection to Northwestern's claim is viewed as a defense.[6] Therefore,

the Debtor is able to utilize the provisions of the Michigan statutes dealing with the charge of excessive interest in its objection to the claim of Northwestern.

[6] *Cf.* 11 U.S.C. § 558 stating that "[t]he estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitations, statutes of frauds, usury, and other personal defenses."

Usury, as a defense, is not an absolute right under Michigan law. It can be waived or subsequently taken away by the creation of a statutory exemption. Two decisions of the Michigan Court of Appeals illustrate this point. They are *Marlowe & Sons v. Farner,* 159 Mich.App. 194, 406 N.W.2d 273 (1987), *lv. appeal den.* 429 Mich. 877 (1987) and *Krause v. Griffis,* 178 Mich.App. 111, 443 N.W.2d 444 (1989). The cases involved the business entity exception found in MICH.STAT.ANN. § 19.15(71) [438.61]. Both cases dealt with the question of whether the business entity exception can be retroactively applied to agreements entered into before the exception was adopted. The cases concur in their finding that the defense of usury is not a vested right and may be extinguished by legislative action that occurs after the defense arises but before it is asserted in a proceeding. *Marlowe & Sons v. Farner,* 159 Mich.App. at 197, 406 N.W.2d 273; *Krause v. Griffis,* 178 Mich.App. at 114, 443 N.W.2d 444; *Michigan Mobile Homeowners Ass'n v. Bank of the Commonwealth,* 56 Mich.App. at 220, 223 N.W.2d 725.[7]

[7] Although not argued by counsel, it is for this reason that the present codification of the exception from the usury prohibition for a written agreement by a corporation is applicable to this proceeding.

The Debtor has admitted in these proceedings that two statutory exceptions apply to the loan entered into with Northwestern. In its original brief, filed in support of its motion, the Debtor concedes that MICH.STAT.ANN. § 21.200(275) [450.1275] and MICH.STAT.ANN. § 19.15(1c)(2) [438.31c(2)] remove the loan agreement from ***863** the general usury prohibition. (Debtor's Brief in Support of Motion to Reconsider Allowed Secured Claim and Objecting to Unsecured Claim of Northwestern Savings & Loan Association at 6–7.)

Despite the admitted existence of these exceptions, the Debtor has raised the novel argument that Northwestern, by charging interest in excess of what was called for in the written agreement, has lost the benefit of the statutory exceptions and again subjected the loan to the defense of usury and the resulting penalty. The Debtor contends that, although the original transaction is free from any defense of usury, the subsequent actions of Northwestern entitle the Debtor to invoke the statutory protection of MICH.STAT.ANN. § 19.15(2) [438.32].

The remedial effect of the Michigan usury statutes does not reach this far. Once a transaction is excepted from the general usury prohibition of MICH.STAT.ANN. § 19.15(1) [438.31], it cannot be brought back, under the penalty provision, by a lender later charging excessive interest. Once lost, the non-vested right to defend against payment based on the Michigan usury statutes cannot be asserted. Northwestern is correct in arguing that the remedy found in MICH.STAT.ANN. § 19.15(2) [438.32] is not applicable to this proceeding. The Debtor may have a cause of action for breach of contract and the Debtor definitely possesses the right to have the claim of Northwestern adjusted for any overpayment or unrecorded payments made[8], but the defense of usury is unavailable, precluded by the statutory exceptions.

[8] Northwestern has already conceded to making all necessary mathematical adjustments to its proof of claim in their response titled *Northwestern's Response to Debtor's Supplemental Brief* and filed on December 13, 1991.

MICH.STAT.ANN. § 21.200(275) [450.1275] states that the defense of usury is prohibited for a corporation. This exception is broad and deserving of liberal application. Before being amended by Pub.Acts No. 121 (1989), the corporate exception to the usury statute stated, in part, "and in such case the defense of usury is prohibited." MICH.STAT.ANN. § 21.200(275) [450.1275] (1982). The language, "in such case", referred presumably to the agreement in writing to pay any rate of interest. In the current version of this statute "in such case" has been deleted and the final part of the corporate exception states only that "the defense of usury shall be prohibited." With this change in language, the exception more strongly dictates that corporations should be free to enter into financial transactions at any rate of interest. The deletion of "in such case" from the statutory corporate exception bolsters the conclusion that the defense of usury should be easily lost by a corporation, and once avoided in writing not again asserted, even when interest is charged in excess of what was called for in the written agreement.

The purpose of the Michigan usury statute is to protect the necessitous borrower, the individual unexperienced in financial transactions and subject, perhaps, to the superior bargaining power of a lender. A corporation entering into a transaction for clearly financial and business reasons merits no such protection. The final clause of the

corporate exception specifically states that, "the defense of usury shall be prohibited." The defense of usury cannot be resurrected for the benefit of a corporation by subsequent action under a non-usurious written obligation.

Michigan cases, early on, concurred in the conclusion that the defense of usury is prohibited for a corporation entering into a written agreement with a lender. In *Thomas v. Union Trust Co.* 251 Mich. 279, 231 N.W. 619 (1930), the Michigan Supreme Court upheld the constitutionality of the corporate exception deciding that the policy behind the prohibition of charging usurious interest does not extend to corporate entities. *Id.* at 282–84, 231 N.W. 619. *See also, Grinnell Realty Co. v. General Casualty & Surety Co.,* 253 Mich. 16, 234 N.W. 125 (1931) (concurring that a corporation cannot raise the defense of usury).

More recently, decisions of the Michigan Court of Appeals deny the benefit of Michigan's usury statutes to corporations agreeing ***864** to a loan in writing. The cases use broad, general language in their denial of the defense of usury. In the case, *Bob v. Holmes,* 78 Mich.App. 205, 259 N.W.2d 427 (1977), the Michigan Court of Appeals concludes that as a result of signing various leases as a corporation, the defendants are "consequently precluded from asserting the defense of usury." *Id.* at 217, 259 N.W.2d 427. The Court comments, in remanding the case to the trial court, that the effect of the corporate exception is to "effectively repeal the usury statutes insofar as corporations are concerned." *Id.* at 217, 259 N.W.2d 427.[9] While not dealing specifically with the Debtor's contention that subsequent action can again implicate the defense of usury, the broad language that the Court of Appeals uses in speaking about the nature of the corporate exception goes against the Debtor's attempt to limit the application of MICH.STAT.ANN. § 21.200(275) [450.1275].

[9] The corporate exception in effect at the time *Bob v. Holmes* was decided was substantially similar to the one before the Court in this proceeding. In fact, the way in which it was changed by later revision strengthened its preclusive effect upon the objection raised by the Debtor. This difference in language is discussed later in the Opinion.

The Michigan Court of Appeals in *Allan v. M & S Mortgage* recognized that, when found to apply, MICH.STAT.ANN. § 21.200(275) [450.1275] prevents borrowers from maintaining any defense based upon the charge of usurious interest. *Allan v. M & S Mortgage Co.,* 138 Mich.App. at 39, 359 N.W.2d 238. In *Allan v. M & S Mortgage Co.,* the Court dealt with the issue, not involved here, of whether a lender can avoid the usury provisions of Michigan law by forcing a borrower to incorporate. The Court decided that, under the corporate exception, the defense of usury is not available to an individual who incorporates for the purpose of borrowing to further business purposes, but can be invoked by an individual who incorporates to borrow to discharge personal obligations. *Id.* at 40, 359 N.W.2d 238. The purpose of the usury statutes only goes to protect this latter type of lending situation. *Id.* at 38, 359 N.W.2d 238.

Even without the corporate exception barring the defense of usury, MICH.STAT.ANN. § 19.15(1c)(2) [438.31c(2)] would again compel the decision that the Debtor is precluded from objecting to the claim of Northwestern based upon the charge of excessive interest. The subsequent charging of interest greater than what was called for in the written agreement does not revive the defense of usury. The loan transaction, by falling under an exception to the usury prohibition, is removed from its operation. Since the defense of usury is not a vested right, once it is lost it cannot again be asserted.

The three arguments raised by the Debtor to support its defense of usury hold no value. The Debtor is precluded from raising them. The excessive amount alleged in Northwestern's proof of claim, does not amount to the charging of usurious interest. It does reflect a mathematical error on the part of Northwestern deserving of correction. Since the parties have stipulated to the amount of the secured claim absent a showing of usury, this error has been corrected.

Northwestern's purported charge of three additional dollars in loan costs also fails to constitute the charge of usurious interest. The additional charge may be beyond what was called for in the loan agreement and hence in violation of the written agreement, but it is not usury. Once again, a mistake of fact has occurred deserving of correction but not of the prohibition of the collection of interest.

Finally, the issue most extensively argued was whether the computing of interest based upon a 360 day rather than a 365 day year could amount to usury. The parties engaged in needless haggling over the date upon which the computation of interest must be considered. The proper definition of per annum in the note is a question of contract interpretation, not usury.

In support of its argument, the Debtor cited the case, ***865** *American Timber & Trading Co. v. First National Bank of Oregon,* 511 F.2d 980 (9th Cir.1974), *cert. denied,* 421

U.S. 921, 95 S.Ct. 1588, 43 L.Ed.2d 789 (1975). The Ninth Circuit concluded that computing interest on a 360 day year rather than a 365 day year could result in the charging of usurious interest. But the conclusion reached by the Ninth Circuit does not apply to the facts that are before me. To begin with, the Ninth Circuit was considering Oregon law, but the defense of usury was based on federal law found in 12 U.S.C. §§ 85, 86. Also, no consideration was given to a corporate exception or an exception existing for loans secured by a first lien on real property. The one possible exception dealt with in *American Timber* was not given effect because it was enacted subsequent to the lawsuit and the Ninth Circuit concluded that Oregon law did not allow for retroactive application. *Id.* at 984.

Given the broad exceptions to the usury prohibition found in Michigan law, I now conclude that this final contention raised by the Debtor does not sustain a defense of usury but rather serves to implicate an issue of contract construction.

Finally, the Debtor has strenuously argued issues such as whether Northwestern's intent is relevant and whether de minimis charges can be excused in considering the defense of usury. These contentions need not be addressed since the Debtor is prevented from interposing the defense of usury. When an exception exists to Michigan's prohibition against excessive interest, the defense of usury is lost and cannot be revived. Such an exception bars the defense of usury in the face of a flagrantly usurious document or when a lender has proceeded to exact usurious interest.

CONCLUSION

The Debtor's request for reconsideration is granted. But, Debtor's objection to the secured claim of Northwestern based on the defense of usury raised by the Debtor is denied. The Debtor is precluded under the operation of Michigan law from raising the defense of usury. Based on Michigan's broad statutory exceptions and the legal conclusion that the defense of usury is not a vested right, Northwestern's right to payment should not be modified. The secured claim possessed by Northwestern will be allowed at the stipulated value of $386,488.72 (plus post-confirmation interest).

All Citations

138 B.R. 854

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1997 WL 33347816
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Roger J. MAC LEOD and Maxine L. Mac Leod,
Plaintiffs-Appellants,
v.
BAY HAVEN MARINA, INC., Defendant-Appellee.

No. 187688.
|
June 13, 1997.

Before: YOUNG, P.J., and DOCTOROFF and CAVANAGH, JJ.

UNPUBLISHED

PER CURIAM.

***1** Plaintiffs, Roger J. Mac Leod and Maxine L. Mac Leod, appeal as of right from a June 12, 1995, order of judgment and foreclosure in favor of defendant, Bay Haven Marine, Inc., on its counterclaim, entered pursuant to a bench trial. Plaintiffs specifically appeal the trial court's July 10, 1995, orders granting summary disposition to defendant and denying plaintiffs' motion for mediation sanctions. We affirm.

Plaintiffs purchased a boat from defendant with $87,500 they borrowed from First of America Bank. When plaintiffs defaulted, plaintiffs and defendant entered into an agreement on January 11, 1983, whereby defendant would pay off the full amount of principal, interest, and penalties that plaintiffs owed to the bank. In return, plaintiffs were required to give defendant title to the boat so that defendant could sell it and apply the proceeds toward reducing the amount plaintiffs owed under the agreement. Plaintiffs thus remained liable for any deficiency along with various costs and interest of one and one-half percent above the prime rate of the bank. Plaintiffs also mortgaged their interest in two parcels of real estate as security for the obligations under the agreement. Defendant eventually paid $110,000 to the bank, sold the boat for $70,000, and applied the proceeds to reduce plaintiffs' indebtedness under the agreement.

Plaintiffs filed the instant lawsuit to discharge the conditional mortgage and assignment of interest in land contract on one of the parcels, claiming that the indebtedness was fully paid. Defendant counterclaimed seeking foreclosure. Plaintiffs sought summary disposition on two grounds: (1) the interest charged on the loan was usurious; and (2) an accord and satisfaction took place. The trial court rejected plaintiffs' arguments, denied their motion, and in turn, granted summary disposition to defendant. The dispute was mediated, resulting in an award of $11,500 to defendant which both parties rejected. After a bench trial, the trial court awarded $9,946.94 to defendant and entered a judgment to that effect, which judgment also provided for foreclosure and sale of the property upon plaintiffs' failure to pay. The trial court then denied plaintiffs' motions for new trial and mediation sanctions.

Plaintiffs first argue that the trial court erred in granting summary disposition to defendant because the interest rate on the loan was usurious. This Court reviews a trial court's decision to grant summary disposition de novo on appeal. *Sharper Image v. Dep't of Treasury,* 216 Mich.App 698, 701; 550 NW2d 596 (1996). The trial court did not state the basis for granting summary disposition to defendant. However, because defendant did not file its own motion, the trial court's decision is properly characterized as being under MCR 2.116(I)(2). "Summary disposition is properly granted to the opposing party if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image, supra* at 701; MCR 2.116(I)(2).

***2** In addition, because the trial court's decision was based on a determination that no genuine issue of material fact existed regarding plaintiffs' claims of usury and accord and satisfaction, the standards applicable to a motion under MCR 2.116(C)(10) apply. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a party's claim. *Royce v. Citizens Ins Co,* 219 Mich.App 537, 541; 557 NW2d 144 (1996). The reviewing court must consider the pleadings, affidavits, depositions and other available evidence, and "determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ." *Id.*

Unqualified lenders are prohibited from charging a maximum rate of interest on mortgage loans and land contracts in excess of eleven percent per annum. MCL

438.31c(6); MSA 19.15(1c)(6). There is no dispute here that defendant charged interest in excess of eleven percent. However, the trial court found that because the real estate served as the primary security for the note, the interest rate charged was therefore not usurious. MCL 438.31c(11); MSA 19.15(lc)(11) provides:

> The parties to a note, bond, or other indebtedness of $100,000 or more, the bona fide primary security for which is a lien against real property other than a single family residence ... may agree in writing for the payment of any rate of interest.

Plaintiffs argue that the above statutory provision is inapplicable because the boat was the primary security for the loan rather than the real estate. We disagree. Primary security has been defined as "that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness due." *Macklin v. Brown,* 111 Mich.App 110, 114; 314 NW2d 538 (1981). Moreover, "security" is defined by Black's Law Dictionary (6th ed.1990) as that which is "given by a debtor in order to assure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." *Id.* at 1355.

In this case, the agreement provided for immediate transfer and sale of the boat, with the proceeds applied toward reducing the amount of plaintiffs' indebtedness. Thus, the boat did not serve as primary security. Rather, defendant's sole recourse upon default was to foreclose on the mortgages and conditional assignment. Accordingly, the trial court correctly determined that the real estate was the primary security for the loan and that the interest rate charged was therefore not usurious.

Plaintiffs also contend that an accord and satisfaction was reached when defendant orally agreed to accept three $5,000 payments in satisfaction of the debt. It is well established that an accord and satisfaction is enforceable only if it is in writing and signed by the party to be charged or, if oral, based upon additional consideration. MCL 566.1; MSA 26.978(1); see *Melick v. Nauman Vandervoort,* 54 Mich.App 171, 176; 220 NW2d 748, rev'd on other grounds 393 Mich. 774; 224 NW2d 280 (1974). In the instant case, because there was no additional consideration to support the alleged change in payment terms nor any written evidence of the transaction, plaintiffs' argument on this issue must fail. In sum, therefore, the trial court's grant of summary disposition to defendant was proper.

***3** Finally, plaintiffs contend that the trial court erred in denying their motion for mediation sanctions. Where a verdict awards both monetary and equitable relief, the determination whether to award costs is governed by MCR 2.403(O)(5), which provides:

If the verdict awards equitable relief, costs *may* be awarded if the court determines that

(a) taking into account *both monetary relief* [adjusted as provided in subrule (O)(3)] *and equitable relief,* the verdict is not more favorable to the rejecting party than the evaluation, and

(b) *it is fair to award costs under all of the circumstances.* [*Id.*] [Emphasis added.]

Applying the court rule to this case, we conclude the trial court's decision not to award mediation sanctions was within its discretion and fair under the circumstances. First, while the monetary component of the verdict was more favorable to plaintiffs than the mediation evaluation, the equitable relief clearly favored defendant. Second, defendant's decision to reject the mediation evaluation was reasonable under the circumstances. As defendant correctly points out, the mediation panel could not have awarded defendant any equitable relief. MCR 2.403(K)(1); *Dane v. Royal's Wine & Deli,* 192 Mich.App 287, 293; 480 NW2d 343 (1992). Because the trial court's subsequent entry of judgment on the mediation award would have disposed of all claims, including equitable ones, defendant would have been precluded from pursuing foreclosure. MCR 2 .403(M)(1); *Joan Automotive v. Check,* 214 Mich.App 383, 387-388; 543 NW2d 15 (1995). Consequently, there was no abuse of discretion in the trial court's refusal to award plaintiffs mediation sanctions.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

All Citations

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237 B.R. 380
United States Bankruptcy Court,
E.D. Michigan,
Northern Division.

In re DOW CORNING CORPORATION, Debtors.

Bankruptcy No. 95–20512.
|
July 30, 1999.

Synopsis
Official unsecured creditors' committee and individual unsecured creditors objected to confirmation of reorganization plan which was jointly proposed by Chapter 11 debtor-manufacturer and official committee of tort claimants, on ground that proposed joint plan allegedly failed to satisfy best-interest-of-creditors test. The Bankruptcy Court, Arthur J. Spector, Chief Judge, held that: (1) order allowing claim in bankruptcy case is equivalent of "money judgment" within meaning of federal postjudgment interest statute; (2) to extent that estate was solvent, proposed plan of reorganization had to provide interest on allowed general unsecured claims, from date that petition was filed, at rate provided in federal postjudgment interest statute; and (3) phrase "interest at the legal rate," as used in bankruptcy statute providing that, when estate is solvent, distribution will be made in payment of interest at the legal rate, meant interest at rate fixed by federal postjudgment interest statute.

Objection overruled.

Attorneys and Law Firms

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David S. Rosner, Kasowitz, Benson, Torres & Friedman LLP, for Creditors Angelo, Gordon & Co., Appaloosa Management, L.P., Franklin Mutual Advisors, New York City, for Creditors.

Ralph R. Mabey, LeBoeuf, Lamb, Greene & MacRae, L.L.P. Management Co. LLC and Halcyon Offshore Management Co. LLC, Kenneth H. Eckstein, Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel LLP, Salt Lake City, UT, for the Official Committee of Tort Claimants.

Mark I. Bane, Kelley Drye & Warren LLP, New York City, for Chase Manhattan Bank.

Patrick A. Murphy, Murphy Sheneman, Julian & Rogers P.C., New York City, for Bank of America NT & SA.

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Glenn E. Siegel, Winthrop, Stimson Putnam & Roberts, New York City, for Bank of New York.

AMENDED OPINION ON THE MEANING OF "INTEREST AT THE LEGAL RATE" IN 11 U.S.C. § 726(A)(5)

ARTHUR J. SPECTOR, Chief Judge.

The Official Committee of Unsecured Creditors ("U/S CC") and certain creditors holding general unsecured claims of a commercial nature objected to confirmation of the plan of reorganization filed jointly by the Debtor and the Official Committee of Tort Claimants (the "Proponents").[1] One of the objections turns on the interpretation of the term "interest at the legal rate" found in 11 U.S.C. § 726(a)(5). Because the Court agrees with the Proponents that the term refers to the federal judgment rate, 28 U.S.C. § 1961(a), this objection is overruled.

[1] The objecting parties, who will be jointly referred to as the "Commercial Creditors," include the following: the U/S CC; Bank of America NT & SA; Bank of New York; Chase Manhattan Bank; Angelo, Gordon & Co., L.P., Franklin Mutual Advisers, and Appaloosa Management, L.P. (the "Angelo Group"); Halcyon/Alan B. Slifka Management Co. LLC and

Halcyon Offshore Management Co. LLC ("Halcyon"); Bear, Stearns Investment Products, Inc.; and Davidson Kempner International Advisors, L.L.C. and M.H.M. Davidson & Co., Inc.

The U/S CC, Bank of America NT & SA, Bank of New York and Chase Manhattan Bank originally raised the objection at issue in connection with the Proponents' request to approve the Joint Plan's accompanying disclosure statement. Some courts recognize that grounds for disapproving a disclosure statement exist when the proposed plan is so "fatally flawed that confirmation is impossible." *See, e.g., In re Cardinal Congregate I,* 121 B.R. 760, 764 (Bankr.S.D.Ohio 1990); *In re U.S. Brass Corp.,* 194 B.R. 420, 422 (Bankr.E.D.Tex.1996); *Eastern Maine Electric Cooperative,* 125 B.R. 329, 333 (Bankr.D.Me.1991); *In re Monroe Well Service, Inc.,* 80 B.R. 324, 333 (Bankr.E.D.Pa.1987). At the disclosure hearing, the Court determined that the plan was not patently unconfirmable as a matter of law and declined to address those objections going to the legality of the Joint Plan.

Nonetheless, the current objection presents a discrete legal issue that was capable of being addressed in advance of the confirmation hearing scheduled to commence June 28, 1999. Therefore, the Court entered an order on March 9, establishing a briefing schedule and hearing date solely with respect to the issue of what rate of interest is required by § 726(a)(5). Oral arguments on the matter were heard April 15.

I. Introduction

The U/S CC and a number of its constituents assert that the Joint Plan cannot be confirmed because it fails to satisfy § 1129(a)(7)'s "best-interest-of-creditors" test. This section reads as follows:

> A court may not confirm a chapter 11 plan unless:
>
> (7) With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date....

11 U.S.C. § 1129(a)(7). Under this statute the bankruptcy court must compare what a dissenting claimant would receive if the estate were liquidated under the provisions of chapter 7 of the Bankruptcy Code with what the claimant would receive under the plan. If the creditor would get more in a chapter 7 liquidation, then the plan cannot be confirmed. *See 7 Collier on Bankruptcy* ¶ 1129.03[7][b] (15th ed. rev.1999). The Commercial Creditors base their assertion that the plan fails this test on the chapter 7 distribution statute, which states:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed—
>
> ***385** (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section;
>
> (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—
>
> (A) timely filed under section 501(a) of this title;
>
> (B) timely filed under section 501(b) or 501(c) of this title; or
>
> (C) tardily filed under section 501(a) or this title, if—
>
> (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
>
> (ii) proof of such claim is filed in time to permit payment of such claim;
>
> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title other than a claim of the kind specified in paragraph (2)(C) of this subsection;
>
> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of *interest at the legal rate* from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

11 U.S.C. § 726(a) (emphasis added). The parties assume, as does the Court for purposes of this opinion, that there will be sufficient funds on hand to pay interest under the fifth paragraph. While the parties agree that § 1129(a)(7) requires the plan to provide interest on unsecured creditors' claims at the legal rate, they disagree over what such compliance entails.

The Proponents argue that § 726(a)(5) calls for interest at the rate determined under 28 U.S.C. § 1961(a). The Commercial Creditors vehemently disagree, arguing instead that the correct post-petition interest rate is the rate provided for in the contract or, if no contract rate exists, at the otherwise applicable statutory rate.

In resolving this conflict, there are two ways to proceed. One is to begin with 28 U.S.C. § 1961(a), and decide whether that statute governs allowed claims in bankruptcy. *See* Part II. The alternative is to focus on § 726(a)(5) and consider whether that statute incorporates 28 U.S.C. § 1961(a). *See* Part III. But regardless of the road traveled, the destination is the same— § 726(a)(5) requires post-petition interest to be calculated pursuant to 28 U.S.C. § 1961(a).

II. Reference to "Money Judgment[s]" in 28 U.S.C. § 1961(a) Includes Allowed Claims in Bankruptcy

A. 28 U.S.C. § 1961(a) Applies in Bankruptcy Cases

Section 1961 provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). The "interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent ... of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." *Id.*

As indicated, the Commercial Creditors argue that the post-petition interest rate should be determined by some source other than this statute, such as state law or the terms of the parties' contract. Courts, however, must invoke § 1961(a) in those circumstances in which ***386** the statute applies. *See Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 989 (6th Cir.1982) ("This provision mandates the imposition of post-judgment interest, thus removing the award of such interest from the discretion of the District Court."). Therefore, the Court may consider "alternatives" to § 1961(a) only if the claims of the Commercial Creditors are not governed by the statute. And, as will be explained, we believe that the statute is in fact controlling.

Section 1961 does not specifically mention the "Bankruptcy Court." But "bankruptcy judges ... constitute a unit of the district court" for the judicial district in which they serve. 28 U.S.C. § 151. Thus it would seem that the reference in § 1961(a) to the "district court" includes bankruptcy courts as well. *In re Goldblatt Bros., Inc.,* 61 B.R. 459, 466 n. 4 (Bankr.N.D.Ill.1986).

Noteworthy in this regard is subsection (c) of § 1961, which limits the statute's applicability with respect to certain judgments, and provides that certain other types of judgments are excluded from § 1961 altogether. Since judgments issued by bankruptcy courts are not mentioned in this subsection, the logical inference to draw is that they are subject to the full thrust of the statute. *Cf. Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 188, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) ("[T]here are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim expressio unius est exclusio alterius, we must presume that [the exemptions listed in the statute] ... were the only 'hardship cases' Congress intended to exempt."). That inference is particularly appropriate here since there is no apparent reason why a judgment creditor's right to interest should turn on whether the judgment issued in the district court or a unit thereof. *Cf. United States v. Ron Pair Enters.,* 489 U.S. 235, 243, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (concluding that non-consensual lienholders are entitled to post-petition interest under 11 U.S.C. § 506(b), based in part on the Court's view that there was no "significant reason why Congress would have intended, or any policy reason would compel, that [such creditors] ... be treated differently" from those holding consensual security interests).

And in fact, bankruptcy cases routinely hold that "[§ 1961(a)] applies to bankruptcy proceedings." *In re Pester Refining Co.,* 964 F.2d 842, 849 (8th Cir.1992); *Ocasek v. Manville Corp. Asbestos Disease Compensation Fund,* 956 F.2d 152, 154 (7th Cir.1992); *In re Resyn Corp.,* 945 F.2d 1279, 1284 (3d Cir.1991); *Grant v. George Schumann Tire & Battery Co.,* 908 F.2d 874, 883 (11th

Cir.1990); *In re Thrall,* 196 B.R. 959, 962 (Bankr.D.Colo.1996) (collecting cases); *In re Meyer,* 206 B.R. 410, 419 (Bankr.E.D.Va.1997); *In re Harvard Knitwear, Inc.,* 193 B.R. 389, 399 (Bankr.E.D.N.Y.1996); *In re Southern Indus. Banking Corp.,* 87 B.R. 518, 520 (Bankr.E.D.Tenn.1988); *see also, e.g., In re Win–Vent, Inc.,* 217 B.R. 803, 818 (Bankr.W.D.Mo.), *aff'd,* 217 B.R. 798 (W.D.Mo.1997) (awarding interest under § 1961(a) on judgment for bank against the bankruptcy trustee and another party); *In re Ramirez Rodriguez,* 209 B.R. 424, 434 (Bankr.S.D.Tex.1997) (doing likewise in judgment for trustee); *In re Davis,* 172 B.R. 437, 459 (Bankr.D.D.C.1994) (doing likewise in judgment for debtor). Therefore, the Court concludes that the reference in § 1961(a) to judgments "recovered in a district court" includes judgments issued by a bankruptcy court.

B. A § 502(b) Order Constitutes a Money Judgment

The next issue is whether an allowed claim is a "money judgment." As one might expect, a "money judgment" consists of three elements: it must be a judgment; entitling the plaintiff to a specified sum of money; and such entitlement must be against an identifiable party. *In re Commonwealth Oil Ref. Co.,* 805 F.2d 1175, 1186 (5th Cir.1986). By definition, ***387** an order issued pursuant to § 502(b) meets the second and third criteria. First, it confers upon the creditor a right of payment for a specified sum of money. *See* 11 U.S.C. § 502(b) (stating that after the court "determine[s] the amount of [a] claim," that such claim shall be allowed "in lawful currency of the United States"). Second, it identifies the party against whom such right of payment is enforceable—the estate. An allowed claim is, therefore, a claim for "money" within the meaning of § 1961(a).

The more difficult question is determining whether an allowed claim constitutes a judgment. "Judgment" is not defined by statute. But as explained by the Supreme Court, "[t]he judgment of a court is the judicial determination ... of the court upon a matter within its jurisdiction." *United States v. Hark,* 320 U.S. 531, 534, 64 S.Ct. 359, 88 L.Ed. 290 (1944). And unless otherwise qualified, it is a judicial decision that is final and subject to appeal. Bankruptcy Rule 7054, made applicable to all contested matters in bankruptcy through Bankruptcy Rule 9014, states that " '[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." F.R.Bankr.P. 7054(a). *See also Schaefer Brewing Co.,* 356 U.S. at 234, 78 S.Ct. 674 (stating that a "final judgment ... [is] a 'complete act of adjudication' ... [which] was intended by the judge to be his final act in the case"); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *Catlin,* 324 U.S. at 233, 65 S.Ct. 631 (implicitly assuming that judgments are appealable as of right); *City of Louisa v. Levi,* 140 F.2d 512, 514 (6th Cir.1944) ("A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save superintend, ministerially, the execution of the decree."); *Black's Law Dictionary* 841–42 (6th ed. 1990) (A judgment is "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties. [It is t]he law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in action or proceeding.").

The distinguishing feature of a judgment, then, is that it is a final judicial decision subject to appeal. *See also* 10 *Moore's Federal Practice,* § 54.02[2] (3d ed. 1999) ("If the order is appealable, the order is a 'judgment'...."); *cf. Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.").

The concept of finality is expressly incorporated into bankruptcy jurisprudence through 28 U.S.C. § 158(a). That section provides that "district courts of the United States shall have jurisdiction to hear appeals ... from final judgments, orders, and decrees" entered by a bankruptcy court. 28 U.S.C. § 158(a)(1). Similarly, a court of appeals will have jurisdiction only over bankruptcy matters that are "final decisions, judgments, orders, and decrees entered" by the district court. 28 U.S.C. § 158(d). *See also In re Boddy,* 950 F.2d 334, 336 (6th Cir.1991) ("In order for this court to have jurisdiction, the underlying decision of the bankruptcy court must be final...."); *In re Morse Electric Co.,* 805 F.2d 262, 263 (7th Cir.1986) (recognizing "finality requirement" of § 158(d)); *In re The Hawaii Corp.,* 796 F.2d 1139, 1141 (9th Cir.1986) ("[T]he order of the district court must be 'final' before we have jurisdiction to review it [pursuant to § 158(d)].").

The Sixth Circuit has recognized that whether a bankruptcy matter is final for ***388** purposes of appeal can sometimes be difficult to resolve. *In re Millers Cove Energy Co.,* 128 F.3d 449, 451 (6th Cir.1997). However,

"[v]irtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." *Id.* (citing 16 Wright & Miller, *Federal Practice and Procedure* § 3926.2 (2d ed.1996)); *see also In re Eagle–Picher Indus., Inc.,* 131 F.3d 1185, 1189 (6th Cir.1997) ("The unique nature of bankruptcy makes it possible to appeal a single, discreet [sic] issue while the bankruptcy proceedings continue in ways that may dramatically change the face of that issue."); *The Hawaii Corp.,* 796 F.2d at 1141–42 (citing cases). The reason that bankruptcy law contains this flexibility is fairly obvious: "[A] bankruptcy case is simply an aggregation of individual controversies, the resolution of which must be reached before bankruptcy distribution." 1 *Collier on Bankruptcy* ¶ 5.07[1][b] at 5–22 to 5–23 (citing *In re Martin Bros. Toolmakers, Inc.,* 796 F.2d 1435, 1437–38 (11th Cir.1986)). In describing the breadth of this flexibility, one of the drafters of the Bankruptcy Code stated:

> The unit of litigation by which finality will be measured is a "proceeding arising under title 11 of the United States Code or arising in or related to a case under title 11." A "case under title 11" is the umbrella under which all other matters take place. It is initiated by the filing of a petition under title 11 in the bankruptcy court, and terminated by an order dismissing or closing the case. Everything that occurs in the bankruptcy court between these two events is treated as "a proceeding arising in or related to" the bankruptcy case. This broad phrase encompasses everything that was formerly known as an adversary proceeding, contested matter, administrative matter, proceeding in bankruptcy or controversy arising in bankruptcy.

Richard B. Levin, *Bankruptcy Appeals,* 58 N.C.L.Rev. 967, 985 (1980); *see also Morse Electric,* 805 F.2d at 265 (The "disposition of a [matter] that would be final as a stand-alone suit outside of bankruptcy is also final [for purposes of appeal] in bankruptcy.").

It is not surprising, therefore, that courts almost uniformly recognize that a § 502(b) order entered by a bankruptcy court is final and subject to appeal. *In re Vause,* 886 F.2d 794, 797 (6th Cir.1989) (holding that an order which disallowed a claim pursuant to § 502(b)(6) was final and appealable); *Siegel v. Federal Home Loan Mortgage Corp.,* 143 F.3d 525, 529 (9th Cir.1998) (describing claims-allowance orders as "being in the nature of a final judgment" (citation omitted));[2] *Porges,* 44 F.3d at 165; *Walsh Trucking Co. v. Insurance Co. of North America,* 838 F.2d 698, 701 (3d Cir.1988) ("[A]n order expunging a creditor's claim in an ongoing bankruptcy proceeding is a final order immediately appealable...."); *In re Fox,* 762 F.2d 54, 55 (7th Cir.1985) ("A proceeding to establish a claim against a bankrupt estate is final for purposes of appeal when it is over and done with, even though the bankruptcy goes on."); *In re Saco Local Dev. Corp.,* 711 F.2d 441, 448 (1st Cir.1983) (Breyer, ***389** J.) ("[A]s long as an order allowing a [bankruptcy] claim ... effectively settles the amount due the creditor, the order is 'final'...."); *In Matter of Baudoin,* 981 F.2d 736, 742 (5th Cir.1993) (though expressing some reservation over the matter, the court, nonetheless, concluded that "[a]n order allowing a proof of claim is ... a final judgment"); *In re Moody,* 849 F.2d 902, 904 (5th Cir.1988) ("[C]onsidering that the allowance of the claim ended a discrete judicial unit in the bankruptcy case, ... the judgment [allowing the claim] ... is a final judgment under 28 U.S.C. § 1291."); *see also* 1 *Collier on Bankruptcy* ¶ 5.07[2]; 6 *Norton Bankruptcy Law and Practice 2d* § 148:26 (1997).

[2] *Siegel* would, at first blush, seem to be in conflict with a more recent Ninth Circuit decision, *In re Southern California Plastics, Inc.,* 165 F.3d 1243 (9th Cir.1999). The creditor in *California Plastics* had "obtained a prejudgment attachment lien against the debtor's property pursuant to California" statutory law. *Id.* at 1244. Such a lien confers "no right to proceed against the property until after the creditor obtains a judgment." *Id.* at 1246. Before the creditor could do so, however, the debtor filed for bankruptcy relief. *Id.* at 1245. The creditor's claim was allowed, and the question before the court was whether that allowance was "an acceptable alternative" to a California State court judgment so as to perfect the attachment lien. *Id.* at 1246. The court held that the California statute was not satisfied. *California Plastics* is inapposite because it interpreted a California statute, not a federal one. Presumably, therefore, the court saw no need to even mention, let alone expressly overrule, its *Siegel* decision, issued only eight months previously.

It would seem to be well-settled that a § 502(b) order is a final judgment subject to appeal. This is particularly true in the Sixth Circuit where appeals on § 502(b) orders are routinely heard. *See In re Highland Superstores, Inc.,* 154 F.3d 573, 576 (6th Cir.1998) (appeal of district court order which had reversed the bankruptcy court and disallowed the creditor's claim); *Eagle–Picher,* 131 F.3d at 1187 (appeal of district court order which had affirmed the bankruptcy court's order disallowing the creditor's claim); *In re Century Offshore Mgmt. Corp.,* 111 F.3d 443, 447 (6th Cir.1997) (same); *In re Brentwood Outpatient, Ltd.,* 43 F.3d 256, 259 (6th Cir.1994) (cross-appeals of district court's order affirming the bankruptcy court's partial allowance of the creditor's claim).[3]

[3] One Sixth Circuit decision can be viewed as standing for the proposition that a § 502(b) order is not final. *In re Inland Gas Corp.,* 187 F.2d 813 (6th Cir.1951). In *Inland Gas,* a case decided under the Bankruptcy Act, the court stated that "the allowance of a bankruptcy claim remains interlocutory until the estate has been closed." *Id.* at 816. *Inland Gas,* however, suffers from a number of insurmountable deficiencies that negate it. First, it appears to be inconsistent with other pre-Code decisions rendered by the Sixth Circuit. *See Stearns Salt & Lumber Co. v. Hammond,* 217 F. 559, 564 (6th Cir.1914) ("It is well settled that the action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of review...."); *see also Louisville & N.R.R. v. United States* (*In re Tennessee Central Ry.*), 498 F.2d 904, 906 (6th Cir.1974) (summarily dismissing *Inland Gas* as "completely inapposite").

In addition, the case relied upon by *Inland Gas* was plainly wrong as a matter of law. In *New York N.H. & H.R. Co. v. Reconstruction Fin. Corp.,* 180 F.2d 241, 243 (2d Cir.1950), the court stated that "[b]y virtue of Sec. 57, sub. k of the Bankruptcy Act, ... the allowance of claims remains interlocutory until the estate has been closed." That section of the Bankruptcy Act did not use the word "interlocutory". Rather, it provided that "[c]laims which have been allowed may be reconsidered for cause ... before ... the estate has been closed." Bankruptcy Act, § 57, subs. k, 11 U.S.C. § 93, subs. k (repealed 1978). The Bankruptcy Code also provides that "[a] claim that has been allowed or disallowed may be reconsidered for cause." 11 U.S.C. § 502(j). The same could be said of any judgment or order issued by a federal court. *See* F.R.Civ.P. 59 and 60(b); *cf.* F.R.Bankr.P. 9023 and 9024. And if a party seeks relief from a "final" order pursuant to one of these cited provisions, that order may become "nonfinal for purposes of appeal for as long as the [motions for relief are] pending." *United States v. Dieter,* 429 U.S. 6, 8, 97 S.Ct. 18, 50 L.Ed.2d 8 (1976); *see also Stone v. INS,* 514 U.S. 386, 402–03, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995). But the mere availability of these "post-order" remedies does not otherwise alter the finality of a judicial decision. *See J. Catton Farms, Inc. v. First Nat'l Bank of Chicago,* 779 F.2d 1242, 1250 (7th Cir.1985) ("[T]he fact that an order ... may later be modified[ ] does not make it nonfinal."); *see also Walsh Trucking,* 838 F.2d at 700 ("[T]he filing of a motion for reconsideration in the bankruptcy court ... is not a jurisdictional pre-condition to an appeal to the district court."). Thus, *Inland Gas* was incorrect when it stated that an order allowing a claim was nonfinal because it could be reconsidered on motion by an aggrieved party. Not surprisingly, the Sixth Circuit has since rejected *Inland Gas* and it is not good law in this circuit.

While certainly not controlling, a 123–year old decision by the Supreme Court arising under the National Banking Act, adds substantial support for the conclusion that an allowed claim in bankruptcy is the equivalent of a money judgment for purposes of the federal judgment interest statute. *National Bank of the Commonwealth* ***390** *v. Mechanics' Nat'l Bank,* 94 U.S. 437, 24 L.Ed. 176 (1876). The immediate predecessor to § 1961 was 28 U.S.C. § 811, which in turn was originally codified as R.S. § 966. *See* Historical and Statutory Notes following 28 U.S.C.A. § 1961; 62 Stat., Part I, at 993 (1948). Section 966 provided:

> Interest shall be allowed on all judgments in civil causes recovered in a circuit[4] or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State.

[4] There once existed "circuit courts [which] had both original and appellate jurisdiction." Charles A. Wright, *Handbook of the Law of Federal Courts* 4 (3d ed.1976). These courts were abolished in 1911. *Id.* at 6.

R.S. 966 (*reprinted in* Revised Statutes of the United States, at p. 182 (2d ed. 1878)).[5]

[5] As can be seen, the interest rate under this statute was tied to the prevailing law of the forum state. By virtue of a 1982 amendment, § 1961(a) differs from § 966 in that respect. *See generally,* S.Rep. No. 97–275, 97th Cong., 2d Sess. 1, 11 (*reprinted in* Vol. 2, 1982 U.S.C.C.A.N. 11, 21) ("Under current law, the interest rate on judgments in the Federal courts is based on varying State laws and frequently falls below the contemporary cost of money. Part B of title III [i.e., § 302 of the Federal Courts Improvement Act of 1982, Pub.L. No. 97–164] sets a realistic and nationally uniform rate of interest on judgments in the Federal courts."). However, this change in the methodology for computing interest clearly has no bearing on the question of whether a § 502(b) order falls within the

> scope of § 1961(a). And as to that issue, R.S. § 966 is essentially the same as current § 1961(a).

In *Commonwealth,* a receiver was appointed by the comptroller of the currency for a failing bank. A provision of the National Banking Act "require [d] the comptroller ... to apply the moneys paid over to him by the receiver 'on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction.' " *Id.* at 439, 24 L.Ed. 176 (quoting the Act). The plaintiff argued that it was entitled to interest on the claims against the bank. The Court agreed, reasoning that once the plaintiff's claim had been proved, it was the equivalent of a judgment.

> If these claims had been put in judgment, whether in a court of the United States or in a State court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the comptroller. *After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground.*
>
> [T]he claims, when proved to the satisfaction of the comptroller, were upon the same footing as if they had been in judgment.

Id. at 439–40, 24 L.Ed. 176 (emphasis added).

Although *Commonwealth* was not a bankruptcy case, the parallels between that decision and this case are unmistakable. The Court was, after all, confronted with the question of whether a closely analogous precursor to § 1961 encompassed claims made against an insolvent estate. The holding that the claims were at least within the spirit of R.S. § 966 is therefore directly pertinent here. And given that *Commonwealth* had little trouble in concluding that a proved claim in a receivership was on the "same footing as ... [a] judgment," we are confident that the Court, if confronted with the question, would decide that a § 502(b) order is in fact a judgment. After all, it is a final order entered by a federal judge, after a hearing conducted in a court of the United States in accordance with the Federal Rules of Civil Procedure (incorporated into ***391** bankruptcy jurisprudence by F.R.Bankr.P. 9014). *See also In re Szekely,* 936 F.2d 897, 899 (7th Cir.1991) ("[T]he decision to allow the claim is deemed a final order.... It is so treated because it is the practical equivalent of a final judgment in a stand-alone suit."); *In re John Osborn's Sons & Co.,* 177 F. 184, 186 (2d Cir.1910) (quoting extensively from *Commonwealth,* and reasoning that "allowed claims in bankruptcy are as much entitled to be treated as judgments");[6] *In re Chiapetta,* 159 B.R. 152, 161 (Bankr.E.D.Pa.1993) ("[S]ince a claim is like a judgment entered at the time of the bankruptcy filing, the applicable [interest] rate should be the federal judgment rate...."); *Wasserman v. City of Cambridge,* 151 B.R. 4, 6 n. 2 (D.Mass.1993) ("Upon the filing of bankruptcy, claims of creditors are treated as the functional equivalent of a federal judgment against the estate's assets."); *In re Laymon,* 117 B.R. 856, 864 (Bankr.W.D.Tex.1990), *aff'd,* No. A–90–CA–1025, 1991 WL 349624 (W.D.Tex. Mar. 22, 1991), *rev'd on other grounds,* 958 F.2d 72 (5th Cir.1992) ("[A]n allowed claim ... is the functional equivalent of a *federal judgment* against the estate's assets...."); *see also Siegel,* 143 F.3d at 529 (A claim-allowance order is "in the nature of a final judgment."); *In re Godsey,* 134 B.R. 865, 867 (Bankr.M.D.Tenn.1991).[7]

[6] The Second Circuit subsequently limited the holding in *John Osborn's Sons & Co.,* to liquidation cases. *See In re Realty Assocs. Sec. Corp.,* 163 F.2d 387, 390 (2nd Cir.1947). The court reasoned that in a reorganization proceeding, a creditor's rights are ultimately defined by the plan rather than the order allowing its claim. *Id.* Since we are obliged by § 1129(a)(7)(A)(ii) to analyze the present issue as though the Debtor were in chapter 7, this distinction is irrelevant here.

[7] Some courts have suggested that *Commonwealth* was overruled by *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990), due to the latter case's strict interpretation of § 1961(a). *See Transmatic, Inc. v. Gulton Indus., Inc.,* 180 F.3d 1343, 1349 (Fed.Cir.1999); *Andrulonis v. United States,* 26 F.3d 1224, 1230 (2d Cir.1994) (citing *Bonjorno* for its contention that, "when the animating principle [of post-judgment interest] suggests one result and the statute another, the statute controls"). This Court, however, is not willing to pronounce the demise of *Commonwealth.*

> *Bonjorno* does not even mention *Commonwealth,* much less purport to overrule it. *See generally College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 131 F.3d 353, 365 (3d Cir.1997), *cert. granted,* 525 U.S. 1063, 119 S.Ct. 790, 142 L.Ed.2d 653 (1999) ("[A] court ... should be reluctant to hold that the Supreme Court implicitly has overruled its own decision when the Court had an opportunity to overrule the decision explicitly and did not do so.....[W]e view our methodology as in keeping with the respect which we must pay to the Supreme Court."); *Levine v. Heffernan,* 864 F.2d 457, 461 (7th Cir.1988) ("Lower courts ..., out of respect for the great doctrine of *stare decisis,* are ordinarily reluctant to conclude that a higher court precedent has been overruled by implication.....A lower court decision that employs analogy to

> conclude that a higher court precedent has been implicitly overruled ... significantly undermines the doctrine of *stare decisis.*"); *see also White v. Johnson & Johnson Prods., Inc.,* 712 F.Supp. 33, 38 (D.N.J.1989) ("Of course, to the extent that [a Supreme Court decision] ... contradicts ... [an earlier Supreme Court decision, the later decision] controls.....However, it is preferable to attempt to harmonize the two Supreme Court cases...."). The holdings of *Bonjorno* and *Commonwealth* are mutually compatible. *Commonwealth* stands for the proposition that any binding decision which finally determines the rights of parties to a dispute should be afforded the dignity of a judgment. *Bonjorno,* on the other hand, does not purport to ascertain what constitutes a judgment. Rather, it deals with the next step in the process. That is, once it is determined that a decision or order is entitled to be treated as a judgment, *Bonjorno* identifies the date from which postjudgment interest begins to run. As can be seen, then, the two cases deal with different issues and there is no reason to presume that *Bonjorno* overruled *Commonwealth.*

The Court, therefore, concludes that a § 502(b) order constitutes a judgment. Moreover, we conclude that such an order is a "money judgment" as that term is used in the context of 28 U.S.C. § 1961(a).

C. Claims Which Are Deemed Allowed Are Also Deemed Money Judgments

Most claims, of course, are uncontested, so an order either disallowing or ***392** allowing such claims is never entered. For purposes of this opinion, it is not necessary to decide whether claims which are deemed allowed have the same preclusive effect as a § 502(b) order. *Compare Siegel,* 143 F.3d at 530 (holding that a claim which is deemed allowed has the same *res judicata* effect as a claim allowed pursuant to a court order) *with County Fuel Co. v. Equitable Bank Corp.,* 832 F.2d 290, 292 (4th Cir.1987) ("[I]t is doubtful that 'automatic allowance' under 11 U.S.C. § 502(a) of a claim not objected to constitutes a 'final judgment' of the type that gives rise to 'bar' or 'claim preclusion' under strict res judicata principles."). Rather, the Court's present focus is on how, for purposes of distribution within the bankruptcy case, the treatment of a deemed-allowed claim compares with that of a claim allowed pursuant to a § 502(b) order.

The Code makes no substantive distinction among allowed-claim holders based on how allowance came about. *See* 11 U.S.C. § 502(a) ("A claim [to which no party in interest objects] ... *is deemed allowed.*" (emphasis added)); *Black's Law Dictionary* (6th ed.1990) (defining the word "deem" as meaning to "treat as if"). *See also, e.g.,* 4 *Collier on Bankruptcy* ¶ 502.02 [3][a] ("Until an objection is made and sustained, all allowed claims stand on equal footing for purposes of distribution of the debtor's assets."); 11 U.S.C. § 726(a)(2) (providing that second in order of distribution is "any allowed unsecured claim"); *In re Darnell,* 834 F.2d 1263, 1265 (6th Cir.1987) ("Section 726 provides for pro rata distribution among two or more claims of the same priority class.").[8] Consequently, a creditor that encounters no resistance to its claim is treated for distribution purposes the same as if a § 502(b) order had in fact been entered in its favor. In the previous Section, the Court determined that a claim allowed pursuant to a § 502(b) order constitutes a "money judgment." It follows that for purposes of distribution a claim that is "deemed allowed" will be treated as if it were also a "money judgment."

[8] Neither the Code nor the Bankruptcy Rules establish a deadline within which objections to claims must be made. 9 *Collier on Bankruptcy* ¶ 3007.01[5] (15th ed. rev.1999). It is therefore possible that "a dividend may be paid on a [deemed allowed] claim which may thereafter be disallowed on objection made pursuant to [Bankruptcy Rule 3007]." Advisory Committee Note (1983) to F.R.Bankr.P. 3007. Moreover, "[t]he amount of the dividend paid [on such claim] before ... disallowance ... would be recoverable by the trustee in an adversary proceeding." *Id.* However, this procedural aspect of the claims-allowance process does not change the fact that the Code's rules of distribution apply equally to all unsecured claims, regardless of whether those claims are deemed allowed, or allowed pursuant to a § 502(b) order.

D. Effect of Bankruptcy Code § 726(a)(5)

Thus far the Court has determined that 28 U.S.C. § 1961(a) applies to bankruptcy proceedings and that a claim allowed pursuant to a § 502(b) order is a "money judgment." We also concluded that for purposes of distribution under the Code, a claim which is deemed allowed will also be deemed to be a money judgment. It would therefore seem that bankruptcy courts are required to apply 28 U.S.C. § 1961(a) to allowed unsecured claims. But doing so is potentially problematic in light of the Supreme Court's decision in *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990).

In *Bonjorno,* the issue was "whether interest under [§

1961(a)] should be calculated from the date of verdict or the date of judgment." *Id.* at 834, 110 S.Ct. 1570. Recall that 28 U.S.C. § 1961(a) specifically provides that "interest shall be calculated from the date of the entry of the judgment." The Court cited the rule that, absent legislative intent to the contrary, a statute must be construed in accordance with its plain language. *Id.* at 835, 110 S.Ct. 1570 (citation omitted). It then observed ***393** that the language of 28 U.S.C. § 1961(a) does not "allude[ ] to the date of the verdict, and there is no legislative history that would indicate congressional intent that interest run from the date of the verdict rather than the date of the judgment." *Id.* From this the Court "conclude[d] that postjudgment interest properly runs from the date of the entry of judgment." *Id.*

If *Bonjorno* stands for the proposition that 28 U.S.C. § 1961(a) must, under all circumstances, be interpreted in accordance with its plain language, then this section would seem to conflict with bankruptcy law. As indicated, 28 U.S.C. § 1961(a) states that "interest shall be allowed[, notwithstanding the solvency of the defendant,] on any money judgment," and that such "interest shall be calculated from the date of the entry of the judgment." On the other hand, § 502(b)(2) generally prohibits the payment of post-petition interest on unsecured claims in bankruptcy. 11 U.S.C. § 502(b)(2); *see also* 4 *Collier on Bankruptcy* ¶ 502.03[3][a]. It is only when estate proceeds are sufficient that post-petition interest becomes payable pursuant to § 726(a)(5). *See* 11 U.S.C. § 726(a)(5).

Bonjorno 's plain-language interpretation of 28 U.S.C. § 1961(a) does not render the federal judgment statute inapplicable to the payment of post-petition interest in bankruptcy. Sections 502(b)(2) and 726(a)(5) were not at issue in *Bonjorno,* so the Court did not have occasion to consider how they interrelate with 28 U.S.C. § 1961(a). Consequently, *Bonjorno* is not dispositive in that regard. Moreover, it is a "familiar rule of statutory construction that, when possible, courts should construe statutes ... to foster harmony with other statutory ... law." *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 879, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994) (citations omitted). Harmonizing these statutes is a simple task.

A central policy of the Bankruptcy Code is the equitable distribution of a debtor's assets among its creditors. *Begier v. IRS,* 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990); *In re McCafferty,* 96 F.3d 192, 196 (6th Cir.1996). Similarly, the Code is designed to achieve an "equality of treatment among similarly situated creditors." *In re Lockard,* 884 F.2d 1171, 1178 (9th Cir.1989); *In re Jet Florida System, Inc.,* 841 F.2d 1082, 1083 (11th Cir.1988). Another objective of the Code is to accomplish a prompt and efficient administration of the bankruptcy estate. *Katchen v. Landy,* 382 U.S. 323, 328–29, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966); *Chemetron Corp. v. Jones,* 72 F.3d 341, 346 (3rd Cir.1995); 11 U.S.C. § 704. Sections 502(b)(2) and 726(a)(5) modify 28 U.S.C. § 1961(a)'s application to the Bankruptcy Code so that compliance with these crucial bankruptcy policies is attainable.

The equitable distribution of a debtor's assets requires that the principal of all claims of the types specified in subsections (1) through (4) of § 726(a) be paid in full before interest can be paid. Accordingly, § 502(b)(2) creates an exception to the general rule of 28 U.S.C. § 1961(a) that interest "shall be allowed on any money judgment." The Code then creates an exception to the exception in § 726(a)(5).

In addition, § 726(a)(5) provides that interest begins to run from the bankruptcy petition date, as opposed to the terminology in 28 U.S.C. § 1961(a)—the date the judgment is entered. But the two statutes are not necessarily inconsistent on this point. Several courts have stated that a creditor's claim is deemed to be a "judgment" entered on the date of the petition. *Chiapetta,* 159 B.R. at 161; *Wasserman,* 151 B.R. at 6 n. 2; *Laymon,* 117 B.R. at 864. If these courts are correct, then both 28 U.S.C. § 1961(a) and § 726(a)(5) start the interest clock running from the same date. This viewpoint is sensible given that unsecured claims are valued as of the petition date. But even if one believes that a claim becomes a judgment at some other ***394** point, § 726(a)(5) is appropriately viewed as a necessary modification to 28 U.S.C. § 1961(a) with respect to the date interest begins to run. If equitable distribution and equality of treatment is to be achieved, interest must begin to run on the same date for all creditors. Moreover, this aspect of § 726(a)(5) greatly enhances a trustee's ability to administer the bankruptcy estate in a prompt and efficient manner. As a result, §§ 502(b)(2) and 726(a)(5) are properly deemed statutory modifications to 28 U.S.C. § 1961(a).

For these reasons, the Court concludes that in this presumptively-solvent estate, the Proponents are required by 11 U.S.C. §§ 1129(a)(7), 502(b)(2), 726(a)(5) and 28 U.S.C. § 1961(a) to provide interest on the Commercial Creditors' claims at the rate stated in the latter statute. Moreover, we believe that 28 U.S.C. § 1961(a) is implicitly incorporated by 11 U.S.C. § 726(a)(5). The grounds for this alternative holding are explained in the next part of the opinion.

III. "Interest at the Legal Rate" Means the Federal Judgment Rate

This Part of the opinion begins its analytical journey from a different port— § 726(a)(5). Sections A and B discuss case law addressing § 726(a)(5). In Section C, we determine that the commonly understood meaning of "interest at the legal rate" is a rate fixed by statute. Section D holds that the statute to which Congress refers when establishing "the legal rate" as the benchmark is 28 U.S.C. § 1961(a).

A. "State Law Approach" is Unpersuasive

Case law is sharply divided over the meaning of "interest at the legal rate," with one line of cases following the "state law approach,"[9] and the other following the "federal judgment rate approach."[10] Neither line of cases is very persuasive, but the cases adopting the state law approach are exceptionally insubstantial.

[9] *See In re Adcom, Inc.,* 89 B.R. 2 (D.Mass.1988); *Federal Savings & Loan Corp. v. Moneymaker* (*In re A & L Properties*), 96 B.R. 287 (C.D.Cal.1988); *In re Carter,* 220 B.R. 411 (Bankr.D.N.M.1998); *In re Huang,* 192 B.R. 184 (Bankr.N.D.Ill.1996); *In re Boehm,* 202 B.R. 99, 100 (Bankr.N.D.Ill.1996); *In re Schoeneberg,* 156 B.R. 963 (Bankr.W.D.Tex.1993); *Kellogg v. United States* (*In re West Texas Marketing Corp.*), 155 B.R. 399, 402–03 (Bankr.N.D.Tex.1993); *In re Beck,* 128 B.R. 571 (Bankr.E.D.Okla.1991); *In re Rivera,* 116 B.R. 17 (Bankr.D.P.R.1990); *In re Boyer,* 90 B.R. 200 (Bankr.D.S.C.1988).

[10] *See In re Beguelin,* 220 B.R. 94 (9th Cir.BAP 1998); *In re Gaines,* 178 B.R. 101 (Bankr.W.D.Va.1995); *In re David Green Property Mgmt.,* 164 B.R. 92 (Bankr.W.D.Mo.1994); *In re Chiapetta,* 159 B.R. 152 (Bankr.E.D.Pa.1993); *In re Melenyzer,* 143 B.R. 829 (Bankr.W.D.Tex.1992); *In re Godsey,* 134 B.R. 865 (Bankr.M.D.Tenn.1991); *In re Laymon,* 117 B.R. 856, 864 (Bankr.W.D.Tex.1990), *aff'd,* No. A–90–CA–1025, 1991 WL 349624 (W.D.Tex. Mar. 22, 1991), *rev'd on other grounds,* 958 F.2d 72 (5th Cir.1992). *See also Crawford Corp. v. Crawford,* 836 F.2d 549, 1987 WL 30588 (6th Cir. Dec. 31, 1987) (unpublished); *Wasserman v. City of Cambridge,* 151 B.R. 4 (D.Mass.1993).

Although it is impossible to glean one uniform methodology from the state law approach cases, they generally award post-petition interest at the contract rate, or, if a contract rate does not exist, at the otherwise applicable state statutory rate. The first reported Code case to adopt this approach was *In re Shaffer Furniture Co.,* 68 B.R. 827 (Bankr.E.D.Pa.1987), *abrogated by In re Chiapetta,* 159 B.R. 152 (Bankr.E.D.Pa.1993).

In *Shaffer,* the unsecured creditors of a solvent, liquidating chapter 11 debtor moved for the payment of post-petition interest on their claims. *Id.* at 828. The court began by stating that the payment of post-petition interest by a solvent debtor was not required, but was instead dependent upon the equities of the case. *Id.* at 830. After deciding that the equities of the case justified the payment of post-petition interest, the court turned to the issue of what that rate should be. Admitting that the issue had not been briefed by ***395** the parties, the court's analysis was cursory—"We believe that, in this area, we are 'governed by state law, absent an overruling federal law.' " *Id.* at 831 (quoting *Debentureholders Protective Comm. v. Continental Inv. Corp.,* 679 F.2d 264, 268 (1st Cir.1982)). It then concluded that post-petition interest should be awarded at one of Pennsylvania's state statutory rates. *Id.*

Shaffer 's premise that the decision to award post-petition interest is discretionary was incorrect. This was the rule under pre-Code law. *See, e.g. Vanston Bondholders Protective Committee v. Green,* 329 U.S. 156, 163, 67 S.Ct. 237, 91 L.Ed. 162 (1946). But it is clear from § 726(a)(5) that payment of interest is no longer a matter of discretion; it is mandatory when estate proceeds are sufficient. Yet *Shaffer* failed to analyze § 726(a)(5). Not surprisingly, the judge who decided *Shaffer* later changed his position. In *Chiapetta,* Judge Scholl held that § 726(a)(5) requires post-petition interest to be paid at the federal judgment rate. Acknowledging his change of position, Judge Scholl stated that "the federal judgment rate [was] an alternative which was not proposed by any of the parties [in *Shaffer*] and, frankly did not occur to [the court] in deciding [that case]." *Chiapetta,* 159 B.R. at 160.

Soon after *Shaffer,* the state law approach was adopted by *In re Adcom, Inc.,* 89 B.R. 2 (D.Mass.1988). That court relied solely on a bare cite to *Shaffer* as the support for its holding that the state commissioner of revenue was entitled to receive post-petition interest at the state statutory rate imposed on delinquent tax payments. *Id.*

The next state law approach case was *Federal Savings & Loan Corp. v. Moneymaker (In re A & L Properties),* 96 B.R. 287 (C.D.Cal.1988). With its first step, the court incorrectly noted that there was no case law on the issue of what post-petition interest rate was required by § 726(a)(5). It then observed incorrectly that there was no

probative legislative history on point. Based upon these miscues, the court founded its eventual holding on the strength of averments made by two bankruptcy commentators. The first was the 1987 edition of *Collier on Bankruptcy.* That edition flatly stated that " 'section 726(a)(5) of the Code does not change prior law.' " *Id.* at 289 (quoting 4 *Collier on Bankruptcy* ¶ 726.02[5] (15th ed.1987)). The court then concluded that under the Bankruptcy Act, post-petition interest was generally payable at the contract rate if one was available, and if not, at the otherwise applicable state statutory rate. *Id.* (citing 3A *Collier on Bankruptcy* ¶ 63.16, 1860–61 (14th ed.1975)). For further support, the court cited a law review article arguing that under § 726(a)(5) unsecured " 'creditors who had bargained for a rate of interest ... [should receive] the bargained-for rate....' "*Id.* (quoting Fortgang & King, *The 1978 Bankruptcy Code: Some Wrong Policy Decisions,* 56 N.Y.U.L.Rev. 1148, 1153 (1981) ("*Some Wrong Policy Decisions* ")).

A & L Properties ' reliance on the above-cited authorities was misplaced. *Some Wrong Policy Decisions* was a position paper in which its authors argued that Congress made some wrong choices in the Code. One of those supposedly wrong choices pertained to the version of § 726(a)(5) Congress ultimately enacted. In the article, the co-authors asserted, without citation to any supporting authority, that "interest at the legal rate" could possibly be defined in the first instance as the contract rate. *Some Wrong Policy Decisions* at 1151. But a thorough reading of the article definitively shows that the authors did not believe this to be the case. The entire discussion of § 726(a)(5) focused on the authors' strong disagreement with the fact that, as enacted, § 726(a)(5) would not provide unsecured creditors post-petition interest at the bargained-for contract rate. The article goes so far as to propose an amendment to the Code—the elimination of the term "at the ***396** legal rate" from § 726(a)(5)—in order to remedy the situation. *Id.* at 1161–64. Such an amendment, the authors asserted, would reinstate the pre-Code practice of paying post-petition interest at the contract rate, and otherwise the applicable state statutory rate. *Id.* at 1164. Thus, *Some Wrong Policy Decisions* actually stands for the proposition that the Code prohibits the payment of post-petition interest to unsecured creditors at the contract rate.

Two points about one of the article's co-authors, Professor King, are also of relevance. Professor King was an unpaid consultant to the original Commission on the Bankruptcy Laws of the United States. *Report of the Commission on the Bankruptcy Laws of the United States,* H.R. Doc. No. 93–137, 93d Cong., 1st Sess. (1973), Preface, *reprinted in* Collier App.Pt. 4(c), at 4–226. The Commission's recommendations were largely adopted by Congress when it enacted the Bankruptcy Code in 1978. Obviously, then, he was better situated than most people to know whether Congress had adopted the position he preferred with respect to post-petition interest on unsecured claims. Based on *Some Wrong Policy Decisions,* it is clear that Professor King believed Congress had not done so. Additionally, Professor King is the editor-in-chief of *Collier on Bankruptcy,* the other authority relied on by *A & L Properties.* It is telling that the current edition of the treatise states: § 726(a)(5) "suggests that Congress envisioned a single rate, probably the federal statutory rate for interest on judgments set by section 1961 of title 28 of the United States Code." 6 *Collier on Bankruptcy* ¶ 726.02[5].

Despite its obvious shortcomings, *A & L Properties* was the exclusive authority relied on by *Kellogg v. United States* (*In re West Texas Marketing Corp.*), 155 B.R. 399, 402–03 (Bankr.N.D.Tex.1993), which held that unsecured creditors were entitled to post-petition interest at "the contract rate where applicable and, alternatively, the rate of interest under state law."

In re Rivera, 116 B.R. 17 (Bankr.D.P.R.1990), is another case adopting the "state law approach." The court relied on cases which addressed the interest rate that *secured* creditors are entitled to, citing *Cardinal Fed. Savings & Loan v. Colegrove* (*In re Colegrove*), 771 F.2d 119 (6th Cir.1985) *and In re Frost,* 47 B.R. 961 (D.Kan.1985). It supported looking "to the most secure loan, ... government bonds of some length of time and adding 2 or 3 points for the undesirability [of the loan] ... and an additional ½ to 1 point for the added chapter 11 risk factor,"[11] but inexplicably awarded post-petition interest at "the Puerto Rico legal rate."[12] *Id.* at 19. The cases relied upon by *Rivera* make it difficult to tell the purpose for which the court was deciding the appropriate interest rate. Most of the cases cited dealt with determining the discount rate for a chapter 13 plan's payment of a secured claim. Choosing the appropriate present value discount rate for purposes of a chapter 13 plan would seem to be an entirely different issue than the post-petition interest rate required by § 726(a)(5). Despite its lack of clarity, we nonetheless include *Rivera* in ***397** the analysis for, regardless of whether it should have been, the court was clearly purporting to interpret § 726(a)(5).

11 This statement could surely serve as the poster-child for the kind of haphazard subjective method for determining post-petition interest that we believe Congress hoped to eliminate when it enacted § 726(a)(5) with language specifying an interest rate. *Cf. Bank of America Nat'l Trust & Savings Assoc. v. 203 N. LaSalle St. Partnership,* 526 U.S. 434, 119 S.Ct.

1411, 1423, 143 L.Ed.2d 607 (1999) (noting that "one of the Code's innovations [was] to narrow the occasions for courts to make valuation judgments").

[12] Although *Rivera* did not expressly state what it meant by "the Puerto Rico legal rate," one can fairly presume that the court was referring to a rate of interest fixed by Puerto Rico statute. The court supported its conclusion by citing two cases referring to "the legal rate of interest" fixed by an Illinois statute. *Rivera,* 116 B.R. at 19 (citing *In re Martin,* 17 B.R. 924, 926 & n. 4 (N.D.Ill.1982); and *In re Williams,* 3 B.R. 728, 732 (Bankr.N.D.Ill.1980)).

In re Schoeneberg, 156 B.R. 963 (Bankr.W.D.Tex.1993), is another case utilizing the state law approach. *Schoeneberg* used the same method of analysis as the Fifth Circuit did to determine what rate of interest a secured creditor is entitled to under § 506(b). *See In re Laymon,* 958 F.2d 72 (5th Cir.1992). In *Laymon,* the Fifth Circuit observed the rule of statutory interpretation that the Code should not be construed to effect a major change in pre-Code practice absent some showing of Congressional intent to the contrary. *Id.* at 74 (citing *Dewsnup v. Timm,* 502 U.S. 410, 419, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992)). Because neither § 506(b) nor its legislative history refers to a specific rate of interest, *Laymon* concluded that it was appropriate to look to pre-Code practice to determine the rate of interest applicable under the section. *Id.* Using the Fifth Circuit's reasoning in *Laymon,* and despite the fact that the Bankruptcy Code, in contrast to the Bankruptcy Act, does seemingly provide a specific rate of post-petition interest to be paid on unsecured claims ("the legal rate" of interest), *Schoeneberg* turned to pre-Code law for its answer. *Id.* at 971–72. Since the overriding practice under pre-Code law was supposedly to award unsecured creditors post-petition interest at the contract rate, *Schoeneberg* did the same. *Id.* at 972.

Adding to the cadre of state law approach cases is *In re Carter,* 220 B.R. 411 (Bankr.D.N.M.1998). In that case, the court recognized the split of authority on the meaning of "interest at the legal rate." It then reached the somewhat dubious conclusion that "[t]he majority of cases follow the state law approach by providing that when a creditor seeks interest on his or her claim, the bankruptcy courts apply *the security agreement's interest rate.*" *Id.* at 415 (emphasis added). The majority of cases cited by *Carter* for its majority-view proposition were actually § 506(b) cases. *Id.* at 415 n. 10. Of the eight cases cited by *Carter,* seven pertained solely to the post-petition interest rate payable to oversecured creditors under § 506(b). Only one, *Schoeneberg,* was a § 726(a)(5) case. The opinion also cited *Collier* 's discussion of § 506(b). *See id.* (citing 4 *Collier on Bankruptcy* ¶ 506.04[2][b] (15th ed.1997)). Having started off on the wrong foot, *Carter* never does right itself. Like *Shaffer,* and overlooking § 726(a)(5)'s mandatory language, it wrongly stated that "the award of post-petition interest is a matter within the [c]ourt's discretion, dependent upon the equities in the case." *Id.* at 417. And based upon the equitable policy that a debtor should not receive a windfall at the expense of its creditors, the court held that—at least under the facts of that case—the unsecured creditors were entitled to receive post-petition interest at their contract rate if one existed.

Other state law approach cases are even less persuasive. *See In re Boehm,* 202 B.R. 99, 100 (Bankr.N.D.Ill.1996) (without analysis, the court awarded post-petition interest at a state statutory rate); *In re Huang,* 192 B.R. 184, 186 (Bankr.N.D.Ill.1996) (same); *In re Beck,* 128 B.R. 572, 573 (Bankr.E.D.Okla.1991) (stating without elaboration that "the 'legal rate' [is] that rate of interest to which a creditor would have been entitled through any appropriate legal proceeding had the bankruptcy Petition never been filed"—that is, the contract rate, a specialized statutory rate, or the federal judgment rate, in that order); *In re Boyer,* 90 B.R. 200, 201 (Bankr.D.S.C.1988) ("[Section] 726(a)(5) provides for the payment of interest at the legal rate to creditors whose unsecured claims were paid. The legal rate is to be determined in accordance with South Carolina statutory law....").

The diversity of reasoning found in the above cases is revealing. In this Court's view, this is likely due to the fact that the state law approach does not readily lend itself to a satisfactory rationale. In any ***398** event, we are unpersuaded by the state law approach cases.

B. Federal Judgment Rate Approach Cases Are Only Somewhat More Satisfactory.

The seeds of the "federal judgment rate approach" were planted in *Laymon,* 117 B.R. 856. The issue in *Laymon* was the rate of post-petition interest to which oversecured creditors are entitled pursuant § 506(b). The court unquestioningly assumed that the principles that should guide a determination of the post-petition interest rate under § 726(a)(5), apply equally to § 506(b). *Id.* at 863. After a lengthy discussion of § 726(a)(5), the court announced that this section entitles unsecured creditors to post-petition interest at the federal judgment rate. *Id.* at

861. Applying the same reasoning to § 506(b), the court held that oversecured creditors are also entitled to receive post-petition interest at the federal judgment rate.

The court's holding with respect to § 506(b) was eventually overturned by the Fifth Circuit. *Laymon,* 958 F.2d 72. The Fifth Circuit held that § 506(b) entitles oversecured creditors to receive post-petition interest at the contract rate if one exists. *Id.* at 75. The Commercial Creditors assert that the Fifth Circuit's reversal of the bankruptcy court's reasoning with respect to § 506(b) should be viewed as a rejection of this reasoning for all purposes, including § 726(a)(5). They, therefore, contend that later cases adopting the reasoning of *Laymon* should be viewed as invalid. *See, e.g., Memorandum of Law of the U/S CC* at 26–29.

This contention is without merit. The correctness of the bankruptcy court's § 726(a)(5) discussion was not an issue on appeal. Consequently, its opinion on § 726(a)(5) was never repudiated. And it should be apparent that the contrasting language found in §§ 506(b) and 726(a)(5) are capable of different interpretations. Thus, it is reasonable to conclude that the Fifth Circuit believed that the interpretation of § 726(a)(5) was a matter better left for another day. *See generally, North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (Courts have neither the "power to issue advisory opinions ... [nor the] power to decide questions that cannot affect the rights of litigants in the case before them.") (internal citations omitted). Such a conclusion is bolstered by the fact that the Fifth Circuit's opinion in *Laymon* does not contain a single reference to § 726(a)(5).

The bankruptcy court in *Laymon* began its discussion of § 726(a)(5) by incorrectly stating that "post-petition interest is a matter within the discretion of the federal court[s]." *Laymon,* 117 B.R. at 860. This, of course, was the same erroneous premise upon which many of the state law approach cases relied. But unlike the state law approach cases, *Laymon's* reasoning does improve somewhat after this initial miscue. The court identified four principles that it believed should guide its interpretation of § 726(a)(5).

The first principle is that the award of post-petition interest in bankruptcy is governed by federal law. The next principle is that the purpose of post-petition interest is to compensate creditors "for the detention of money occasioned by the bankruptcy case itself." *Id.* And since this detention is the result of the bankruptcy case, the court believed that it was "not directly related to the prepetition agreements the debtor struck with its creditors," and was "visited equally on all creditors." *Id.* The third principle is that "[i]f there is a surplus, creditors should be compensated for the delay occasioned by bankruptcy before any balance is returned to the debtor." *Id.* at 861. The final principle recognized by the court is that "[t]he general purpose of ... bankruptcy ... is the equitable distribution of the debtor's assets among the debtor's creditors." *Id.*

Applying these principles to § 726(a)(5), the court first concluded that "interest at the legal rate" could not mean the contract ***399** rate because that would be contrary to the equitable distribution of assets. *Id.* The fact that post-petition interest is controlled by federal law also militates against the use of "state-law contract rates." *Id.* The court also believed that the language of § 726(a)(5) suggested that a single rate should be applied equally to all unsecured claims. It further concluded that interest contemplated under the contract is expressly excluded from allowance by § 502(b)(2). *Id.* After rejecting the contract rate, the court concluded that "interest at the legal rate" could not mean a state judgment rate because post-petition interest is governed by federal law. *Id.* at 862.

The court finally settled on the federal judgment rate. In its view, this source yields an equitable distribution and comports with the notion that the award of such interest is controlled by federal law. It also reasoned that because from the petition date forward, a "creditor hold[s] the equivalent of a federal judgment against estate assets, enforceable only in federal court," only the federal judgment rate was appropriate. *Id.*

The first case to officially embrace the federal judgment rate approach in the form of a holding was *Godsey,* 134 B.R. 865. That case began its analysis with the actual language of the statute. *Godsey* said that since Congress had not defined "the legal rate" in § 726(a)(5), it was necessary to look to other sources to define the term. *Id.* at 866. But for whatever reason, the court made no attempt to identify a source that actually defined the term. Instead, it used the process of elimination.

Godsey compared the language of § 726(a)(5) with that of § 506(b). It stated that the latter section requires the bankruptcy court to look to the contract between the parties (if one exists) in order to determine the correct post-petition interest rate payable on oversecured claims. Since the language of the two sections is so different, the court concluded that "the legal rate" could not be referring to the contract rate. *Id.*

The court then observed that the Bankruptcy Code expressly incorporates state law in a number of sections.

Id. (citing §§ 544(b), 546(c) and 546(b)). This demonstrated to the court that Congress knew how to incorporate state law when it so desired. Because § 726(a)(5) does not contain an explicit reference to state law, the court decided that this section could not be referring to a state statutory rate. *Id.*

Godsey then turned to federal statutes. Although the United States Code contains a number of references to interest rates, the court held that the federal judgment rate as calculated pursuant to 28 U.S.C. § 1961(a) was the appropriate benchmark. Section 1961(a) is the source used to compute the post-judgment interest rate applicable to money judgments obtained in federal district court and the bankruptcy court is a unit of the district court. *Id.* While the court was careful to point out that it was not deciding whether the allowance of a claim is the equivalent of a judgment, it, nonetheless, believed that these factors pointed toward use of the federal judgment rate.

In re Melenyzer, 143 B.R. 829 (Bankr.W.D.Tex.1992), was issued shortly after *Godsey,* and was decided by the same bankruptcy judge who penned *Laymon.* This time, however, the interpretation of § 726(a)(5) was ripe for adjudication. Using the same reasoning that it employed in *Laymon,* the court held that the federal judgment rate was the appropriate rate of interest for § 726(a)(5). *Id.* at 833.

A number of cases since *Melenyzer* have also adopted the federal judgment rate approach. *See In re Beguelin,* 220 B.R. 94, 99–101 (9th Cir. BAP 1998); *In re Gaines,* 178 B.R. 101 (Bankr.W.D.Va.1995) (concluding without analysis that § 726(a)(5) requires payment of post-petition interest at "the federal legal rate"); ***400** *In re David Green Property Mgmt.,* 164 B.R. 92 (Bankr.W.D.Mo.1994); *Chiapetta,* 159 B.R. at 160–61 (rejecting position previously taken in *Shaffer* and adopting federal judgment rate approach).

While this Court agrees that post-petition interest paid pursuant to § 726(a)(5) must be determined in accordance with 28 U.S.C. § 1961(a), we do so largely independently of the above cases. *Laymon* and *Melenyzer,* for instance, make no attempt to construe § 726(a)(5). Instead, they rely exclusively on policy considerations. *Godsey* purported to interpret the words of § 726(a)(5), but, in this Court's view, does so unconvincingly. For these reasons, the Court declines to adopt whole-cloth, the analysis of any of the federal judgment rate cases and, in the following section, we begin interpretation of § 726(a)(5) anew.

C. "Interest at the Legal Rate" Commonly Understood to Mean a Rate Fixed by Statute

The Commercial Creditors insist that "interest at the legal rate" is commonly understood to mean "interest at the contract rate up to the maximum rate allowed to be contracted for, or, in the absence of a contractually specified rate, the otherwise applicable statutory rate." *Memorandum of Law of the U/S CC* at 8. Alternatively, they assert that the phrase is at best ambiguous and that due to its paucity, legislative history on § 726(a)(5) is of little help in discerning Congressional intent. When a bankruptcy statute is vague, it "will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change." *Ron Pair,* 489 U.S. at 252, 109 S.Ct. 1026 (O'Connor, Brennan, Marshall and Stevens, J.J., dissenting) (1989). *See also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection,* 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) ("[I]f Congress intends for legislation to change the interpretation of a judicially created concept it makes that intent specific."). Relying on this rule of statutory construction, the Commercial Creditors assert that the Court should "conclude that Congress intended to continue pre-Code practice," which they contend was to pay unsecured creditors "post-petition interest at the rates specified in their contracts or, in situations where there was no contractually specified rate, at the otherwise applicable statutory rate." *Memorandum of Law of the U/S CC* at 10.

While it seems that cases decided under the Bankruptcy Act were not necessarily the model of clarity and uniformity the Commercial Creditors suggest,[13] we need not determine what the predominant methodology of calculating post-petition interest on unsecured claims was under the Act.[14] ***401** For, as will be discussed below, "interest at the legal rate" is, and always has been, commonly understood to mean a rate of interest fixed by statute. Moreover, it is more likely than not that when Congress enacted § 726(a)(5), it intended for the phrase to carry this ordinary meaning.

13 *Compare In re Imperial '400' Nat'l Inc.,* 374 F.Supp. 949, 954 (D.N.J.1974) (Post-petition interest is paid at the contract rate if there is one, and otherwise at the "government legal rate."); *In re Chicago, Milw., St. P. and P.R.R.,* 791 F.2d 524, 530 (7th Cir.1986) ("[W]hen the debtor is solvent, the judicial task is to give each creditor the measure of his contractual claim, no more and no less."); *Commercial Paper Holders v. Hine* (*In re Beverly Hills Bancorp.*), 752 F.2d 1334, 1339 (9th Cir.1984) (awarding post-petition interest at the rate

fixed by California's constitution), *with Johnson v. Norris,* 190 F. 459, 466 (5th Cir.1911) (unclear what source the court thought should be used to determine the post-petition rate of interest); *John Osborn's Sons,* 177 F. 184, 186–87 (2nd Cir.1910) (equating the allowance of a claim in bankruptcy with a judgment and concluding that the appropriate post-petition interest rate was the federal judgment rate); *In re Norcor Mfg. Co.,* 36 F.Supp. 978, 980 (E.D.Wis.1941) (contract did not specify interest rate and it is not clear if the court would have awarded post-petition interest at the contract rate even if it had: "all that the creditor is entitled to is the face of his claim, plus accrued interest at the legal rate to the date of payment").

[14] Bankruptcy Act cases did achieve uniformity on at least one issue now before the Court, the manner in which the term "the legal rate" was employed. Bankruptcy Act cases invariably used the term to mean a rate of interest fixed by statute. *See, e.g., Dayton v. Stanard,* 241 U.S. 588, 590, 36 S.Ct. 695, 60 L.Ed. 1190 (1916); *Dower v. Bomar,* 313 F.2d 596, 597 (5th Cir.1963); *Delatour v. Prudence Realization Corp.,* 167 F.2d 621, 622 (2d Cir.1948); *Realty Assocs.,* 163 F.2d at 389; *Imperial '400',* 374 F.Supp. at 954 (contrasting contract rate with "the government legal rate"); *In re Maryvale Community Hosp., Inc.,* 307 F.Supp. 304 (D.Ariz.1969); *Norcor Mfg.,* 36 F.Supp. 978; *Rollins v. Repper,* 69 F.Supp. 976, (E.D.Mich.1947); *In re Jones,* 2 B.R. 46, (Bankr.N.D.Ala.1979).

The Bankruptcy Code does not define the phrase "interest at the legal rate." When a term or phrase is not defined in a statute, courts frequently turn to dictionaries in order to ascertain its common, ordinary meaning. *See, e.g., AT & T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 119 S.Ct. 721, 737, 142 L.Ed.2d 835 (1999); *Lopez v. Monterey County,* 525 U.S. 266, 119 S.Ct. 693, 701, 142 L.Ed.2d 728 (1999); *Clark Equip. Co. v. United States,* 912 F.2d 113, 117 (6th Cir.1990).

As our task is to determine what Congress meant by "the legal rate" when it drafted § 726(a)(5) in 1978, those dictionaries available around the time of enactment are the most relevant. The edition of *Black's Law Dictionary* then in use defined "legal rate of interest" as "[a] rate fixed by statute where it is not fixed by contract, and it is unless otherwise specifically provided the maximum rate which may be contracted for." *Black's Law Dictionary* 1041 (4th ed. rev.1968); *see also Ballentine's Law Dictionary* 720 (3d ed.1969) (legal interest is defined as "[t]hat rate of interest prescribed by the law which will prevail in the absence of any contract between the parties fixing the rate").

Although reference to legal dictionaries in use during other periods is not decisive, it is nonetheless instructive. *Black's Law Dictionary* 700 (1891) (defining "legal interest" as "[t]hat rate of interest prescribed by the laws of the particular state or country as the highest which may be lawfully contracted for or exacted"); 45 *Am.Jur.2d,* Interest and Usury § 1 (1999) ("Legal interest is defined as the rate of interest prescribed by law which will prevail in the absence of a contract between the parties fixing the rate."); *Black's Law Dictionary* 894 (6th ed.1990) (defining "legal rate of interest" as "[a] rate of interest fixed by statute as either the maximum rate of interest permitted to be charged by law, or a rate of interest to be applied when the parties to a contract intend an interest rate to be paid [but] do not fix the rate in the contract."); *Black's Law Dictionary* 805 (5th ed.1979) (defining "legal interest" as "[t]hat rate of interest prescribed by law as the highest which may be lawfully contracted for or exacted").

The above definitions show that the meaning of "the legal rate of interest" has remained constant for a considerable period of time. At the same time, the various phraseologies used in these definitions tends to lack precision. And because of this, a non-frivolous argument could be made that some of these definitions support the view that "the legal rate of interest" means the contract rate if there is one. This is true, for instance, of the definition found in the 1968 edition of *Black's Law Dictionary,* which defines the term to mean "a rate fixed by statute where it is not fixed by contract." But this 1968 definition could also be understood to simply mean a rate of interest fixed by statute—more specifically, the statutory rate that will be employed when the parties have not otherwise agreed upon a rate. *See Ballentine's Law Dictionary* (3d ed.1969) (defining "legal rate" as: "that rate of interest prescribed by the law which will prevail in the absence of any contract between the parties fixing the rate"). And in the Court's view, when all of the definitions are considered together, the more credible interpretation of the term is a rate of interest fixed by statute, not contract.

***402** The best evidence, however, comes from case law. For over 100 years courts have consistently used the term to mean a rate of interest fixed by statute. *See, e.g., City of New York v. Saper,* 336 U.S. 328, 336, 69 S.Ct. 554, 93 L.Ed. 710 (1949) (referring to rate fixed by statute as "interest at the legal rate"); *Louisville & N.R. Co. v. Holloway,* 246 U.S. 525, 528, 38 S.Ct. 379, 62 L.Ed. 867 (1918) (referring to a rate fixed by Kentucky statute as that state's legal rate of interest); *Dayton v. Stanard,* 241 U.S. 588, 590, 36 S.Ct. 695, 60 L.Ed. 1190 (1916)

(observing that "the ordinary legal rate" is the statutorily-fixed rate of interest that will apply when there is no contract); *American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,* 233 U.S. 261, 264–65, 34 S.Ct. 502, 58 L.Ed. 949 (1914) (referring to "legal interest" as the applicable state statutory rate in situation where contract did not specify an interest rate); *Mohamed v. UNUM Life Ins. Co.,* 129 F.3d 478, 481 (8th Cir.1997); *In re M/V Nicole Trahan,* 10 F.3d 1190, 1192 (5th Cir.1994) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.,* 888 F.2d 260, 269 (2nd Cir.1989) (same); *U.S. v. Griffin,* 782 F.2d 1393, 1395 (7th Cir.1986) (same); *Colegrove,* 771 F.2d at 123 (distinguishing between "interest [at] the legal rate," which is fixed by statute, and "the rate provided for in the original loan agreement"); *Memphis Sheraton Corp. v. Kirkley,* 640 F.2d 14, 19 (6th Cir.1981) (observing that "interest at the legal rate" is a rate fixed by statute); *Texas Eastern Transmission Corp. v. Marine Office–Appleton & Cox Corp.,* 579 F.2d 561, 568 (10th Cir.1978) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); *National Packing Co. v. Century Provision Co.,* 354 F.2d 7, 9 (7th Cir.1965) (equating "legal rate" with a Kansas statutory rate); *Dower v. Bomar,* 313 F.2d 596, 597 (5th Cir.1963) (noting Florida statute establishing the maximum "legal rate of interest" for loans to a corporation); *E.I. Du Pont De Nemours & Co. v. Lyles & Lang Constr. Co.,* 227 F.2d 517 (4th Cir.1955) (referring to "interest at the legal rate ... [as a] rate fixed by statute"); *Delatour v. Prudence Realization Corp.,* 167 F.2d 621 (2d Cir.1948) (calling the statutorily-created rate of interest imposed on debts overdue in New York as "the legal rate of interest"); *In re Realty Associates Securities Corp.,* 163 F.2d 387, 389 (2d Cir.1947) (equating "interest at the legal rate" with the statutory judgment rate); *Bins v. Artison,* 764 F.Supp. 129, 132 (E.D.Wis.1991) (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); *Reid v. Prudential Ins. Co. of America,* 755 F.Supp. 372, 377 (M.D.Fla.1990) (same); *Burston v. Commonwealth of Virginia,* 595 F.Supp. 644, 652 (E.D.Va.1984) (same); *In re Maryvale Community Hosp., Inc.,* 307 F.Supp. 304, 309 (D.Ariz.1969) (referring to rate of interest in an Arizona statute as "the Arizona legal rate of interest"); *In re Norcor Mfg. Co.,* 36 F.Supp. 978, 980 (E.D.Wis.1941) (equating "the legal rate" with a Wisconsin statutory rate); *Rollins v. Repper,* 69 F.Supp. 976, 979 (E.D.Mich.1947) (referring to interest rate established by Michigan statute as "the legal rate of interest"); *Fitch v. Remer,* 9 F.Cas. 181, 184 (D.Mich.1860) (observing that in Michigan the legal rate of interest was a rate fixed by statute); *City of Danville v. Chesapeake & O. Ry.,* 34 F.Supp. 620, 637 (W.D.Va.1940) ("The legal rate of interest, generally speaking, is a rate fixed by statute ...."); *Davis,* 172 B.R. at 457 (referring to the rate under 28 U.S.C. § 1961(a) as the "legal rate"); *Goldblatt Bros.,* 61 B.R. at 465 (same); *In re Jones,* 2 B.R. 46, 49 (Bankr.N.D.Ala.1979) (awarding interest on judgment at "the legal rate" as established by Alabama statute).

Therefore, while the Court agrees with the Commercial Creditors that "interest at the legal rate" had a commonly understood meaning when Congress enacted the Bankruptcy Code in 1978, we also believe that they misconstrue what that meaning was. It is abundantly clear that "interest at the legal rate" was, and is, commonly ***403** understood to mean a rate of interest fixed by statute, and not by contract.

The Court is also convinced that Congress intended for the term to carry this commonly understood meaning. For one thing, Congress enacted, for the first time, a statute requiring the payment of post-petition interest to unsecured creditors in solvent estates. And it specified "interest at the legal rate," when it could have simply said "interest." This is important because the language originally proposed for § 726(a)(5) was "interest on claims allowed." *Report of the Commission on the Bankruptcy Laws of the United States,* H.R.Doc. No. 93–137, 93d Cong., 1st Sess. (1973), § 4–405(a)(8), *reprinted in* Collier App.Pt. 4(c), at 4–679. An explanatory note to the Report illustrates what was meant by this phrase. It stated that "[t]he rate of interest is to be determined by other applicable law." *Id.* § 4–405, Note 6, *reprinted in* Collier App.Pt. 4(c), at 4–681.

The Commercial Creditors viewed this suggested language as an expression of the Bankruptcy Commission's desire to continue what they allege to be the pre-Code methodology for calculating post-petition interest on unsecured claims. *See Transcript of Hearing,* April 15, 1999 at 151–58 (statement of Ogden Lewis—counsel for the U/S CC). This may well have been the case. The problem for the Commercial Creditors, however, is that Congress rejected this language, choosing instead to use "interest at the legal rate." The Commercial Creditors attempt to explain away this glitch in the legislative history by arguing that Congress merely adopted language that it believed more clearly articulated the true intent of the Bankruptcy Commission, as expressed in the explanatory note. Specifically, they assert "that [interest determined by] 'other applicable law' and 'interest at the legal rate' mean exactly the same thing." *Transcript of Hearing,* April 15, 1999 at 153 (Statement of Ogden Lewis). However, the Commercial Creditors are not correct on this point. In the bankruptcy context, "other applicable law" means all federal and state

nonbankruptcy law. *See Patterson v. Shumate,* 504 U.S. 753, 759, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (the phrase "applicable nonbankruptcy law" in § 541(c)(2) of the Code encompasses all other applicable nonbankruptcy law, be it federal or state); *FDIC v. Canfield,* 967 F.2d 443, 446 (10th Cir.1992) (" '[O]ther applicable law' means all 'other applicable law.' "). "Other applicable law" is a broad, general term. Conversely, "interest at the legal rate" carries a much more definite meaning, a rate of interest fixed by statute. The two terms are not synonymous, as is evidenced by the fact that the Court found no case equating the two terms in any way whatsoever.

In the Court's view, Congress rejection of "interest on claims allowed," in favor of the more specific "interest at the legal rate" is significant.[15] First, "[a] rejected ***404** proposition strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *United States v. Flo–Lizer, Inc. (In re Flo–Lizer, Inc.),* 916 F.2d 363, 365 (6th Cir.1990) (quoting *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974)); *cf. John Hancock Life Ins. Co. v. Harris Trust and Sav. Bank,* 510 U.S. 86, 100, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) ("In resisting the argument that ... state law ... is preemptive, we are mindful that Congress had before it, but failed to pass, just such a scheme."). Second, a court "must assume that Congress carefully select[s] and intentionally adopt[s] the language" that it chooses to employ in a statute. *Ebben v. IRS,* 783 F.2d 906, 916 (9th Cir.1986). For this reason, one of the cornerstone rules of statutory interpretation is that " '[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' " *Field v. Mans,* 516 U.S. 59, 69, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) (quoting *Community for Creative Non–Violence v. Reid,* 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989)); *Evans v. United States,* 504 U.S. 255, 259, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992); *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); Hudson v. Reno, 130 F.3d 1193, 1199 (6th Cir.1997).

[15] Certain of the Commercial Creditors asserted that, while Congress intended to continue pre-Code practice, it did not attempt to adopt language expressly describing pre-Code practice because this would have been too cumbersome. Transcript of Hearing, April 15, 1999 at 204–06 (statement of Alan Gelb—counsel for Bear, Stearns). But this assertion is without merit for two reasons. First, there is no evidence in the legislative history suggesting this to be the case.

Second, just how easy it would have been for Congress to implement language expressly continuing pre-Code practice is demonstrated by the following state statutes defining how "the legal rate of interest" awarded pursuant to that particular statute is to be calculated. Cal.Civ.Code § 3289(b) ("If a contract ... does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."); 16 Kan.Stat.Ann. § 16–201 (providing that the state's legal rate of interest is to be calculated at "the rate of ten percent per annum, when no other rate of interest is agreed upon."); 15 Okl.St.Ann. § 266 ("The legal rate of interest shall be six percent (6%) in the absence of any contract as to the rate of interest, and by contract the parties may agree to any rate as may be authorized by law, now in effect or hereinafter enacted."). Note that under some state statutes, such as the ones cited here, "the legal rate of interest" that a creditor receives can be the same rate as the contract rate. However, this is only because the statute defining "the legal rate of interest" so provides. It is not because the contract rate is *per se* "the legal rate."

As already demonstrated, when the Bankruptcy Code was enacted in 1978, the phrase "interest at the legal rate" had long since acquired a well-established and commonly understood meaning—a rate of interest fixed by statute. And there is nothing in the legislative history to suggest that Congress intended for the term to have any other meaning. How strange it would be if Congress had selected a term with a well-settled meaning, and then, without saying so, intended for that term to carry an entirely new and different meaning.

There would seem to be only one way "interest at the legal rate" could mean what the Commercial Creditors say it does. And that is if Congress intended for the term to simply refer to "a" rate of interest that is legal. *See Ballentine's Law Dictionary* 713 (defining "*lawful interest* " as "[a]ny rate of interest up to that fixed by statute as the maximum rate at which interest can be charged by contract"). For a number of reasons, this could not have been the meaning intended by Congress.

The fact that "legal rate" is preceded by the definite article "the" in § 726(a)(5) indicates that Congress intended for a single source to be used for the calculation of post-petition interest, as opposed to using whatever rate of interest happened to be in the contract. *See Black's Law Dictionary* 1477 (6th ed. 1990) ("In construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an.' ").[16] Moreover, to conclude that Congress intended the term to mean any legally permissible rate of interest, and thus the rate fixed

by ***405** contract, one would have to accept the untenable notion that Congress felt the need to instruct bankruptcy courts not to allow post-petition interest at illegal or usurious rates. Not only is such a notion specious, but had Congress felt such instruction necessary, it presumably would have used "legal" in a similar manner throughout the Bankruptcy Code. But Congress did not do this. *See, e.g.,* 11 U.S.C. § 506(b) (allowing the holder of an oversecured claim to receive "interest on such claim").

16 The Commercial Creditors caution the Court not to make too much of the fact that "legal rate" is preceded by "the." *Memorandum of Law of the U/S CC* at 20–21 (criticizing the Proponents' assertion that with § 726(a)(5) Congress intended to refer courts to a single source). The relevance and meaning of "the" in this context, however, is unassailable. As a previous edition of *Black's Law Dictionary* stated: "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.' The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object." *Black's Law Dictionary* 1324 (5th ed.1979).

The Court therefore concludes that Congress intended for "interest at the legal rate" to be imbued with its commonly understood meaning—a rate of interest fixed by statute.

D. "The Legal Rate" Refers to the Rate Fixed by 28 U.S.C. § 1961(a)

The issue now is whether § 726(a)(5) refers to an interest rate fixed by a state statute, the federal judgment rate statute or some other federal statute. The Angelo Group, while conceding that "interest at the legal rate" means a rate fixed by statute, asserts that the appropriate statute to look to is the one fixing the post-judgment interest rate for the State of Michigan. *See* Mich.Comp.Laws § 600.6013. (Since this law mandates that judgments based on written instruments accrue interest at 12%—roughly double the rate applicable on the facts of this case pursuant to 28 U.S.C. § 1961(a)—it is not surprising that the Angelo Group champions the state rate.) The remaining Commercial Creditors similarly argue, at least implicitly, that if the post-petition interest rate is to be determined by reference to a statute, as opposed to contract, then the Court should look to the otherwise applicable state statute. For the following reasons, the Court concludes that Congress intended for post-petition interest to be determined in accordance with 28 U.S.C. § 1961(a).

A chapter 7 bankruptcy estate consists of all non-exempt assets that the debtor owns on the petition date. 11 U.S.C. § 541(a). For this reason, an estate's value will generally be fixed at the time of the filing. Similarly, each unsecured creditor's claim is valued as of the petition date. 11 U.S.C. § 502(b). Of course, creditors do not receive payment at this time. The length of time between the petition date and the date that creditors receive payment depends upon how quickly the bankruptcy estate can be administered. The delay in payment, therefore, results almost entirely from the procedural mechanisms of the bankruptcy laws. *See Bruning v. United States,* 376 U.S. 358, 362 n. 4, 84 S.Ct. 906, 11 L.Ed.2d 772 (1964) ("[T]he delay incident to collecting and distributing the funds [of a bankruptcy estate] ... was the act of the law ....") (quoting *American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,* 233 U.S. 261, 266, 34 S.Ct. 502, 58 L.Ed. 949 (1914) (receivership case); *Vanston,* 329 U.S. at 163, 67 S.Ct. 237; *Debentureholders Protective Committee,* 679 F.2d at 269 (noting that once a petition is filed, it is the bankruptcy court, not the debtor, that is responsible for the detention of estate assets). Any post-petition interest that a chapter 7 estate is required to pay pursuant to § 726(a)(5) likewise accrues because of the delay caused by the administration of federal bankruptcy law. *Melenyzer,* 143 B.R. at 832 (post-petition interest is "compensation for the detention of money occasioned by the bankruptcy case itself"); *Godsey,* 134 B.R. at 867; *Laymon,* 117 B.R. at 860. The purpose of post-petition interest, then, is to compensate a successful creditor for any delay that occurs between the time of entitlement (the petition date) and the time of payment. It so happens that post-judgment interest, which is calculated pursuant to 28 U.S.C. § 1961(a), serves the same purpose. *See Bonjorno,* 494 U.S. at 835–36, 110 S.Ct. 1570 ("[T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ***406** ascertainment of the damage and the payment by the defendant.)" (citation omitted)).

Given the purpose that it serves, courts recognize that post-judgment interest is procedural. *Bailey,* 838 F.2d at 152; *Harris v. Mickel,* 15 F.3d 428, 431 n. 4 (5th Cir.1994); *Transpower Constructors v. Grand River Dam Auth.,* 905 F.2d 1413, 1424 (10th Cir.1990); *Forest Sales Corp. v. Bedingfield,* 881 F.2d 111, 113 (4th Cir.1989); *Nissho–Iwai Co., Ltd. v. Occidental Crude Sales, Inc.,* 848 F.2d 613, 624 (5th Cir.1988); *Weitz Co. v. Mo–Kan Carpet, Inc.,* 723 F.2d 1382, 1386 (8th Cir.1983). All procedural matters arising in federal court are decided by federal law. *Hanna v. Plumer,* 380 U.S. 460, 473, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). Accordingly, in federal court "[i]t is settled that ... [p]ost-judgment interest is

determined by federal law. " *Northrop Corp. v. Triad Int'l Mktg., S.A.,* 842 F.2d 1154, 1155 (9th Cir.1988) (quoting *James B. Lansing Sound, Inc. v. National Union Fire Ins. Co.,* 801 F.2d 1560, 1570 (9th Cir.1986)); *Travelers Ins. Co. v. Transport Ins. Co.,* 846 F.2d 1048, 1053–54 (7th Cir.1988); *Bailey,* 838 F.2d at 152; *Nissho–Iwai,* 848 F.2d at 624; *Everaard v. Hartford Accident & Indem. Co.,* 842 F.2d 1186, 1193–94 (10th Cir.1988); *Roy Stone Transfer Corp. v. Budd Co.,* 796 F.2d 720, 723 n. 6 (4th Cir.1986); *G.M. Brod & Co. v. U.S. Home Corp.,* 759 F.2d 1526, 1542 (11th Cir.1985); *Weitz,* 723 F.2d at 1386–87.

Since post-petition interest performs the same function as post-judgment interest, it too can be rationally classified as procedural. Moreover, "bankruptcy law is federal law." *Brown v. Felsen,* 442 U.S. 127, 136, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). From this it follows that the computation of post-petition interest in bankruptcy cases must be determined by reference to federal law, which of course means a federal statute. And this has long been the rule. *Vanston,* 329 U.S. at 163, 67 S.Ct. 237.

Other considerations bolster this conclusion. "Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency." *Patterson v. Shumate,* 504 U.S. 753, 758, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) (citing a number of Bankruptcy Code provisions that explicitly incorporate "state law"— §§ 109(c)(2), 522(b)(1), 523(a)(5), 903(1), 362(b)(12), and 1145(b)). That it did not do so in this context speaks volumes, for Congress is presumed to have acted rationally. We, therefore, conclude that Congress intended for post-petition interest to be calculated pursuant to a federal statute.

Identifying which federal statute (or statutes) should be used to calculate post-petition interest under § 726(a)(5) is the simplest part of this problem. In Part II, the Court concluded that the allowance of a claim is equivalent to a "money judgment." And because of this fact, bankruptcy courts are required to calculate post-petition interest in accordance with 28 U.S.C. § 1961(a). But even if one does not agree that the two are equivalent, the fundamental similarities between an allowed claim and a money judgment are unmistakable. An allowed claim, like a judgment, gives the creditor a legal "right to payment" against the debtor. 11 U.S.C. § 101(5). Such entitlement is for a specified sum of money. *See* 11 U.S.C. § 502(b). If the parties are unable to agree on the amount of the claim, the bankruptcy court must resolve the dispute in accordance with the Federal Rules of Civil Procedure (incorporated into bankruptcy jurisprudence by F.R.Bankr.P. 9014). A bankruptcy court's order resolving such a dispute is a final and appealable order. *See* discussion *supra* Part II.B. The substantial parallels between an allowed claim and a money judgment make it highly probable that Congress intended for post-petition interest, like post-judgment interest, to be calculated at the federal judgment rate.

***407** This probability increases when one considers three additional factors. The first is that an alternative federal statute that would be more appropriate than 28 U.S.C. § 1961(a) has not been suggested. Second, federal courts have long referred to the rate of interest calculated pursuant to § 1961(a) as "the legal rate" or "the federal legal rate."[17] And let us not forget that a respected treatise now states that for purposes of § 726(a)(5), it appears "that Congress envisioned ... [use of] the federal statutory rate for interest on judgments set by [28 U.S.C. § 1961(a)]." 6 *Collier on Bankruptcy* ¶ 726.02[5].

[17] *Mohamed v. UNUM Life Ins. Co.,* 129 F.3d 478, 481 (8th Cir.1997); *In re M/V Nicole Trahan,* 10 F.3d 1190, 1192 (5th Cir.1994); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.,* 888 F.2d 260, 269 (2nd Cir.1989); *U.S. v. Griffin,* 782 F.2d 1393, 1395 (7th Cir.1986); *Texas Eastern Transmission Corp. v. Marine Office–Appleton & Cox Corp.,* 579 F.2d 561, 568 (10th Cir.1978); *Bins v. Artison,* 764 F.Supp. 129, 132 (E.D.Wis.1991); *Reid v. Prudential Ins. Co. of America,* 755 F.Supp. 372, 377 (M.D.Fla.1990); *Burston v. Commonwealth of Virginia,* 595 F.Supp. 644, 652 (E.D.Va.1984); *In re Davis,* 172 B.R. 437, 457 (Bankr.D.D.C.1994); *In re Goldblatt Bros., Inc.,* 61 B.R. 459, 465 (Bankr.N.D.Ill.1986).

That Congress intended this result makes sense because "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration ... of the [bankruptcy] estate...." *Katchen,* 382 U.S. at 328–29, 86 S.Ct. 467 (citation omitted); *Chemetron Corp.,* 72 F.3d at 346; *Kowal v. Malkemus* (*In re Thompson*), 965 F.2d 1136, 1145 (1st Cir.1992). Congress viewed this policy to be of particular importance in the context of a chapter 7 case. *See* 11 U.S.C. § 704 ("The trustee shall—(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest.").

Use of the federal judgment rate produces a number of salutary benefits that enhance the prospect of achieving the goal of efficient administration of a bankruptcy estate. By "afford[ing] all affected parties [an] ... easily ascertainable, nationally uniform rate," predictability within the bankruptcy process is increased. *Melenyzer,* 143 B.R. at 833. A uniform rate also keeps the bankruptcy estate from being saddled with potentially difficult and

time-consuming administrative burdens. For instance, if the state law approach were used, the trustee would first have to determine whether a contract exists. If there is a contract, its interest rate may not be easy to identify. If there is a default rate, should that rate apply? Would application of the contract default rate hinge upon fuzzy notions of equity to which only the court is privy? If there is no contract rate, should the otherwise applicable rate be drawn from federal law or state law? If the post-petition interest rate is to be determined by reference to state law, the trustee must determine which state's law applies. Once the choice-of-law determination is made, the trustee would then have to identify which of the state's multiple statutory rates is most applicable.[18] On the other hand, if ***408** the trustee determines that federal law applies, she must determine whether to apply some specialized rate (like one found in the Internal Revenue Code) or the federal judgment rate. The trustee would then have to repeat this process for each unsecured claim, which could very well number in the hundreds. Setting the stage for such an administrative nightmare would not only be counter-intuitive, but would directly contradict fundamental bankruptcy policy.

[18] Cursory research has identified 19 different statutory interest rates in Michigan alone. *See* Mich.Comp.Laws § 211.74 (redemption of land sold at tax sale requires payment of principal plus interest at 1.25% per month); Mich.Comp.Laws § 290.672 (assessments on producers of marketable agricultural commodities accrue interest at 1% per month); Mich.Comp.Laws § 325.855 (loans made by the toxic substance loan commission accrue interest at 0% for the first 5 years, at 3% for the next 5 years, and at 2% less than the prime lending rate thereafter); Mich.Comp.Laws § 438.31 (Except for certain notes and bonds, the "legal interest rate ... of money shall be ... $5.00 upon $100.00 for a year, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum."); Mich.Comp.Laws § 438.31c(4) (interest rate on first mortgage may not exceed 25%); Mich.Comp.Laws § 438.31c(6) (unregulated lenders may charge maximum interest rate of 11% on mortgages and land contracts); Mich.Comp.Laws § 438.31c(7) (maximum interest rate on second mortgage is 11%); Mich.Comp.Laws § 438.31c(11) (nonresidential mortgage over $100,000 can carry any rate of interest); Mich.Comp.Laws § 438.41 (unless otherwise permitted by law, the maximum rate of interest is 25%); Mich.Comp.Laws § 438.61 (loans to business entities made by a regulated lender can carry any rate of interest agreed to by the parties); Mich.Comp.Laws § 438.101 (interest on unpaid interest accrues at 7%, though parties can agree to pay up to 10%); Mich.Comp.Laws § 445.857 (retail installment contract can carry the rate of interest a regulated lender is permitted to charge pursuant to the "credit reform act" found at Mich.Comp.Laws § 1851 *et seq.*); Mich.Comp.Laws § 445.1204b (based on formula in statute, interest rate on "home improvement charge agreement" will be between 1.2% and 1.375% per month); Mich.Comp.Laws § 445.1301 (provides extremely confusing formula that, when applied, will supposedly set the interest rates on home improvement installment contracts at somewhere between 8% and 16.5%); Mich.Comp.Laws § 445.1854(1) (pursuant to credit reform act, a "regulated lender may charge, collect, and receive any rate of interest or finance charge for an extension of credit not to exceed 25% per annum"); Mich.Comp.Laws § 445.1854(2) (pursuant to credit reform act, "[a] depository institution may charge, collect, and receive any rate of interest or finance charge for a credit card arrangement"); Mich.Comp.Laws § 450.1275 (corporation may agree to pay any rate of interest); Mich.Comp.Laws § 491.718 (savings and loans may charge: interest of no more than 1.5% per month on credit card arrangements; a maximum rate of interest of 15% on all non-first mortgage home loans and non-residential real property loans under $100,000; and a maximum rate of interest of 14.55% per year on all other loans except for those specified in § 491.702); Mich.Comp.Laws § 492.118 (An installment sale contract on a motor vehicle can carry the maximum interest rate permitted by the credit reform act); Mich.Comp.Laws § 493.13 (A licensed lender may loan money at a rate of interest that does not exceed that rate permitted by the credit reform act); Mich.Comp.Laws § 493.110 ("On loan made ... pursuant to a credit card arrangement, a [licensed lender] may collect interest not to exceed 1.5% per month"); Mich.Comp.Laws § 600.6013 (judgments on written instruments shall carry a minimum interest rate of 12% and a maximum of 13%; all other judgments shall have an interest rate of 1% over the 5–year U.S. Treasury rate).

This sampling of Michigan statutes shows that determining the state statute that would be most applicable to a given claim would be no easy task. The next step, actually determining the correct interest rate, could also be a complicated proposition. *See e.g.,* Mich.Comp.Laws §§ 325.855; 445.1204b and 445.1301 (discussed above). Moreover, since claims come in all flavors, there will be some claims for which no state statute seems applicable. For instance, which state statute would the trustee apply to personal injury claims? At least some of the Commercial Creditors, the Angelo Group, would seem to suggest the state judgment rate. *See Memorandum of Law of the Angelo Group* at 7 (citing Mich.Comp.Laws § 600.6013). This would be appropriate, however, only if the allowance of a personal injury claim were substantially equivalent to a judgment. But if this is so, it is a judgment entered in federal court.

In 1978, when the Code was adopted, bankruptcy trustees

were (and still are) overwhelmingly individuals. Computers were not yet available. The kind of computations that these independent businesspeople would have been required to perform to properly implement a rule based on an interpretation of § 726(a)(5) other than one invoking 28 U.S.C. § 1961(a) would have been unduly burdensome, if not unworkable. Requiring the trustee to apply only one interest rate to the principal of every allowed unsecured claim immensely simplifies—and thereby expedites—the process of getting claims paid. And even before the amendment of § 1961(a) in October, 1982, when the statute merely incorporated the state judgment rate, the trustee still had only one rate to consider—the judgment rate in the state in which the bankruptcy court sat.

Some commercial creditors posited equitable arguments, relying to some extent on *Vanston,* which suggested that "bankruptcy ***409** courts must administer and enforce the Bankruptcy Act as interpretated by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed *under equitable principles.*" 329 U.S. at 163, 67 S.Ct. 237 (emphasis added). *Id.* (Courts do not generally allow post-petition interest on unsecured claims because "it would be *inequitable* for anyone to gain an advantage or suffer a loss because of [a] delay" caused by the court's processes.) (emphasis added). *Vanston* referred to principles derived from equity receiverships because the Bankruptcy Act was silent on the question of interest. But the Bankruptcy Code is not. Post-petition interest on unsecured claims in solvent estates is *mandated;* reliance on equitable notions is unnecessary.

Furthermore, although it is frequently described as a "court of equity," a bankruptcy court is not empowered to ignore the actual provisions of the Bankruptcy Code in order to reach a result that it finds more palatable. *See United States v. Noland,* 517 U.S. 535, 538–39, 116 S.Ct. 1524, 134 L.Ed.2d 748 (1996) (cautioning that while a bankruptcy court is a court of equity, it can only do that equity which is permitted by the Bankruptcy Code); *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Therefore, this Court is duty-bound, equitable concerns notwithstanding, to apply "interest at the legal rate" in accordance with its most plausible meaning—the rate of interest fixed by 28 U.S.C. § 1961(a). Even were the Court to decide the case by balancing equitable concerns, however, the holding would be unchanged.

The Commercial Creditors argue that if they are paid post-petition interest pursuant to § 1961(a) that they will not receive the benefit of their bargain. And if they do not receive the benefit of their bargain the Debtor's shareholders will, by the mere happenstance of bankruptcy, unfairly receive a windfall at the creditors' expense. *See Memorandum of Law of the U/S CC* at 14 n. 6; *Memorandum of Law of Halcyon* at 4; *Supplemental Brief of Chase Manhattan Bank* at 15; *Memorandum of Law of the Angelo Group* at 6.

But as explained, post-petition interest does not serve to continue the contractual rights which formed the basis of the underlying claim. Rather, just as with post-judgment interest, it serves to compensate the successful party for any delay that occurs between the time of entitlement and the time of payment. Congress obviously viewed the federal judgment rate as both fair and adequate for purposes of post-judgment interest. It is reasonable to conclude that Congress believed the rate of interest provided by 28 U.S.C. § 1961(a) was sufficient to accomplish the identical task performed by post-petition interest. Thus, the payment of post-petition interest at the federal judgment rate does not provide a windfall to debtors and its use cannot be seen as being inequitable to unsecured creditors.

Furthermore, had we been hearing this argument in 1982 instead of 1999, the Commercial Creditors would likely have been taking the other position. In 1982, in the midst of a serious inflationary environment, market interest rates were approaching 20%. The complaints of creditors, who were constrained by far lower contract rates, were heard by Congress. Congress amended 28 U.S.C. § 1961(a) to let the judgment interest rate float with the market. For those creditors holding claims arising from older contracts or contracts limited by old usury laws, the possibility of escape from such rates by use of the more liberal federal judgment rate would have been enticing.[19] Would a debtor then argue that use of the federal judgment ***410** rate was inequitable—and demand use of the contract rate? In short, a myopic view of equity, limited to the current facts, is neither appropriate nor consistent with the role of a court when a statute governs.

[19] Indeed, bondholders advanced just such an argument in *Realty Assocs.,* 163 F.2d at 390. The contract rate there was 5%, but the legal rate, which the court said was New York's judgment rate, was 6%. Relying on *John Osborn's Sons,* 177 F. 184, the bondholders asserted "that allowance by the court of the claim on the bonds is a judgment which bears interest at the legal rate from the date of the Chapter X petition." *Id.*

Certain of the Commercial Creditors also argue that, while it may be appropriate to equate "interest at the legal rate" with the federal judgment rate in some cases, it is not appropriate to do so here because, in essence, this case

is different. *See Supplemental Brief of Chase Manhattan Bank* at 10 (federal judgment rate "cases are wholly inapplicable as they address factual scenarios distinguishable from the facts herein"); *Memorandum of Law of Halcyon* at 16–17 (arguing that "special facts and circumstances," different from those here, existed in cases applying the federal judgment rate); *Memorandum of Law of Bear, Stearns Investment Products* at 17 (Federal judgment rate cases "all reflect exercise by the [b]ankruptcy [c]ourt of its substantial discretion under the Code to protect the interest of all creditors."). This argument illustrates with particular clarity why courts have only those equitable powers expressly set forth in the Code: If bankruptcy laws are to mean anything, the Code's provisions cannot be ascribed chameleon-like qualities, constantly changing in meaning depending on the facts of the case or the whims of the court. Thus, "interest at the legal rate" must be given the same meaning regardless of whether the case at hand is a small chapter 7 or a large chapter 11.

Chase Manhattan Bank also suggests that equating "interest at the legal rate" with the federal judgment rate will potentially have a devastating impact on the capital markets system. "A primary component of [this] system is the primacy of debt over equity in the scheme of recoveries." *Supplemental Brief of Chase Manhattan Bank* at 13. That is, lenders have the right to be paid in full before equity is entitled to receive a return on its investment. Chase contends that using the federal judgment rate will cause this fundamental component of the capital markets system to be turned on its head, and lenders will view the Bankruptcy Code as embodying "a principle of prejudicing creditors for the benefit of equityholders." *Id.* at 14. The result, according to Chase, will be that financially troubled businesses will be able to secure financing only at exorbitant rates if they are able to do so at all. *Id.; see also* Transcript of Disclosure Hearing, January 21, 1999 at 223–25 (Statement of Mark Bane—counsel for Chase Manhattan Bank). Again, Chase would not be making this argument in 1983; it would have been begging for the federal judgment rate.

Chase's sky-is-falling argument is unpersuasive for another reason. If applying the federal judgment rate would have the catastrophic effects that Chase postulates, those effects would have already been felt in those jurisdictions where bankruptcy courts have utilized the federal judgment rate approach. Chase suggested no evidence that banks in these jurisdictions have stopped making loans to troubled businesses. Moreover, one can only presume that the percentage of loans made to businesses on the brink of bankruptcy is extremely small. And the percentage of unsecured loans made to such businesses is undoubtedly smaller yet. Thus, the horrible impact that Chase warns would befall the capital markets system if this Court interprets "interest at the legal rate" to be the federal judgment rate is simply smoke and mirrors.

The Angelo Group further argues that in order to avoid an absurd result that could not have been intended by Congress, the best-interest-of-creditors test must be interpreted to "require[ ] payment of interest at the same rate that would apply absent bankruptcy." *Memorandum of Law of the Angelo Group* at 9. As noted, the best-interest-of-creditors test requires that a creditor "receive or retain under the plan ... property of a value ... that is not less than the amount that such holder ***411** would ... receive or retain" in a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7). In chapter 7, a corporate debtor does not receive a discharge. 11 U.S.C. § 727(a)(1) ("The court shall grant the debtor a discharge, unless—(1) the debtor is not an individual"). Citing cases which state that a debtor remains liable for post-petition interest on non-dischargeable claims, such as *In re Hanna,* 872 F.2d 829 (8th Cir.1989), *In re Fullmer,* 962 F.2d 1463 (10th Cir.1992), and *In re Roa–Moreno,* 208 B.R. 488 (Bankr.C.D.Cal.1997), the Angelo Group concludes that if the interest rate payable pursuant to § 726(a)(5) is construed to mean a rate that is less than the rate that would be "provided by state law ..., then the Debtor's creditors would ... retain the right to sue the Debtor for the difference." *Id.* at 10.

The cases cited by the Angelo Group do not support its argument for they merely stand for the proposition that post-petition interest continues to accrue on claims that are not discharged. None of the cases cited address what the appropriate rate of post-petition interest is. In addition, neither § 726(a)'s rules of distribution nor the cases cited by the Angelo Group lead to the conclusion that the best-interest-of-creditors test requires payment of post-petition interest at the same rate that would apply outside of bankruptcy.

When employing the best-interest-of-creditors test, courts look at the dividend the creditor would receive from the chapter 7 trustee—and only that amount—for comparison with the dividend available under the plan. 7 *Collier on Bankruptcy* ¶ 1129.03[7][b]. A best-interests-of-creditors test that is almost identical to the one found in § 1129(a)(7) is contained in § 1325(a)(4). Courts construing this chapter 13 provision uniformly hold that amounts obtainable from other sources, such as guarantors, are irrelevant when performing that section's best-interest-of-creditors test. *In re Rimgale,* 669 F.2d 426, 430 (7th Cir.1982) (Liquidation analysis "does not include additional

amounts that a creditor may be able to collect after a liquidation."); *In re Syrus,* 12 B.R. 605, 608 (Bankr.D.Kan.1981); *In re Hurd,* 4 B.R. 551, 553 (Bankr.W.D.Mich.1980); 8 *Collier on Bankruptcy* ¶ 1325.05 [2][a] (Only estate property held on the date the petition is filed is part of the liquidation analysis.). *Cf.* 5 *Norton Bankruptcy Law and Practice 2d* § 122:7 ("[T]he test involves no comparison of plan payments and the amount a creditor might receive upon collection of a nondischargeable debt after exception from the discharge in a Chapter 7 case."). By analogy then, it would be irrelevant whether a creditor who receives full payment of principal plus post-petition interest at the federal judgment rate could, after the close of the bankruptcy, file a new lawsuit to recover additional interest.

On the other hand, a corporate debtor whose assets are liquidated in chapter 7 does indeed remain liable for claims not paid in full since such claims are not discharged. 11 U.S.C. § 727(a)(1). And § 1129(a)(7)'s version of the best-interest-of-creditors test is actually slightly different from § 1325(a)(4)'s. The chapter 11 version refers to the "amount that ... [a creditor] would ... receive or retain" in a chapter 7, whereas § 1325(a)(4) refers to the "amount that [a creditor] would be paid" in chapter 7. Thus, a non-frivolous, but decidedly novel, argument could be made that § 1129(a)(7)'s best-interests-of-creditors test should account for the value of any cause of action that a creditor would *retain* against a chapter 7 corporate debtor.[20]

[20] No case has ever discussed, let alone decided, this issue. And *Collier* 's discussion of § 1129(a)(7)'s bestinterest-of-creditors test applies the chapter 13 formulation, entirely disregarding the "or retain" terminology. *Collier on Bankruptcy* ¶ 1129.03[7][b] ("[A] creditor or interest holder must receive (i) property (ii) that has a present value equal to (iii) that participant's hypothetical chapter 7 distribution (iv) if the debtor were liquidated instead of reorganized on the plan's effective date."). *Norton* is also silent on this issue. *Norton Bankruptcy Law and Practice 2d* § 91.14.

***412** One response is that the term "retain" merely reflects the fact that § 1129(a)(7) is intended to protect secured creditors and equity interests holders as well as unsecured creditors, while § 1325(a)(4) protects only unsecured creditors. But more significantly, both provisions refer to "the amount" that a claimant would receive, retain or be paid in a chapter 7. Obviously, the term "amount" refers, not to an unliquidated claim of an uncertain value, but to a specified sum.

This last point reveals an even more fundamental weakness underlying the Angelo Group's argument. The argument is based on the assumption that an otherwise non-dischargeable, unsecured claim could pass through bankruptcy without being liquidated or estimated and that, as a result, the holder of the claim would be excluded from sharing in the *pro rata* distribution of a debtor's assets. Section 726(a) demonstrates that this assumption is incorrect. And in fact, when estate proceeds are sufficient, the Bankruptcy Code requires all claims to be paid in full with interest, thereby leaving nothing upon which to sue. In other words, the most that an unsecured creditor is entitled to receive in a chapter 7 proceeding is the value of its claim as of the petition date plus post-petition "interest at the legal rate." Once an unsecured claim is paid in accordance with the above formula, it is satisfied and the claimant will have no further recourse against the debtor. Were this not the case, Congress would not have expressly provided for estate proceeds remaining after such distribution to be returned to the debtor. *See* 11 U.S.C. § 726(a)(6). If a chapter 11 plan of reorganization proposes such a distribution scheme, as the Joint Plan does, this aspect of the plan *a fortiori* satisfies § 1129(a)(7)'s best-interest-of-creditors test. In addition, there is no basis to conclude from the above discussion that a statutory absurdity or inconsistency would result from equating "interest at the legal rate" with the federal judgment rate.

It can be seen, then, that the Angelo Group is actually asserting that an unsecured creditor dissatisfied with the post-petition interest rate that it receives in bankruptcy may collaterally attack the bankruptcy court's judgment in state court. But, of course, a creditor cannot do this. *See, e.g., MSR Exploration Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 915 (9th Cir.1996) ("Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts ...."); *see also* 28 U.S.C. § 1334(a) ("[T]he district courts shall have original and exclusive jurisdiction of all cases under title 11.").

For the above reasons, the Court concludes that, within the context of § 726(a)(5), "interest at the legal rate" means the federal judgment rate.

IV. Recapitulation

In this opinion, the Court was required to construe § 726(a)(5), and specifically, the meaning of "interest at the legal rate." At the outset it was determined that there were two ways to approach this problem. In Part II, the Court

held that because an allowed claim is a money judgment, 28 U.S.C. § 1961(a) must be used to determine the rate of post-petition interest paid pursuant to § 726(a)(5). In Part III, it was determined that even if one does not agree that an allowed claim is equivalent to a money judgment, the same outcome is achieved since "interest at the legal rate" was commonly understood in 1978 to mean a rate of interest fixed by statute. Finally, the Court held that the statute to which Congress was referring when it said "interest at the legal rate" in 11 U.S.C. § 726(a)(5) was 28 U.S.C. § 1961(a). Accordingly, the Commercial Creditors' objection to confirmation is overruled.

All Citations

237 B.R. 380, 34 Bankr.Ct.Dec. 982

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561 F.3d 601
United States Court of Appeals,
Sixth Circuit.

Thomas A. LINDSAY, Plaintiff–Appellant,
v.
COVENANT MANAGEMENT GROUP, LLC,
Defendant–Appellee.

No. 07–1725.
|
Submitted: March 6, 2009.
|
Decided and Filed: April 7, 2009.

Synopsis

Background: Individual Chapter 11 debtor objected to proof of claim filed by secured creditor, asserting that it had impermissibly charged interest on discount fee that debtor paid at inception of loan and that it had failed to apply debtor's extension fee to principal reduction. The United States Bankruptcy Court for the Eastern District of Michigan overruled objection, and debtor appealed. The District Court, Anna Diggs Taylor, J., affirmed. Debtor appealed.

Holdings: The Court of Appeals, Cook, Circuit Judge, held that:

under Michigan law, debtor, who expressly agreed to pay interest on the discount fee, could properly be charged interest on the discount fee, and

debtor failed to demonstrate that secured creditor's booking of the extension was illegal or a breach of contract.

District court's judgment affirmed.

Attorneys and Law Firms

***602 ON BRIEF:** Donald H. Robertson, Winegarden, Haley, Lindholm & Robertson, Grand Blanc, Michigan, for Appellant. Steven W. Moulton, Cooley, Moulton & Smith, Flint, Michigan, for Appellee.

Before SILER, COOK, and McKEAGUE, Circuit Judges.

OPINION

COOK, Circuit Judge.

Thomas A. Lindsay appeals the district court's order affirming the bankruptcy court's decision to allow Covenant Bankcorp, Inc. ("Covenant")'s claim against him. Lindsay objects to Covenant's claim on the grounds that (1) Covenant impermissibly charged interest on the discount fee Lindsay paid at the inception of the loan, and (2) Covenant failed to apply to principal reduction the extension fee Lindsay paid. For the reasons that follow, we affirm.

I.

Two different loan transactions underlie Lindsay's appeal. In the first, Lindsay sought funding from Covenant to finance his purchase of a bowling alley in Lapeer, Michigan. The loan instruments germane ***603** to that transaction include the Promissory Note and the Buyer's Closing Statement, both attached as exhibits to the parties' factual stipulation. The Note reflects Lindsay's promise to pay "the sum of $1,350,000 (Principal) plus interest ... at the rate of 11% per annum (Contract Rate)," and the Closing Statement shows that the $1,350,000 loaned included $270,000 as a discount fee.

The second transaction occurred several years later, when Lindsay sought to extend the Note payment term for six months. Covenant charged a $36,765.86 extension fee—reflected in a Note Modification Agreement—which Lindsay paid with funds borrowed from a different lender, BNC Mortgage Company ("BNC").

Unable to satisfy his debt at the end of the extension period, Lindsay sought protection under Chapter 11 of the Bankruptcy Code. Covenant, as a secured creditor, filed a Proof of Claim for $1,340,321—the outstanding balance due on the Note. Lindsay responded with an Objection to the Claim. The bankruptcy court overruled Lindsay's

Objection, and Lindsay appealed the court's order to the district court. The district court affirmed, and Lindsay now appeals.

II.

We "directly review[ ] the bankruptcy decision, not the district court's review of the bankruptcy court's decision"—de novo for legal conclusions, and clear—error review for factual findings. *In re Trident Assocs. Ltd. P'ship,* 52 F.3d 127, 130 (6th Cir.1995).

A.

Lindsay quarrels with the amount Covenant claims he owes. According to Lindsay, the 11% interest charged on the $270,000 discount fee throughout the loan term "violates Michigan law because the discount fee is itself interest, and Michigan law does not permit the compounding of interest unless authorized by statute." The bankruptcy court overruled that objection after finding that Lindsay not only agreed to pay the $270,000 discount fee, but also to finance the fee along with the remainder of the loan and to pay interest on the entire balance. The court further noted that Lindsay bore the burden of overcoming the presumption of validity accorded a properly filed Proof of Claim, *see In re Dow Corning Corp.,* 250 B.R. 298, 321 (Bankr.E.D.Mich.2000), and observed that "there's no argument in this case that the interest rate is usurious."

We agree with the bankruptcy court's decision to rule against Lindsay on his interest-based objection. Courts, wherever possible, interpret an agreement "in such manner as to carry out the intent of the parties." *Loyal Order of Moose, Adrian Lodge 1034 v. Faulhaber,* 327 Mich. 244, 41 N.W.2d 535, 538 (1950); *see also Minthorn v. Haines,* 169 Mich. 169, 134 N.W. 1113, 1114 (1912) ("It is a familiar rule of construction that contracts shall be so interpreted as to make them valid, rather than illegal."). Lindsay does not dispute that he agreed to pay interest on the discount fee. Rather, he insists that—notwithstanding the plain meaning of the contract—the discount fee was an interest charge, and urges us to invalidate applying the 11% interest rate to the fee in the absence of a Michigan statute authorizing it. Covenant takes the opposite tack, asking us to uphold the structuring of this transaction in the absence of statutory authority forbidding it.

In arguing that the discount fee is itself interest, Lindsay points only to cases examining claims of usury, *see, e.g., Leach v. Dolese,* 186 Mich. 695, 153 N.W. 47, 49 (1915). We view those cases as inapposite, ***604** not only because Lindsay's brief explicitly disavows reliance on a usury theory, but also because usury arguments lack applicability here inasmuch as Lindsay specifically agreed to pay interest on the discount fee by signing the Note. *See* Mich. Comp. Laws § 438.31c(11) ("The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence ... may agree in writing for the payment of any rate of interest."). Lindsay's cited cases simply confirm the typical aim of courts confronted with usury—"to protect the necessitous borrower from extortion." *Wilcox v. Moore,* 354 Mich. 499, 93 N.W.2d 288, 291 (1958). They do not pertain to sophisticated borrowers taking out million-dollar business loans. Like the bankruptcy court, we find that Lindsay cannot overcome the presumptive validity of Covenant's Proof of Claim.

B.

As for his second objection, Lindsay argues that Michigan law requires Covenant to apply the $36,765.86 extension fee he paid to principal reduction, relying on *Bateman v. Blake,* 81 Mich. 227, 45 N.W. 831 (1890). But *Bateman* does not help Lindsay because those defendants appear never to have agreed to treat their monthly payments as extension fees rather than principal reductions, as Lindsay did. *See id.* at 832. The *Bateman* court concluded after noting the defendants' extreme poverty, that the trial judge "rightly refused to treat the monthly payments ... as anything else than payments on the principal debt." *Id.* Courts interpreting *Bateman* characterize it as involving usury. *See, e.g., Gladwin State Bank v. Dow,* 212 Mich. 521, 180 N.W. 601, 607 (1920). Contrast Lindsay, whose Note Modification Agreement plainly listed the fee as consideration for Covenant's six-month forbearance. *See Davis v. Teachout's Estate,* 126 Mich. 135, 85 N.W. 475, 476 (1901) ("It seems to us elementary that an agreement to defer the time of payment upon a promise to pay for the waiting is based upon a valid consideration."). And in exchange for Lindsay's fee, Covenant agreed not only to extend the

deadline for payment, but also to discharge and re-record its mortgage on Lindsay's residence, subordinating it to Lindsay's mortgage with BNC. Because Lindsay fails to demonstrate that Covenant's booking of the extension was illegal or a breach of contract, we conclude that the bankruptcy court properly upheld Covenant's claim.

III.

We affirm the district court's judgment upholding the bankruptcy court's order.

All Citations

561 F.3d 601, 51 Bankr.Ct.Dec. 124

End of Document

MICHIGAN STATUTORY INTEREST RATE CEILINGS

References herein are to the Michigan Compiled Laws of 1970 (MCL) available on the Michigan Legislature website, www.legislature.mi.gov.

In addition to the state laws mentioned below, a bank, savings bank, or credit union is authorized by the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 USC 1735f-7a, to charge the greater of 1 percentage point in excess of the Federal Reserve discount rate or the highest rate permitted by state law to any lender on the type of loan in question (the most favored lender authority). DIDMCA also preempts state usury ceilings by allowing any rate of interest for virtually all first lien mortgages and mobile home loans as well as first lien mobile home installment contracts. Moreover, under DIDMCA, an individual selling his or her home and taking a first lien on the title or a land contract given in exchange for the sale of unencumbered property could be at any rate of interest. The states had the authority to override the federal preemption of the first lien mortgages and mobile home loans but had to act before April 1, 1983. The state of Michigan did not act before the deadline. Regarding other loans, states may override the preemption at any time. DIDMCA, as amended, also preempted certain state usury ceilings applicable to business and agricultural loans. The preemption expired on April 1, 1983.

Further, Title VIII of the Garn-St. Germain Depository Institutions Act of 1982, PL 97-320, entitled "Alternative Mortgage Transaction Parity Act of 1982,"(AMPTA), 12 USC 3801 *et seq.,* authorizes state-chartered banks, credit unions, savings banks, and other housing creditors (including licensees under the Mortgage Brokers, Lenders and Servicers Licensing Act, MCL 445.1651 *et seq.,* and the Secondary Mortgage Loan Act, MCL 493.51 *et seq.*) to make alternative mortgage transactions notwithstanding any provisions of state law which restrict or prohibit the making of such transactions. States had the authority to override the federal preemption but had to act before October 15, 1985. The state of Michigan did not act before the deadline. Effective July 21, 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 USC 5301 *et seq.,* amended AMTPA to narrow the scope of federal preemption.

The following table is divided into two parts. The first part primarily applies to extensions of credit which, with two exceptions, are made exclusively by, "regulated lenders," as defined under the Credit Reform Act (CRA), MCL 445.1851, *et seq*. The two exceptions are: 1) real estate mortgages and land contracts by all types of lenders and vendors (some not subject to the CRA) and 2) business loans made by all types of lenders (some not subject to the CRA). The second part of the table covers extensions of credit by lenders which are not permitted to extend credit under the CRA. Among the lenders appearing in this part of the table, are licensees under the Credit Card Act (CCA), MCL 493.101 *et seq*. Although the CRA includes licensees under the CCA in the definition of "regulated lenders," CCA licensees cannot exercise powers under the CRA because they remain subject to specific and controlling provisions contained in the CCA.

This document is intended to provide general information regarding state interest rate ceilings and certain loan terms. The information presented is not legal advice, is not to be acted on as such, may not be current, and is subject to change without notice.

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"Business loans," as used in this schedule, includes agricultural loans. Variable Interest rate loans are allowed unless otherwise indicated.

PART I.
LENDERS SUBJECT TO CREDIT REFORM ACT, MORTGAGE LOANS, AND BUSINESS CREDIT EXTENSIONS

LOAN CATEGORY	LEGAL CITATION	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	LATE CHARGE
1. Mortgages, Land Contracts				
a. Conventional first lien or land contract by a regulated lender under CRA and a licensee/registrant under the MBLSLA[1], except as in 1c.[2]	MCL 438.31c[3]	25% per annum	Reasonable loan processing fee by contract.	Reasonable late charge by contract.
b. Conventional first lien or land contract by unregulated lender, except as in 1c.	MCL 438.31c[4]	11% per annum	Loan processing fee not permitted; variable rates not permitted for some lenders.	Reasonable late charge by contract.
c. Loan or land contract in excess of $100,000 secured by first or junior lien on other than single-family dwelling.	MCL 438.31c	No ceiling	Reasonable loan processing fee by contract for regulated lenders.	Reasonable late charge by contract.

[1] MBLSLA is the Mortgage Brokers, Lenders, and Servicers Licensing Act, MCL 445.1651 *et seq.*
[2] FHA/VA loans are exempted from the Michigan Usury Law by MCL 438.31 and MCL 487.751
[3] DIDMCA allows any rate of interest.
[4] DIDMCA allows person selling his/her principal residence, on which there is no prior lien, by first mortgage or land contract to charge any rate.

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d. Loan secured by junior lien, except as in 1c, 1d(ii), 2a, and 2b.				
i. By bank	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
ii. By savings bank (includes certain business loans secured by junior liens.)	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
iii. By credit unions	MCL 445.1854, MCL 445.1857	25% per annum	All fees and charges as agreed to by borrower.	Late fee as agreed to by borrower.
iv. By secondary mortgage licensees (loans may be secured by 1-4 family dwelling)	MCL 493.71, MCL 493.72, MCL 445.1854, MCL 445.1856	25% per annum	Loan processing fee not to exceed 5% of the gross amount of the loan; prepaid finance charge allowed to buy down interest rate; reasonable annual fee on open-end credit.	Greater of $15.00 or 5% of the installment payment.
v. By unlicensed person who is selling home, or a builder (loans may be secured by 1-4 family dwelling)	MCL 438.31c, MCL 493.80, MCL 493.52	11% per annum	Limited: two loans per year; loan processing fee not permitted.	Reasonable late charge by contract.
vi. Realtor representing buyer or self	MCL 438.31c, MCL 493.52	11% per annum	Limited: two loans per year; loan processing fee not permitted.	Reasonable late charge by contract
vii. Other unlicensed person	MCL 438.31, MCL 493.52	7% per annum	Limit: two loans per year; loan processing fee not permitted	Reasonable late charge by contract.

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2. Business Loans					
a. Loan to unincorporated borrower					
i. By depository financial institution insurance company, finance subsidiary of manufacturer, or a related entity (includes business purpose loan secured by junior lien, except as in 1c)	MCL 438.61[5], MCL 438.31a, MCL 445.1854	25% per annum	Reasonable loan processing fee by contract for regulated lenders; Must have sworn statement of business purpose if borrower is a natural person	Reasonable late charge by contract.
ii. By other lender, except as in 1b and 1c	MCL 438.61, MCL 438.41	25% per annum	Must have sworn statement of business purpose if borrower is a natural person; loan processing fee not permitted for certain unregulated lenders.	Reasonable late charge by contract.
b. Loan or other credit extension to a corporation or limited partnership from any source, except as in 1c	MCL 450.1275, MCL 449.1109, MCL 438.41	No ceiling, as long as agreement is in writing	Reasonable loan processing fee by contract.	Reasonable late charge by contract
c. Regulated lenders, as defined under MCL 445.1852[6] may make business loans to the extent authorized by law, except as in 1c	MCL 445.1854, MCL 445.1856	No ceiling, as long as agreement is in writing	Processing fee of 2% of amount of loan.	Greater of $15.00 or 5% of the installment payment.
3. Credit card, auto, and other types of loans				

[5] DIDMCA indicates that credit unions and savings banks may charge the rate allowed for business loans by banks.

[6] Pursuant to MCL 445.1852, "regulated lender" means a depository institution, a licensee under the consumer financial services act, Act No. 161 of the Public Acts of 1988, being sections 487.2051 to 487.2072 of the Michigan Compiled Laws, Act No. 379 of the Public Acts of 1984, being sections 493.101 to 493.114 of the Michigan Compiled Laws, the motor vehicle sales finance act, Act No. 27 of the Public Acts of the Extra Session of 1950, Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or the regulatory loan act of 1963, Act No. 21 of the Public Acts of 1939, being sections 493.1 to 493.26 of the Michigan Compiled Laws, or a seller under the home improvement finance act, Act No. 332 of the Public Acts of 1965.

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a.	Credit card or line of credit agreement by a depository financial institution	MCL 445.1854, MCL 445.1857	No ceiling[7]	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.
b.	All other types of loans by depository institutions except as in 1a and 1c	MCL 445.1854, MCL 445.1857	25% per annum[8]	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.
4.	Loans by regulatory loan licensees	MCL 445.1854, MCL 445.1856, MCL 493.13	25% per annum	Processing fee of 5% of amount of loan up to $300.00.[9]	As permitted by CRA
5.	Auto financing by licensed auto dealers	MCL 445.1854, MCL 445.1856, MCL 492.113, MCL 492.118	25% per annum	Processing fee not permitted; documentary preparation fee up 5% of cash price or $210.00, whichever is less.[10]	As permitted by CRA
6.	Unsecured loans by unlicensed entity	MCL 438.31	5% without written contract; 7% with written contract	All fees and charges as agreed to by borrower.	Late charge as agreed to by borrower.

[7] Pursuant to MCL 487.14201, a bank is authorized to collect interest and charges on loans and extensions of credit as permitted by the laws of this state or of the United States to any lender. A bank, on a credit card loan, can charge the interest rate and fees allowed to a regulated lender under the CRA. Pursuant to MCL 487.3430, a savings bank is authorized to collect interest and charges on a credit card loan as permitted by the CRA. A credit union is authorized on a credit card loan to charge the rate of interest allowed by the CRA. Also, as a result of the federal most favored lender authority, a federally insured state or national bank, state or federal savings bank, or state credit union, can charge the highest rate of interest allowed under Michigan law to any lender on the type of loan in question.

[8] May charge rate authorized under MCL 445.1854 or 1% plus Federal Reserve Discount.

[9] The documentary preparation fee is adjusted every two years to reflect the cumulative percentage change in the consumer price index for the two immediately preceding calendar years. Please see the applicable bulletin for the permitted documentary preparation fee. Fee of $300.00 is permitted under Bulletin 2018-01-CF and is subject to change every two years.

[10] The documentary preparation fee is adjusted every two years to reflect the cumulative percentage change in the consumer price index for the two immediately preceding calendar years. Please see the applicable bulletin for the permitted documentary preparation fee. Fee of $210.00 is permitted under Bulletin 2017-02-CF and is subject to change every two years.

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PART 2.
CREDITORS REGULATED BUT NOT SUBJECT TO THE CREDIT REFORM ACT

	LOAN CATEGORY	LEGAL CITATION	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	LATE CHARGE
1.	Loans by non-depository credit card licensees	MCL 493.110	1.5% per month (18% per annum) on the unpaid balance.	Loan processing fee not permitted; annual fee is permitted.	Not permitted.
2.	Financed insurance premiums	MCL 500.1509, MCL 500.1510	$12 per $100 plus $18 per contract on premiums of $100 or more; $15 on premiums less than $100 paid in 1-3 installments; $17 on premiums less than $100 paid in 4 or 5 installments.	Add-on interest only; $18 charge need not be refunded upon cancellation or pre-payment.	Delinquency charge of $1 to a maximum of 5% payment not to exceed $5 per installment in default 10 days or more.

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EXHIBIT 12

Conte v. Greater Houston Bank

Court of Appeals of Texas, Fourteenth District, Houston

August 19, 1982

No. C2993

Reporter
641 S.W.2d 411 *; 1982 Tex. App. LEXIS 4970 **

JOSEPH P. CONTE, Appellant v. GREATER HOUSTON BANK, Appellee

Prior History: [**1] Appeal from 189th District Court of Harris County.

Case Summary

Procedural Posture
Appellant challenged the decision of the 189th District Court of Harris County (Texas), which granted summary judgment for appellee bank, issuing a declaratory ruling that it could accelerate demand for the entire balance due on a note on real estate.

Overview

The trial court granted summary judgment for appellee bank, declaring that it could accelerate payment upon demand of the entire balance and accrued interest due and owing by appellee as the maker of a $ 1,700,000 real estate note bearing interest on the unpaid principal at 9.5 percent per annum. Appellant challenged the declaratory ruling of the trial court on the grounds of usury, waiver, estoppel, and failure of consideration. On appeal, the court affirmed. Appellant failed to show that the note was usurious under *Tex. Rev. Civ. Stat. Ann. art. 5069, § 1.06(2)* (1971), or that there was a breach of contract, or negligence by appellee in failing to carry out an alleged agreement for permanent financing in consideration of a $ 17,000 deduction from funds that were advanced. The note was not ambiguous, and there was no occasion for parol evidence as to its meaning. The trial court's declaratory judgment determined the rights of the parties as to the note, so appellee was not required to make a demand to collect on the debt. Thus, there were no affirmative defenses preventing entry of a final summary judgment for appellee.

Outcome
The court affirmed the declaratory ruling and grant of summary judgment for appellee bank, holding that it could accelerate demand for the balance owed on a note made by appellant. Appellant failed to show the note was usurious, that there was a breach of contract, or that the action was prevented by waiver or estoppel.

Counsel: Charles A. Botschen, Houston, Texas, For Appellant.

Don M. Kennedy, Houston, Texas, For Appellee.

Judges: Robert E. Morse, Jr., Associate Justice. Associate Justices Miller and Morse and James.

Opinion by: MORSE

Opinion

[*412] Appellant Joseph P. Conte appeals from a summary judgment for appellee Greater Houston Bank declaring that it may, at its sole discretion, accelerate payment upon demand of the entire balance and accrued interest due and owing on a $1,700,000 real estate lien note bearing interest on unpaid principal at nine and one-half percent per annum, decreeing that appellant take nothing on his cross-actions and pay costs, and denying all other relief. We overrule all eleven points of error asserted by appellant and affirm the judgment of the trial court.

Appellee filed suit seeking a declaration of its rights under the following provision in the real estate lien note:

> "ON DEMAND, BUT IF NO DEMAND IS MADE: principal and interest shall be due and payable in monthly installments of Fourteen Thousand Five Hundred Thirty Five and No/100 Dollars ($14,535.00) (or more) each, payable on the 4th day [**2] of each and every calendar month, beginning on the 4th day of May, 1978, and continuing regularly thereafter until the expiration of fifteen (15) years from the date hereof, when the entire amount hereof, principal and interest thereon remaining unpaid, shall then be due and payable; interest being calculated on the unpaid principal to the date of each installment paid and the payment made credited first to the discharge of the interest accrued and the balance to the reduction of the principal."

Appellant, the maker of the note dated April 3, 1978, answered with a general denial and affirmative pleas of usury, waiver and estoppel, and failure of consideration. He added a cross-action asserting four causes of action, alleging that the purpose of the note was for permanent long term financing as an extension and renewal of prior notes and that $17,000 was required to be paid to appellee bank as a one percent "brokerage" fee. Further, appellant asserted that he maintained certificates of deposit in the amount of $1,800,000 with appellee bank for the first sixteen months after the note was executed. Appellant prayed as defendant that the court declare that plaintiff-appellee [**3] bank "has no right to make a demand upon defendant for the principal balance due and owing together with interest thereon." Appellant's answer asserted usury as an affirmative defense and his first two cross-actions were "based on usury." The first of these asserted that the "brokerage point" of $17,000 was in fact interest contracted for, charged and received which made the demand note usurious in excess of double the amount of interest allowed by law contrary to *TEX. REV. CIV. STAT. ANN. art. 5069 § 1.06 (2)* (Vernon 1971), so as to cause forfeiture of all principal. The second cause of action based on usury asserted that the bank's requirement of maintenance of his certificates of deposit, as a compensating balance, reduced the true principal to zero and made the interest contracted for, charged and received usurious in excess of double the amount allowed by law so as to cause a forfeiture. Appellant's third and fourth cross-actions asserted a breach of contract and negligence in failing to carry out an alleged agreement for permanent financing in consideration of the $17,000 deduction from the funds advanced by the bank. Appellant sought damages of double the amount of interest [**4] plus attorney's fees, consequential damages, expenses and punitive damages. The trial court entered summary judgment for the bank and against all defenses and cross-actions.

[*413] DECLARATORY JUDGMENT JURISDICTION

Appellant's first two points claim error in rendition of the declaratory judgment, for a lack of jurisdiction because of absence of a justiciable controversy and inability to fully resolve the controversy. The principal cases cited on by appellant as requiring our holding that the court had no power to grant advisory opinions or to determine matters not essential to the decision of an actual controversy are distinguishable as instances of attempted modification of earlier final judgments on the basis of hypothetical future facts. See *Reuter v. Cordes-Hendreks Coiffures, Inc., 422 S.W.2d 193* (Tex. Civ. App. -- Houston [14th District] 1967, no writ) and *California Products Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780 (1960)*.

Appellant cites other cases which involve efforts to pre-judge possible future litigation, usually between unknown parties. In *Byrd v. Fard, 539 S.W.2d 213* (Tex. Civ. App. -- Dallas 1976, no writ) where the [**5] controversy between the parties before the court was already resolved, the court refused to pass on whether the Texas Deceptive Trade Practices Consumer Protection Act violated due process and was unenforceable as to other possible litigants. Similarly, in *State of Texas v. Margolis, 439 S.W.2d 695* (Tex. Civ. App. -- Austin 1969, writ ref'd n.r.e.) it was held improper, in the absence of a *bona fide* threat of prosecution, to declare that the Texas anti-trust laws would not be violated by a proposed scheme to avoid the laws requiring stores to close on Saturday or Sunday. *Southern Traffic Bureau v. Thompson, 232 S.W.2d 742* (Tex. Civ. App. -- San Antonio 1950, writ ref'd n.r.e.) merely held it improper to enter a declaratory judgment on facts which were particularly subject to mutation and change, where there were adequate criminal laws and procedures to provide relief against illegal practice of law. The court would not advise with regard to the admissibility in future cases of evidence which might be offered. In such cases,

as in *Firemen's Insurance Co. v. Burch, 442 S.W.2d 331 (Tex. 1969)* and *Liberty Mutual Insurance Co. v. American Employers Insurance Co. [**6] , 545 S.W.2d 216* (Tex. Civ. App. -- Fort Worth), *reversed on other grounds*, *556 S.W. 2d 242 (Tex. 1977)*, where it was held that it was not proper for declaratory judgment to determine future liability on tort judgments which might be established, further litigation would necessarily be required despite the entry of declaratory judgment.

Accordingly, Texas courts dismissed for want of jurisdiction a case filed after the United States Court of Appeals, Fifth Circuit, stayed decision on a diversity case to allow a declaratory judgment by a Texas court on the construction of a life insurance clause, saying the federal court's reservation of jurisdiction made the requested declaratory judgment only advisory. *United Services Life Insurance Co. v. Delaney, 386 S.W.2d 648* (Tex. Civ. App. -- San Antonio), *aff'd*, *396 S.W.2d 855 (Tex. 1965)*. The case before us on appeal does not involve such an "advisory opinion" on liabilities that could only be established in future litigation which is merely possible or between non-parties. Once the demandability of the note was adjudicated, the bank could resort to extra judicial foreclosure without the need to sue for any non-payment.

[**7] In appellant's cited cases of *Joseph v. City of Ranger, 188 S.W.2d 1013* (Tex. Civ. App. -- Eastland 1945, writ ref'd w.o.m.), and *Harding Bros. Oil & Gas Co. v. Jim Ned ISD, 457 S.W.2d 102* (Tex. Civ. App. -- Eastland 1970, no writ), declaratory judgments sought in tax cases which would not fully determine the tax liability were held properly refused. The *Joseph* case involved an interlocutory appeal, there being no final appealable adjudication; in the *Harding* case declaratory judgment was held properly denied on the merits by the trial court. In *McKinnon v. Lane, 285 S.W.2d 269* (Tex. Civ. App. -- Fort Worth 1955, writ ref'd n.r.e.), it was held proper for the trial court to refuse to rule on a declaratory judgment request "without prejudice to future rights to seek relief should the occasion arise." No actual controversy exists where a dispute is theoretical and a mere advisory opinion would result. In the instant case, [*414] however, the declaratory judgment sought would determine the rights of the parties between themselves as to the propriety of a demand to mature the debt, the resulting obligation to make payment and the propriety of a foreclosure [**8] in the event of non-payment. Although appellant had not refused a demand made by appellee, at least after the assertion of the affirmative defenses and cross-actions related to the note on which both parties sought interpretation by declaratory judgment, the trial court was presented with a present justiciable controversy as to whether the obligation could be legally matured by the bank. Appellant's first two points of error are overruled.

SUMMARY JUDGMENT -- DEFENSES REQUIRING PAROL EVIDENCE

Appellant contends by his third point of error that a summary declaratory judgment as to the bank's right to make demand should have been prevented by issues of fact with regard to appellant's affirmative defenses of usury, waiver and estoppel, and failure of consideration. Under the written transactions presented in the record, particularly in light of the parol evidence rule, there was no admissible evidence to raise the defenses of waiver, estoppel or failure of consideration. No assertion of fraud in the inducement was raised. In *Town North National Bank v. Broaddus, 569 S.W.2d 489 (Tex. 1978)*, where summary judgment against the makers of a promissory note was affirmed, the Court [**9] said at page 491:

> . . . a negotiable instrument which is clear and express in its terms cannot be varied by parol agreements . . .

The Court continued at page 492, stating:

> An unconditioned written instrument cannot be varied or contradicted by parol agreements or by representations of the payee that the maker would not be held liable according to the tenor of the instrument.
> * * *
>
> The promise here complained of as being intended not to be performed was a collateral one in parol at variance with the written contract entered into, and one proof of which the law does not admit. If fraud could be predicated upon such promise and intention, then any collateral parol agreement might be asserted to contradict, vary, or even abrogate any written contract, under the guise of a fraudulent intent not to perform such collateral parol agreement. The practical effect would be to destroy the parol evidence rule altogether. *Mitcham v. London, 110 S.W.2d 140, 142 (Tex.Civ.App. 1937)*.
>
> Or, in the words of another court, a promissory note would be reduced to a 'meaningless scrap of paper.' *Howeth v. Davenport, 311 S.W.2d 480, 482* (Tex. Civ. App. -- San [**10] Antonio 1958, writ ref'd n.r.e.).

Thereafter, the Court concluded at page 494:

> To be entitled to a summary judgment, the movant has the burden of establishing that there exists no material fact issue and that he's entitled to judgment as a matter of law. [cites omitted] By way of pleadings and proper summary judgment proof . . . Bank demonstrated as a matter of law that it was entitled to summary judgment. In opposition to this, [defendants] asserted the affirmative defense of fraud in the inducement. In order to avoid a summary judgment in favor of the plaintiff -- Bank, it was their burden as defendants to show the existence of an issue of fact with respect to their affirmative defense. [cites omitted] To meet this requirement, [defendants] offered an affidavit in which it was averred that an officer of the bank represented to them that they would not be held liable on the note, that only another person would be looked to for payment of the note. *Rule 166* -- A(e) of the Texas Rules of Civil Procedure (Supp. 1978) requires that supporting and opposing affidavits, among other things 'shall set forth such facts as would be admissible in evidence.' This rule [**11] has been interpreted to mean that the affidavit must set forth such facts as would be admissible in evidence [*415] of a trial. [cites omitted] Because of our previous holding that the facts in their affidavit upon which they rely to establish fraud in the inducement are barred by the parol evidence rule, [defendants] are, in effect, in the position of having offered no summary judgment proof to meet the burden imposed upon them to show the existence of a genuine issue as to a material fact. Consequently the trial court properly granted summary judgment in favor of . . . Bank.

Applying such rules to our case, the contention that by having accepted installment payments without having made a demand before they became due, the appellee bank did not have and retain the right to make a demand would have been contradictory of the express written agreement between the parties as construed by the trial court. Likewise, any assertion of failure of consideration under an obligation for "permanent financing," contrary to the express provisions of the written note and related arrangements, would violate these contractual provisions protected by the parol evidence rule. As in [**12] *Town North National Bank v. Broaddus, supra*, the trial court properly granted summary judgment in favor of the bank, at least as to the affirmative defenses of waiver, estoppel and failure of consideration.

USURY -- as a defense

Contracting for, charging or collecting interest at a usurious rate in violation of Article 5069 § 1.06(1) would not be more than a partial defense, and would not prevent the declaratory judgment sought by appellee bank. Usury would be no defense unless it was construed that contracting for the payments called for by the note (especially when construed as still containing a right to make a demand) automatically constitutes contracting for usurious interest because of the possibility that the appellee bank could collect more than twice the permissible interest at the rate of 10%, so as to cause a forfeiture by the appellee bank of all rights to collect the principal pursuant to the provisions of Article 5069 § 1.06 (2). Any other contention of the commission of usury, even if criminal, would constitute no defense to the plaintiff bank's cause of action to obtain a declaration of its right to make a demand.

The $17,000 deducted from the funds [**13] advanced by appellee bank to appellant on April 3, 1978, where the note was executed, could not be classified or justified as a "brokerage fee," in that there was no third party involved in the transaction, and the money was retained by appellee bank rather than paid out to another who performed some function in the transactions. Any sum charged by the bank in addition to the interest specified and the principal required to be repaid would have to be deemed a part of the consideration for the use of the money loaned by the bank, or in other words, interest.

Just the deduction of $17,000 as 1% from the face amount of the loan under the note, even if treated as pre-paid interest over and above the 9 1/2% per annum interest called for, did not necessarily constitute usury simply because the total exceeds 10%.

USURY -- "spreading"

Under the rule of *Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046 (1937)*, as recently applied in *Tanner Development Company v. Ferguson, 561 S.W.2d 777 (Tex. 1977)*, the $17,000, as pre-paid interest, can be "spread over the entire term" of the notes in determining whether the interest charged was a sum greater than such principal debt would produce [**14] at 10% per annum during the time for which the borrower had use of the money. *First State Bank of Bedford v. Miller, 563 S.W.2d 572 (Tex. 1978)*. Since September 1, 1975, Article 5069 § 1.07 (a) adopted the "spreading doctrine" of *Nevels v. Harris, supra*, with regard to loans secured by real estate. That doctrine in turn was based on the law merchant as recognized in the earlier holding in *Bothwell v. Farmers' and Merchants' State Bank & Trust Co. of Rusk, 120 Tex. 1, 30 S.W.2d 289 (1930)* that:

In Texas the rule sanctioning the reservation of interest in advance at the highest conventional rate for a year or less is too firmly established to be departed from.

[*416] In *Nevels v. Harris, supra*, the lender took a note for $6,400, but deducted $320 and only loaned $6080 -- which sum the Court treated as the "real amount of the loan." The Court treated the $320 as interest, which it added to the 8% per annum interest called for over the 3 year term of the note, in finding the total was less than 10% on the true amount loaned. In *O'Connor v. Lamb, 593 S.W.2d 385* (Tex. Civ. App. -- Dallas 1979, no writ), a $500 discount on a loan where no third [**15] party provided any service for which a fee could be charged, was held to amount to interest greater than 10% on a $2,500 ninety day note. The plaintiff there was awarded twice the amount of such deducted interest under the usury statute, plus discharge of the note and attorney's fees, because contracting for the payment of the $2,500 within 90 days after a loan of only $2,000 resulted in interest more than twice the permissible amount. The doctrine of "spreading" the interest, pre-paid by deduction, would still not make the transaction legal, and there was no savings clause which reduced the total amount payable to a legally permissible sum.

If the "true principal," as determined in the case before us by the method employed in *First State Bank of Bedford v. Miller, supra*, is $1,683,000 instead of $1,700,000, then we must determine whether the scheduled installment payments resulted in contracting for usury. The permissible interest of 10% payable monthly on the net loan of $1,683,000, as diminished by the monthly payments of $14,535, to the extent such payments exceeded 5/6% of that month's balance, permits the $17,000 excess of the face amount of the note over the actual [**16] loan to be absorbed by the amount such permissible interest exceeds the 9 1/2% "interest calculated on the unpaid principal to the date of each installment paid", with "the payment made credited first to the discharge of the interest accrued and the balance to the reduction of the principal" as called for by the note. Over the 15 years it is obvious that the total permissible interest (i.e. $2,404,920.10 calculation) would exceed (by $251,213.00) the amount required to be paid, even including the $17,000 "pre-paid" plus the cumulative interest component of the 180 installments. The first month's interest at 9 1/2% on the "unpaid principal" as called for by the note is $701.25 less than that which is permissible, and it would obviously take only a little more than two years to absorb the $17,000 within the permissible extra 1/2%. A pre-payment of interest which is amortized in less than the three years approved in *Nevels v. Harris, supra*, cannot make the transaction usurious.

Appellant contends, however, that Article 5069 § 1.07(a) merely adopted the "spreading doctrine" of *Nevels v. Harris*, which depended upon "savings clauses" to abate unearned interest, whereas the [**17] savings provisions of our note and deed of trust do not purport to relieve anything but the payment of interest "under this note"; he says the $17,000 deducted from the note at the time of execution was not payable thereunder. Apparently appellant would contend such sum merely reduced the principal which could legally bear interest and constituted a sum *already* charged, which apparently appellant contends exceeded 20% interest during the period of approximately the first eighteen days when a demand could have been made for the face amount of the note. Appellant cites *Shropshire v. Commerce Farm Credit Co., 120 Tex. 400, 30 S.W.2d 282 (1930)*, for the proposition that a person may not relieve himself from effects of usury by merely including a contractual disclaimer of the intent to do that which the contract has plainly done.

In *Nevels v. Harris, supra*, a provision in the note which called for reduction of interest and was not a mere denial of intent to violate the usury statutes, but a modification of the contractual obligations, was held effective to prevent the creation of any illegal obligation. In the note before us there is a provision that "in no event shall [**18] any interest payable under this note, regardless of how said interest may be defined or computed, ever exceed the maximum rate permitted under the laws of the State of Texas." This provision effectively makes *Nevels v. Harris* and Article 5069 § 1.07(a) both applicable.

[*417] USURY -- acceleration by demand or on default

Nevertheless, appellant apparently contends that the deduction of $17,000 at the time of the execution of the promissory note, together with the claimed right to make demand -- i.e., acceleration of maturity of the face amount of the obligation so as to give the appellee bank the contractual right to receive that sum from the appellant prior to the time when $17,000 would have amounted to less than 20% per annum interest on the net $1,683,000 principal -- is contracting for usury contrary to Article 5069 § 1.06 (2) which constitutes a defense by reason of the forfeiture provisions of that statute. In *Temple Trust Co. v. Haney, 103 S.W. 2d 1035*, (Tex. Civ. App. -- Austin) *aff'd, 133 Tex. 414, 107 S.W.2d 368 (Tex. 1937)* it was held that the right to recover unearned interest by acceleration of maturity could constitute usury even though acceleration [**19] never occurred.

In *Bothwell v. Farmers Bank & Trust Co. of Rusk, Texas, supra*, it was held that the fact that a default was not within the lender's control did not prevent the transaction from being usurious if the resulting contractual interest was greater than 10% by reason of the acceleration. The Court reasoned that it was no defense that the borrower could have kept from incurring usurious interest by paying on time. However, in *Dunlap v. Voter, 72 S.W.2d 1109* (Tex. Civ. App. -- El Paso 1934, writ ref'd) where, on acceleration, makers could not be required to pay more than principal and interest at the rate specified in the note, there was held to be no contractual usury. Also in *Nevels v. Harris, supra*, it was held that because of a savings clause which required reduction of the 8% interest to that legally allowable, the possibility of optional acceleration of maturity for non-payment during the period before the $320 deducted "pre-paid interest" could be absorbed by the 2% additional permissible interest on the $6080 "true principal" did not make the contract usurious, despite the holding in *Shropshire v. Commerce Farm Credit Co., supra*, which was [**20] a companion case (also involving an acceleration provision) decided at the same time as *Bothwell v. Farmers State Bank & Trust Co. of Rusk, Texas, supra.* Under the holding in *Eubanks v. Simpson, 90 S.W.2d 291* (Tex. Civ. App. -- Amarillo 1936, writ ref'd), and the cases cited therein, the deduction from the face of the loan of a sum which results in payments of less than 10% if the note is allowed to run to maturity does not make the transaction usurious. The note there provided that if accelerated "the interest on the loan shall be 10%." Thus, in effect, there was a savings clause applied to prevent the contention that usurious interest was contracted for merely by the possibility of an acceleration which did not actually occur.

In *Miller v. First State Bank of Bedford, 551 S.W.2d 89* (Tex. Civ. App. -- Ft. Worth 1977), modified and affirmed in *First State Bank of Bedford v. Miller, supra*, if there had been a savings clause requiring spreading of otherwise usurious interest, usury would expressly not been held to have resulted. The holding in *Ferguson v. Tanner Development Co., 541 S.W.2d 483* (Tex. Civ. App. -- Houston [1st Dist.] 1976), that savings clauses [**21] "cannot operate to change the plain terms of the note" and that therefore "the contract is found usurious under its terms" was reversed, *Tanner Development Co. v. Ferguson, supra.* The note before us not only includes an effective savings clause, but expressly provides that interest is "payable monthly *as it accrues,* . . ." as ". . . calculated on the *unpaid principal*" and "*payment . . . credited* . . . first to . . . interest accrued and the balance to the reduction of the principal." Anything required to be paid and not earned as lawful interest is credited to principal. Since the note contemplates and provides for the Bank's optional maturity upon default "on any part" of the principal and interest called for, as well as being payable "on demand", the amount required to be paid at any time could only be the balance then due after crediting all payments first to any interest accrued, as reduced (if necessary) to the legally permissible rate, then to the reduction of principal. In this case there was no attempt to make any demand at any [*418] time so as to charge or collect interest at a usurious rate. Neither was there any contracting for usury by the demandability [**22] or provisions for acceleration of maturity upon default.

If a contract as a whole is susceptible of more than one reasonable construction, the Court will adopt the construction which comports with legality. *Smart v. Tower Land and Investment Co., 597 S.W.2d 333 (Tex. 1980)*. In view of the savings and reduction of principal clauses quoted above, the appellee's right to make a demand prior to the expiration of the period of time when the face amount of the note plus 9 1/2% per annum interest accrued on the unpaid principal thereof would amount to in excess of 20% per annum interest on $1,683.000, would not constitute a violation of Article 5069 § 1.06(2).

USURY -- "Compensating balances"

Under the facts shown without dispute, appellant was not required to maintain a compensating balance which made the percentage interest provided on his loan excessive. The appellant received the interest called for by the certificates of deposit, and therefore such certificates cannot be considered as abolishing the loan principal. Compare the case of *Bradley v. Houston State Bank, 588 S.W.2d 618* (Tex. Civ. App. -- Houston [14th Dist.] 1979, writ ref'd n.r.e.), where it was held that [**23] there was no reduction of principal by the amount of a compensating balance where not the borrower's funds. Appellant was not deprived of the use of the $1,800,000 deposited for the certificates and was allowed to and did cash them in without restraint.

USURY -- summary

Under the usury statutes there was, as a matter of law, no contracting for, charge or receipt of interest in excess of 10% to cause a forfeiture of twice the amount of interest under Article 5069 § 1.06 (1) as an offset to the obligation under the note. Neither could there possibly be interest contracted for, charged or received in excess of double the amount of interest allowed so as to cause a forfeiture of principal under Article 5069 § 1.06 (2). As a result of either the $17,000 deduction or of the certificate of

deposits of appellant there could not be any complete defense to the principal and interest obligations so as to make the note uncollectible and the demandability moot.

Accordingly there were no fact issues as to affirmative defenses which prevented the entry of a final summary judgment as to the declaratory judgment action.

CONSTRUCTION OF THE NOTE'S DEMAND PROVISION

When the note on which appellee [**24] bank sought judgment declaring its right to demand the principal balance due with accrued interest and the accompanying deed of trust are considered together in the light of the surrounding circumstances, no ambiguity appears as to the intended term of the debt. There is no need to speculate about or be concerned with the purposes of the respective parties to the transactions; the agreements reached can be readily ascertained from the documents executed. Appellant cites no Texas case holding that a note payable "on demand, but if no demand is made," at a stated time or times should be construed as not capable of being demandable as to the balance due at any time prior to payment in full. All of the cases cited by appellant from other jurisdictions allowed demand to be made as an optional alternative to the date or dates specified for payment in the absence of a demand. No case or logic requires disregarding the express right to make demand and thereby mature the obligation. The construction of the note was a question of law to be determined by the trial court. *City of Pinehurst v. Spooner Addition Water Company, 432 S.W.2d 515 (Tex. 1968)*; *Myers v. Gulf Coast Minerals [**25] Management Corp., 361 S.W.2d 193 (Tex. 1962)*. As in *C&Z Inc. v. Oklahoma Tax Commission, 459 P.2d 601 (Okla. 1969)*, it was proper to construe the note "payable, at the convenience of the holder, either on demand or in installments . . . ." Appellant's fourth and fifth points of error are overruled.

[*419] FACT ISSUES RE CROSS-ACTIONS

As to the claim that fact issues prevented the summary judgment against appellant's cross-actions, it has already been determined that the $17,000 "brokerage fee" must be treated merely as a reduction of the principal of the loan. There is no usury when such amount is spread over the full term of the note in accordance with Article 5069 § 1.07 (a) and the doctrine of *Nevels v. Harris, supra.* The note under consideration was unlike the one held usurious in *Smart v. Tower Land & Investment Company, supra*, where "neither the note nor the deed of trust, nor any of the other documents contains any kind of usury savings clause whatever" and there was "nothing in the note to indicate that [bank] would pursue any course of action other than to keep unearned interest." Under the reasoning in *Eubanks v. Simpson, supra*, the [**26] savings clause and provisions as to calculation of interest on unpaid principal and the application of payments to reduce principal prevent the demandability of the note from causing it to be construed as usurious as a result of such $17,000 deduction.

Since the undisputed evidence shows that appellant was not required to maintain his certificate of deposits as a compensating balance, but could and did remove them from the bank, their existence did not cause or result in usury.

As to asserted breaches of contract, the express provisions of the note with regard to when the obligation is payable or may be payable, cannot be contradicted by parol evidence in an attempt to show some breach of a commitment to provide "long term financing." The terms set out in the note were accepted by appellant without any contemporaneous written commitment modifying them. Appellant's affidavit as to the purpose of converting interim financing into permanent long term financing pursuant to an agreement allegedly reached does not permit his contradiction of the express and unambiguous terms of the written agreements which he executed with appellee bank. Any other agreements which had been made were [**27] superseded by the express terms put in writing on April 3, 1978. Similarly, any undertaking on the part of appellee bank to arrange financing was not preserved by a written agreement which might be construed together with the note and deed of trust which reduced the transactions as of April to written contractual arrangements which were accepted. Appellant's acceptance and participation in such arrangements would amount to an accord and satisfaction of any previous existing duty inconsistent with the written terms ultimately established.

With regard to any action based on negligence, appellant fails to allege or show any basis for appellee bank's obligation to disclose to appellant the meaning of the written instruments which appellant signed or to disclose anything with respect to the other alleged failures on the part of the appellee bank to make disclosures claimed to constitute alleged negligence. Appellant's tenth point of error as to material fact issues on negligence is related only to appellee bank's alleged status as a broker; any contentions as to other claims of negligence were waived by not being supported or argued in any way. The parol evidence

rule prevents appellant [**28] from showing any obligation which contradicts those expressly set out in the transaction documented. The trial court properly granted summary judgment as to appellant's cross-actions, because no genuine issue of fact was raised in support of such allegations and contentions. The undisputed evidence shows that appellee bank was not acting as a broker, but was a party to the transactions which culminated on April 3, 1978.

CONCLUSION

In summary, the trial court properly entered a declaratory judgment construing the note in accordance with its terms after being presented with a justiciable controversy under the pleadings of the parties. The court was able to and did finally resolve that controversy, and it determined the asserted defenses and cross-actions on their merits. Under proper summary judgment procedures the appellant was required [*420] to support any affirmative defenses and cross-actions with affidavits or other competent evidence, but did not raise any fact issues in support thereof. The note was not ambiguous and there was no occasion for parol evidence as to its meaning. The savings clause here was no mere disclaimer of illegal intent, but a disclaimer of any [**29] contractual commitment for interest in excess of the maximum rate permitted under the laws of the State of Texas. There was no usury contracted for, charged or received by reason of the deduction of the $17,000 from the face amount of the loan or by reason of the existence of the certificates of deposit on which appellant received interest and later withdrew the principal. The provisions of Article 5069 § 1.07 (a) are applicable to this loan secured by real property so as to allow spreading of the $17,000 deduction if treated as pre-paid interest along with the interest component of the monthly installments which were scheduled to extend over a 15 year period. Appellant contends the $17,000 was not "interest payable *under this note*" or under the deed of trust which also contains the savings clause. If this contention were accepted, then the $17,000 would have to be considered merely as a reduction of the amount loaned, so that there would be no interest other than the 9 1/2% on the "unpaid balance to date of each installment paid." Even if 9 1/2% was applied to the unpaid balance of the face amount of the note (making a rate of only 9.596% -- i.e. 100/99X99 1/2%) until the [**30] complete collection of such interest and the $1,683,000 loaned, at which time the $17,000 excess of the face amount would be collected, that sum would have been effectively "spread" so as to amount to a total of interest ($2,189,955.20 + $17,000.00 = $2,206,995.20 by calculation) of less than 10% even without the applicability of the savings clause. Interest charged as of May 4, 1981, including the $17,000, amounted to only 9.65%. There was no evidence of waiver, estoppel or failure of consideration resulting from the transactions involved, nor was there any breach of any properly established contractual obligation on the part of the appellee bank. Neither was there any showing of the negligent breach of any duty on the part of the bank, and as result, no fact issue was raised which prevented the final entry of summary judgment declaring the appellee bank's right to make demand. The trial court properly denied the defenses asserted when it included in the final judgment the statement that "all relief not expressly granted is denied," in addition to the adjudication that appellant take nothing by his cross-actions.

The judgment of the trial court is in all things affirmed.

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In re Cadillac Wildwood Dev. Corp.

United States Court of Appeals for the Sixth Circuit

May 26, 1993, Filed

No. 92-2037

Reporter
1993 U.S. App. LEXIS 13287 *

In re Cadillac Wildwood Development Corporation, Debtor. Cadillac Wildwood Development Corporation, Plaintiff-Appellant v. Northwestern Savings and Loan Association, Defendant-Appellee

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported as Table Case at: *995 F.2d 1066, 1993 U.S. App. LEXIS 21058*.

Prior History: United States District Court for the Western District of Michigan. District No. 92-00308. McKeague, District Judge.

Case Summary

Procedural Posture
Appellant debtor sought review of the judgment from the United States District Court for the Western District of Michigan that held that Michigan's "corporate exception" to its usury statute precluded the debtor, as a corporate borrower, from asserting the defense of usury to appellee creditor's claim in the debtor's chapter 11 bankruptcy.

Overview
The creditor financed a condominium project for the debtor. The creditor filed a proof of claim. The loan, upon which the creditor's claim was based, specified an interest rate of 16 1/2 percent. The debtor contended that the usury law kicked in, and the aggrieved corporate party could properly invoke the general usury statute, which had the effect of denying the creditor any interest and granting the debtor certain costs and fees. The court ruled that the corporate exception recognized that corporations typically entered loan agreements for business purposes, advised by expensive corporate lawyers, and were thus in a better position to bargain with lenders for fair rates, and to assess their own ability to afford high rates of interest. In any event, the record showed nothing suggesting that the debtor was in desperate straits when it sat down with the creditor to negotiate the loan, or that the alleged overcharges resulted from the creditor's taking advantage of loan terms the debtor missed due to a lack of sophistication. The court found that the debtor's proper remedy was in contract if it believed the creditor charged it more than the agreed-upon rate.

Outcome
The court affirmed the judgment.

Judges: BEFORE: JONES and BATCHELDER, Circuit Judges, and ENGEL, Senior Circuit Judge.

Opinion by: PER CURIAM

Opinion

PER CURIAM.

Cadillac Wildwood, a Michigan real estate developer, filed Chapter 11 bankruptcy in 1982. A major creditor, Northwestern Savings & Loan, had financed a condominium project which had apparently been Cadillac's primary *raison d'etre*; Northwestern filed a proof of claim for $ 400,000 in principal and $ 125,306.68 in interest with the Bankruptcy Court in 1985. The loan upon which Northwestern's claim was based, written in 1980, specified an interest rate of 16 1/2%. In 1991, Cadillac (now operating under a plan of reorganization) filed an objection to Northwestern's claim which contended that the loan was tainted with usury due to an overstatement [*2] of the amount of interest owed, improper calculation of interest effectively yielding Northwestern a rate greater than 16 1/2%, and an overcharge for loan closing costs. Both the Bankruptcy Court and the District Court held that Michigan's "corporate exception" to its usury statute precluded Cadillac, as a corporate borrower, from asserting the defense of usury. We agree.

Michigan's usury law specifies, in relevant part, that

> the interest of money shall be at the rate of $ 5.00 upon $ 100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum.

M.C.L. § 438.31. In order to comport Michigan law with economic reality, the legislature has provided a host of exceptions to the statute, including the so-called "corporate exception" at issue in this case, which provides:

> A . . . corporation . . . may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

M.C.L. § 450.1275. Cadillac [*3] argues, in essence, that this statute prohibits a corporate borrower from claiming the defense of usury only where a lender has specified an interest rate in writing *and* has actually charged that agreed-upon rate. Where a lender overcharges his customer, even inadvertently, Cadillac contends, the usury law kicks in, and the aggrieved corporate party may properly invoke the general usury statute, which has the effect of denying the lender any interest and granting the debtor certain costs and fees. M.C.L. § 438.32.

We find no Michigan caselaw to support Cadillac's argument. On its face, the corporate exception provision is unambiguous; the second clause is not conditioned on the first. It simply states two propositions: first, corporations may contract in writing to borrow at any rate of interest, and second, corporations may not invoke the defense of usury. The Michigan courts have said as much, holding that the corporate exception "has been held to effectively repeal the usury statutes insofar as corporations are concerned." Bob v. Holmes, 78 Mich. App. 205, 259 N.W.2d 427, 433 (1977). See also Allan v. M & S Mortgage Co., 138 Mich. App. 28, 359 N.W.2d 238 (1984) [*4] ("If a loan is made to a corporation, the corporation, by statute, is prohibited from asserting the defense of usury.") Cadillac argues that the statute has been changed since these cases were decided. This is true enough, but if anything, the scope of the corporate exception has been broadened, not narrowed, and most of the changes have been at best cosmetic.

Cadillac's interpretation of the corporate exception clashes with the legislative policy which motivated the provision. "The purpose of the usury law is to protect the necessitous borrower." Allan, 359 N.W.2d at 242. While Cadillac would like us to believe it is a "necessitous borrower," it would be unreasonable to stretch *Allan* (which held that lenders cannot force individual borrowers to incorporate in order to permit lenders to charge higher rates) to permit certain "needy" corporations to be protected under the usury statute, which quite clearly excludes all corporations from its protection. The exception, if Cadillac's construction be accepted, would clearly swallow the rule. More importantly, inasmuch as the usury laws "protect the necessitous borrower," they are [*5] meant to even the weight of bargaining power between lender and borrower, to protect "desperate and unsophisticated borrowers" from "loan sharks." Allan, 359 N.W.2d at 242 (quoting Schneider v. Phelps, 41 N.Y.2d 238, 242-43, 391 N.Y.S.2d 568, 359 N.E.2d 1361 (1977)).

The corporate exception recognizes that corporations typically enter loan agreements for business purposes, advised by expensive corporate lawyers, and are thus in a better position to bargain with lenders for fair rates, and to assess their own ability to afford high rates of interest. In any event, the record shows nothing suggesting that Cadillac was in desperate straits when it sat down with the Bank to negotiate the loan, or that the alleged overcharges resulted from the Bank's taking advantage

of loan terms Cadillac missed due to a lack of sophistication. As both the Bankruptcy Court and the District Court correctly noted, Cadillac's proper remedy is in contract if it believes Northwestern charged it more than the agreed-upon rate. If the usury law ought be stretched to accommodate "necessitous" corporate [*6] borrowers, Cadillac should suggest this to the Michigan legislature, not at the bar of this court.

For the reasons explained above, the judgment of the District Court is **AFFIRMED.**

Concur by: ENGEL

Concur

ENGEL, Senior Circuit Judge, concurring. I concur in the affirmance of the judgment of the district court, but I am not sufficiently confident of its language to join in the majority opinion. In particular, I am uneasy with the majority's conclusion that a corporate borrower may never raise the defense of usury. The relevant Michigan statutory language is as follows:

> A domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may be [*sic*: by] agreement in writing and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

Mich. Comp. Laws § 450.1275, Mich. Stat. Ann. § 21.200(275). While the language cited is perhaps susceptible to the interpretation reached by the majority, I am too troubled by the term "and not otherwise" to hold outright that the defense of usury in Michigan is altogether denied to corporate borrowers.

The difficulty with [*7] the broader language employed by the majority is that it would appear to preclude a usury defense when the corporate borrower has agreed to pay a rate of interest in excess of the legal rate, but has done so orally through an agent, and not in writing. Whether such a circumstance might give rise to a defense of usury under the statute in question, I would leave to the determination of Michigan courts when and if those specific facts arise.

The case of *Bob v. Holmes, 78 Mich. App. 205, 259 N.W.2d 427 (1977)*, on which the majority relies, is of doubtful support. It cites only two cases, decided in 1930 and 1931, when the statute in fact did prohibit the defense of usury to all corporations. *Allan v. M & S Mortgage Co., 138 Mich. App. 28, 359 N.W.2d 238 (1984)*, is likewise of very little help to us here, since the *Allan* court was describing New York law, and since the case stood for the proposition, later abrogated by statute, that the defense of usury is available to Michigan corporations incorporated to obtain loans to further personal projects: "Where the loan is made to an individual [*8] borrower to discharge his personal debts and obligations, and not in furtherance of a corporate or business enterprise, the individual may assert the defense of usury." *Id. at 243*.

Nonetheless, the record does not persuade me that the Michigan legislature could have intended that the penalties of the usury laws should have been available to appellant under the facts of this case, where the excess charges involved simply a mistake in bookkeeping, a small closing charge of which the creditor was ignorant, and the use of a 360-day year in calculating interest. These charges, if not altogether *de minimis*, are certainly so arguable that to peg the defense of usury on them would be tantamount to awarding the debtor a windfall.

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Jersey Palm-Gross v. Paper

Supreme Court of Florida

July 20, 1995, Decided

No. 84,158

Reporter
658 So. 2d 531 *; 1995 Fla. LEXIS 1154 **; 20 Fla. L. Weekly S 389

JERSEY PALM-GROSS, INC., Petitioner, v. HENRY PAPER, et al., Respondents.

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Fourth District - Case No. 93-0732 (Palm Beach County).

Case Summary

Procedural Posture
The Fourth District Court of Appeal (Florida) certified conflict with another district and applied for review to determine whether the existence of a usury savings clause in loan documents removed the determination of usurious intent from a factual inquiry and proved as a matter of law that the lender could not have willfully or knowingly charged or accepted an excessive interest rate.

Overview
The supreme court held that the use of a usury savings clause could not, alone, absolutely insulate a lender from a finding of usury. The court adopted the district court's holding that a usury savings clause was one factor to be considered in the overall determination of whether a lender intended to exact a usurious interest rate. The court noted that a contrary holding would allow lenders to charge excessive interest rates and avoid punishment by writing a disclaimer into the contract. Furthermore, the court held that the district court's finding that petitioner lender violated usury laws, despite having a usury savings clause in the contract, was supported by the evidence where petitioner knew that respondent borrowers were in desperate need for funding and used that not only to receive a rate of interest on the loan, but to gain an interest in respondent's partnership. The court noted that although the loan agreement contained a usury savings clause, the agreement giving petitioner an interest in respondent's partnership did not have such a clause, and it was, therefore, questionable whether the clause was even intended to apply. The district court's decision was approved.

Outcome
The court approved the district court's ruling that petitioner lender had violated usury laws by charging an excessive interest rate to respondent borrowers, and held that the use of a usury savings clause did not, alone, insulate a lender from a finding of usury. Rather, the use of such a clause was but one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate.

Counsel: Daniel S. Pearson and Lucinda A. Hofmann of Holland & Knight, Miami, Florida, for Petitioner.

Robert W. Weinberger of Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, Florida, for Respondents.

Judges: ANSTEAD, J., GRIMES, C.J., and SHAW, KOGAN, HARDING and WELLS, JJ., concur. OVERTON, J., concurs with an opinion, in which WELLS, J., concurs.

Opinion by: ANSTEAD

Opinion

[*532] ANSTEAD, J.

We have for review *Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th DCA 1994)*, in which the Fourth District certified conflict with *Forest Creek Development Co. v. Liberty Savings & Loan Ass'n, 531 So. 2d 356 (Fla. 5th DCA 1988)*, *review denied, 541 So. 2d 1172 (Fla. 1989)*. We have jurisdiction. *Art. V, § 3(b)(3), Fla. Const.* We approve the decision below, and disapprove *Forest Creek* insofar as it holds that a usury savings clause precludes, as a matter of law, a finding of usury. *FACTS AND PROCEDURAL HISTORY*

We quote [**2] the following relevant facts from the Fourth District opinion below:

> The borrowers [Henry Paper and Anthony V. Pugliese, III] were partners in a real estate partnership which required capital to build a multi-tenant office building. The partnership owned land consisting of three prime lots in West Palm Beach worth $ 1,700,000, subject to a purchase money mortgage of $ 1,100,000 that was due shortly. To satisfy the purchase money mortgage and construct an office building on the land, the borrowers went to a [*533] bank to secure a loan. After obtaining an appraisal of the partnership assets and the project, the bank agreed to lend the partnership most of the needed capital. The loan amount, however, was $ 200,000 short of the estimated partnership needs. The borrowers needed a "bridge-the-gap loan."
>
> The borrowers approached Walter Gross (Gross), a real estate developer, and suggested that he become an equity partner in the partnership for an investment of $ 200,000. Gross reviewed the partnership assets and appraisal. Fully aware of the partnership's financial picture and needs, he refused to become an investor, but agreed to lend the partnership $ 200,000 and charge an [**3] interest rate of 15% for eighteen months, amounting to $ 45,000 in interest charges. By the time of closing, Gross had formed the appellant corporation, Jersey Palm-Gross, Inc., for the purpose of making the loan.
> Shortly before closing, Gross presented the borrowers with loan documents which included a demand for a 15% equity interest in the partnership as additional consideration for making the loan. Gross did not attempt to hide his motives for exacting an interest in the partnership. He testified that the partnership interest was an inducement to make the loan, even though he had previously agreed to loan the money at a 15% interest rate. Gross knew the value of the partnership based on the borrowers' disclosures and was aware of the borrowers' urgent need for funds. The borrowers were in desperate financial straits. With closing imminent, they were in no position to bargain or to seek another source of the money.
>
> The lender brought suit when the borrowers failed to repay the loan. The borrowers' defense was that the loan was usurious from its inception, and therefore, an unenforceable debt because the consideration for the loan, which included the partnership [**4] interest and the 15% interest rate, totaled 45% per annum in interest.

. . . .

> The trial court here made factual findings, on the evidence presented, that the net equity value of the partnership at the time the loan was made, based on partnership assets of $ 1,700,000 and debts of $ 1,100,000, was $ 600,000. . . . The trial court correctly calculated the effective interest rate at 45% per annum over the eighteen month loan period, with the partnership interest of $ 90,000 (15% interest in partnership valued at $ 600,000) added to the $ 45,000 in interest charges (15% interest rate on loan of $ 200,000). The cost of the loan totaled $ 135,000, which was an effective interest rate of 45% on a loan of $ 200,000 for the eighteen month period of the loan.

639 So. 2d at 666. After a non-jury trial, the trial court concluded that Gross had "knowingly and willingly" charged and accepted a usurious consideration in exchange for making the $ 200,000 loan transaction. Consequently, the trial court found the promissory note and guarantee unenforceable as usurious and ordered that Gross forfeit the entire principal amount of the loan pursuant to *section 687.071(7), Florida [**5] Statutes* (1991).

On appeal, Gross argued that the trial court had failed to properly consider a usury savings clause contained in the promissory note in determining the issue of intent. The Fourth District upheld the trial court's finding of usury and, in its analysis, posed the following question:

> Whether the existence of a contractual disclaimer of intent to violate the usury laws commonly known as a "usury savings clause" in the loan documents in this case removes the determination of usurious intent from a factual inquiry and

> conclusively proves as a matter of law that the lender could not have "willfully" or knowingly charged or accepted an excessive interest rate.

639 So. 2d at 668. In answering this question in the negative, the Fourth District held that "[a] usury savings clause is one factor to which the finder of fact should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned." Id. at 671.

[*534] *LAW AND ANALYSIS*

The Florida Legislature enacted Chapter 687, Florida Statutes (1993), to protect [**6] borrowers from paying unfair and excessive interest to overreaching creditors. This chapter sets limits on interest rates and prescribes penalties for the violation of those limits. Section 687.071(2), Florida Statutes (1993), defines criminal usury as the willful and knowing charge or receipt of interest in excess of 25% per annum. *Id.* The civil penalty for violating this statute is forfeiture of the entire principal amount. § 687.071(7), Fla. Stat. (1993).

In *Chandler v. Kendrick*, we defined "willful" in the following manner:

> A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so. "Willful" is sometimes used in the sense of intentional, as distinguished from "accidental," and, when used in a statute affixing a punishment to acts done willfully, it may be restricted to such acts as are done with an unlawful intent.

108 Fla. 450, 452, 146 So. 551, 552 (1933). We also explained the purpose and meaning of the usury statute:

> The very purpose of statutes prohibiting usury is to bind the power of creditors [**7] over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans. . . . It is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a *purpose in his mind to get more* than legal interest for the use of his money, and whether, by the terms of the transaction and the means employed to effect the loan, he may by its enforcement be enabled to get more than the legal rate.

Id. Subsequently, in Dixon v. Sharp, 276 So. 2d 817, 820 (Fla. 1973), we noted that: "Usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, *but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent*." *Id.* Moreover, "the question of intent is to be gathered from the circumstances surrounding the entire transaction." Id. at 821 (quoting River Hills, Inc. v. Edwards, 190 So. 2d 415, 423-24 (Fla. 2d DCA 1966)). Consequently, the ultimate arbiter on the issue of intent is the trial court because "the question of intent is one of fact." Rebman v. [**8] Flagship First Nat'l Bank, 472 So. 2d 1360, 1364 (Fla. 2d DCA 1985).

SAVINGS CLAUSES

A usury savings clause is a provision in a loan agreement that attempts to negate any other provisions in the agreement that might result in the extraction of an illegal rate of interest. The effect of a usury savings clause on a claim of usury has been addressed by several of our appellate courts. In Forest Creek, the Fifth District affirmed, without discussion, the dismissal of a count based on usury where the mortgage note contained a usury savings clause which provided:

> In no event shall the amount of interest due or payment in the nature of interest payable hereunder exceed the maximum rate of interest allowed by applicable law, as amended from time to time, and in the event any such payment is paid by the undersigned or received by the Holder, then such excess sum shall be credited as a payment of principal, unless the undersigned shall notify the Holder, in writing, that the undersigned elects to have such excess sum returned to it forthwith.

531 So. 2d at 357.

The Second District has approved of the trial court's consideration of a similar savings clause in determining [**9] whether a lender intended to charge excessive interest. In Szenay v. Schaub, 496 So. 2d 883, 884 (Fla. 2d DCA 1986), the lenders contended that a genuine error had been made in calculating the amount of interest in the promissory note. Pursuant to the

provisions of a usury savings clause, the trial court denied a usury claim and made an adjustment to the parties' agreement to bring the interest charged within legal limits. The district court held that although the agreement may have technically [*535] provided for a usurious rate of interest, the trial court acted within its fact-finding authority in relying upon the savings clause to determine that the lender had no intent to charge such an amount. *496 So. 2d at 884*. Similarly, in *First American Bank & Trust v. International Medical Centers, Inc., 565 So. 2d 1369, 1374 (Fla. 1st DCA 1990), review denied, 576 So. 2d 286 (Fla. 1991)*, the First District, while not directly addressing the effect of a savings clause, made the following observation:

> We do note that provisions in loan documents limiting the amount of interest payable to that authorized under applicable law have been recognized as valid and enforceable in this [**10] state and provide a complete defense to a charge of usury. In a case such as this, where the effective interest rate found to be usurious is so near the allowable maximum depending on disputed legal principles of valuation, a strong showing indeed must be made to invalidate such provisions in the loan documents . . . . We do not, however, find it necessary to review the sufficiency of the record to support the trial court's adverse ruling on this issue.

Id. (citation omitted).

Because of the lack of extensive discussion, we cannot be certain of the circumstances present in *Forest Creek*. However, contrary to any implied holding in that case, we conclude that a usury savings clause cannot, by itself, absolutely insulate a lender from a finding of usury. Rather, we approve and adopt the Fourth District's holding, that a usury savings clause is one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate. Such a standard strikes a balance between the legislative policy of protecting borrowers from overreaching creditors and the need to preserve otherwise good faith, albeit complex, transactions which [**11] may inadvertently exact an unlawful interest rate.

In rejecting the use of a savings clause as an absolute bar to a usury claim, we note, as have other courts, that a contrary holding would permit a lender to "relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done." *First State Bank v. Dorst, 843 S.W.2d 790, 792 (Tex. Ct. App. 1992)*(quoting *Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1050 (Tex. 1937))*. If approved, we believe this practice would undermine public policy as set by the legislature and defeat the purpose of Florida's usury statute. Indeed, such a practice might encourage lenders to charge excessive interest, since, even if caught, the only penalty would be the loss of the excess interest.

However, we also believe that savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances. For instance, we agree with Judge Pariente's illustration, in the majority opinion below, of the proper utilization of a savings clause:

> Where the actual interest charged is close [**12] to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent.

Jersey Palm-Gross, 639 So. 2d at 671. While not exhaustive, this illustration captures the essence of the legitimate use of a savings clause. This illustration is also consistent with the way savings clauses were discussed or applied in *Szenay* and *First American Bank & Trust*.

THIS CASE

We agree with the district court that there is no indication that the trial court in this case failed to apply the correct legal standard for determining usury or erred in its treatment of the savings clause. There is substantial competent evidence in the record to support the court's finding of usury. For example, there is evidence that the lender directly sought and received a 15% interest in the partnership, in addition to the 15% interest on the loan as initially agreed. The lender also knew "that the borrowers had an urgent need for the money." *Jersey Palm-Gross, 639 So. 2d at 668*. These circumstances support the trial court's finding of an intent on the part of [**13] the lender to extract an [*536] excessive rate of interest, and this finding, in view of those circumstances, is consistent with the law set out in *Chandler* and *Dixon*.

In addition, we note that there is no complex loan transaction involved here or any claim of a mistake in the mathematical calculations like that seen in *Szenay*; neither is the interest charged close to the legal limit as discussed in *First American Bank & Trust*. In short, unlike *Szenay* and *First American Bank & Trust*, there are no circumstances present that would require the trial court to apply the usury savings clause to avoid the excessive interest. Further, the entire additional consideration of the 15% interest in the venture would have to be stricken to avoid the excessive interest charged. As noted in *First State Bank*, that would clearly be giving effect to a lender's "disclaimer of any intention to do that which under his contract he has plainly done." We decline to mandate such an outcome here.

It is also noteworthy that the usury savings clause in this case was not included in the agreement granting the lender a 15% interest in the partnership. Rather, the savings clause was contained [**14] only in the promissory note which, of course, contained a provision for lawful interest of 15%, and contained no reference to the additional consideration demanded by the lender. Under such circumstances, it is questionable whether the savings clause was even intended to apply to the separate agreement for an interest in the venture.

Jersey Palm-Gross, Inc. also asserts that the trial court should have concluded that the instant transaction, while arguably providing for an excessive interest rate on the date of closing, was reduced to nothing more than a speculative hope for profit after the partnership incurred a debt of approximately $ 2,000,000 to finance its development project. We disagree.

First, it is important to note that at the same time the venture incurred a debt of $ 2,000,000, it received an asset of $ 2,000,000 in the form of proceeds of the development loan. Second, and more importantly, however, *section 687.03(3), Florida Statutes* (1993), in pertinent part instructs that:

> Any payment . . . charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest shall be valued as of the date [**15] received and shall be spread over the stated term of the loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation for the purpose of determining the rate of interest.

Pursuant to this section, the trial court was required to value the partnership interest as of the date received, which was March 27, 1990. The evidence presented at trial fully supports the trial court's valuation of the venture's worth on this date.

Lastly, if a trial court accepted the lender's position, it would be speculating as to the real estate development venture's chances of success at the time the lender joined the venture. That speculation, of course, could result in the lender's interest in the venture being set at an estimated value ranging from worthless to one many times its initial value. While there may be instances that might permit or require such speculation, we find no error in the trial court's failure to do so under the circumstances presented here. There is a sound and substantial basis in the evidence for the trial court's valuation, and for its ultimate finding on the usury issue.

Accordingly, we approve the Fourth District decision [**16] below and disapprove *Forest Creek* insofar as it is inconsistent with this opinion.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING and WELLS, JJ., concur.

OVERTON, J., concurs with an opinion, in which WELLS, J., concurs.

Concur by: OVERTON

Concur

OVERTON, J., concurring.

I concur because I believe that the trial judge, under the state of this record, could believe that the lender in this instance, at the time of making the loan, intended to charge a usurious rate of interest irrespective of the [*537] savings clause in the loan

documents. I write to emphasize that a savings clause is still a valid factor--but not the exclusive factor--in determining the intent of the lender at the time of making the loan. A savings clause should have the purpose of assuring that usurious interest is not charged. The borrower, as the movant or claimant, has the burden of proof to establish the usurious intent of the lender.

WELLS, J., concurs.

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Karel v. Jrck Corp.

Court of Appeals of Michigan

May 10, 2012, Decided

No. 304415

Reporter
2012 Mich. App. LEXIS 903 *

THOMAS KAREL, Plaintiff/Counter-Defendant-Appellee, v JRCK CORP., RAUL RODRIGUEZ, and JENNIFER RODRIGUEZ, Defendants/Counter-Plaintiffs-Appellants.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Kent Circuit Court. LC No. 08-001469-CK.

Judges: Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

Opinion

PER CURIAM.

In this action to enforce the terms of a promissory note, defendants, JRCK Corp. and Raul and Jennifer Rodriguez, appeal as of right the trial court's order denying, in part, their motion for summary disposition relating to the application of the wrongful-conduct rule. For the reasons stated in this opinion, we affirm.

This case arises from defendants' failure to repay a loan. Plaintiff loaned JRCK $230,000 pursuant to the terms of a promissory note.[1] The note provided that the interest rate was 17.5 percent. The note further provided that, in the event of a default:

> All sums not paid when due shall bear interest between the due date until the payment date at the annual rate of 10 [percent] over the above-specified interest rate of 17.5 [percent] on the principal of this Note (a combined annual interest rate of 27.5 [percent]) . . . or if such rate is usurious, the highest legal rate.

JRCK failed to meet its repayment obligation, and plaintiff sued to collect on the note. It is [*2] not disputed that plaintiff's complaint sought a criminally usurious amount of interest. Defendants filed a counter-complaint alleging that plaintiff's demanded interest violated the usury statutes.

After a series of procedural motions not at issue in this appeal, plaintiff filed an amended motion for summary disposition on May 26, 2010. Plaintiff's motion was brought pursuant to *MCR 2.116(C)(10)*, and alleged there was no genuine issue of material fact that defendants were required to satisfy the terms of the promissory note. On June 15, 2010, defendants filed a response to plaintiff's motion for summary disposition and their own motion for summary disposition, relying on *MCR 2.116(I)(2)* and *MCR 2.116(C)(8)*. Defendants argued that the wrongful-conduct rule barred any recovery by plaintiff due to the charging of criminally usurious interest.

On December 3, 2010, a hearing on the parties' competing motions for summary disposition was held. On February 11, 2011, the trial court entered its opinion and order that is the subject of this appeal. The trial court determined that the promissory note was not facially usurious, but that the interest sought by plaintiff was usurious. Therefore, [*3] under the wrongful-conduct

[1] Raul and Jennifer, who formed the corporate entity JRCK, both personally guaranteed repayment of the loan.

rule, the trial court barred plaintiff from recovering interest, fees, or costs under the promissory note, but did not bar plaintiff from recovering the principal.

On appeal, defendants argue that the trial court erred in determining that plaintiff was not barred from recovering the principal of the note under the wrongful-conduct rule.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi, 475 Mich 558, 567; 719 NW2d 73 (2006)*. Defendants' motion for summary disposition was brought pursuant to *MCR 2.116(I)(2)*, premised on an argument that *MCR 2.116(C)(8)* clearly barred plaintiff from recovery based on the wrongful-conduct rule. "Under *MCR 2.116(I)(2)*, summary disposition is properly granted in favor of the nonmoving party if that party, rather than the moving party, is entitled to judgment." *Auto-Owners Ins Co v Martin, 284 Mich App 427, 433; 773 NW2d 29 (2009)*.

MCR 2.116(C)(8) allows a trial court to grant summary disposition where the opposing party "has failed to state a claim on which relief can be granted." "A motion for summary disposition brought under *MCR 2.116(C)(8)* tests the legal sufficiency of the complaint [*4] on the basis of the pleadings alone." *Beaudrie v Henderson, 465 Mich 124, 129; 631 NW2d 308 (2001)*. For purposes of a motion under *MCR 2.116(C)(8)*, "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999)*. The promissory note was a part of the pleadings, as it was the written instrument plaintiff's claim was based on and, therefore, "is a part of the pleading for all purposes." *MCR 2.113(F)(2)*.

We also review matters of contract interpretation de novo. *DaimlerChrysler Corp v Wesco Distribution, Inc, 281 Mich App 240, 245; 760 NW2d 828 (2008)*.

In *Orzel v Scott Drug Co, 449 Mich 550, 558; 537 NW2d 208 (1995)*, the Court described the wrongful conduct rule as stemming from two "maxims:" (1) "a person cannot maintain an action, if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party;" and (2) "as between parties in pari delicto, that is equally wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." However, "[t]he [*5] mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id. at 561*.

Further, for the wrongful-conduct rule to bar recovery "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id. at 564*. "An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish his cause of action without showing or having to rely upon such act or transaction." *Id*. (quotation omitted).

Defendants argue that the trial court erred in failing to preclude plaintiff from enforcing the promissory note to collect the principal based on the wrongful-conduct rule where plaintiff violated Michigan's criminal usury statutes; *MCL 438.41*, which bars interest rates "exceeding 25% at simple interest per annum," and *MCL 438.42*, which bars the possession of usurious [*6] loan records.

In this case, it is not disputed that plaintiff violated *MCL 438.41* by charging a usurious interest rate; however, as the trial court correctly found, the promissory note was not facially usurious. The default interest rate was stated as 27.5 percent, but this was qualified by the statement that "if such rate is usurious, the highest legal rate." The plain language of the contract provides that if the default rate is usurious, it is reduced to the "highest legal rate." See *Shay v Aldrich, 487 Mich 648, 660; 790 NW2d 629 (2010)*. "[C]ontracts must be construed so as to give effect to every word or phrase as far as practicable." *Klapp v United Ins Group Agency, Inc, 468 Mich 459, 467; 663 NW2d 447 (2003)*. To find the promissory note to be usurious on its face, we would have to ignore the qualification regarding the interest rate. We "avoid an interpretation that would render any part of the contract surplusage or nugatory." *Id. at 468*. Consequently, the trial court did not err in determining that the promissory note was not, on its face, usurious, but that the charging and seeking of a usurious interest rate was wrongful conduct. *MCL 438.41*.

Further, in order for the criminal [*7] act of charging an interest rate that is usurious to bar recovery of the principal on the note, there must be a sufficient causal nexus between the charging of the illegal interest rate and the plaintiff's asserted damages. *Orzel, 449 Mich at 564*. In *Ward v Titan Ins Co, 287 Mich App 552, 557; 791 NW2d 488 (2010)*, this Court held that

the plaintiff was not barred from recovering work loss injuries resulting from an automobile accident, despite accepting wages "under the table" and failing to report the income on the plaintiff's taxes because "[t]he wrongful conduct rule does not apply because plaintiff's alleged failure to file income tax returns would be only incidentally or collaterally connected to his claim for work loss benefits." *Id. at 556-557*. We conclude that the same reasoning is applicable to this case. While the promissory note is obviously related to plaintiff's attempt to collect usurious interest, it is only incidentally related because the usurious rate of interest was not authorized by the terms of the note. Therefore, the trial court did not err in permitting plaintiff to recover the principal.

We note that on appeal, plaintiff presented an issue in his counterstatement [*8] of questions regarding his argument that the trial court erred in applying the wrongful-conduct rule to this case because *MCL 438.41* and *MCL 438.42* are not serious enough crimes to warrant application of the rule. Plaintiff's presentation of this issue constitutes an improper attempt to circumvent the rule requiring the filing of a cross-appeal. "Generally, failure to file a cross appeal precludes an appellee from raising an issue not appealed by the appellant." *Kosmyna v Botsford Community Hosp, 238 Mich App 694, 696; 607 NW2d 134 (1999)*. Plaintiff cannot neglect to file a proper cross-appeal and then request a decision "more favorable than that rendered below." *Turcheck v Amerifund Fin, 272 Mich App 341, 351; 725 NW2d 684 (2006)*.

Nevertheless, we reject plaintiff's argument that violation of the usury statutes does not constitute a serious enough crime to warrant application of the wrongful conduct rule. *MCL 438.41* and *MCL 438.42* unambiguously criminalize usurious lending and provide significant penalties for such conduct. Therefore, we conclude that the conduct prohibited by these statutes is serious enough to warrant the application of the wrongful conduct rule.

Affirmed.

/s/ William [*9] C. Whitbeck

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

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Meador v. Hotel Grover

Supreme Court of Mississippi

October 5, 1942, Decided

No. 34980.

Reporter
193 Miss. 392 *; 9 So. 2d 782 **; 1942 Miss. LEXIS 120 ***

MEADOR v. HOTEL GROVER et al.

Subsequent History: [***1] Suggestion Of Error Overruled November 9, 1942.

Prior History: APPEAL from the circuit court of Bolivar county.

HON. WM. A. ALCORN, JR., Judge.

Action by F. L. Meador, administrator of the estate of R. Herman Meador, deceased, against the Hotel Grover and another to recover damages for deceased's death. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture
Appellant estate administrator sought review of an order from the Circuit Court of Bolivar County (Mississippi), which entered judgment in favor of appellees, a hotel and an elevator operator, and dismissed an action by the administrator to recover damages for the deceased's death.

Overview
The decedent died when, as a passenger in the hotel's elevator, he became trapped between the elevator cage and the wall of an elevator shaft. After the injury, a hotel employee who attended the decedent failed to indicate to the police that the man was injured. The administrator's complaint alleged that the hotel negligently operated a defective elevator, that the operator was wilfully negligent in failing to stop the elevator upon discovering that the decedent was trapped, and that the hotel and its employees failed to render proper aid after the accident. The court, in reversing the trial court's judgment, found that the trial court erred in sustaining demurrers to the complaint. First, the court concluded that allegations of the hotel's failure to render reasonable care and of the operator's failure to stop the elevator each presented justiciable jury issues. Next, the court rejected the hotel's assertion that, because the decedent had visited the hotel as an invitee of prostitutes, the action was barred on the grounds that decedent was engaged in unlawful activity. The court found instead that no unlawful act of the decedent proximately contributed to his injury.

Outcome
The court reversed the trial court's judgment that had sustained demurrers to the administrator's complaint and remanded the case for a trial on the merits of the negligence action against the hotel and the elevator operator.

Counsel: Dugas Shands and **Alfred A. Levingston,** both of Cleveland, and **Sillers & Roberts,** of Rosedale, for appellant.

When Meador was injured, even though he might have been a trespasser, it was the duty of Sam Deloach and Mrs. Katherine Vaughn to render to him such reasonable care and attention as common humanity would dictate.

Hughes v. Gregory Bus Lines, 157 Miss. 374, 128 So. 96, 13 C. J. S., Carriers, 1414, Sec. 754; *Dyche v. Vicksburg, S. & P. R. Co., 79 Miss. 361, 30 So. 711*; *Yazoo & M. V. R. Co. v. Leflar, 168 Miss. 225, 150 So. 220*; *Alabama Great Southern R. Co. v. Taylor, 190 Miss. 69, 199 So. 310*; *New Orleans & N. E. R. Co. v. Humphreys, 107 Miss. 396, 65 So. 497*; *Boyd v. Alabama & V. Ry. Co., 111 Miss. 12, 71 So. 164*; *Yazoo & M. V. R. Co. v. Byrd, 89 Miss. 308, 42 [***2] So. 286*.

The second count of the declaration is based on gross, willful and wanton negligence. The case should go to the jury on the second count of the declaration, even if the court should be of the opinion that Meador was not rightfully and legally in the elevator, because it charges gross negligence.

The rule of law with reference to the duty owed a trespasser is that he should not be wantonly or willfully injured, or, in other words, that reasonable care should be exercised to avoid injuring him after his presence is discovered. This is the rule in Mississippi and every other state.

Bremer v. Lake Erie & W. R. Co., 318 Ill. 11, 148 N. E. 862, 41 A.L.R. 1345; *Gotch v. K. & B. Packing & Provisions Co. (Colo.), 25 P. (2d) 719, 89 A.L.R. 753*; annotations on 14 A.L.R. 151, 62 A.L.R. 1168, 74 A.L.R. 163; Sophia Cleveland v. Pine Bluff Arkansas River Ry., 44 L.R.A. (N. S.) 687; *Bobos v. Krey Packing Co., 317 Mo. 108, 296 S.W. 157*; *Young v. Columbus & G. Ry. Co., 165 Miss. 287, 147 So. 342*; *Murray et al. v. Louisville & Nashville R. Co., 168 Miss. 513, 151 So. 913*; *Christian v. Illinois Cent. R. Co., 71 Miss. 237, 15 So. 71*; *Railroad Co. v. Womack, 84 Ala. 149, 4 So. 618*; [***3] *Frazier v. Railroad Co., 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145*; *Fuller et al. v. Illinois Cent. R. Co., 100 Miss. 705, 56 So. 783*; *Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 2 So. 171*; *Dooley v. Mobile & O. R. Co., 69 Miss. 648, 12 So. 956*; *Louisville, N. O. & T. R. Co. v. Williams, 69 Miss. 631, 12 So. 957*; *Richmond & D. R. Co. v. Burnsed, 70 Miss. 437, 12 So. 958*; *Trico Coffee Co. et al. v. Clemens, 168 Miss. 748, 151 So. 175*; *Watson v. Holiman, 169 Miss. 585, 153 So. 669*; *Burks v. Yazoo & M. V. R. Co., 153 Miss. 428, 121 So. 120*; *Barmore v. Vicksburg, S. & P. Ry. Co., 85 Miss. 426, 38 So. 210*; 2 Restatement of the Law on Torts, Negligence, Sec. 336; 13 C. J. S. 1310, Sec. 700; 22 R. C. L. 924; 20 R. C. L. 59; 45 C. J. 679, Sec. 49; 4 R. C. L. 1050; 45 C. J. 749.

The first ground of the demurrer to the second count of the declaration raises the question that the gross and willful negligence of Sam Deloach, the operator of the elevator, "may have been personal to the defendant, Sam Deloach." It is to be noted that the demurrer does not charge that it was personal to Sam Deloach, but only that it "may have been" personal to him. In answer to this, it is only necessary to say [***4] that Sam Deloach was employed by the hotel company to operate the elevator and that is what he was doing at the time of the injury to Meador. Sam Deloach was transporting Meador from the ground floor of the hotel to an upper floor for the purpose of seeing a registered guest of the hotel. The hotel company knew that she was in the hotel for she was registered and had been assigned to a room. Meador was going to visit with the guest. The declaration alleges that this custom had been followed by the hotel company since May 25, 1937. Under these facts it is clear that the hotel company is even responsible for ordinary negligence, and the second count of the declaration alleges willful and wanton negligence. Even if it be conceded, for the sake of argument, that Meador was a trespasser on the elevator, still the hotel company is liable for willful and wanton negligence. We have hereinabove pointed out that willful and wanton negligence includes the failure to exercise ordinary care where the injured party is discovered in a place of danger.

The Hotel Grover Company contends that, under the declaration, the allegations of which are admitted by the demurrers, the Hotel Grover Company [***5] and R. Herman Meador were violating the law at the time of the accident, and, therefore, there can be no recovery. In the first place, even if R. Herman Meador had accomplished the purpose he had in going to the hotel, no wrong would have been committed and no statute violated. In the second place, Meador did not accomplish this purpose, but was only on his way to the room where the prostitute was. In the third place, it is immaterial whether or not Hotel Grover Company and R. Herman Meador were both violating a statute when the accident occurred, for that would not be a bar to a recovery, unless Meador's violation of some statute was the sole proximate cause of the injury complained of, and that is not the case here. Too, if Meador had been violating some statute which had been expressly enacted to prevent just such an accident as caused his death, that could be pleaded as contributory negligence and if found to be true by the jury would reduce the damages.

A plaintiff who has violated a legislative enactment designed to prevent a certain type of dangerous situation is barred from recovery for a harm caused by a violation of the statute if, but only if, the harm was sustained [***6] by reason of a situation of that type.

2 Restatement of the Law of Torts 1239, Sec. 469.

The rule stated in the Restatement of the Law of Torts applies in states where there is no comparative negligence statute. In Mississippi, even if the statute was enacted to prevent the very thing that occurred (and it was not) and was being violated at the time of the injury to the plaintiff, it would not bar his recovery unless it was the sole proximate cause of the injury, but would then only diminish the amount of his damages.

Frazier v. Hull, 157 Miss. 303, 127 So. 775.

The Hotel Grover Company is not in any position to invoke the unlawful act, if any, or Meador, because it was the one which occasioned the act of Meador. It furnished the place for him to go and knowingly permitted the prostitutes to be there and to receive the men guests.

It has also been held that a defendant cannot invoke the violation of a statute or ordinance by plaintiff as a defense where such violation is occasioned by his own negligence or unlawful act.

45 C. J. 971, Sec. 525.

See also *Everett v. Sturges, 46 Pa. Super. 612*; Grohn v. Lucy Mfg. Co. (Tex.), 426 S.W. 1059.

But conceding [***7] for the sake of argument that Meador was violating or about to violate a statute at the time he was injured, which is not a fact, even then, under the well established rule of law in Mississippi and all other statutes, that would not be a bar to recovery in this case.

Illinois Cent. R. Co. et al. v. Messina, 111 Miss. 884, 72 So. 779; *Illinois Cent. R. Co. v. Cole, 113 Miss. 896, 74 So. 766*; *Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82*; *E. L. Bruce Co. v. Bramlett (Miss.), 188 So. 532*; *Frazier v. Hull, supra*; 45 C. J. 970, Sec. 524.

Where the action is on a contract, the fact that the parties were violating the law at the time the contract was made might prevent a recovery, but this is not true when the action is in tort.

Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97, 44 A.L.R. 124.

But see the case of *Johnston v. Swift & Co., 186 Miss. 803, 191 So. 423*.

See also *Whitley v. Holmes, 164 Miss. 423, 144 So. 48*.

Appellee's main defense in this case is bottomed on the case of *Western Union Telegraph Co. v. McLaurin, 108 Miss. 273, 66 So. 739*, and his contention that Meador was engaged in an unlawful or immoral enterprise when he was hurt, [***8] and therefore he cannot recover against the defendant in this cause. We deny the application of the McLaurin case, and say that the case which controls this appeal in this particular is that of *Illinois Central Railway Co. v. Messina, 111 Miss. 884, 72 So. 779*, which case thoroughly discusses and distinguishes the McLaurin case from the case at bar. Under the Messina case, the appellant is unquestionably entitled to maintain this action.

Wynn, Hafter & Lake, of Greenville, and **Roberts & Smith** and **W. D. Jones,** all of Cleveland, for appellee.

Hotel company operating elevator in its building cannot be held guilty of negligence in failing to provide inner door for elevator where declaration fails to allege that company failed to install the type of elevator generally operated by careful and prudent business men engaged in the same business or that other persons had been injured thereby.

Newell Contracting Co. v. Flynt, 172 Miss. 719, 161 So. 298; *Distinguishing Stumpf v. Baronne Bldg. (Ala.), 135 So. 105*;

Leonard v. Herrman (Pa.), 7 Am. Neg. Rep. 506; *Russo v. Morris Bldg. & L. I. Co. (La.), 29 So. 26*; *Spindler v. American Express Co. (Mo.), 232 S.W. 690*; [***9] *Supreme Instruments Corp. v. Lehr, 190 Miss. 600, 1 So. 2d 242*.

The courts will refuse redress to one participating in a wrong where two persons are engaged in the same unlawful or immoral enterprise and in prosecuting it one is injured by the negligence of the other.

Johns v. State, 78 Miss. 663, 29 So. 401; *Reed v. Greenville, 83 Miss. 192, 35 So. 178*; *State v. Treweilder, 103 Miss. 859, 60 So. 1015*; *Stokes v. State, 92 Miss. 415, 46 So. 627*; *Distinguishing Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97*; *Distinguishing Ill. Cent. R. Co. v. Messina, 111 Miss. 884, 72 So. 779*; *Gilmore v. Fuller, 189 Ill. 130, 60 L.R.A. 286*; *Western Union Tel. Co. v. McLaurin, 108 Miss. 273, 66 So. 739*; *Williams v. Mobile & O. R. Co. (Miss.), 19 So. 90*; Code of 1930, Sec. 3472.

In order to become a passenger on an elevator and be entitled to protection as such, one must have a valid and enforceable contract to be transported, which contract may be either express or implied.

Odom v. Gulf & S. I. R. Co., 101 Miss. 642, 57 So. 626; *Alabama Great Southern R. Co. v. Harris, 71 Miss. 74, 14 So. 263*; *Mitchell v. Campbell, 111 Miss. 806, 72 So. 231*; *Menger v. Thompson, 128 Miss. 455, 91 [***10] So. 40*; *Ham v. Wilson, 123 Miss. 510, 86 So. 298*; *Rosenblatt v. Escher, 184 Miss. 274, 185 So. 551*.

Declaration in which it is necessary to allege and rely on immoral mission of plaintiff in order to show liability is demurrable, for when it becomes necessary in order to establish liability to show immoral acts of the injured party the court will decline to proceed further.

Western Union Tel. Co. v. McLaurin, 108 Miss. 273, 66 So. 739.

The allegations of any pleading are construed most strongly against the pleader, and when such allegations, which purport to state the facts in detail, fail to charge gross, wilful or wanton negligence, except by way of conclusion of the pleader, then only simple negligence, if any negligence at all, is charged by such pleading.

Hammontree v. Cobb Construction Co., 168 Miss. 844, 152 So. 279; *Georgia Casualty Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73*; 2 Thomp. Neg. 1264, Par. 52.

The operator of an elevator is not liable for the acts of its servant when done outside of the scope of his employment and not in the furtherance of the master's business unless such act be directed to be done by the master or ratified [***11] by him.

Illinois Cent. R. Co. v. Green, 130 Miss. 622, 94 So. 793.

Hotel owes trespasser in hotel for immoral purpose who appears drunk no duty to take charge of him, if injured, but has statutory duty and authority to call officers to remove drunken and immoral trespasser, and if mistake in judgment is made in calling officers, who it is presumed would properly care for him, there is no liability.

Odom v. Gulf & S. I. R. Co., 101 Miss. 642, 57 So. 626; *New Orleans & N. E. R. Co. v. Humphreys, 107 Miss. 396, 65 So. 497*; *Approving Boyd v. Alabama & V. Ry. Co., 111 Miss. 12, 71 So. 164*; Code of 1930, Sec. 5111.

Argued orally by **Dugas Shands** and **W. C. Roberts,** for appellant, and by **John T. Smith** and **Jerome S. Hafter,** for appellee.

Judges: Alexander, J., Smith, C. J., dissenting.

Opinion by: Alexander

Opinion

[**783] [*400] **Alexander, J.,** delivered the opinion of the court.

The declaration is in three counts. The first count alleges that plaintiff's decedent suffered fatal injuries on account of the negligence of the hotel company in maintaining a defective and dangerous elevator for the use of its guests and invitees. The allegation in this [***12] connection is as follows: "that the elevator and appurtenances thereto did not conform with the modern standards and requirements of safety and security for passengers required to use its facilities; that the defendant negligently allowed the spaces or openings to exist as aforesaid between the bottom south side of the elevator cage and the south side of the shaft and door openings at the respective floors; that the defendant failed to provide, as good prudence, sound judgment, and reasonable care for the safety of passengers on the elevator would dictate, an inner door on the cage of the elevator to protect the passengers from the obvious and patent danger of coming into contact with the wall of the shaft or the doors cut therein at the respective landings when said elevator was moving in an upward or downward course; that the defendant failed to provide the proper guards to prevent passengers on the said elevator from being caught in the said opening and spaces as aforesaid; that the defendant in operating [**784] an elevator was charged under the law with the highest degree of care and caution in protecting passengers on the said elevator from injuries that are inevitable in [***13] the operation of machinery unless [*401] proper and adequate safeguards are taken and made; that such proper and adequate safeguards were not taken and made by the defendant; that the defendant knew, or should have known, under the circumstances, that these defects and dangers existed." It was further alleged that while the deceased was a passenger in the elevator and "While the said elevator was thus proceeding in an upward direction, he then, in some manner either stumbled, fell, or was knocked from his then existing position in the elevator to the floor of the cage at the points where the south bottom edge of the said open side of the cage was passing the upper portion of the second floor elevator door or the open space which said door would have covered had it been closed. He was caught between the edge of the floor and said elevator cage and the door of the said second floor and the wall of the south side of the said elevator shaft between the top of the second and bottom of the third floors. After being so thrown and so caught as aforesaid, the elevator proceeded in an upward direction a distance of approximately 2 feet 11 inches, thereby crushing the body of the said R. [***14] Herman Meador between the said edge of the cage and the top of the facing of the second floor door and the side of the shaft."

The second count is grounded upon the alleged wanton and wilful negligence of the operator of the elevator in failing promptly to bring the elevator to an immediate stop upon discovering that decedent had fallen or been thrown to the floor at the point when he was exposed to the danger of being caught and crushed against the exposed side of the elevator shaft, whereby decedent was caught and crushed in the space between the elevator door and the side of the exposed shaft. This space is asserted to vary between 1 1/2 and 7 inches.

The third count is based upon the humanitarian doctrine that after the injury to decedent the hotel company and its servant, the elevator operator, were under a duty to provide necessary and proper ministration to the injured [*402] man by giving or procuring medical aid and comfort, all of which the defendants wilfully and wantonly neglected to do.

Defendants filed a motion for a bill of particulars clarifying certain generalizations of fact and particularly seeking an enlargement of the allegation that deceased at the time [***15] of his injury, "was in the hotel for the purpose of a business well known and long condoned by the defendant." Plaintiff's forthcoming bill of particulars elaborated this allegation with the explanation: "That on the night of January 13, 1941, and for several weeks prior thereto, with the knowledge of the defendant corporation, there were one or more women registered and staying in a room or rooms in said hotel who were there, to the knowledge of said defendant, corporation, and with its permission, for the purpose of practicing prostitution and had been so doing; and R. Herman Meador was in the hotel for the purpose of so engaging one of them, but whose name plaintiff does not know, and which purpose the defendants herein knew, and as the corporate defendant had customarily, habitually, and regularly allowed of such men in the past; and, for the purpose of knowingly allowing the said Meador to carry out his said purpose, the defendant corporation accepted him on its elevator in said hotel as a passenger to carry him up to the floor on which said women were staying, and he was being transported upward by the defendant corporation, acting by its employee within the scope of his employ, [***16] when he suffered the injuries herein complained of, and at that time he was a guest of the defendant corporation and a guest of a guest of said defendant corporation."

Defendants filed separate demurrers to each of the three counts, all of which were sustained, and, the plaintiff declining to amend, the suit was dismissed. Each demurrer includes as grounds that no negligence is shown by the allegations of the declaration, and that it is not alleged that the deceased was at the time of his injury using reasonable care for his own safety. The demurrers [*403] to the first and third counts also urged that the legal status of deceased as a guest was negatived by the declaration itself and further that the parties were jointly engaged in an unlawful enterprise and being in pari delicto no right of action existed in plaintiff. The second count was attacked specially on the ground that the alleged wilful act of the elevator operator was not that of the hotel but "may have been personal to the defendant, Sam Deloach." The third count is assailed further [**785] on the ground that the declaration reveals a sufficient compliance by the defendants with the legal duty to use reasonable [***17] care for one injured by the operation of their premises. Such contention is sought to be sustained by the disclosure of the declaration that: "The said defendant Sam Deloach informed and advised the night clerk, Mrs. Katherine Vaughn, that Meador had been seriously injured by the elevator. The said Mrs. Katherine Vaughn, Night Clerk, while engaged in the business of the defendant and within the scope of her employment, took charge of him in his helpless condition and called the Splendid Cafe by telephone and requested that police officers of the City of Cleveland then present in the said cafe be sent to the said hotel. Officers Elmo M. East and J. K. Bryant were in the said cafe and immediately responded to the request and proceeded to the Hotel Grover. Upon their arrival at the Hotel Grover the said Mrs. Katherine Vaughn motioned with her hand to the said R. Herman Meador, who was lying stretched out in the said lobby of the hotel, and told the officers, 'There he is, passed out'; that she directed the officers to take and remove him from the hotel, and the officers understood her by these words to mean that there was a man who was drunk and who had been made senseless or unconscious [***18] by or as the result of whiskey; that the officers did not understand her to mean that the man had been hurt."

Taking up the three demurrers in inverse order, we find that the allegations of the third count sufficiently present a justiciable issue. It was the duty of the hotel [*404] company to use reasonable care to see that one injured on its premises and by the operation of its business receives prompt and proper care and treatment to the end that his injuries, however occasioned, may not be aggravated by unnecessary and avoidable delay or inattention. Such care must be commensurate with the facilities available to the party charged and with the needs of the party injured, and such duty is heightened once the injured party is taken in charge by the other. *Yazoo & M. V. R. Co. v. Leflar, 168 Miss. 255, 150 So. 220*; *Hughes v. Gregory Bus Lines, Inc., 157 Miss. 374, 128 So. 96*; *Yazoo & M. V. R. Co. v. Byrd, 89 Miss. 308, 42 So. 286*; *Dyche v. Vicksburg, S. & P. R. Co., 79 Miss. 361, 30 So. 711*. It was error to sustain the demurrer to the third count.

The second count alleges wilful and wanton negligence on the part of the operator [***19] of the elevator in refusing to bring the elevator cage to an immediate stop after discovery of deceased's fall and peril. Even if the allegation of the demurrer, that the reason for the action of the operator "may have been personal" to him, had been bolder and more positive it would be insufficient to deny to plaintiff the right to sustain his allegation that the injury was wilfully and wantonly inflicted by a servant of the hotel company in the course of his employment upon one to whom the company owed a recognized duty. It was error to sustain the demurrer to the second count.

The demurrer to the first count raises the most serious point in the case. It denies that the legal status of the deceased was that of a guest, and invokes a doctrine by which the deceased is sought to be placed in pari delicto with the hotel company as a result of a joint engagement with the latter in an illegal enterprise, to wit, the conduct of a disorderly house. Putting aside, the question whether the hotel as so operated must be viewed in the light of such status, we come at once to the question whether the deceased was injured while and as a result of engaging in an illegal act.

[*405] For a [***20] plaintiff to be barred of an action for negligent injury under the principle of public policy implicit in the maxim ex dolo malo non oritur actio, his injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted. *Western Union Tel. Co. v. McLaurin, 108 Miss. 273, 66 So. 739*, L.R.A. 1915C, 487; *Norris v. Litchfield, 35 N.H. 271, 277, 69 Am. Dec. 546*; *Dudley v. Northampton Street Ry. Co., 202 Mass. 443, 89 N.E. 25, 23 L.R.A. (N. S.), 561*; *Cohen v. Manuel, 91 Me. 274, 39 A. 1030, 40 L.R.A. 491, 64 Am. St. Rep. 225*; *McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119*; *Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N.E. 555, 4 Am. St. Rep., 354*; *Welch v. Wesson, 72 Mass. 505, 6 Gray 505*; *Cox v. Cook, 96 Mass. 165, 14 Allen [**786] 165*; [***21] *Whitley v. Holmes, 164 Miss. 423, 144 So. 48*; *Steele v. Burkhardt, 104 Mass. 59, 6 Am. Rep. 191*; *Moran v. Dickinson, 204 Mass. 559, 90 N.E. 1150, 48 L.R.A. (N. S.), 675*; *Malloy v. American Hide & Leather Co., 1 Cir.,*

185 F. 776; Faggart v. Rowe, 33 Ga. App. 423, 126 S.E. 731; Hall v. Corcoran, 107 Mass. 251, 9 Am. & Rep. 30; Kimballs Case, 132 Me. 193, 168 A. 871; Johnson v. Boston & M. R. R., 83 N.H. 350, 143 A. 516, 61 A.L.R. 1178; Martinez v. Rein (La. App.), 146 So. 787; 1 Cooley Torts (4 Ed.), secs. 90, 92; 2 Wigmore, Select Cases on Law of Torts, pp. 171 et seq.; Chapin, Torts, p. 111; 38 Am. Jur., Negligence, secs. 169, 214; 18 Harvard Law Review 505.

The mere status of a plaintiff as a lawbreaker at the time of his injury is not sufficient of itself to bar him from resort to the courts. With respect to the particular act out of which the injury arose, his right to invoke the power of the law to protect can be neutralized only by the power of the law to punish. Before he can be held [*406] in pari delicto with defendant he must first be in delicto. [***22] Regardless of the propriety for a private or public condemnation of one for a moral delinquency, matters which affect his personal character or reputation are no concern of the courts in their examination of his rights as a litigant. Plaintiff by his conduct did not place himself outside the law. He is not caput lupinum. IV Black Comm. 320. Even illegality as such is but an abstraction and of itself neither causes injury nor creates disability. The status of the deceased as a violator of the law is thus made an irrelevant inquiry. Illinois C. R. Co. v. Messina, 111 Miss. 884, 72 So. 779; *Atlantic Coast Line Ry. Co. v. Weir, 63 Fla. 69, 58 So. 641, 41 L.R.A. (N. S.), 307,* Ann. Cas. 1914A, 126; Marland Refining Co. v. Duffy, 94 Okla. 16, 220 P. 846, 35 A.L.R. 52 and annotation; Gilman v. Central Vt. Ry. Co., 93 Vt. 340, 107 A. 122, 16 A.L.R. 1102 and annotation; Hooker v. Schuler, 45 Idaho 83, 260 P. 1027. In Hall v. Corcoran, supra; Cox v. Cook, supra; and Welch v. Wesson, supra, it was held that the status of plaintiff need not have been made a part of his action.

We must not be [***23] taken as holding that deceased at the time of his injury was engaged in an unlawful act. To so hold would be to attribute to deceased's intent all the incidents and disabilities incident to its consummation. It would mean even more than this: it would mean that the accomplishment of his purpose would have amounted to a violation of the law. All these questions are precluded by our conclusion that the commission of no unlawful act proximately contributed to his injury. We are of the opinion that the allegations of the first count if established would make out a case of negligence against the hotel company. Reversed and remanded.

Dissent by: Smith

Dissent

DISSENTING OPINION.

Smith, C. J., delivered a partially dissenting opinion.

I will assume, as the main opinion does, that the allegations of the first count of this declaration present a case [*407] of simple negligence in that the appellee failed to equip the cage of its elevator with an inner door and to keep that door closed while the elevator was ascending and descending, so as to prevent passengers therein from coming in contact with the wall of the elevator shaft. Whether this negligence can be complained of by the appellant [***24] depends upon the duty, if any, which the appellee owed Meador to care for his safety at the time of his injury. The existence of such a duty and its extent depend upon the relation existing between Meador and the appellee at that time.

The appellant's contention is that this relation was that which exists between an innkeeper and one who enters his inn for the purpose of visiting a guest therein; that of the appellee, in effect, is that it was that which exists between the keeper of a house of prostitution and one who enters it for the purpose for which it is being kept.

It appears from the bill of particulars filed by the appellant that Meador was on his way, when injured, to the room of a prostitute who was a guest of the appellee, for the purpose of having sexual intercourse with her. Meador was without the right to enter the appellee's premises for the purpose of having sexual intercourse with one of its guests without appellee's consent thereto. Curtis v. Murphy, 63 Wis. 4, 22 N.W. 825, 53 Am. Rep. 242; Jones v. Bland, 182 N.C. 70, 108 S.E. 344, 16 A.L.R. 1383. In support of a claimed right of Meador to enter the appellee's premises for that purpose, [***25] the bill of particulars alleges an implied invitation from the appellee to so do by setting forth in substance and great length, that from May 25, 1937, through January 13, 1941, the appellee repeatedly, [**787] habitually and regularly allowed prostitutes, known by it as such, to become its guests and ply their trade in their rooms, for which purpose men regularly, habitually, and frequently visited them

with the appellee's knowledge and approval, using its elevator while on such missions, which fact "was generally [*408] and commonly known and reputed in the City of Cleveland and the community there surrounding."

A house of prostitution is a house kept or resorted to, with the express or implied permission of the person in control thereof, for the purpose of prostitution; or, as defined in Section 2868, Code of 1930, is "any building . . . or portion thereof . . . in . . . which . . . prostitution is conducted, permitted, continued or exists." Keeping such a house is an illegal business, Section 3472, Code 1930, designated and forbidden as a nuisance, Section 2868, Code 1930. It is true that the appellee was an innkeeper, a legitimate business, but if it habitually permitted [***26] prostitutes to become its guests and ply their trade on its premises, it was also keeping a house of prostitution, for its legal and respectable business cannot change the character of its illegal and disreputable business. 27 C. J. S., Disorderly Houses, sec. 3, last paragraph. *Fitzgerald v. State, 10 Ga. App. 70, 72 S.E. 541*; *Smith v. State, 52 Ga. App. 88, 182 S.E. 816*; *State v. McGahan, 48 W. Va. 438, 37 S.E. 573*; see, also, cases cited in note 54 of 18 C. J., p. 1236. Since the purpose for which Meador entered the appellee's premises was not connected with its business of an innkeeper but with that of keeping a house of prostitution, the relation between him and the appellee, when he was injured, was that which exists between the keeper of such a house and one who resorts thereto for the purpose for which it is being kept.

I come then to the question of what duty, if any, the appellee owed Meador to care for his safety while on its premises. A house of prostitution and patrons thereof are both necessary for the accomplishment of the immoral and illegal purpose for which the house is maintained and its patrons visit it. Such a house, or rather [***27] the person conducting it, and its patrons are therefore jointly engaged in the same immoral and illegal enterprise, i. e., with the bringing about of illicit sexual intercourse. Parties to a joint and illegal enterprise are not [*409] charged with the duty of caring for the safety of each other in the prosecution thereof, and the only duty each owes to the other, in this connection, is to abstain from wilfully and wantonly injuring him. 1 Cooley on Torts, 4th Ed., sec. 90; 12 Jaggard on Torts, sec. 189; *Gilmore v. Fuller, 198 Ill. 130, 65 N.E. 84, 60 L.R.A. 286*; 2 Wigmore Select Cases on Law of Torts, 180.

The main opinion is based on the elementary and undoubtedly correct rule of law that "The mere status of a plaintiff as a lawbreaker at the time of his injury is not sufficient of itself to bar him from resort to the courts." The application of this rule, in that opinion, is based on the erroneous assumption that the use by Meador of the appellee's elevator did not enter into the accomplishment of the act for which he was using the appellee's premises, but was merely collateral thereto. It was necessary for Meador to use the facilities furnished by the appellee [***28] for obtaining access to the rooms in its building, and the elevator was a necessary equipment for the use of the appellee's patrons without which or its equivalent Meador could not have accomplished his intended purpose pursuant to the appellee's invitation therefor; consequently, the use by him of the elevator was a necessary step in the accomplishment of a purpose in which he and the appellee were interested--the appellee for the reason that its house-of-prostitution business depended on obtaining patrons therefor. The application of this rule is illustrated by *Johnston v. Swift & Co., Inc., 186 Miss. 803, 191 So. 423*, and *Whitley v. Holmes, 164 Miss. 423, 144 So. 48*, in both of which cases the illegal act (violation of the Sunday law), as the court in the Whitley case pointed out, had no causal connection with the plaintiffs' injury but was merely, in Mr. Bishop's apt language, a "collateral wickedness," as was the case in *Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82*. In *Illinois C. R. Co. v. Messina, 111 Miss. 884, 72 So. 779*, cited in the main opinion, and its companion case, *Illinois C. R. Co. v. Cole, 113 Miss. 896, 74 So. 766*, [***29] the [*410] right of the plaintiffs to safe carriage was not derived from the illegal contract or permission therefor but from the fact that they were accepted as passengers by the railroads, because of which "the local law . . . imposed a duty upon the carrier irrespective of the contract of carriage." *Southern Pacific R. Co. v. Schuyler, 227 U.S. 601, 33 S. Ct. 277, 281, 57 L. Ed. 662, 43 L.R.A. (N. S.), 906*. A large [**788] number of cases so holding will be found collated in *Meloon v. Davis, 1 Cir., 292 F. 82, at page 89*.

It follows from the foregoing views that I am of the opinion that the first count of the declaration presents no cause of action, but that the second count thereof does for the reason that it alleges that Meador's injury was caused by the wilful and wanton negligence of the appellee's servant in operating the elevator. I concur in holding that the third count of the declaration presents a cause of action.

I am requested by my Brother ROBERDS to say that he concurs in this opinion.

End of Document

Meklir v. J.C. Penney Co.

Court of Appeals of Michigan

July 5, 2005, Decided

No. 253089

Reporter
2005 Mich. App. LEXIS 1608 *; 2005 WL 1579658

KATHRYN MEKLIR, Trustee of the KATHRYN MEKLIR REVOCABLE LIVING TRUST, JAMES GINZLER, HILLARY SHAW, Trustee of the HILLARY SHAW REVOCABLE LIVING TRUST, LINDA WINKELMAN, individually and as parent and guardian of JACKLYN WINKELMAN and JULIE WINKELMAN, ROGER WINKELMAN, individually and as parent and guardian of JACKLYN WINKELMAN and JULIE WINKELMAN, BRENDA WORTH PASSER, SANDFORD PASSER, NORMAN HUBERT, ESTHER HUBERT, WENDY HUBERT, IRA MONDRY, REX LANYI, and KOLMAN VERONA, Plaintiffs-Appellants, v J.C. PENNEY COMPANY, INC., STANLEY G. FELDMAN, and STANLEY LTD, INC., Defendants-Appellees, and ROBERT J. BALL, individually and d/b/a RJB SALES, INC., Defendants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by, Sub nomine at *Meklir v. Feldman, 474 Mich. 1055, 708 N.W.2d 436, 2006 Mich. LEXIS 212 (Jan. 31, 2006)*

Related proceeding at *Hubert v. Morganroth, 2013 Mich. App. LEXIS 131 (Mich. Ct. App., Jan. 24, 2013)*

Prior History: Oakland Circuit Court. LC No. 2001-031248-NZ.

Disposition: Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Judges: Before: Gage, P.J., and Cavanagh and Griffin, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants J.C. Penney Company, Inc., Stanley Feldman, and Stanley Ltd., Inc. (Stanley). We affirm in part, reverse in part, and remand.

Plaintiffs invested in the "J.C. Penney Investment Program," which was organized by defendants Feldman and Robert J. Ball, a retired J.C. Penney executive. Plaintiffs believed this was a legitimate program that had been organized for temporarily financing the purchase of merchandise pending its resale to defendant J.C. Penney Company, Inc. Ball and Feldman allegedly advised investors that J.C. Penney orders its merchandise from manufacturers outside the United States and that it had a strict cancellation policy whereby orders were automatically cancelled [*2] if the merchandise did not arrive by the scheduled date. In that instance, the manufacturers were left with the merchandise. According to plaintiffs, Ball and Feldman explained to them that J.C. Penney would still accept the late merchandise if it could purchase it at a discount from a third party, who first acquired it from the manufacturers. Ball acted as the intermediary in these transactions and created defendant RJB Sales, Inc. to conduct the transactions. Ball and Feldman informed plaintiffs that Thomas Hutchens, J.C. Penney's president and chief operating officer, was participating in this operation on behalf of J.C. Penney.

In their complaint, plaintiffs explained how their contributions were to be used to finance these transactions:

> K) Inasmuch as JC Penney would not pay for the merchandise for about six or seven weeks after RJB's cash purchase from the vendors, RJB would finance these transactions by getting investors. Accordingly, RJB needed investors to finance the cash purchases for the initial six to seven week period.
>
> L) The JC Penney Investment Program was created as a means to finance these purchases until JC Penney would reimburse Ball/RJB for the transaction. [*3]
>
> M) According to the JC Penney Investment Program, each investor would receive a 4% return on their investment for each transaction or seven week cycle, and an additional 1% would go to Feldman for administrative costs.
>
> N) Depending on the availability of JC Penney merchandise purchase transactions, the total amount of returns would be approximately 28% over a period of one year.
>
> O) Feldman would provide each investor a post-dated check for the profit, dated approximately six to seven weeks after the investment. At any time, an investor could either demand the return of their principal upon two weeks notice or just roll the principal amount over into the next merchandise purchase transaction.
>
> P) Occasionally, JC Penney would demand a special quick turn around purchase which would generate a 4% return within one month followed by another 4% return the following month, totaling 8% return in an eight week period. Such opportunities occurred rather infrequently and on short notice, therefore, an investor would have to make an immediate decision to take advantage of such a transaction if it was presented.

Plaintiffs alleged that Feldman assured [*4] them that in the event the investment program ended, they would receive one hundred percent of their investment back without delay.

Plaintiffs allege that the investment program was in reality a Ponzi scheme [1] and that none of their money was ever invested in the program. In May 2000, plaintiffs were advised that RJB Sales had terminated operations. Although plaintiffs made formal demands for the return of their investment monies in December 2000, they did not receive their money back.

In 1997, the FBI and IRS launched an investigation into the J.C. Penney Investment Program. In approximately July 1998, the FBI and IRS informed J.C. Penney about Ball's and Feldman's use of [*5] J.C. Penney's name and Hutchens' involvement, as an agent, in the investment program. Plaintiffs allege that J.C. Penney had actual knowledge that Ball, Feldman, and Hutchens were operating the investment program to perpetrate a fraud on unsuspecting investors, and that J.C. Penney failed to warn the public about the fraudulent use of its corporate name.

Plaintiffs commenced this action against Ball and RJB Sales (the "Ball defendants"), Feldman, J.C. Penney, and Stanley, requesting compensatory damages of $ 3,700,016 for virtually every one of the claims asserted.

Plaintiffs moved for entry of a default judgment against the Ball defendants based on discovery violations. The trial court granted plaintiffs' motion and entered a default judgment against the Ball defendants in the requested amount of $ 11,737,908.72. [2] Defendants J.C. Penney, Feldman, and Stanley subsequently moved for summary disposition, arguing that because plaintiffs had obtained a default judgment against the Ball defendants for the entire amount of their damages, they were not entitled to pursue their tort claims against the remaining defendants. [3] Feldman and Stanley further argued that plaintiffs' contract [*6] claims should be dismissed because the alleged contract was unenforceable, inasmuch as it contained a usurious rate of interest. The trial court agreed and granted defendants' motions.

Plaintiffs first argue that the trial court erred in granting defendants summary disposition of their tort claims based on the prior default judgment against the Ball defendants. We review a trial court's decision on a motion for summary disposition de novo.

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[1] A "Ponzi" or "Ponzi scheme" is defined as "a swindle in which a quick return on an initial investment paid out of funds from new investors lures the victim into bigger risks." *Random House Webster's College Dictionary* (1997). It is named after Charles Ponzi, who was the organizer of such a scheme during 1919 and 1920. *Id.*

[2] The court trebled plaintiffs' damages of $ 3,700,016, for a total of $ 11,100,048, and awarded $ 637,860.72 in prejudgment interest.

[3] Because the Ball defendants are not parties to this appeal, the term "defendants" shall collectively refer only to defendants J.C. Penney, Feldman, and Stanley.

Pierson Sand and Gravel Inc v Keeler Brass Co, 460 Mich. 372, 379; 596 N.W.2d 153 (1999). The trial court granted defendants summary disposition on this issue, apparently under *MCR 2.116(C)(7)*. Summary disposition may be granted [*7] under *MCR 2.116(C)(7)* when an action is barred due to the entry of a prior judgment. The standard for reviewing a motion under *MCR 2.116(C)(7)* is as follows.

> A defendant who files a motion for summary disposition under *MCR 2.116(C)(7)* may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. *MCR 2.116(G)(3)*; *Patterson v Kleiman, 447 Mich. 429, 432; 526 N.W.2d 879 (1994)*. If such documentation is submitted, the court must consider it. *MCR 2.116(G)(5)*. If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Ostroth v Warren Regency, GP, LLC, 263 Mich. App. 1, 6; 687 N.W.2d 309 (2004)*, quoting *Turner v Mercy Hospitals & Health Services of Detroit, 210 Mich. App. 345, 348; 533 N.W.2d 365 (1995)*.]

If the pleadings or other documentary evidence reveal that there is no genuine [*8] issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Medical Center, 242 Mich. App. 703, 706; 620 N.W.2d 319 (2000)*.

Relying on *MCL 600.2956* and *MCL 600.2957*, the trial court reasoned that plaintiffs could not apportion any of their damages to J.C. Penney, Feldman, or Stanley for the following reasons: 1) the liability of each defendant in a tort action is no longer joint, but several only; 2) liability among multiple defendants must be allocated in direct proportion to each defendant's fault; and 3) plaintiffs obtained a default judgment against the Ball defendants for the full amount of their damages.

MCL 600.2956 provides that the liability of defendants in a tort action is several only, not joint. *MCL 600.2957* provides that the trier of fact "shall" allocate the fault of each party. The term "shall" designates a mandatory provision. *Salter v Patton, 261 Mich. App. 559, 565; 682 N.W.2d 537 (2004)*.

MCL 600.6304 provides [*9] that if there is no jury, the trial court is required to make findings regarding the total amount of each plaintiff's damages, and the percentage of total fault of each responsible person. The statute provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [*MCL 600.2925d*] regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal [*10] relation between the conduct and the damages claimed.
>
> (3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or [*MCL 600.2955a*] or [*MCL 600.6303*] and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in [*MCL 600.2925d*].
>
> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). . . .
>
> * * *
>
> (8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

In the instant case, plaintiffs requested [*11] and received a default judgment against the Ball defendants in the total amount of their damages, but there was never any determination that the Ball defendants were solely at fault. Indeed, Feldman's attorney admitted that it was not clear to what extent each party was at fault because discovery had not been completed. Although the court may have determined the total amount of plaintiffs' damages as required by subsection MCL 600.6304(1)(a), it never made any findings concerning the percentage of the total fault of all persons who contributed to plaintiffs' damages as required by subsection (1)(b). Ultimately, it was the trial court's duty to allocate fault. See also *Holton v A+* Ins Associates, Inc, 255 Mich. App. 318, 323-324; 661 N.W.2d 248 (2003). Because the trial court did not consider MCL 600.6304 when it entered the default judgment against the Ball defendants, that judgment did not preclude plaintiffs from proceeding on their claims against the remaining defendants.

This conclusion is reinforced by the Michigan Supreme Court's recent decision in Gerling Konzern Allgemeine Versicherungs AG v Lawson, 472 Mich. 44; [*12] 693 N.W.2d 149 (2005). The Court in *Gerling* concluded that while the forgoing statutes, adopted as part of tort reform legislation in 1995, eliminated joint and several liability in certain tort actions, they do not preclude every type of contribution claim. The Court held that a party may still seek contribution under MCL 600.2925a if "judgment has not been recovered against all or any of them," and the party seeking contribution has "paid more than his pro rata share of the common liability." Gerling, supra at 53. When the contribution statute is read in conjunction with MCL 600.6304(4), it requires that a party may not be compelled to pay damages in excess of the percentage of his fault, as found by the trier of fact under MCL 600.6304(1).

In Gerling, supra at 56-57, the Court clarified that MCL 600.6304

> applies specifically in those cases in which there is common liability among multiple tortfeasors, and it is inaccurate to interpret it as meaning that there is no longer any common liability among responsible tortfeasors. [*13] Rather, the common liability remains; what differ merely are the terms and conditions by which that liability must be satisfied. That is, by virtue of § 6304, in cases in which there has been a judgment, a tortfeasor need only pay a percentage of the common liability that is proportionate to his fault. Previously, where there had been a judgment, a tortfeasor could have been required to pay the entire amount of common liability and then seek contribution from other tortfeasors according to their degrees of fault.

The fact that this case involves a default judgment against some defendants does not affect the application of MCL 600.6304. That statute requires that, where there is common liability among multiple tortfeasors, each party is responsible only for his pro rata share of liability.

For these reasons, we conclude that the trial court erred when it relied on MCL 600.2956 and MCL 600.2957 to conclude that plaintiffs, having obtained a default judgment against the Ball defendants for the full amount of their requested damages, could not proceed with their action against defendants J.C. Penney, [*14] Feldman, and Stanley, where the court never determined, in accordance with MCL 600.6304, the percentage of fault of each party responsible for plaintiffs' damages. [4]

Defendant J.C. Penney argues, as an alternative ground for affirmance, that it was entitled to summary disposition pursuant to MCR 2.116(C)(10). Middlebrooks v Wayne Co, 446 Mich. 151, 166 n 41; 521 N.W.2d 774 (1994). Because the trial court did not address this issue, it is not preserved. ISB Sales Co v Dave's Cakes, 258 Mich. App. 520, 532-533; 672 N.W.2d 181 (2003). [*15] We may, however, review it because it is a question of law, and the facts necessary for its resolution have been presented. *Village of Hickory Pointe Homeowners* Ass'n v Smyk, 262 Mich. App. 512, 516; 686 N.W.2d 506 (2004).

Plaintiffs brought claims for fraud, misrepresentation, securities fraud, innocent misrepresentation, and negligent misrepresentation against J.C. Penney. Plaintiffs alleged that J.C. Penney was liable because it failed to warn plaintiffs that Feldman and Ball were not legitimately doing business with J.C. Penney, and that J.C. Penney had a duty to warn them of the Ponzi scheme upon learning of it from the FBI and the IRS. J.C. Penney sought summary disposition of plaintiffs' claims under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact about whether: 1) it ever made any false statements

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[4] Plaintiffs also argue that, even if summary disposition was properly granted with respect to their tort claims, the trial court erred in dismissing their claim for unjust enrichment, because such a claim does not sound in tort. Having concluded that the trial court erred in dismissing plaintiffs' tort claims, however, plaintiffs may proceed on their claim for unjust enrichment.

to plaintiffs concerning Feldman, Ball, or the investment program; and 2) it had a duty to notify plaintiffs of these defendants' activities.

A motion under *MCR 2.116(C)(10)* tests the factual support for a claim. Summary disposition should be granted if there is no genuine issue [*16] of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc, 466 Mich. 453, 461; 646 N.W.2d 455 (2002)*.

The first element plaintiffs must establish to succeed on their fraudulent misrepresentation claim is that J.C. Penney was responsible for a material misrepresentation that was false. *Bergen v Baker, 264 Mich. App. 376, 382; 691 N.W.2d 770 (2004)*. Plaintiffs have not identified any false statements made by J.C. Penney related to this investment scheme. Rather, plaintiffs only submitted evidence of misrepresentations by Ball and Feldman.

Plaintiffs appear to rely on silent fraud, which requires a duty to make a disclosure. Mere nondisclosure is insufficient. *Hord v Environmental Research Institute of Michigan (After Remand), 463 Mich. 399, 412; 617 N.W.2d 543 (2000)*. A duty to disclose typically arises when the plaintiff make inquiries, to which the defendant makes incomplete replies that are truthful but omit material information. *Id.*

In the instant case, plaintiffs do not allege that they made any inquiries of J.C. Penney at any [*17] time about the investment program. Furthermore, they have not established that J.C. Penney had a duty to disclose the truth about Ball's and Feldman's activities after it became aware of the investment scheme. Indeed, there is no indication in the record that J.C. Penney was aware that plaintiffs were investors in the scheme. At most, J.C. Penney could have made a public announcement disavowing its association with the scheme, but resorting to public notice has no assurance of reaching all affected parties, and, absent any inquiries, we are not persuaded that it had a legal obligation to do so. Therefore, under the circumstances, plaintiffs cannot prevail on a claim of silent fraud.

For the same reasons, plaintiffs cannot establish negligent misrepresentation. Negligent misrepresentation requires justifiable reliance to one's "'detriment on information prepared without reasonable care by one who owed the relying party a duty of care.'" *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust, 262 Mich. App. 485, 502; 686 N.W.2d 770 (2004)*, quoting *Law Offices of Lawrence J Stockler, PC v Rose, 174 Mich. App. 14, 30; 436 N.W.2d 70 (1989).* [*18] Plaintiffs have not established that J.C. Penney made erroneous representations to them or that J.C. Penney owed them a duty of care.

Plaintiffs' allegations involve misrepresentations made only by Ball and Feldman, not J.C. Penney. Further, there is no basis for concluding that either Ball or Feldman were acting as agents for J.C. Penney. Plaintiffs did not submit any evidence that would allow a trier of fact to find that J.C. Penney performed any affirmative acts to lead plaintiffs to believe that Ball or Feldman were acting as its agent, under either a theory of actual or apparent authority. *Alar v Mercy Memorial Hosp, 208 Mich. App. 518, 528; 529 N.W.2d 318 (1995)*; see also *Meretta v Peach, 195 Mich. App. 695, 699-700; 491 N.W.2d 278 (1992)*.

Accordingly, J.C. Penney is entitled to summary disposition of the claims against it. Thus, while we reverse the trial court's order granting summary disposition of plaintiffs' tort claims against defendants Feldman and Stanley, we affirm the order of summary disposition with respect to defendant J.C. Penney, albeit for reasons different than the trial court. *Spiek v Dep't* [*19] *of Transportation, 456 Mich. 331, 337; 572 N.W.2d 201 (1998)*; *Gleason v Michigan Dep't of Transportation, 256 Mich. App. 1, 3; 662 N.W.2d 822 (2003)*.

Plaintiffs also alleged various contract-based claims against defendants Feldman and Stanley. The trial court granted summary disposition of these claims because it concluded that the underlying contract included a usurious rate of interest and, therefore, the entire contract was unenforceable. We conclude that the trial court erred in dismissing these claims in their entirety.

Initially, we agree with the trial court that the parties' agreement should be characterized as a loan because plaintiffs alleged that they were assured that their principal investment would be returned. In *People v Lee, 447 Mich. 552, 558; 526 N.W.2d 882 (1994)*, the Court held that "a loan only occurs when there is an obligation to repay." See also *Lawsuit Financial, LLC v Curry, 261 Mich. App. 579, 588; 683 N.W.2d 233 (2004)*(a loan involves an absolute right to repayment). The trial court also correctly concluded that the loans are [*20] subject to the criminal usury statute, *MCL 438.41*, which prohibits charging a rate of interest in excess of twenty-five percent.

Contrary to what the trial court concluded, however, a contract is not unenforceable because it contains a usurious rate of interest. Where a loan violates the usury statutes, lenders are only barred from recovering any interest, late fees, court costs, or attorney fees. *MCL 438.32*; *Lawsuit Financial, supra at 590-591*. Thus, plaintiffs are only barred from attempting to collect interest at the alleged rate of twenty-eight percent. [5] Because a usurious interest rate does not make an instrument void, plaintiffs are not barred from enforcing other provisions of the agreement, such as the alleged provision requiring the full return of their principal. *Shaw Investment Co v Rollert, 159 Mich. App. 575, 580; 407 N.W.2d 40 (1987)*.

[*21] The trial court also held that because any underlying contract was unenforceable, plaintiffs could not prove privity to maintain their action for innocent misrepresentation. *United States Fidelity & Guaranty Co v Black, 412 Mich. 99, 119; 313 N.W.2d 77 (1981)*. Because the parties' underlying agreement was not void, however, the trial court erred in dismissing plaintiffs' innocent misrepresentation claim against defendants Feldman and Stanley. *Shaw Investment Co, supra at 580*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard A. Griffin

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[5] We find no merit to plaintiffs' claim that *MCL 438.31* authorized the higher rate of interest. Plaintiffs have failed to show that this statute is applicable to this case.

Midwest Bus. Credit v. Ttod Liquidation

Court of Appeals of Michigan

November 27, 2012, Decided

No. 305569

Reporter
2012 Mich. App. LEXIS 2380 *

MIDWEST BUSINESS CREDIT, L.L.C., Plaintiff-Appellant, v TTOD LIQUIDATION, INC. and LAPEER PLATING & PLASTICS, INC., Defendants-Appellees. and DOTT ACQUISITION, L.L.C., Defendant

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Midwest Bus. Credit, L.L.C. v. Ttod Liquidation, Inc., 2013 Mich. LEXIS 784 (Mich., May 28, 2013)*

Prior History: [*1] Lapeer Circuit Court. LC No. 10-043082-PD.

Judges: Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

Opinion

PER CURIAM.

Midwest Business Credit, L.L.C., a Nevada company with its principal place of business in Illinois ("Midwest"), appeals as of right from the trial court's final order on July 25, 2011, dismissing Midwest's remaining claims against the debtor, Dott Acquisition, L.L.C. ("the debtor"). Midwest primarily contests the trial court's prior grant of summary disposition pursuant to *MCR 2.116(C)(10)* to defendants TTOD Liquidation, Inc. and Lapeer Plating & Plastics, Inc. ("defendants"), both Michigan companies, in its order on December 6, 2010.[1] For all the following reasons, we affirm in part, reverse and remand in part.

I. FACTUAL BACKGROUND

This case primarily involves a dispute between two creditors, Midwest and TTOD Liquidation, Inc. ("TTOD"), over their respective rights in the debtor's collateral—inventory comprised of manufacturing materials for use in fabricating chrome-plated, plastic-molded automobile parts. The debtor, a bankrupt Michigan company who defaulted on its loan obligations to both Midwest and TTOD, is not a party to this appeal. The disputed collateral is comprised of the debtor's inventory, as well as all inventory records and insurance proceeds of the inventory, worth approximately $3,000,000.

[1] The court did not immediately enter a final order after granting summary disposition to defendants in part because the court initially stayed its order and refused to release defendants' $250,000 deposit pending Midwest's application for leave to appeal with this Court. Midwest sought the stay because it was concerned about the lack of a remedy in the event this Court reversed the trial court's dispositive decision, as the trial court permitted defendants to use and consume [*2] the collateral in the ordinary course of business. After this Court denied leave to appeal in *Midwest Business Credit LLC v TTOD Liquidation, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2011 (Docket No. 301540), the trial court returned the deposit, released all restrictions on the use of the collateral, and later entered the final order by dismissing the debtor.

The loan agreement between Midwest and the debtor ("Midwest loan") contained a choice of law provision, which specified that the terms of the agreement would be governed by Illinois law. The agreement [*3] provided the debtor with a $500,000 line of credit, while interest would be charged at: (1) five percent higher than the prime rate; and (2) upon default, the lesser of 23 percent a year, or the highest rate permitted under Illinois Law. To protect Midwest's investment and establish the creditors' respective priorities in the debtor's inventory, Midwest and TTOD independently entered into the Intercreditor and Lien Subordination Agreement ("Intercreditor Agreement"), which granted Midwest priority over TTOD in the debtor's inventory to the extent of the "Midwest Obligations," while acknowledging that TTOD claimed priority over the remaining inventory. "Midwest Obligations" was defined as "[t]he obligations of Debtor to Midwest, not exceeding in the aggregate $500,000 in principal plus interest thereon and all fees costs, and expenses incurred in connection therewith, that are now or hereafter secured by all or a portion of the Midwest Senior Collateral and the TTOD Senior Collateral." Additionally, the Intercreditor Agreement restricts both Midwest and TTOD from taking "any action" with respect to each others' senior collateral, and permits each party to "interpose as a defense or [*4] plea the making of this Agreement," and do so "in its name or in the name of the Debtor" if either party acts to enforce the lien over each other's senior collateral.

When the debtor defaulted on its loan obligations, TTOD evicted the debtor from its facility and leased the space to Lapeer Plating & Plastics, Inc. ("LPP"), and permitted LPP to use and consume the collateral in order to produce automobile parts. However, TTOD required LPP to sequester a portion of the collateral that allegedly equaled the value of the Midwest Obligations. When TTOD failed to guarantee that none of the collateral was being consumed and failed to immediately permit Midwest to inspect the collateral, Midwest filed the instant complaint to recover all the collateral in order to satisfy the outstanding balance on the Midwest loan, which was $684,986. Midwest also sued TTOD for breach of the Intercreditor Agreement and both statutory and common law conversion.

Following oral arguments, the trial court granted defendants' motion for summary disposition. The court initially found that TTOD held a valid security interest in the debtor's inventory, evidenced by the fact that TTOD presented its UCC-1 covering the [*5] collateral. However, defendants did not submit a signed security agreement from the debtor during this motion.[2] The court also found that, in the 18 months since Midwest executed the Midwest loan, "interest has accrued in the amount of $487,845.22," which constituted an interest rate in excess of 25 percent a year and qualified as criminal usury in Michigan.[3] Although unstated, the trial court implicitly held that the Midwest loan was unenforceable as a matter of law in Michigan because the interest rate constituted criminal usury, notwithstanding the usury savings clause in the parties' agreement. The trial court held that defendants could invoke the usury defense because the Intercreditor Agreement granted TTOD the right to raise the debtor's defenses when Midwest attempted to foreclose on the TTOD Senior Collateral, and because the debtor assigned LPP all its property rights. Without commenting on whether Michigan or Illinois law applied, the court noted that Midwest was not exempt from usury under Illinois law because the statute it referenced, *815 ILCS 205/4(1)(c)*, did not expressly exempt loans made to limited liability companies from usury restrictions. Finally, the court held [*6] that Midwest failed to raise a genuine issue of material fact regarding its claims because it offered no proof that defendants had converted the collateral, and defendants proved that: (1) they sequestered the Midwest Senior Collateral; (2) they permitted Midwest to inspect the collateral; and (3) they only used it in the ordinary course of business after the court granted them permission to do so. Accordingly, the trial court granted summary disposition to defendants on all claims.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a dispositive motion. *Shay v Aldrich, 487 Mich 648, 656; 790 NW2d 629 (2010)*. When analyzing a motion for summary disposition under *MCR 2.116(C)(10)*, the court evaluates whether a genuine issue of material fact exists. *Coblentz v Novi, 475 Mich 558, 569; 719 NW2d 73 (2006)*. [*7] A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes an issue where reasonable minds could differ. *Allison v AEW Capital Mgt, LLP, 481 Mich 419, 425; 751 NW2d 8 (2008)*. The trial court may not make factual findings or weigh witness credibility on disputed factual matters when deciding a dispositive motion. *Anzaldua v Neogen Corp, 292 Mich App 626, 637; 808 NW2d 804 (2011)*.

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[2] Defendants, in a later proceeding, submitted the security agreement between TTOD and the debtor, which created a security interest over all of the debtor's interest to secure the debtor's loan obligations to TTOD.

[3] Although not calculated by the trial court, this amounts to an average yearly interest charge of $325,230.15, or a 65.05 percent interest rate, over the life of the loan.

Statutory interpretation invokes questions of law that are reviewed de novo by this Court. *Briggs Tax Service, LLC v Detroit Public Schools, 485 Mich 69, 75; 780 NW2d 753 (2010)*. When interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp, 282 Mich App 621, 628-629*; 765NW2d 31 (2009) (citation omitted). Further, the construction of contractual language is a question of law, which is reviewed de novo by this Court. *Shay, 487 Mich at 656*. Finally, conflicts of law are reviewed de novo. *Frederick v Federal-Mogul Corp, 273 Mich App 334, 336; 733 NW2d 57 (2006)*.

III. CHOICE OF LAW

Although Midwest initially argues that defendants lack standing to raise the usury defense, the outcome [*8] of this matter depends on whether Michigan or Illinois law controls in this dispute. Midwest argues that, in refusing to honor the parties' choice of law provision contained in their contract, the trial court erroneously concluded that Midwest lacked an enforceable security interest in the collateral because the Midwest loan agreement was unenforceable under Michigan law, on the grounds that the charged interest rate constituted criminal usury. We agree.

When deciding whether to enforce the parties' contractual choice of law, the parties' expectations "must be balanced with the interests of the states." *Hudson v Mathers, 283 Mich App 91, 96; 770 NW2d 883 (2009)*. Our courts have historically honored a choice of law provision contained in a contract, unless: (1) the chosen state lacks a substantial relationship to the parties or the transaction; (2) there is no reasonable basis for adopting the law of the chosen state; or (3) it "would be contrary to a fundamental policy of [Michigan] which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of [*9] law by the parties." *Chrysler Corp v Skyline Industrial Services, Inc, 448 Mich 113, 126; 528 NW2d 698 (1995)*, quoting *Restatement Conflict of Laws, 2d, § 187(2)(b)*.

Under the facts presented by the parties, it is clear that the chosen state of Illinois has a substantial relationship to the parties and the transaction. In its brief during the motion for summary disposition, Midwest presented uncontested evidence showing that: (1) the debtor contacted Midwest in Illinois, which is its principal place of business, in order to obtain the Midwest loan; (2) some of the direct negotiations occurred in Illinois; (3) the debtor sent all loan documents and payments to Midwest at its Illinois office; (4) the loan documents were executed in Illinois; (5) the loan was underwritten in Illinois; and (6) the funds were transferred to the debtor from an Illinois account. While Michigan undoubtedly possesses a substantial relationship to the parties and transaction, this fact does not invalidate Illinois's clear relationship to the parties and the transaction, as the debtor travelled to Illinois in order to procure the loan.

If there is an exception under Illinois law for charging what has otherwise [*10] been defined as a "usurious" interest rate on business loans to LLCs, then there exists a reasonable basis for the parties to adopt Illinois law, as doing so would permit Midwest to charge a higher interest rate than permitted under Michigan law. Defendants claim that Illinois law is unclear as to the status of usury restrictions regarding LLCs. However, *805 ILCS 180/1-30(7)* unambiguously permits LLCs to incur liabilities and borrow money at any interest rate, regardless of any usury restrictions under Illinois law. Because the Illinois Legislature unambiguously expressed, as a matter of policy, its intent to permit LLCs to borrow at "any rate of interest," the parties' dispute over the type of entities subject to the "business loan" exception from usury under *815 ILCS 205/4(1)(c)* is irrelevant. Moreover, the Appellate Court of Illinois has clearly stated that, under Illinois law, defendants cannot assert a usury defense. "[T]he defense of usury is a personal one and not available to a [corporation]." *Jones & Brown, Inc v W E Erickson Constr Co, 73 Ill App 3d 481, 483; 391 NE2d 1097 (1979)*. For the purposes of *815 ILCS 205/4(1)(a)*, an LLC is considered a corporation, and thus loans [*11] made to an LLC are exempt from the usury restrictions in the Illinois Interest Act. *Asset Exchange II, LLC v First Choice Bank, 2011 IL App (1st) 103718; 953 NE2d 446, 451-452; 352 Ill Dec 207 (2011)* ("There is no dispute here that [the] plaintiff is a corporation within the meaning of the Illinois Interest Act, and thus the Act does not apply to [the] plaintiff's loan agreement with the Bank."). Therefore, because Illinois law exempts usury restrictions on loans made to LLCs such as the debtor, there is a reasonable basis for adopting Illinois law.

Finally, we hold that Michigan does not have a materially greater interest than Illinois in seeing its own laws enforced because our policy concerns regarding usury are not implicated in this case. "A fundamental policy may be embodied in a statute which (1) makes one or more kinds of contracts illegal or (2) which is designed to protect a person against the oppressive use of superior bargaining power." *Martino v Cottman Transmission Sys, Inc, 218 Mich App 54, 60-61; 554 NW2d 17 (1996)*. The debtor, a sophisticated commercial entity, sought out Midwest in Illinois to obtain financing for its business operations. In this

scenario, the debtor [*12] was fully aware of what it was getting into when it negotiated and agreed to the terms of the Midwest loan. Illinois arguably has a strong interest in seeing its contracts enforced according to its own laws, particularly when out-of-state debtors seek funding from its in-state creditors. As Midwest notes, Michigan has a policy interest in seeing its contracts honored and in interpreting usury restrictions narrowly, especially in the context of commercial transactions between business entities. *Minthorn v Haines, 169 Mich 169, 171; 134 NW 1113 (1912)*; see *Allan v M&S Mortgage Company, 138 Mich App 28, 37-39; 359 NW2d 238 (1984)*. Any countervailing policy concerns are further mitigated by the fact that the debtor is no longer a party to this dispute and will therefore be unaffected by the outcome. Moreover, contrary to defendants' assertions, the Midwest loan is not an "illegal contract" because the contractual language in the agreement clearly prohibits Midwest from charging the debtor interest in excess of 23 percent a year.[4] Therefore, the trial court should have honored the parties' choice of law provision and held that the Midwest loan did not violate Illinois' usury laws. Accordingly, [*13] we hold that the trial court committed error requiring reversal by finding that Midwest lacked an enforceable security interest in the collateral.[5]

IV. RIGHT TO INVOKE THE USURY DEFENSE

Midwest next challenges defendants' "standing"[6] under both Michigan and Illinois law to invoke the usury defense because they were not parties to the Midwest loan. However, as we have decided that Illinois law is controlling, defendants cannot assert the usury defense. As noted above, under Illinois law, the defense of usury is not available to a corporation, including an LLC . *Jones & Brown, Inc, 73 Ill App 3d at 483*; *Asset Exchange II, LLC, 953 NE2d at 451-452*. Thus, as both defendants and the debtor are considered "corporations," and corporations may not assert the usury defense under Illinois law, they lack the right to raise this defense.

V. TTOD'S SECURITY INTEREST

Midwest next challenges the trial court's finding that TTOD had a valid security interest in the collateral because TTOD offered no proof during the dispositional hearing of its alleged security interest in the collateral. We agree. During the dispositional hearing, TTOD only produced the following as evidence of its purported security interest in the collateral: (1) its judgment and injunction against the debtor from its independent case in *TTOD Liquidation, Inc v Dott Acquisition, Inc*, Oakland Circuit Court No. 09-102138; and (2) its UCC-1 financing statement covering the collateral. However, the court documents made no reference to any collateral that TTOD had in the debtor's property, so this evidence does not establish that defendants had a valid security interest in the collateral.

Further, a financing statement does not attach a security interest to collateral; it merely perfects an existing security interest. *MCL 440.9310*. To attach a security interest to collateral, the secured party must: (1) have the debtor [*16] authenticate a security agreement specifically describing the collateral; (2) value must be given; and (3) the debtor must have rights in the collateral. *MCL 440.9203(2)*; *Michigan Tractor & Machinery Co v Elsey, 216 Mich App 94, 97-98; 549 NW2d 27 (1996)*. While defendants claim that Midwest is bound by its admission that TTOD had a valid security interest in the collateral, this

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[4] Even if this agreement could be construed as a criminally usurious contract under Michigan law, we note that defendants are conflating a criminally usurious contract with an "illegal contract" that is unenforceable in its entirety. An "illegal contract" is one that is unenforceable on the grounds that the illegal provision is an essential part of the contract. See *Miller v Radikopf, 394 Mich 83, 88-89; 228 NW2d 386 (1975)*. Under these facts, the interest rate was clearly a nonessential part of the agreement because the subject matter of the contract involved a business loan regarding the acquisition of operating capital. Also, when there is a specific statutory remedy for usury, and this remedy does not include rendering the contract unenforceable in its entirety, construing the contract as "illegal" would improperly create a greater remedy than provided by the Legislature. *MCL 438.32*; *Lawsuit Financial, LLC v Curry, 261 Mich App 579, 590-591; 683 NW2d 233 (2004)*. "[A] usurious rate of interest does not make an instrument void." See *Shaw Inv Co v Rollert, 159 Mich App 575, 580; 407 NW2d 40 (1987)*.

[5] As [*14] we hold that the trial court should have applied Illinois law, we need not address plaintiff's arguments concerning whether the court correctly applied Michigan law in determining that the Midwest loan was unenforceable.

[6] Although the parties claim to raise the issue of "standing," in context it is clear that they are equivocating on the meaning of this word. The parties are contesting defendants' right to assert a defense, not this Court's propriety in determining whether defendants have an interest in a claim [*15] that is "distinct from the general public." See *Lansing Schools Education Association v Lansing Bd of Ed, 487 Mich 349, 378; 792 NW2d 686 (2010)*.

matter involves a question of law, and "an admission regarding a point of law is not binding on a court." *Ann Arbor Tenants Union v Ann Arbor YMCA, 229 Mich App 431, 440; 581 NW2d 794 (1998)*. Although defendants later submitted its security agreement into the record as an exhibit to its motion on January 24, 2011, to modify a prior order, this does not cure the error because the trial court may only consider the documentary evidence "then filed in the action or submitted by the parties." *MCR 2.116(G)(5)*. By relying on TTOD's UCC-1 in the absence of a signed security agreement, the trial court erred by finding as a matter of law that TTOD had an enforceable security interest in the collateral and basing its summary disposition decision on this finding.[7]

TTOD claims that Midwest is collaterally estopped from contesting TTOD's security interest in the debtor's collateral because these issues were conclusively decided in its independent case against the debtor. Although defendants present no legal analysis on this issue, "[c]ollateral estoppel precludes relitigation of issues between the same parties." *VanVorous v Burmeister, 262 Mich App 467, 479; 687 NW2d 132 (2004)*. The elements of collateral estoppel are: "(1) a question of fact essential [i.e. necessary] to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus, 481 Mich 573, 585; 751 NW2d 493 (2008)*. Mutuality of estoppel exists where there is substantial identity of the parties in the two proceedings. *Dearborn Heights Schools District No. 7 v Wayne County MEA/NEA, 233 Mich App 120, 126-127; 592 NW2d 408 (1998)* [*18] (noting that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter"). However, our Supreme Court has held mutuality of estoppel is not required when a party is asserting defensive collateral estoppel to defend against "a party who has already had a full and fair opportunity to litigate the issue." *Monat v State Farm Ins Co, 469 Mich 679, 695; 677 NW2d 843 (2004)*. As Midwest was not a party to the prior proceeding, it did not have a full and fair opportunity to litigate this issue. Additionally, neither Midwest nor the debtor are in privity with each other, as they were adverse parties to this litigation. Therefore, it is clear that collateral estoppel does not prevent Midwest from challenging the validity of TTOD's security interest in the collateral.

VI. SUMMARY DISPOSITION

Midwest finally argues that the trial court improperly granted summary disposition to defendants when it was clear that Midwest was entitled to judgment as a matter of law pursuant to *MCR 2.116(I)(2)* on its breach of contract and conversion claims.[8] We agree in part and disagree [*19] in part.

Midwest argues that it was entitled to judgment as a matter of law on its breach of contract and conversion claims. Defendants respond by asserting that Midwest itself breached the Intercreditor Agreement by taking legal action to acquire the entire inventory, worth $3,000,000, to satisfy its $500,000 senior interest. Based on all the preceding analysis, Midwest had a perfected security interest in the debtor's inventory, with priority to the extent of $500,000. Although the Intercreditor Agreement specified that TTOD had priority over the remaining collateral, TTOD's ability to enforce the Agreement is contingent upon its capacity as a secured party to the collateral. As TTOD failed to establish a valid security interest in the collateral during the motion for summary [*20] disposition, the court should have treated TTOD as an unsecured party to the collateral, only holding an outstanding money judgment against the debtor. Accordingly, defendants had no rights to the collateral and were required to relinquish it to Midwest, who had priority as to the entire inventory. TTOD was not permitted to take "any action" against Midwest's collateral. Because TTOD failed to deliver the collateral to Midwest and permitted LPP to consume the collateral in its business operations, Midwest offered sufficient proof to establish that TTOD breached the Intercreditor Agreement by interfering with Midwest's interest in the collateral. The fact that TTOD permitted Midwest to inspect the collateral did not cure TTOD's refusal to cease consumption and relinquish the collateral to Midwest. Similarly, because TTOD had no enforceable security interest in the collateral, Midwest did not breach the Intercreditor Agreement by rightly demanding its collateral. Accordingly, the trial court erred in granting summary disposition to TTOD on the breach of contract claim.

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[7] Midwest alternatively avers that there is an outstanding [*17] factual dispute as to whether the debtor fully repaid its loans to TTOD, which—if true—would void TTOD's security interest in the collateral. As this Court already held that TTOD failed to establish its security interest in the collateral, this issue is moot.

[8] Midwest also argues that summary disposition was premature because the actual interest rate Midwest charged the debtor is in dispute. Midwest also argued that the lower court should have interpreted the scope of the "Midwest Obligations" as including all fees, interest, costs, and expenses above the initial $500,000 principal balance. However, due to our resolution of the above issues, these questions are now moot.

Similarly, Midwest has presented evidence that TTOD committed common law conversion. Common law conversion is defined [*21] as a "distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Dep't of Agriculture v Appletree Marketing, LLC, 485 Mich 1, 13-14; 779 NW2d 237 (2010)* (citation and quotation marks omitted). Additionally, "[c]onversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Id. at 14*. The undisputed facts establish that TTOD delivered possession of the collateral to LPP and permitted LPP to consume the collateral in its business operations. By doing so, TTOD could be found to have committed common law conversion because it "delivered the collateral without authorization to a third party" and "used [the collateral] in an improper way." *Id.*.[9] Accordingly, the trial court erred in granting summary disposition to TTOD on this claim.

In contrast, statutory conversion, a cumulative claim to common law conversion that permits recovery of treble damages, [*22] occurs if a defendant commits either of the following actions:

> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [*MCL 600.2919a(1)*.]

In light of the record, Midwest presented no evidence supporting its claim of statutory conversion against TTOD, so the trial court did not err in granting summary disposition to TTOD on this claim. The record establishes that TTOD did not convert the property for its own use, but rather permitted LPP to use it for its own purposes. Additionally, Midwest presented no evidence that TTOD knowingly converted the collateral. In fact, but for TTOD's failure to timely submit its security agreement, it would have shown that it had an enforceable security interest in the collateral. Thus, in only permitting LPP to consume collateral that allegedly exceeded the value of the amount owed [*23] to Midwest, TTOD cannot be said to have knowingly converted the collateral.

Finally, Midwest argues that the trial court erred by prematurely granting summary disposition before discovery was complete. "A motion under *MCR 2.116(C)(10)* is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Anzaldua, 292 Mich App at 636* (citation and quotation marks omitted). Midwest submitted a discovery request, asking TTOD in part to furnish all records pertaining to: (1) the debtor's outstanding debt to TTOD; (2) TTOD's security interest in the collateral; and (3) the methodology behind how TTOD calculated and sequestered the Midwest Senior Collateral. As these documents were pertinent to establishing TTOD's security interest—and priority—in the collateral, the trial court erred in prematurely granting summary disposition because there was a fair likelihood that this information could have established whether TTOD breached the Intercreditor Agreement by converting the Midwest Senior Collateral. However, because discovery was incomplete, the trial court also did not err in failing to [*24] grant summary disposition to Midwest on its breach of contract and common law conversion claims.

VII. CONCLUSION

Because the Midwest loan was not usurious under Illinois law and was not an unenforceable "illegal" contract, Midwest has shown that it had an enforceable security interest in the debtor's collateral. While TTOD failed to properly establish below its security interest in the collateral, the trial court improperly granted summary disposition to defendants before discovery was complete. Accordingly, we hold that the trial court erroneously granted summary disposition to defendants on all claims, as TTOD was only entitled to summary disposition on the statutory conversion claim. Accordingly, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Cynthia Diane Stephens

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[9] Although the debtor later assigned all its assets to LPP, this occurred long after TTOD leased the facility to LPP and permitted LPP to use the collateral.

/s/ Michael J. Riordan

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MoneyForLawsuits V LP v. Rowe

United States District Court for the Eastern District of Michigan, Southern Division

January 23, 2012, Decided; January 23, 2012, Filed

CASE NO. 4:10-CV-11537

Reporter
2012 U.S. Dist. LEXIS 43558 *; 2012 WL 1068171

MONEYFORLAWSUITS V LP, d/b/a MFL CASEFUNDING, a Delaware limited partnership, and GUARDIAN ADVISORS LP II, d/b/a MFL CASEFUNDING, a Delaware limited partnership, Plaintiffs, v. TAMMY ROWE a/k/a TAMMY LACROSS, CARRIE FLEMION, LURA L. GIPSON, ROXANNE LOFTON, DELORES MADISON, WENDY GARAGIOLA, PAMELA MOFFIT, all Michigan residents, and VIVIAN AROUSELL, an Indiana resident, Defendants.

Subsequent History: Adopted by, Objection overruled by, Summary judgment granted by *MoneyForLawsuits V LP v. Rowe, 2012 U.S. Dist. LEXIS 43633 (E.D. Mich., Mar. 29, 2012)*

Case Summary

Overview
A magistrate judge recommended that the settlement right investors be granted summary judgment on their breach of contract and related claims where the application of New York usury laws, as provided in the contingent proceeds purchase agreement, did not violate Michigan public policy, and under those laws, the agreements were not usurious.

Outcome
Recommended that motion be granted.

Counsel: [*1] For MoneyForLawsuits V LP, Doing business as MFL CaseFunding, Guardian Advisors LP II, also known as MFL CaseFunding, Plaintiffs: David E. Plunkett, Susan A. Babcock, Williams, Williams, Birmingham, MI.

For Tammy Rowe, also known as Tammy LaCross, Lura L. Gipson, Roxanne Lofton, Delores Madison, Wendy Garagiola, Pamela Moffit, Vivian Arousell, Carrie Flemion, Defendants: Ralph J. Sirlin, Reosti & Sirlin, P.C., Pleasant Ridge, MI.

Judges: PAUL J. KOMIVES, UNITED STATES MAGISTRATE JUDGE. JUDGE MARK A. GOLDSMITH.

Opinion by: PAUL J. KOMIVES

Opinion

REPORT AND RECOMMENDATION ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT (docket #188 and #190)

* * * * *

I. RECOMMENDATION: The Court should grant plaintiffs' motion for summary judgment (docket #188) and deny defendants' motion for summary judgment (docket #190).

II. REPORT:

A. Background

This matter is before the Court on the parties' cross-motions for summary judgment, filed on July 1, 2011 (by plaintiffs) and July 8, 2011 (by defendants). Responses [*2] and replies to each of the motions have been filed. The basic facts are not in dispute.

Plaintiff Guardian Advisors LP II, a Delaware limited partnership which, along with plaintiff MoneyForLawsuits V LP, does business as MFL CaseFunding ("CaseFunding"), invests in claims and lawsuits by purchasing the right to receive a portion of any judgment or settlement. Between February and May 2009, CaseFunding entered into "Contingent Purchase Agreements" with defendants Wendy Garagiola, Pamela Moffitt, Lura Gipson, Delores Madison, Roxanne Lofton, and Vivian Arousell, who at the time were members of a plaintiff class in a suit against the Michigan Department of Corrections. In each case, CaseFunding provided funds to the defendant individual or to an entity to whom the defendant owed money, as well as an origination fee to a third party broker and processing fee to other entities, as reflected in the following table:

	Garagiola	**Moffitt**	**Gipson**	**Lofton**	**Madison**	**Arousell**
Direct funds	$50,000.00	$50,000.00	$75,000.00	$50,000.00	$30,000.00	$30,000.00
3d party	46,852.00	35,197.00	29,573.00	—	60,300.00	35,371.00
Orig. fee	14,827.80	13,079.55	18,823.14	7,500.00	16,200.00	9,880.65
Proc. fee	2,000.00	2,000.00	2,500.00	500.00	500.00	500.00
Total	$113,679.80	$100,276.55	$125,896.14	$58,000.00	$107,000.00	$75,751.65

See [*3] Br. in Supp. of Def.s' Mot. for Summ. J., Exs. A-D, F, H. In each case, the processing fee was paid to Quick Cash, Inc. The origination fee was paid to Trimark Capital Funding, Inc. (defendants Garagiola, Moffitt, and Gipson), Case Trace, Inc. (defendants Lofton and Madison), or Montclair Funding Group (defendant Arousell). The third party funds were distributed to pay existing liens to Bridge Funds, LLC (defendants Garagiola, Moffitt, Gipson, Lofton, and Arousell), or Peachtree Pre-Settlement Finance (defendant Madison). [1] In June 2009, CaseFunding and defendants Lofton and Madison entered into second agreements, advancing an additional $18,250.00 to Lofton or on her behalf, and an additional $35,000.00 to Madison or on her behalf. Each of these agreements incorporated by reference the prior agreements made with these defendants. Thus, pursuant to the second agreements, defendant Lofton's total was $76,250.00, and defendant Madison's total was $142,500.00. *See id.*, Ex. E & G.

The agreements in each case provided for repayment of a set amount if CaseFunding's share of the proceeds was paid on a certain date, increasing at a compounded monthly rate, as set forth in the following table:

Initial Payment Date	**Initial Payment Amount**	**Monthly Rate**	**Annualized Rate**

[1] The Court has entered a default judgment against defendant Tammy Rowe. Although it appears that defendant Carrie Flemion has been served with the summons and complaint, she has not appeared in this action *pro* [*4] *se* or through counsel, and has not answered the complaint. The parties' motions do not address plaintiffs' claims against defendant Flemion.

	Initial Payment Date	Initial Payment Amount	Monthly Rate	Annualized Rate
Garagiola	4/1/09	$150,660.01	4.25%	64.78%
Moffitt	4/1/09	132,896.66	4.25%	64.78%
Gipson	4/1/09	165,237.78	4.25%	64.78%
Lofton	4/1/09	72,617.82	3.5%	51.11%
	7/1/09	25,203.34	4.99%	79.38%
Madison	4/1/09	140,435.28	4.25%	64.78%
	7/1/09	49,035.39	4.99%	79.38%
Arousell	7/1/09	100,254.59	4.25%	64.78%

See id., Exs. A-H.

In each case, the defendant signed a "Contingent Proceeds Purchase Agreement Consumer Disclosure Statement" setting forth an explanation of the basic terms of the agreement, including the purchase price, fees, and monthly rate. *See id.*, Ex. A. [2] The disclosure statement also states that "[t]he Agreement evidences a purchase and sale of a portion of the Proceeds from the Claim. It does not represent a loan to you." *Id.* The Agreement itself provides that, in exchange for the purchase price paid to the defendants [*5] by CaseFunding, the seller "unconditionally and irrevocably grants, assigns, transfers and conveys a portion of the Proceeds recovered with respect to the Claim in accordance with" the terms of the agreement. The Agreement continues:

> Purchaser's Share shall be paid to Purchaser in full on the date the Proceeds are received. Purchaser's share shall be withheld from any money collected as a result of the Claim and paid to Purchaser immediately upon collection without set-off or reduction of any kind. The amount due shall be paid immediately upon collection without set-off or reduction of any kind. The amount due shall be paid immediately after attorney fees (including the expenses charged by the Seller's attorney for costs) and after payment to any recorded lien holder that might exist prior to the date hereof, or which may have priority by law. Seller will not receive any money from the Proceeds of the Claim until Purchaser has been paid in full.
>
> In the event the Proceeds are received in multiple payments, whether pursuant to a structured settlement, annuity, or other form of installment payment or incremental recovery, Purchaser's right to receive full payment of its Share from such [*6] Proceeds shall be prior and senior to the Seller's rights to receive any portion of the Proceeds.
>
> If the Proceeds are insufficient to pay Purchaser's Share, then Purchaser's share will be limited to the proceeds from the Claim.
>
> If the Seller does not recover any money from the Claim, then the Seller shall owe nothing to Purchaser.

Id., Contingent Proceeds Purchase Agreement, at 2, ¶ 3. The Agreement further provides that "this Agreement constitutes a non-recourse sale of contingent proceeds and is not a loan," and that "Purchaser shall not have any right to control, interfere with, or influence the handling of the Claim or any settlement negotiations that may occur. The Purchaser's only right shall be to be paid its Share of the Proceeds of the Claim pursuant to this Agreement." *Id.* at 3, ¶ 6. The Agreement requires the seller to, *inter alia*, "notify Purchaser of any verdict, award, settlement, discontinuance or ending with respect to the Claim and to cause the Attorney to do the same." *Id.* at 4, ¶ 11. The Agreement provides that:

> 24. Seller has been advised and understands that the cost of selling a portion of the Proceeds to Purchaser is potentially expensive and should only be used [*7] as a last resort and that Purchaser may make a substantial profit from its investment by the terms of this Agreement. Other sources of funding, including loans, may be available at more favorable rates, payment schedules, terms and conditions.
>
> 25. Seller has had a full and complete opportunity to consult with an attorney and other advisors before signing this Agreement. This Agreement has been fully explained to Seller, and all questions that Seller might have about this transaction have been fully explained. . . .

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[2] Apart from the specific purchase price and monthly rate terms, the agreements are identical. For simplicity, I cite to only the purchase agreement with defendant Garagiola [*8] for purposes of discussing the general terms of the contract. Hereinafter, when referring to the general, universal terms of the Agreements, I will simply cite the provision as "Agreement, ¶ x."

Id. at 7, ¶¶ 24-25. The Agreement provides a five business day period in which the seller may rescind the Agreement. *See id.*, ¶ 26. Each Agreement is accompanied by an Attorney Acknowledgment, in which counsel for defendant affirms, under penalty of perjury, that he has "reviewed and explained the contract to Seller, including the annualized rate and the monthly rate, compounded monthly, applied to calculate the Purchaser's Share of the Proceeds with respect to the Claim." *See id.*, Attorney Acknowledgment. [3]

In each case, the funding was premised on the defendants' claims for damages as plaintiffs in *Neal, et al. v. Michigan Department of Corrections, et al.*, a case brought in the Washtenaw Circuit Court alleging that female inmates had been subjected to sexual harassment in violation of the Michigan Elliot-Larsen Civil Rights Act. At the time the agreements at issue in this case were executed, the jury had returned separate verdicts for each of the class members. After the agreements had been executed and while the matter was pending on appeal, the parties to the state court action reached a settlement totaling $100,000,000.00. The settlement was approved by [*9] the Washtenaw County Circuit Court on August 21, 2009. Pursuant to the settlement, each defendant was given a settlement amount to be paid in installments of 10% in each of October 2009 and 2010, 15% in October 2011, 20% in each of October 2012 and 2013, and 25% in October 2014. *See* Br. in Supp. of Def.s' Mot., Exs. J & K. The following table reflects the amounts of the defendants' initial jury verdict and settlement:

	Verdict	**Settlement**
Garagiola	$850,000.00	$552,500.00
Moffitt	475,000.00	308,000.00
Gipson	550,000.00	357,500.00
Lofton	335,000.00	224,450.00
Madison	885,000.00	592,950.00
Arousell	2,400,000.00	1,560,000.00

On January 15, 2009, after the jury verdict had been returned but prior to the execution of any of the agreements, Kenneth W. Bradt, CEO of CaseFunding/Attorney Financial Services, sent a letter via e-mail to Deborah LaBelle, lead counsel for the plaintiffs in the *Neal* action, discussing various aspects of the Agreements. Among other matters discussed, the letter stated:

> Finally, this will also confirm that, based upon our conversation, even though there are judgments in these cases, those judgments are on appeal and the appellate courts may overturn the judgments, reduce the awards, or [*10] refer the cases back to the trial court. Therefore, you have indicated that there is no absolute recovery guaranteed in these cases.

Id., Ex. N. Ms. LaBelle responded in an e-mail on February 7, 2009:

> I don't disagree with your analysis and as you know we wish the clients could simply wait for the outcome of the case. This will also confirm my agreement that your email of January 15th accurately represents our discussions and understanding.

Id. On July 6, 2009, after execution of the Agreements, Ms. LaBelle sent a letter to members of the *Neal* plaintiff class advising them of the proposed settlement and recommending that the members accept the settlement. In advising the class members to accept the settlement, Ms. LaBelle indicated:

> With regard to the first group of women who went to trial last year [which included all of the defendants in this case], there continues to be a substantial risk of loss. The Department has appealed your awards to the Michigan Supreme Court. The Department is urging the Michigan Supreme Court to rule that women prisoners do not have the right to sue under the Civil [R]ights Act, among other arguments for reversal of the jury verdicts. If the Supreme Court accepts [*11] the case, it could dismiss the case and the verdicts will be lost in their entirety or it could reverse and order a new trial. The Court could also decide not to take the case at this time and it could affirm the decision of the Court of Appeals and the trial Court. The decision of the Supreme Court will be final and binding on all parties. In our opinion, the risk of losing everything justifies compromising the awards to guarantee a substantial amount for the first trial groups' injuries and damages.

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[3] The Attorney Acknowledgment accompanying the agreement signed by defendant Arousell is more detailed than those accompanying the other agreements. Further, although signed by counsel, the acknowledgment contains a handwritten notation that counsel had "advised client not to enter into this agreement." *See id.*, Ex. H, Attorney Acknowledgment.

Id., Ex. O. The letter further advised that "[w]ith regard to the class members and class representatives, the settlement provides for guaranteed monetary awards for all without the risk of trials and appeals, which could take another ten years to resolve." *Id.*

Plaintiffs allege that defendants failed to notify them of the settlement, and have failed to pay anything towards the amounts owed pursuant to the agreements. Defendants' Answers to the Complaint, as well as their responses to plaintiffs' interrogatories, make clear that as of the time of the pending motions each defendant had received her 2009 and 2010 payments under the settlement, but had not paid anything to CaseFunding. The [*12] Answers and discovery responses also make clear that defendants do not intend on paying any of the proceeds from the settlement to CaseFunding because, in their view, the Agreements are usurious and therefore unenforceable under Michigan law. Plaintiffs' complaint asserts state law causes of action for breach of contract, anticipatory breach of contract, statutory conversion, and unjust enrichment.

The matter is currently before the Court on the parties' cross-motions for summary judgment. As aptly stated by plaintiffs, there are no genuine issues of fact present, there is no dispute concerning the terms of the Agreements, and there is no dispute that defendants have breached the Agreements by failing to pay to CaseFunding its share of the proceeds from the settlement. Rather, "[t]he only disputed issue in this case is whether the Contingent Purchase Agreements are enforceable contracts." Br. in Supp. of Def.s' Mot. for Summ. J., at 1. Plaintiffs argue that the usury issue is governed by New York law pursuant to the choice of law provision in the Agreements. Under New York law, plaintiffs argue, the Agreements are not loans subject to the usury laws, and therefore the Agreements are [*13] valid and enforceable. Plaintiffs also argue that the same result obtains if Michigan law is applied. Defendants, on the other hand, contend that Michigan law should apply, and that under Michigan law the Agreements charge a usurious interest rate and thus are unenforceable. Defendants also argue that, even under New York law, the second agreements to defendants Lofton and Madison are unenforceable. For the reasons that follow, the Court should grant plaintiff's motion for summary judgment and deny defendants' motion for summary judgment. [4]

B. *Choice of Forum*

Before addressing the parties' respective motions, the Court must first consider whether plaintiff has properly brought its claims in this Court. In addition to a choice-of-law provision, the Agreements contain a choice-of-forum [*14] provision, which states:

> The Seller and Purchaser hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York in the County of New York for any lawsuits, claims or other proceedings arising out of or relating to this Agreement and agree not to commence any such lawsuit, claim or other proceeding except in such courts. The Seller and Purchaser hereby irrevocably and unconditionally waive any objection to the laying of venue of any lawsuit, claim, or other proceeding arising out of or relating to this Agreement in the courts of the State of New York in the County of New York, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such lawsuit, claim or other proceeding brought in any such court has been brought in an inconvenient forum.

Agreement, ¶ 22. Notwithstanding this forum selection clause, the Court should exercise jurisdiction over this case.

"A forum selection clause does not oust a court of subject matter jurisdiction." *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)*, *overruled on other grounds by Lines v. Chasser, 490 U.S. 495, 109 S. Ct. 1976, 104 L. Ed. 2d 548 (1989)*. As with [*15] other matters that do not affect a federal district court's subject matter jurisdiction, "a party may obviously waive a forum selection clause." *PC Specialists, Inc. v. Micros Systems, Inc., No. 10-CV-78, 2011 U.S. Dist. LEXIS 88088, 2011 WL 3475369, at *3 (S.D. Cal. Aug. 09, 2011)* (citing *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B. V., 391 F.3d 871, 881 (7th Cir. 2004)*; *see also, Heartland Payment Sys., Inc. v. Island Pride Homes, Inc., No. 10-cv-1739, 2011 U.S. Dist. LEXIS 114126, 2011 WL 4458988, at *3 (E.D.N.Y. Aug. 31, 2011)* (citing *American Int'l Group Europe S.A. (Italy) v. Franco Vago Int'l, Inc., 756 F. Supp. 2d 369, 378-79 (S.D.N.Y. 2010))* ("The applicability of a forum selection clause is not a jurisdictional matter and a party may waive its right to enforce such clause."). Although a federal district court is not prohibited from doing so, because a forum selection clause is subject to waiver and because a federal court should not generally refuse to exercise its jurisdiction once properly invoked, *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404,*

[4] The parties' arguments, focusing on whether the Agreements are enforceable, address only plaintiffs' breach of contract and anticipatory breach of contract claims. As noted above, plaintiffs' complaint also raises claims of statutory conversion and unjust enrichment. Whether, and to what extent, these claims remain is best considered after the Court has ruled on the parties' pending summary judgment motions.

5 L. Ed. 257 (1821), "[d]istrict courts should not, as a matter of general practice, dismiss *sua sponte* either for improper venue or for failure to follow a forum selection clause." [*16] Automobile Mechanics Local 701 Welfare and Pension Funds v. Vanguard Car, 502 F.3d 740, 746 (7th Cir. 2007).

Here the parties, by their conduct, have waived enforcement of the forum selection clause. Plaintiff has done so by filing its suit in this case. *See* Heartland Payment Sys., 2011 U.S. Dist. LEXIS 114126, 2011 WL 4458988, at *3. Defendants have done so by failing to raise the issue in their Answers to the Complaint or in a motion to dismiss or transfer the case on the basis of the forum selection clause. Indeed, defendants note the existence of the forum selection clause in their motion for summary judgment, but do not argue that the case should be dismissed or transferred on this basis. Because plaintiff has chosen Michigan as its preferred forum, defendants have not sought to enforce the forum selection clause, and all but one of the defendants are residents of Michigan making this Court the most convenient forum for the parties, the Court should not *sua sponte* dismiss or transfer the action based on the forum selection clause. *See* Wesco Distribution, Inc. v. Anshelewitz, No. 06 Civ. 13444, 2008 U.S. Dist. LEXIS 54044, 2008 WL 2775005, at *4 (S.D.N.Y. July 16, 2008).

C. *Choice of Law*

This Court has subject matter jurisdiction over plaintiffs' state [*17] law claims based on the diverse citizenship of the parties. *See* 28 U.S.C. § 1332. In resolving the parties' state law claims, the Court must apply the substantive law of the state. 28 U.S.C. § 1652 ("The laws of the several states . . . shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply."); *see also*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In the absence of controlling authority by the controlling state's highest court on a particular issue, this Court must determine what that court would decide if faced with the issue. In making this determination, the Court may look to "the considered dicta" of the highest state court, *see* Nolan v. Transocean Air Lines, 365 U.S. 293, 293-96, 81 S. Ct. 555, 5 L. Ed. 2d 571 (1961); decisions of that court in analogous cases, *see* Monette v. AM-7-7 Baking Co., 929 F.2d 276, 280-83 (6th Cir. 1991); decisions of the state's intermediate appellate courts, *see* West v. American Tel. & Tel. Co., 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940); the majority view of other jurisdictions, *see* Cox v. Nasche, 70 F.3d 1030, 1031-32 (9th Cir. 1995); and scholarly treatises, law review articles, and Restatements of the law, *see* Cox, 70 F.3d at 1031. [*18] In determining the appropriate source of the substantive law governing the parties' claims, the Court applies the choice of law rules of Michigan, the state in which this Court sits. *See* Klaxon v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."); International Ins. Co. v. Stonewall Ins. Co., 86 F.3d 601, 604 (6th Cir. 1996) ("A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state."); Security Ins. Co. v. Kevin Tucker & Assocs., Inc., 64 F.3d 1001, 1005 (6th Cir. 1995) (same).

In determining the validity of a contractual choice-of-law provision, Michigan follows the approach of § 187 of the Restatement (Second) of Conflicts of Laws. *See* Chrysler Corp. v. Skyline Indus. Servs., Inc., 448 Mich. 113, 126, 528 N.W.2d 698, 703-04 (1995). Under this approach, a court will generally enforce the parties' choice of law unless either (1) the chosen state has no relationship to the parties and there is no basis for choosing that state's law, or (2) application of the chosen law would be contrary to the public [*19] policy of a state with a materially greater interest in determining the issue. *See* id.; Restatement (Second) of Conflicts of Laws, § 187(a)(2) Nevertheless, Michigan courts generally enforce contractual choice-of-law provisions; indeed, the Michigan courts have observed that "[i]t is undisputed that Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." Turcheck v. Amerifund Financial, Inc., 272 Mich. App. 341, 345, 725 N.W.2d 684, 688 (2006); *accord* Robert A. Hansen Family Trust v. FGH Industries, LLC, 279 Mich. App. 468, 476, 760 N.W.2d 526, 532 (2008). The public policy exception is a narrow one. As another Judge of this Court has observed, "both Michigan choice-of-law rules and general equitable choice-of-law policies support enforcing parties' agreed-upon choice-of-law clauses absent any strong public policy concerns to the contrary.'" Prestige Capital Corp. v. Michigan Gage and Mfg., LLC, 722 F. Supp. 2d 837, 843 (E.D. Mich. 2010) (Lawson, J.) (internal quotation omitted) (citing In re Dow Corning Corp., 419 F.3d 543 (6th Cir. 2005)).

Defendants argue that the Agreements would be usurious under Michigan law because [*20] Michigan usury law is not confined to agreements which are loans, but extends to all agreements that charge a rate of interest. New York usury law, on the contrary, applies only to "loans," and defendants appear to concede that all but the second Agreements executed by defendants Lofton and Madison are outside the scope of the New York usury statute. Defendants argue, therefore, that

application of New York law would contradict Michigan's public policy of protecting its residents from usurious contractual interest rates. It is not clear, however, that the Michigan courts would view the application of New York's slightly different usury statute as contrary to the public policy embodied in the Michigan usury statute. [5] Defendants have cited, and I have found, no Michigan decisions addressing this issue. However, courts in other jurisdictions that follow the rule of *§ 187* generally enforce a contractual choice of law provision even as to contracts that would be usurious under the forum state's law. *See, e.g.*, *Sarlot-Kantarjian, 599 F.2d 915, 917-18 (9th Cir. 1979)* (California law); *Kronovet v. Lipchin, 288 Md. 30, 415 A.2d 1096, 1104-07 & n.16 (Md. Ct. App. 1980)* (citing cases); *Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc., 731 A.2d 708, 710 (R.I. 1999)*. [*21] [6] These decisions apply the "generally accepted" rule, reflected in *§ 187*, "that the parties to a contract may agree as to the law which will govern their transaction, even as to issues going to the validity of the contract." *Kronovet, 415 A.2d at 1104*. Further, the *Restatement* embodies a preference for upholding the validity of a contract in making choice-of-law determinations. *See, e.g.*, *Restatement (Second) of Conflicts of Laws, § 187, cmt. e* (where parties have chosen a law that would declare the contract invalid, the chosen law will not be applied because the parties can be assumed to have intended the provisions of the contract to be binding); *§ 203* (in the absence of a choice of law provision, "[t]he validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of *§ 188*).

Further, it is doubtful that the Michigan courts would view its usury statute as reflecting such a fundamental public policy that it would override what the Michigan courts have explicitly recognized as a strong "public policy favor[ing] the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turcheck, 272 Mich. App. at 345, 725 N.W.2d at 688*. Importantly, under Michigan law a contract that provides for a usurious [*23] rate of interest is not void. *See Heide v. Hunter Hamilton Ltd. Partnership, 826 F. Supp. 224, 229 (E.D. Mich. 1993)* (Feikens, J.); *Bebee v. Grettenberger, 82 Mich. App. 416, 423, 266 N.W.2d 829, 832 (1978)*. Rather, usury may be asserted only as a defense by the borrower in an action brought by the lender to enforce the debt, and then only to the extent of prohibiting the lender from recovering interest; the borrower remains liable to pay the principal. *See Lincoln Nat'l Bank v. Kaufman, 406 F. Supp. 448, 451 (E.D. Mich. 1976)* (Kennedy, J.); *Osinski v. Yowell, 135 Mich. App. 279, 287-88, 354 N.W.2d 318, 322 (1984)*; *MICH. COMP. LAWS § 438.32*. In lights of these facets of Michigan usury law, the public policy favoring enforcement of contractual choice of law provisions, and other jurisdictions' application of *§ 187*, it cannot be said that application of New York usury law would violate a fundamental public policy of Michigan so as to justify upsetting the law chosen by the parties to govern their transactions. [7]

Further, even if application of New York usury law would violate Michigan public policy, this by itself would be insufficient to reject the parties' choice of law. The public policy exception applies only where the chosen law is contrary to a fundamental policy "of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of *[§] 188*, would be the state of the applicable law in the absence of an effective choice of law by the parties." *Restatement (Second) of Conflicts of Laws, § 187(2)(b)*. In other words, the conflict between Michigan and New York public policy is relevant only if both (a) Michigan has a materially greater interest than New York in determining the usury issue, and (b) Michigan law would apply under *§ 188* in the absence of the parties' choice of law provision. *See Kelly Servs., Inc. v. Marzullo, 591 F. Supp. 2d 924, 938 (E.D. Mich. 2008)* [*25] (Rosen, J.). Here, neither condition is met.

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[5] As the Sixth Circuit has explained in applying Michigan choice-of-law rules as reflected in *§ 187*, "[t]he fact . . . that a different result might [*22] be achieved if the law of the chosen forum is applied does not suffice to show that the foreign law is repugnant to a fundamental policy of the forum state. If the situation were otherwise, and foreign law could automatically be ignored whenever it differed from the law of the forum state, then the entire body of law relating to conflicts would be rendered meaningless." *Johnson v. Ventra Group, Inc., 191 F.3d 732, 740 (6th Cir. 1999)* (citation omitted).

[6] Where Michigan has adopted a rule reflected in a *Restatement* and there are no Michigan cases on point, the Michigan courts find persuasive "the manner in which other courts have applied the *Restatement*." *Pierson Sand and Gravel, Inc. v. Keeler Brass Co., 460 Mich. 372, 385, 596 N.W.2d 153, 159 (1999)*.

[7] Indeed, in many respects New York law is more protective of borrowers than Michigan law. Under New York law, the rate of interest is capped at 6%, rather than at 7% as under [*24] Michigan law. *See N.Y. Gen. Oblig. Law § 5-501*. Further, unlike Michigan law, under New York law "[a] usurious contract is void and relieves the borrower of the obligation to repay principal and interest thereon." *Venables v. Sagona, 85 A.D.3d 904, 925 N.Y.S.2d 578, 580 (N.Y. App. Div. 2011)*.

First, Michigan does not have a "materially greater interest" in the issue than New York. While Michigan undoubtedly has an interest in protecting its residents from usurious interest rates on loans, it is equally true that New York has an equally strong interest in protecting entities doing business in that state, and in allowing those entities to enter into and enforce contracts which are permitted by New York law. *See* *Adler v. Dell, Inc., No. 08-CV-13170, 2008 U.S. Dist. LEXIS 104912, *13 (E.D. Mich. Dec. 18, 2008)* (Steeh, J.) (citing *Gay v. Credit Inform, 511 F.3d 369, 390 (3d Cir. 2007)*). Second, under *§ 188* it would be New York, rather than Michigan, law that applies. *Section 188*, which Michigan follows, *see* *Chrysler Corp., 448 Mich. at 126-28, 528 N.W.2d at 704-05*, provides:

> (1) The rights and duties of the parties with respect to an issue in contract are to be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and to the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in [*26] applying the principles of *§ 6* to determine the law applicable to an issue include:
> (a) the place of contracting;
> (b) the place of negotiation of the contract;
> (c) the place of performance;
> (d) the location of the subject matter of the contract; and
> (e) the domicile, residence, nationality, place of incorporation, and the place of business of the parties.
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflicts of Laws § 188. Here, these factors support application of New York law. Defendants are Michigan (or, in one case, Indiana) residents, but CaseFunding has its principle place of business in New York, and thus this factor is neutral. Likewise, it appears that the contracts were negotiated both in Michigan and New York, and the subject matter of the contract covers both states (the funds advanced by CaseFunding from New York, to be paid from the proceeds of a suit in Michigan), and thus these factors are likewise neutral. However, the other factors support the application of New York law. The contracts were consummated in New York, the funds were advanced from that state, and payment was to be made [*27] to CaseFunding in New York in the event defendants succeeded in their state court suit. CaseFunding's injury occurred in New York. Further, the general factors for resolving conflicts set forth in *§ 6*, which are incorporated in *§ 188*, also support the application of New York law. These factors include not only the relevant interests of the respective states, but also "the needs of the interstate and international systems," "the protection of justified expectations," and "certainty, predictability, and uniformity of result," *See id.*, *§ 6(2)(a)*, *(d)*, *(f)*. These factors are best served by allowing for the application of a uniform law, pursuant to the parties contracted expectations, of an entity doing business throughout the United States. In short, "[i]n view of the balance of the *§ 188* factors . . . , the scales tip east—to the law of" New York. *Professional Consultation Servs. Inc. v. Schaefer & Strohminger Inc., 412 Fed. Appx. 822, 825 (6th Cir. 2011)*; *see* *Johnson, 191 F.3d at 741* ("Although Michigan has substantial ties to the instant transaction because it is Johnson's place of residence and the place where a major part of the performance occurred, Ontario has the more significant [*28] relationship because Manutec as well as the present defendant are Ontario corporations, the contract was negotiated and signed in Ontario, and the alleged breach occurred in Ontario.").

For the reasons set forth above, the Court should conclude that the public policy exception set forth in *§ 187(2)(b)* is inapplicable, and thus that the contractual choice of law provision agreed to by the parties controls here. Further, even if the contractual choice of law provision were inapplicable, the appropriate law governing this dispute would be New York law in accordance with *§ 188*. Accordingly, the Court should apply New York law.

D. *Analysis*

1. *Summary Judgment Standard*

Under *Rule 56*, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Hedrick v. Western Reserve Care Sys., 355 F.3d 444, 451 (6th Cir. 2004)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*). "A fact is material only if its resolution will affect [*29] the outcome of the lawsuit." *Hedrick, 355 F.3d at 451-52* (citing *Anderson, 477 U.S. at 248*). In deciding a motion for summary judgment, the Court must view the evidence in a light

most favorable to the non-movant as well as draw all reasonable inferences in the non-movant's favor. *See* Sutherland v. Michigan Dep't of Treasury, 344 F.3d 603, 613 (6th Cir. 2003); Rodgers v. Banks, 344 F.3d 587, 595 (6th Cir. 2003).

"The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case." Hedrick, 355 F.3d at 451 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). To meet this burden, the moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." Celotex Corp., 477 U.S. at 325; *see also*, Fed. R. Civ. P. 56(c)(1) (moving party may meet its burden by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the [*30] absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 453 (6th Cir. 2001) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)); *see also*, Fed. R. Civ. P. 56(e). To create a genuine issue of material fact, however, the non-movant must do more than present some evidence on a disputed issue. As the Supreme Court has explained:

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [non-movant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson, 477 U.S. at 249-50. (citations omitted); *see* Celotex Corp., 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Thus, "[t]he existence of a mere scintilla of evidence in support of the non-moving party's position will not be sufficient; there must be evidence on which [*31] the jury could reasonably find for the non-moving party." Sutherland, 344 F.3d at 613.

2. *Analysis under New York Law*

Here, there is no dispute that defendants have breached the contracts by not paying the amounts due thereunder after they recovered proceeds from the state court litigation settlement. Nor are there any material facts in dispute. The only question before the Court is the legal question of whether the contracts, or any part thereof, or void as usurious. Applying New York law, the Court should conclude that the contracts are not usurious, and thus that plaintiffs are entitled to summary judgment.

The New York usury statute provides, in relevant part, that "[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action, . . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law." N.Y. Gen. Oblig. Law § 5-501. Under this statute, "[i]t is well settled that there can be no usury in the absence of a loan or forbearance of money." Transmedia Restaurant Co., Inc. v. 33 E. 61st Street Restaurant Corp., 184 Misc. 2d 706, 710 N.Y.S.2d 756, 760 (N.Y. Sup. Ct. 2000) (citing Donatelli v. Siskind, 170 A.D.2d 433, 565 N.Y.S.2d 224, 226 (N.Y. App. Div. 1991)); [*32] *see also*, Seidel v. 18 E. 17 St. Owners, 79 N.Y.2d 735, 598 N.E.2d 7, 11-12, 586 N.Y.S.2d 240 (N.Y. 1992) (citations and quotations omitted) ("Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be."). The hallmark of a loan, for purposes of the usury statute, is an absolute right to repayment or some form of security for the debt. "'For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard.'" *Zoo Holdings, LLC v. Clinton, 11 Misc. 3d 1051[A], 814 N.Y.S.2d 893, 2006 WL 297730, at *4 (N.Y. Sup. Ct. 2006)* (quoting Rubenstein v. Small, 273 A.D. 102, 75 N.Y.S.2d 483, 485 (N.Y. App. Div. 1947)). In other words, "there can be no usury unless the principal sum advanced is repayable absolutely." Transmedia Restaurant, 710 N.Y.S.2d at 760. Under New York law, there is a strong presumption against finding a transaction to be usurious, and the party seeking to void the transaction must establish usury by clear and convincing evidence. *See* Zhavoronkin v. Koutmine, 52 A.D.3d 597, 860 N.Y.S.2d 561, 562 (N.Y. App. Div. 2008); Jimenez v. Acheson, 42 A.D.3d 831, 840 N.Y.S.2d 648, 649 (N.Y. App. Div. 2007).

Defendants [*33] concede, as they must, that under New York law that Agreements were not "loans," and thus cannot be usurious. As just noted, where a purported lender does not have an absolute right to repayment, the transaction is not a loan and the usury statute is inapplicable. Here, there is no dispute that CaseFunding had no absolute right to repayment under the Agreements. The Agreements explicitly provide that CaseFunding's right to payment is contingent upon defendants' success in

the underlying state court litigation, that its right to payment is limited to the amount recovered through verdict or settlement, and that it has no right to payment if no recovery is obtained. *See* Agreement, ¶ 3. Because CaseFunding's right to payment was contingent upon success and recovery in the underlying lawsuit, the transactions were not "loans" and the New York usury statute does not render them invalid. *See Lynx Strategies, LLC v. Ferreira, 28 Misc. 3d 1205[A], 2010 WL 2674144, at * (N.Y. Sup. Ct. 2010)* ("The instant transaction . . . is an ownership interest in proceeds for a claim, contingent on the actual existence of any proceeds. Had respondent been unsuccessful in negotiating a settlement or winning [*34] a judgment, petitioner would have no contractual right to payment. Thus, usury does not apply to the instant case."); *see also, O'Farrell v. Martin, 161 Misc. 353, 292 N.Y.S. 581, 583-84 (N.Y. City Ct. 1936)*.

Defendants do argue, however, that even under New York law the second agreements between CaseFunding and defendants Lofton and Madison were usurious, because when those agreements were entered into the defendants in the underlying state court litigation had already agreed to settle with the class for $100 million. Defendants contend that these agreements, entered into on June 16, 2009, were effected six days after the state court defendants had agreed to settle with the class, and thus "there was no question that at the time th[ese] advance[s] w[ere] made, both Ms. Lofton and Ms. Madison were definitely going to recover some damages." Br. in Supp. of Def.s' Mot. for Summ. J., at 12. In support of this argument, defendants rely on the Michigan Court of Appeals's decision in *Lawsuit Financial, L.L.C v. Curry, 261 Mich. App. 579, 683 N.W.2d 233 (2004)*. Defendants cite, however, no New York law on point in support of their position.

As noted above, under New York law the usury statute is applicable [*35] only to loans, and the New York courts are clear that for a transaction to be considered a loan there must be a right to "'repayment *absolutely* and *at all events*.'" *Zoo Holdings, 11 Misc. 3d 1051[A], 814 N.Y.S.2d 893, 2006 WL 297730, at *4* (quoting *Rubenstein, 75 N.Y.S.2d at 485*) (emphasis added); *see also, Transmedia Restaurant, 710 N.Y.S.2d at 760*. Here, even if the defendants had agreed to settle, there was not an absolute right to repayment at the time the second agreements were executed because the settlement had not been agreed to by the plaintiffs. Class counsel in the state court litigation did not inform the state court plaintiffs of the proposed settlement until her July 6, 2009, letter advising the plaintiffs of the proposed settlement and encouraging the plaintiffs to accept the settlement. *See* Br. in Supp. of Pl.s' Mot. for Summ. J., Ex. O. Indeed, that letter indicates that the tentative settlement was reached not on June 9, but rather on June 30, 2009, after the second agreements had been executed. *See id.* In any event, at the time the second agreements were executed the settlement had neither been accepted by the state court plaintiffs nor been approved by the trial court. Whether likely or not, there still [*36] remained the possibility that one or more of the litigants would decline to accept the settlement, or that the trial court would not approve the settlement. Thus, at the time the second agreements were entered into, CaseFunding did not have a right to "repayment absolutely and at all events." Its right to payment remained contingent on events that were yet to occur, namely, acceptance of the settlement by the state court plaintiffs and approval by the trial court. Under New York law, this is sufficient to take the agreements outside the scope of the usury statute.

Further, under New York law "[i]ntent to overcharge is an essential and necessary element of usury." *Leibovici v. Rawicki, 57 Misc. 2d 141, 290 N.Y.S.2d 997, 1001 (N.Y. City Ct. 1968)*. "There must exist, in fact or in law, a corrupt purpose or intent on the part of the person who takes the security to secure an illegal rate of interest for the loan or forbearance of money." *Orvis v. Curtiss, 157 N.Y. 657, 52 N.E. 690, 691 (N.Y. 1899)*. Under this rule, "a bona fide mistake of fact vitiates usurious intent." *Freitas v. Geddes Sav. & Loan Ass'n, 63 N.Y.2d 254, 471 N.E.2d 437, 443, 481 N.Y.S.2d 665 (N.Y. 1984)*. Here, there is no evidence, much less clear and convincing evidence, to establish [*37] that CaseFunding had a usurious intent. Even if a settlement had been reached as of the date of the second agreements which rendered CaseFunding's right to payment absolute, there is no evidence that CaseFunding knew of this settlement at the time the second agreements were executed. Defendants cite only an e-mail from one attorney in the underlying state court action to other attorneys in the state court action pre-dating the second agreements indicating that a settlement had been reached as to monetary issues. *See* Br. in Supp. of Def.s' Mot. for Summ. J., Ex. 7. There is no evidence, however, that CaseFunding knew of this proposed settlement, and thus intended to "secure an illegal rate of interest for the loan or forbearance of money." Rather, CaseFunding's intent at that time, based on the information then available to it, was to enter into a contingent purchase agreement, not a loan of money. Because there was no usurious intent, and because in any event CaseFunding did not have an absolute right to repayment when it executed the second agreements with defendants Lofton and Madison, these second agreements are not void under the usury statute.

Because the Agreements entered into [*38] between CaseFunding and defendants were not loans subject to the New York usury statute, and because there is no genuine issue of material fact that defendants have breached the Agreements, the Court should grant summary judgment to plaintiffs on their breach of contract and anticipatory breach of contract claims.

3. *Analysis under Michigan Law*

Although I recommend that the Court conclude New York applies pursuant to both the parties' contractual choice of law and Michigan's ordinary conflict of law principles, for the sake of completeness I analyze defendants' argument that the Agreements are usurious under Michigan law, in the event the Court disagrees with my analysis of the choice of law provision.

On its face, the Michigan usury statute is broader than the New York statute. The Michigan statute provides, in relevant part: "The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum." *Mich. Comp. Laws § 438.31*. By its terms, the statute [*39] is not limited to a "loan" or "forbearance." In *dicta*, the Michigan Supreme Court has observed that this statute is broader than many other usury statutes, because the statute applies not only to the "loan of money or the extension of pre-existing debts, but also [to] all contracts and assurances." *Black v. Contract Purchase Corp., 327 Mich. 636, 643, 42 N.W.2d 768, 772 (1950)*; *see also*, *Hillman's v. Em 'N Al's, 345 Mich. 644, 651, 77 N.W.2d 96, 101 (1956)*. [8] From this statement in *Black*, reiterated in *Hillman's*, defendants argue that the Michigan usury statute prohibits any "charges, whatever their specific character or label, that aggregate in excess of seven percent annual simple interest." Br. in Supp. of Def.s' Mot. for Summ. J., at 12. Michigan law, however, does not support this argument.

It is true that *Black* recognized that the usury statute applies to all contracts. However, the *Black* court itself recognized that what is prohibited [*40] by the usury statute is an illegal rate of interest. Specifically, the court stated that the usury statute "includes *interest* not only on the loan of money or the extension of pre-existing debts, but also on all contracts and assurances." *Black, 327 Mich. at 643, 42 N.W.2d at 772* (emphasis in original). The *Black* court itself emphasized the word "interest," and concluded that a discount rate on the purchase of commercial paper did not constitute interest prohibited by the usury statute. The court also concluded that the underlying installment sales contracts were not usurious, because a seller may charge a different price for goods sold on credit than that charged on goods sold for cash. Similarly, in *Hillman's* the court remanded for a determination of whether the transaction at issue involved a charge of interest, or merely a discount on the sale of commercial paper. Under defendants' view of Michigan law, these cases could not have been decided as they were-the simple fact that there was some charge in excess of the legal rate prescribed by the usury statute would have resulted in a finding that the contracts were usurious.

Defendants' interpretation of *Black* and *Hillman's*, apart [*41] from being not supported by their language, runs afoul of the long established rule in Michigan that interest and usury statutes, being in derogation of the common law, are to be strictly construed. *See* *Marion v. City of Detroit, 284 Mich. 476, 484, 280 N.W. 26, 29 (1938)*; *Trierweiler v. Varnum, Riddering, Schmidt & Howlett, L.L.P., No. 256511, 2006 Mich. App. LEXIS 1510, 2006 WL 1161546, at *3 (Mich. Ct. App. May 2, 2006)* (per curiam). Their interpretation also reads out of the statute the word "interest," replacing it with the word "charge." *Black* itself, however, highlighted the word interest, and concluded that a discount rate on the sale of commercial paper, which could certainly constitute a "charge," was not "interest" under the usury statute. Thus, the real question before the Court is not whether the Agreements are subject to the usury statute, but rather whether the charges reflected in the Agreements constitute "interest" under the Michigan usury statute. The Court should conclude that they are not.

Under Michigan law, in a variety of contexts, interest is defined as a fixed rate paid for the use or forbearance of money, pursuant to a contract or by law. *See* *Town & Country Dodge, Inc. v. Department of Treasury, 420 Mich. 226, 242, 362 N.W.2d 618, 626 (1984)*; [*42] *Balch v. Detroit Trust Co., 312 Mich. 146, 152, 20 N.W.2d 138, 141 (1945)*; *Marion, 284 Mich. at 484, 280 N.W. at 29*; *Eames v. Barber, 192 Mich. 1, 14, 158 N.W. 218, 223 (1916)*; *Perry Drug Stores, Inc. v. Department of Treasury, 229 Mich. App. 453, 463, 582 N.W.2d 533, 538 (1998)*. Here, for the same reason that the Agreements do not constitute loans under New York law, they do not charge interest under Michigan law. Because there is no guarantee of repayment, the charges in the Agreements are not a fixed rate for the use or forbearance of money; rather, they are a negotiated rate of return on an investment, payable in the event that the contingency occurs. *Lawsuit Financial, supra*, upon which defendants rely, supports this conclusion.

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[8] *Black* involved installment sales on credit, which the court determined to be outside the scope of the usury statute. *Hillman* remanded for a determination of whether the contract was actually a credit sale or a loan subject to the usury statute.

In *Lawsuit Financial,* the court considered an agreement similar to those involved here, which provided a capital advance in exchange for an agreed-upon return on investment if the defendant was successful in his underlying state court action. While the court found that the agreement in that case was usurious under the Michigan usury statute, it did not do so on the basis advanced by defendants here, *i.e.*, that the usury statute prohibits all "charges" in [*43] excess of 7% in any contract. Rather, the court construed the issue as being whether the contingent advances were actually loans with an absolute right of repayment. The court explained:

> Contrary to plaintiff's arguments, the "contingent advances" were actually loans. "The hallmark of a loan is the *absolute* right to repayment." *Blackwell Ford, Inc. v. Calhoun, 219 Mich. App. 203, 209, 555 N.W.2d 856 (1996)* (emphasis in original). The word "loan" implies an advance of money with an absolute promise to repay. *Id., at 209-210, 555 N.W.2d 856*, quoting *People v. Lee, 447 Mich. 552, 559, 526 N.W.2d 882 (1994)*.

Lawsuit Financial, 261 Mich. App. at 588, 683 N.W.2d at 239. The court went on to conclude that the advances in that case were loans because at the time they were made the defendant in the underlying suit had already admitted liability, the borrower had obtained a jury verdict and judgment had been entered, and the only remaining issues after judgment went to the propriety of the amount of the verdict, not to liability. *See id. at 588-89, 683 N.W.2d at 239*. The court reasoned that "[b]ecause liability had already been admitted when plaintiff advanced the funds, the fact that defendant [*44] Curry would recover some damages for her injuries was already known. Therefore, plaintiff was entitled to an absolute right of repayment." *Id. at 589, 683 N.W.2d at 239*. Contrary to defendants' argument here as to the provisions of Michigan law, the *Lawsuit Financial* court focused on the absolute right to repayment as the dispositive factor in determining whether the usury statute applied to the loan. Had that court viewed Michigan law as providing for the rule asserted by defendants here, its discussion of whether there was an absolute right to payment would be irrelevant; it would have been enough for the court to simply observe that the contract contained a charge above the 7% limit set by the usury statute. *Cf. Dimmitt & Owens Fin., Inc. v. Realtek Indus., Inc., 90 Mich. App. 429, 436, 280 N.W.2d 827, 830 (1979)* ("The usury statute . . . is inapplicable because . . . the instant situation does not involve refinancing or the making of loans.").

Applying the *Lawsuit Financial* analysis here, plaintiffs are entitled to summary judgment because there was no absolute right to repayment. Rather, as explained above in the discussion of New York law, CaseFunding's right to payment was contingent [*45] upon defendants' success in the underlying lawsuit. While it is true that a judgment had been entered in the underlying suit, as one had been entered in *Lawsuit Financial*, unlike in that case here the state court defendants had not admitted liability at the time the Agreements were executed. On the contrary, the state court defendants were appealing on the basis that the Civil Rights Act did not apply to prisoners, and that in any event they were not liable for the alleged harassment. As counsel for the state court plaintiffs (defendants here) repeatedly acknowledged, while this appeal was pending—which it was at the time all of the Agreements were executed—there remained a substantial risk that the Michigan Supreme Court would reverse the judgment and that the state court plaintiffs would not recover on their claims. *See* Br. in Supp. of Pl.s' Mot., Exs. N & O. Thus, there was no absolute right to payment and, under the reasoning of *Lawsuit Financial*, this fact is sufficient to take the Agreements outside the scope of the Michigan usury statute. Accordingly, the Court should conclude that plaintiffs are entitled to summary judgment even if Michigan law is applied to the Agreements. [*46] [9]

E. *Conclusion*

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[9] If the Court disagrees with my conclusions both that New York law applies and that the Agreements are not usurious under Michigan law, each party would be entitled to partial summary judgment. As noted above, under Michigan law a contract that provides for a usurious rate of interest is not void. *See Heide v. Hunter Hamilton Ltd. Partnership, 826 F. Supp. 224, 229 (E.D. Mich. 1993)* (Feikens, J.); *Bebee v. Grettenberger, 82 Mich. App. 416, 423, 266 N.W.2d 829, 832 (1978)*. Rather, usury may be asserted only as a defense by the borrower in an action brought by the lender to enforce the debt, and then only to the extent of prohibiting the lender from recovering interest; the borrower remains liable to pay the principal. *See Lincoln Nat'l Bank v. Kaufman, 406 F. Supp. 448, 451 (E.D. Mich. 1976)* (Kennedy, J.); *Osinski v. Yowell, 135 Mich. App. 279, 287-88, 354 N.W.2d 318, 322 (1984)*; *Mich. Comp. Laws § 438.32*. Thus, if the Court concludes that Michigan law applies and that the Agreements are usurious under Michigan law, plaintiffs are still entitled to summary judgment on their breach of contract claims with respect to the principal advanced to defendants, while defendants are entitled [*47] to summary judgment to the extent plaintiffs are seeking any amount beyond the principal sums advanced to defendants. *See Lawsuit Financial, 261 Mich. App. at 587, 591, 683 N.W.2d at 238, 240*.

In view of the foregoing, the Court should conclude that there are no genuine issues of material fact and that plaintiffs are entitled to judgment as a matter of law. Specifically, the Court should conclude that New York law governs the Agreements, and that under New York law the Agreements are not usurious. Alternatively, the Court should conclude that even if Michigan law applies, the Agreements are not usurious under the Michigan usury statute. Accordingly, the Court should grant plaintiffs' motion for summary judgment and deny defendants' motion for summary judgment.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in *Fed. R. Civ. P. 72(b)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Secretary of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; [*48] *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sullivan, 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE

Dated: 1/23/11

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Penn Mut. Life Ins. Co. v. Orr

Supreme Court of Iowa, Des Moines

February, 1934, Decided

No. 42345.

Reporter
217 Iowa 1022 *; 252 N.W. 745 **; 1934 Iowa Sup. LEXIS 263 ***

PENN MUTUAL LIFE INSURANCE COMPANY, Appellee, v. EDITH F. ORR et al., Appellants.

Prior History: [***1] Appear from Woodbury District Court.--MILES W. NEWBY, Judge.

FEBRUARY 6, 1934.

Action in equity to foreclose a mortgage on real estate. From a judgment and decree in favor of plaintiff, the defendant appeal.--Affirmed.

Disposition: Affirmed.

Case Summary

Procedural Posture
Plaintiff, an assignee of a note and a mortgage on real estate, brought an action in equity against defendants, a husband and a wife, to foreclose the mortgage. The Woodbury District Court (Iowa) entered a judgment and a decree in favor of the assignee. Defendants sought review.

Overview
Defendants executed and delivered a promissory note and, as security for same, a mortgage covering certain real estate. The mortgagee assigned the note and the mortgage to the assignee. The trial court foreclosed the mortgage. On appeal, the court held that the husband, as a signer of the note, was presumptively liable because he failed to show that consideration was lacking for his signature where the wife received valuable consideration as a part of the same transaction. Next, the court held that defendants failed to sustain their burden of proving that the note was usurious because the evidence did not show that the rate of interest reserved, together with the commission and taxes and other known charges which defendants, as the makers of the note and the mortgage, were required to pay, would exceed eight percent per annum when computed over the full term of the note and mortgage. Furthermore, the trial court's judgment was not reduced because the interest at eight percent charged from January 1, 1932 to July 1, 1932 was interest that became due on the principal after maturity.

Outcome
The court affirmed the judgment and the decree of the trial court.

Counsel: F. W. Lohr, for appellants.

Milchrist, Schmidt, Marshall & Jepson, for appellee.

Judges: DONEGAN, J. CLAUSSEN, C. J., and EVANS, ALBERT, and KINDIG, JJ., concur.

Opinion by: DONEGAN

Opinion

[*1023] [**745] DONEGAN, J.--On May 3, 1924, Edith F. Orr and M. J. Orr executed and delivered to W. F. Grandy their promissory note for $ 21,000 and, as security for same, a mortgage covering certain real estate in the city of Sioux City, Iowa. Such note and mortgage were later assigned to the Penn Mutual Life Insurance Company. On July 13, 1932, the Penn Mutual Life Insurance Company filed its petition in equity against said Edith F. Orr and M. J. Orr, alleging that they had failed to make payment as provided in said note, asking for a personal judgment against them in the sum of $ 20,204.37, and for the foreclosure of the said mortgage. The defendants filed separate answers. In his separate answer, the defendant M. J. Orr admitted that he signed the note [***2] and mortgage, but claimed that his signature to said note was given without any consideration; that the consideration for said note was a loan made to Edith F. Orr, secured by the real estate described in the mortgage, in which the defendant M. J. Orr had no interest whatever except an inchoate [*1024] right of dower; that he signed said note as husband of said Edith F. Orr merely to bind his inchoate right of dower or statutory interest in his wife's real estate and for no other purpose. In her separate answer the defendant Edith F. Orr admitted signing said note and mortgage, but denied that there was due on said note the amount claimed by plaintiff; alleged that Grandy had retained [**746] $ 420 of said loan as pretended commission in addition to amounts deducted therefrom for revenue stamps, recording fees, and abstract fees; and that in addition he had required insurance upon the mortgaged property in the sum of $ 26,500, which was written by him for the purpose of increasing the profit of said Grandy on said loan; that said mortgage also contained provisions requiring the mortgagor to pay all taxes and assessments, general and special, except federal income tax, assessed [***3] upon the mortgaged premises, and upon the mortgage or money secured thereby, without regard to any law theretofore or thereafter enacted; and that, because of said requirements, the said note and mortgage contracted for interest in excess of 8 cents on the dollar by the year and were usurious. Said defendant also alleged that the Penn Mutual Life Insurance Company is not a holder in good faith, and that the said W. F. Grandy was the agent of said plaintiff in the making of the loan to defendant, and that said plaintiff is charged with knowledge and notice of the illegal nature of the transaction. Defendant Edith F. Orr also filed a counterclaim in which she asked for an accounting to determine the exact amount of illegal and usurious interest paid by defendant, and that there be deducted from the principal 8 per cent on the dollar by the year as provided by law. Upon the trial of the case the court entered judgment and decree in favor of the plaintiff in the sum of $ 21,138.24, with interest thereon at 8 per cent from January 6, 1933, the date of the decree, and for costs and attorney's fees. From this decree and judgment, and from all parts of said judgment and rulings thereon, the [***4] defendants appeal.

[1] I. The first proposition presented by appellants is that the note sued upon was without consideration so far as the appellant M. J. Orr is concerned. The record shows without dispute that the legal title to the property covered by the mortgage was in the appellant Edith F. Orr, and appellant M. J. Orr contends that his only interest in the mortgaged property and in the loan secured thereon was because of his inchoate right of dower; that none of the money secured by the loan was paid to him; and that his only [*1025] connection with the loan was in conducting the negotiations as agent for his wife, Edith F. Orr. He contends that the evidence is therefore such that the trial court should have decreed that there was no consideration to support his signature to the note, and that as to him there should be no personal judgment. The evidence shows, however, that appellant M. J. Orr not only conducted all the negotiations in regard to securing the loan, but that he stated that the property had been purchased and paid for by him and the title taken in the name of his wife. It further shows that there was no discussion whatever in regard to his inchoate [***5] right of dower or the reasons for his signature being attached to the note at any time either before or after it was signed, until the filing of his answer herein. It appears that his signature was attached to the note at the time that the loan was secured and as a part of that transaction. It is a rule of law so well established as to require no citation of authorities that the signer of a promissory note is presumptively liable thereon. It is stated in *Nolte v. Nolte, 211 Iowa 1289, 235 N.W. 483*, that:

"It is a fundamental rule that consideration passing from the payee of a note to the maker will support the liability of one who signs contemporaneously, as a surety or comaker."

In *Myers v. Sunderland, 4 Greene 567*, one of the makers of a note defended on the ground that he had received no part of the consideration. In considering that question, this court said:

"The only question to be decided is, Do the averments in the answer constitute a bar to the action? The answer admits that the payee gave a full consideration for the note, but claims that the consideration was received by Weir, one of the makers. It matters not which of the makers of a note receive [***6] the consideration. It must be presumed that the payee was induced to

give the consideration on the credit of the names attached to the note. The makers of such a note are severally and equally responsible, without regard to the party who received the consideration."

Appellant M. J. Orr having signed the note along with his wife and as a part of the same transaction in which she received valuable consideration, the burden was upon him to show failure of consideration for his signature. We think he has failed to sustain such burden.

[*1026] **[2]** II. Appellants contend that the note sued upon was usurious. They base this contention on the fact that Grandy deducted $ 420 from the face of the loan as a commission; that the appellant Edith F. Orr received only $ 20,580, instead of $ 21,000, that this $ 420 commission together with the $ 1,260 interest for one year made a total of $ 1,680 paid by her on said note for the first [**747] year; and that this made a total charge for the use of the money for this first year in excess of the 8 per cent and is, therefore, usurious. Appellee, on the other hand, contends that the $ 420 deducted from the face of the loan was a commission [***7] of 2 per cent on the loan charged for procuring the same; that the loan was for five years; that the commission, if considered as interest, applied to a five year loan and should be distributed over that period of time; and that when this is done, it will readily be seen that the rate of interest is much less than the 8 per cent permitted by the laws of this state.

Neither side has cited any authorities in support of their respective contentions. Aside from the question as to the commission being for services rendered and based upon an independent consideration, we think the reasonable rule for determining whether an instrument is usurious or not must take into consideration the entire length of time that the money will be retained by the borrower. In *Smith v. Parsons, 55 Minn. 520, 57 N.W. 311*, the amount of interest reserved was 7 per cent, and there was a question whether the bonus charge for making the loan, and other charges made by the lender, caused the total amount charged for the use of the money loaned to be more than 10 per cent. The court found that the transaction was usurious, but in doing so it computed the interest as provided by the instrument for the [***8] full term, added thereto the amount of all other deductions made by the lender, and found that the total amount thus charged to the borrower exceeded the legal rate of 10 per cent on the amount of principal actually received by him.

The mortgage involved in this case contained a provision that:

"The mortgagor hereby agrees to pay all taxes and assessments, general or special, excepting only the Federal Income Tax, which may be assessed upon said land, premises or property, or upon the mortgagee's interest therein; or upon this mortgage or the moneys secured hereby; without regard to any law heretofore enacted or [*1027] hereafter to be enacted, imposing payment of the whole or any part thereof, upon the mortgagee; * * *"

Appellants further contend that by requiring the borrower to pay such taxes assessed against the lender, the amount thus exacted from the borrower should be considered as additional interest in determining whether the note was usurious or not. They argue that under such instrument the borrower may be compelled to pay a state income tax on the interest on the loan received each year by the lender; a tax upon the mortgagee's interest in the land based on the [***9] amount of his mortgage; and a tax on moneys and credits. It is conceded that the only such tax now imposed by the laws of this state is the tax on moneys and credits, which, upon the face of the loan, would amount to $ 126 per year. But it is contended that the other taxes referred to in the mortgage may be imposed by the state at some future time, and that, if this is done, the total of such taxes would reasonably amount to nearly three per cent a year on the debt, which, added to the rate of interest provided, would make the instrument usurious.

Appellants contend that the mere fact that the mortgage provides for these charges against the borrower is sufficient to make the instrument usurious, and that the intention of the lender in providing for these charges cannot be considered. In support of this contention they cite the case of *Vandervelde v. Wilson, 176 Mich. 185, 142 N.W. 553*. In the case cited, however, the rate of interest reserved in the instrument was 7 per cent, which was the maximum rate of interest permitted in Michigan at that time. The court found that, under the provisions of the mortgage, certain taxes, which under the law were assessed to the mortgagee, [***10] were required to be paid by the mortgagor, and held that, since any addition to the rate of interest provided in the note would make the instrument usurious, there could be no question of the intention of the mortgagor. In considering the question of intention, that case cited from *Green v. Grant, 134 Mich. 462, 96 N.W. 583* wherein it was said:

"'Nor can we assent to the contention of defendant that a contract is usurious because the aggregate of interest reserved and taxes paid exceeds the maximum allowed by the statute. In our judgment, such a contract is not usurious per se. Whether or not it is usurious depends upon the intention of the lender. If, at the time the contract was made, he knew that the aggregate of interest [*1028] reserved and taxes to be paid would exceed the statutory rate, as he would if the interest reserved was the maximum interest, the contract is usurious. If, on the other hand, at that time he believed that the aggregate of interest and taxes would not exceed the maximum rate allowed by statute, it would be as contrary to law as to good morals to declare it usurious.'"

Following the above quotation, the court, in Vandervelde v. Wilson, [***11] proceeded to say:

[**748] "Counsel says that the statement in the opinion, 'as he would if the interest reserved was the maximum interest,' is obiter dictum. This is, however, a correct statement of the law, and when the contract in terms reserves usury the intent is necessarily implied."

Appellants also cite the case of *Stuart v. Durland, 115 Neb. 211, 212 N.W. 31, 53 A. L. R. 739*, in which it was held that a mortgage which contained a provision that the mortgagor should pay, in addition to the maximum rate of interest permitted by statute, the taxes to be assessed upon the notes and mortgages or assessed against the mortgagee's interest in the mortgaged premises, was usurious. In that case, as in the Vandervelde case, supra, the interest reserved in the note and mortgage was the maximum rate permitted by statute. Under the Nebraska law then in force, the mortgagor was held to have an interest to the extent of his mortgage in the mortgaged premises, and was required to pay taxes thereon. The provision in the note requiring these taxes to be paid by the borrower, in addition to the maximum rate of interest, necessarily constituted usury. While holding that the transaction [***12] was usurious, the court said:

"We do not wish to be understood as holding that a mortgage containing such a clause as appears in the present case is usurious, where the stipulated rate of interest; exclusive of the taxes is less than the legal maximum rate. It is probable that such a contract would not be usurious, even when the aggregate of the stipulated interest and taxes exceeded 10 per cent, unless at the time of the making of the contract, both parties knew or believed that the tax and other stipulated interest would be in excess of 10 per cent. However, that question is not now before us and of course is not decided."

[*1029] So far as we have been able to find, the cases generally support the rules announced in the Vandervelde case and the Stuart case, supra; that is, if the instrument provides for the maximum rate of interest and for the payment by the borrower of taxes assessable to the lender, there can be no question of intention involved, because the instrument itself shows that it is usurious. But, if the instrument does not provide for the maximum rate of interest, and provides for payment of taxes by the borrower which are assessable to the lender, the instrument [***13] may or may not be usurious, and in determining this question the intention of the parties may be considered. The evidence in this case fails to show that the rate of interest reserved, together with the commission and taxes and other known charges which the makers of the note and mortgage were required to pay, will exceed 8 per cent per annum when computed over the full term of the note and mortgage. The burden of proving that the note is usurious was on the defendants, and they have failed to sustain this burden.

[3] III. Appellants complain that, in any event, the amount of the judgment should be reduced because it contains a charge for interest at the rate of 8 per cent per annum from January 1, 1932, to July 1, 1932, whereas the interest for that period should be computed at the rate of 6 per cent per annum. The note sued upon, however, provides that the principal amount shall be paid "with interest thereon at the rate of six (6) per cent per annum from date hereof until the maturity of said respective installments, payable semi-annually January 1st and July 1st, and after maturity at the rate of eight (8) per cent per annum." The last installment of principal was payable [***14] July 1, 1929. The interest at 8 per cent charged from January 1, 1932, to July 1, 1932, was, therefore, interest which became due on the principal after maturity. We see no error in the computation made by the trial court.

Other propositions are set forth and argued by appellants in their brief and argument, but, in view of our holding that the note sued upon was not usurious, it becomes unnecessary to consider them in this opinion.

The judgment and decree of the trial court is affirmed.--Affirmed.

CLAUSSEN, C. J., and EVANS, ALBERT, and KINDIG, JJ., concur.

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Pisciotta v. Kardos

Court of Appeals of Michigan

October 5, 2017, Decided

No. 332300

Reporter
2017 Mich. App. LEXIS 1526 *

MARK PISCIOTTA and DARK HORSE DEVELOPMENT GROUP, LLC, Plaintiffs/Counter-Defendants-Appellants, v RONALD LAWRENCE KARDOS, Defendant/Counter-Plaintiff-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Pisciotta v. Kardos, 501 Mich. 1061; 910 N.W.2d 276; 2018 Mich. LEXIS 781 (Mich., May 1, 2018)*

Prior History: [*1] Genesee Circuit Court. LC No. 14-103738-CB.

Judges: Before: GADOLA, P.J., and METER and FORT HOOD, JJ.

Opinion

PER CURIAM.

Plaintiffs appeal as of right an order "settling attorney fees [and] reinstatement amount and for payment of received rents in lieu of judgment of foreclosure." We affirm.

After meeting at a crowdfunding seminar in April 2012, the individual parties[1] became business partners, with plaintiff Mark Pisciotta locating and managing properties in Flint, and defendant Ronald Lawrence Kardos being the funding source for the venture. After a few weeks, Kardos informed Pisciotta that he wanted out of the venture. Pisciotta requested that Kardos lend the money in exchange for a 20% return, instead of pulling out of the venture. Kardos agreed to lend money for homes under contract to avoid losing deposits, retained a lawyer, and had mortgages and promissory notes prepared and executed. Some of the mortgages applied to Pisciotta and others to Dark Horse Development Group, LLC. Each of the loans was cross-collateralized with the others. Thereafter, Pisciotta implored Kardos to supply more funding for additional homes. Kardos was initially reluctant, but eventually agreed when Pisciotta offered Kardos [*2] an equity share in the event of sale of the properties. Later, Pisciotta demanded a lower monthly payment, and Kardos accommodated this. Pisciotta then requested that Kardos "over advance" him more money to make improvements to the properties. Kardos agreed to this as well.

Pisciotta paid his debt obligations for seven months, then defaulted. Pisciotta tried to convince Kardos to restructure the loans, but Kardos refused. In response, Pisciotta threatened Kardos with litigation, arguing that the loans were usurious. Kardos subsequently began foreclosing on four of the properties, by advertisement. On October 28, 2014, plaintiffs filed a complaint and moved for a preliminary injunction and restraining order to prevent Kardos from foreclosing on the properties by advertisement, alleging that the loans were usurious. The trial court granted a temporary restraining order, only to dissolve it and reschedule the foreclosure sale after hearing plaintiffs' motion on November 10, 2014. At the hearing, the parties argued about the effect the equity-sharing agreements had on the usury claim and the harm of allowing the foreclosures by

[1] Pisciotta is the sole owner of Dark Horse Development Group, LLC.

advertisement to happen. The court found that defendant's expert's [*3] testimony stating that the interest rates on the properties did not exceed 25% was unrefuted by plaintiffs and that the equity-sharing agreements should not be considered when calculating the effective interest rates of the loans. It denied the preliminary injunction.

Subsequently, Kardos moved for summary disposition, and the court granted the motion. The parties argued whether to follow *Holland v Michigan National Bank-West, 166 Mich App 245; 420 NW2d 173 (1988)*, and *Krause v Griffis, 178 Mich App 111; 443 NW2d 444 (1989)*.[2] The court also considered whether the present case dealt with a business entity under *MCL 438.61* and whether the notarized mortgages counted as sworn statements under this statute. The court found that the loans to Dark Horse were "certainly" not usurious because they were made to a limited liability company. The court also found that the loans made to Pisciotta were not usurious under *Krause*, *Holland*, and the business-entity exception of *MCL 438.61*. Lastly, the court found that because there were too many uncertainties about the value of the properties if and when Pisciotta decided to sell them, the equity-sharing agreements could not be calculated into the interest rates for the properties when determining whether the loans were usurious.[3]

Kardos had filed a counter-complaint seeking judicial foreclosure on the [*4] remainder of the properties. He filed a motion for summary disposition for judicial foreclosure pursuant to *MCL 600.3115* on August 24, 2015. On September 11, 2015, the court granted Kardos's motion for summary disposition regarding judicial foreclosure. This order preserved plaintiffs' right to appeal the prior rulings of the lower court and any damages incurred based on the lower court's rulings in the event that the appeal was successful. Plaintiffs moved to settle attorney fees on

October 30, 2015, because the parties had not been able to resolve the amounts owed for attorney fees. Plaintiffs requested that the court determine the reasonableness of Kardos's attorney fees and reduce the hourly rate to that customarily charged in the locality. During the November 16, 2015, hearing, the lower court ruled that plaintiffs should not receive a reduction for the attorney fees paid by Kardos in the purchase of the four properties because the foreclosures by advertisement were "done" and "taken care of." The lower court also determined that Genesee County was the appropriate county to use to determine reasonable attorney fees.

Kardos also filed a motion to settle the differences in amounts to reinstate [*5] some of the loans. The parties determined the remaining funds plaintiffs owed Kardos. On March 14, 2016, the court issued an order "settling attorney fees [and] reinstatement amount and for payment of received rents in lieu of judgment of foreclosure." After the order was entered, the loans were reinstated. Plaintiffs subsequently filed their claim of appeal.

Plaintiffs first contend that the trial court erred in determining that the business-entity exception to usury laws applied to the loans in this case because Kardos did not obtain a sworn statement as required by *MCL 438.61(1)(a)*.

This issue requires us to interpret *MCL 438.61*. Statutory interpretation is reviewed de novo. *Czymbor's Timber, Inc v City of Saginaw, 478 Mich 348, 354; 733 NW2d 1 (2007)*. We also review de novo a trial court's ruling on a motion for summary disposition. *Id.*

The trial court indicated that the loans were not usurious because the business-entity exception in *MCL 438.61(1)(a)* applied. *MCL 438.61* states:

(1) As used in this act:

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[2] In *Holland, 166 Mich App at 258-261*, this Court found that the Hollands' loan fell within the intent of the business-entity exception to usury laws—outlined in *MCL 438.61*—because it was made for a business purpose, and that the Hollands were estopped from asserting the lack of strict compliance with the "sworn statement" language of *MCL 438.61(1)(a)* because they did not protest when they acquiesced to the procedures used in the making of the statement. In *Krause, 178 Mich App at 115-116*, the Court applied the business-entity exception in *MCL 438.61* to the loan at issue because it was made to purchase property to be operated as a business and the signed, notarized land contract made reference to the property as "income potential" property.

[3] An additional count of the complaint remained outstanding at the time of the court's grant of summary disposition, but the court later dismissed this remaining count as well.

> (a) "Business entity" means a corporation, trust, estate, partnership, cooperative, or association or a natural person who furnishes to the extender of the credit a sworn statement in writing specifying the type of business and business purpose for which the proceeds of the loan or other extension of credit will [*6] be used. An exemption under this act does not apply if the extender of credit has notice that the person signing the sworn statement was not engaged in the business indicated in the sworn statement.
> (b) "Related entity" means a business entity other than a natural person whose members, owners, partners, or limited partners include a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, an insurance carrier, or finance subsidiary of a manufacturing corporation.
>
> (2) Notwithstanding [*MCL 438.31* through *MCL 438.33*] and [*MCL 438.41* through *MCL 438.42*], but subject to any other applicable law of this state or of the United States which regulates the rate of interest, it is lawful in connection with an extension of credit to a business entity by a state or national chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest.
>
> (3) Notwithstanding [*MCL 438.31* through *MCL 438.33*], it is lawful in connection [*7] with an extension of credit to a business entity by any person other than a state or nationally chartered bank, a state or federal chartered savings bank, a state or federal chartered savings and loan association, a state or federal chartered credit union, insurance carrier, finance subsidiary of a manufacturing corporation, or a related entity for the parties to agree in writing to any rate of interest not exceeding the rate allowed under [*MCL 438.41* through *MCL 438.42*].

If plaintiffs are business entities under *MCL 438.61*, the loans in question are not usurious.[4]

In *Krause, 178 Mich App at 115*, the applicability of the business-entity exception was established by evidence that the property covered by the transaction was being operated as a foster-care facility and that the land contract, which was signed by the purchasers and notarized, made reference to the facility as "income potential" property. The present case is analogous to *Krause*. The cross-collateralization provisions in the mortgage documents indicate that the properties were to be leased as part of a large-scale leasing business managed by plaintiffs. Just as the language of Krause's signed, notarized land contract indicated that the land was being used for a business purpose, [*8] the language of Pisciotta's signed, notarized mortgages indicate that the properties were being used for a business purpose.

Plaintiffs rest their appellate argument on their contention that we should disregard the holding of *Krause*; plaintiff notes that we are not required to follow it because it was issued before November 1, 1990. See *MCR 7.215(J)(1)*. We decline plaintiffs' invitation to ignore the rule of stare decisis. See *MCR 7.215(C)(2)* ("[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis"). The ruling of *Krause*, especially as applied to the present case—involving clear, notarized, signed mortgage documents evidencing a business purpose, analogous to the land contract in *Krause*—is not unworkable or badly reasoned such that stare decisis should be disregarded. See, e.g., *Robinson v Detroit, 462 Mich 439, 464; 613 NW2d 307 (2000)*.[5]

Plaintiffs next argue that the trial court erred in using $250 an hour as the rate for Kardos's attorney fees. This Court reviews awards of attorney fees and costs for an abuse of discretion. *Smith v Khouri, 481 Mich 519, 526; 751 NW2d 472 (2008)*. An abuse of discretion occurs when a court chooses an outcome outside the range of principled and reasonable outcomes. *Id.*

Under *MRPC 1.5(a)*, factors to consider in determining proper attorney fees are: (1) the [*9] skill, time, and labor involved in the litigation; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and

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[4] We note that plaintiffs focus their arguments on loans to Pisciotta, arguing that a sworn statement was necessary to avoid the usury laws for these loans because Pisciotta is a "natural person." However, Kardos also made loans to Dark Horse, and plaintiffs do not raise a sufficient argument to challenge those loans.

[5] We note that *MCL 438.61(1)(a)* does not specify what form the sworn statement must take.

the results achieved; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the professional standing and experience of the attorney; and (8) whether the fee is fixed or contingent. See also *Smith, 481 Mich at 529-530* (discussing various factors).

Plaintiffs contend that once the trial court determined that the customary fee in Genesee County was $217 an hour, it was obligated, when adjusting this base fee, to explicitly explain its reasoning on applicable factors. It is true that in *Smith, 481 Mich at 537*, the Court stated that when a court deviates from a fee customary in a particular locality, "[i]n order to aid appellate review, the court *should* briefly indicate its view of each of the factors." (Emphasis added.)

While the trial court in this case may not have performed ideally by failing to explain its adjustment on the record, it is a court's failure to consider [*10] the factors, not its failure to discuss its view of the factors, that constitutes an abuse of discretion, and because the court explicitly stated that it was familiar with the applicable case law, there is no evidence to suggest that the court completely failed to consider the factors. The court stated, "I know the case law, so we don't have to spend a lot of time arguing about [cases dealing with the factors]." The court appeared to be making a compromise between the hourly rates the parties were arguing ($295 an hour and $215 an hour), and $250 an hour is within the range of principled outcomes in light of the circumstances surrounding Kardos's counsel and his work.

Plaintiffs lastly argue that the trial court should have reduced the attorney fees awarded to Kardos to account for the four properties that were foreclosed by advertisement. Plaintiffs stated that, before December 3, 2014, there were 22 properties involved in this litigation. On December 3, 2014, four of the properties were sold at sheriff's sales, and Kardos received all necessary payment for the fees he incurred related to the four properties that were foreclosed by advertisement. Plaintiffs argue that because these [*11] four properties represented 18% of the properties in this litigation, the court should have reduced by 18% Kardos's award for all services rendered before December 3, 2014.[6]

Under Michigan's foreclosure laws, a mortgagee is not entitled to full attorney fees when foreclosing by advertisement, as he would be in the case of judicial foreclosure. The mortgagee is entitled to only the amounts specified in *MCL 600.2431*:

> (2) Where an attorney is employed to foreclose a mortgage by advertisement, an attorney's fee, not to exceed any amount which may be provided for in the mortgage, may be included as part of the expenses in the amount bid upon such sale for principal and interest due thereon in the following amounts:
>
> (a) for all sums of $1,000.00 or less, $25.00.
>
> (b) for all sums over $1,000.00 but less than $5,000.00, $50.00
>
> (c) for all sums of $5,000.00 or more, $75.00.

The trial court determined that plaintiffs were not entitled to an 18% reduction in attorney fees to account for attorney fees related to the four properties foreclosed by advertisement. Plaintiffs' argument that the total attorney fees charged to Kardos's litigation before the December 2014 foreclosures should be reduced by 18% is mathematically [*12] erroneous. Reducing the total amount of defense counsel's fees before the foreclosures by 18% would be appropriate if 18% of defense counsel's time and transactions during that time were related to the foreclosures by advertisement. It is not appropriate simply because four properties represent 18% of 22 properties.

Plaintiffs would be entitled to a reduction if defense counsel charged Kardos the full amount of attorney fees for the properties foreclosed by advertisement instead of the amounts specified by *MCL 600.2431(2)*. However, this is not the case. The parties do not dispute that defendant was charged only $300 ($75 for each foreclosure by advertisement), and not his attorney's hourly rates, for the foreclosures by advertisement. As such, arguing that defense counsel's fees should be reduced to account for attorney fees related to the properties foreclosed by advertisement is illogical, and the declination to reduce the attorney fees incurred before the foreclosure sale of the four properties by 18% does not render the court's determination of the fee award an abuse of discretion.

Affirmed.

/s/ Michael F. Gadola

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[6] Plaintiffs cite no authorities to support their argument on this issue.

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

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Rebman v. Flagship First Nat'l Bank

Court of Appeal of Florida, Second District

July 26, 1985

No. 84-1603

Reporter
472 So. 2d 1360 *; 1985 Fla. App. LEXIS 14415 **; 10 Fla. L. Weekly 1827

VIRGINIA W. REBMAN, Appellant, v. FLAGSHIP FIRST NATIONAL BANK OF HIGHLANDS COUNTY, f/k/a FIRST NATIONAL BANK OF SEBRING, Appellee

Prior History: [**1] Appeal from the Circuit Court for Highlands County; Dennis P. Maloney, Judge.

Case Summary

Procedural Posture
Appellant mortgagor sought review of an order from the Circuit Court for Highlands County (Florida), which granted summary judgment in favor of appellee bank in a mortgage foreclosure action.

Overview
Appellee bank was granted summary judgment in a mortgage foreclosure action against appellant mortgagor. Appellant asserted that the trial court erred when it granted summary judgment because the interest rate charged by appellee was usurious and, therefore, appellant was entitled to cancellation of her obligation. Appellant based her claim on the fact that appellant withheld a portion of the loan proceeds in an escrow account for payment of the loan. Appellant contended that the escrow reserve resulted in a usurious interest rate. The court affirmed the trial court, finding that a greater rate of interest was neither paid nor agreed to be paid. The court found that although escrowed monies never passed through appellant's hands, they were used exclusively to benefit her in the payment of her monthly principal and interest obligation. Further, the court determined that the loan documents contained no requirement that either the operation or maintenance of the escrow account was a condition of the loan. Finally, the court concluded that appellant failed to meet her burden of showing that appellee willfully and knowingly charged or accepted excessive interest.

Outcome
The court affirmed an order that granted appellee bank summary judgment in a mortgage foreclosure action against appellant mortgagor. The court held that an interest rate was not usurious where an escrow reserve was used exclusively to benefit appellant in the payment of her monthly principal and interest obligations and appellant failed to meet her burden of showing appellee knowingly and willingly charged excessive interest.

Counsel: John F. Howard, Sebring, for Appellant.

Clifford M. Ables, III, Sebring, for Appellee.

Judges: Danahy, Judge. Boardman, Edward F., (Ret.) J., concurs. Grimes, A.C.J., dissents With Opinion.

Opinion by: DANAHY

Opinion

[*1361] This is an appeal from a summary judgment of mortgage foreclosure. The only issue involves usury. We affirm the judgment and the finding of the trial judge that the mortgagee bank did not charge the mortgagor, Virginia W. Rebman, a usurious rate of interest.

The mortgage secured three loans evidenced by three promissory notes which were made at different times. The first note was for one year in the principal amount of $21,000 and carried an interest rate of 14% per annum. The second note, executed a year later, was for a term of one year, in the principal amount of $30,000 with interest at the rate of 15-1/2% per annum. The proceeds of that note paid off the balance of the first note and the remaining $5,662.47 was deposited in the bank in a non-interest-bearing account entitled "Virginia W. Rebman Escrow Account, Mike Willingham." [1] According to Rebman's affidavit, [**2] she signed no signature card and was not allowed to make withdrawals from this account because "the funds were there for the purpose of paying payments on the mortgage." Bank records show that the only transactions involving this account were monthly withdrawals equal to Rebman's $430.19 monthly mortgage payment of principal and interest. These account transactions continued until the funds were depleted, approximately one year later. At about the same time, Rebman executed the third promissory note for $29,360 with interest at the rate of 17% per annum. A handwritten notation on the bottom of the second note indicates that the third note was a renewal of the second note. Each of the three notes contained the following clause:

> In no event shall the interest charged hereunder be in excess of the legal maximum rate of interest (if any) allowed by applicable law as the law now exists or as the law may be changed in the future to allow higher rates of interest, and in the event that interest is charged at a rate in excess of the maximum rate allowed, any excess sums collected by the Bank shall be applied as a reduction to principal, it being the intent of the Maker hereof and [**3] the Bank that the Maker pay no more and the Bank collect no more than the sums allowed using a lawful rate of interest.

Two months later Rebman executed yet another promissory note, which was unsecured, for $2,762.40 with an interest rate of 15% per annum. That sum was deposited in the bank in a new non-interest-bearing account entitled "Virginia W. Rebman Escrow, give to Mike Willingham." Contrary [*1362] to Rebman's affidavit which alleges that she signed no signature card and had no access to this account for use of the funds, the affidavit of the bank vice president contains a signature card signed by Rebman whereby she authorizes the bank to debit this account in order to make her payments on the third note secured by the mortgage. According to bank records, the funds were used to pay monthly mortgage payments of principal and interest until the funds were depleted. Additionally, bank records indicate another deposit was made to this account.

Rebman [**4] contends that since she did not have use of the funds in the escrow account, those funds should be treated as an "advance" or "forbearance" in computing the effective rate of interest under Florida's general usury law, chapter 687, Florida Statutes (1983). The bank argues that there is no evidence that the opening or maintenance of the account was a requirement of the bank. The trial court rejected Rebman's contention and in doing so stated:

> By placing a portion of the principal amount in escrow to assure timely repayment, the bank placed itself in the position of escrow agent for the defendant vis-a-vis the escrowed money. Since the bank did not retain an ownership interest in the money and could use it only to make the monthly loan payments, the principal amount was not thereby reduced. A usurious interest rate was not charged.

We agree with the trial court and begin our discussion by noting the four requirements necessary to establish a usurious transaction. They are:

1. A loan, either express or implied.
2. An understanding between the lender and the borrower that the money must be repaid.
3. For such loan a greater rate of interest than is [**5] allowed by law shall be paid or agreed to be paid.
4. There must be a corrupt intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned.

[1] Mike Willingham was a bank officer.

Dixon v. Sharp, 276 So.2d 817 (Fla. 1973); *Clark v. Grey, 101 Fla. 1058, 132 So. 832 (1931)*; *Stewart v. Nangle, 103 So.2d 649 (Fla. 2d DCA 1958)*. The burden to establish these elements of usury is on the borrower. *Dixon; Swanson v. Gulf West International Corp., 429 So.2d 817 (Fla. 2d DCA 1983)*.

While we agree that Rebman did prove the first and second requirements, she did not prove the third and fourth. Looking first at the third element, *section 687.03(1)* defines unlawful rates of interest as:

> Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, [**6] or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest.

This section thus requires interest to be calculated upon the "actual principal sum received." Florida courts have defined that term to mean the actual money distributed by the lender to the borrower at the time of closing. *See Mindlin v. Davis, 74 So.2d 789 (Fla. 1954)*; *Wilson v. Conner, 106 Fla. 6, 142 So. 606 (1932)*. In this regard, Rebman asks this court to treat the escrowed monies as a forbearance in the form of an interest reserve or alternatively as a compensating balance account. She therefore argues that the effective rate of interest should be computed according to the "spreading" formula set forth in *section 687.03(3), Florida Statutes* (1983), and [*1363] approved in *St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982)*.

A court should seek substance over form when it analyzes the amount of "actual principal sum received" for purposes of usury calculations. *See Mindlin* [**7] . Accordingly, any amounts advanced by a lender which directly or indirectly benefit the borrower--as well as any amounts directly received by a borrower--should be a part of the principal used for calculating interest under our usury law. That being so, although the escrowed monies never passed through Rebman's hands, they were used exclusively to benefit her in the payment of her monthly principal and interest obligation. Consequently, we find appellant's argument that the escrow accounts were in fact compensating balance or interest reserve accounts established for the bank's benefit is without merit. In its simplest form, a compensating balance is an amount a lender contractually requires a borrower to leave on deposit during the term of the loan; an interest reserve account is an express contractual designation of a portion of the loan to be used to pay interest that will accrue on that loan. These two practices are discussed in *Practice Under Florida Usury Law*, sections 4.33 and 4.34 at 114 through 116 (Florida Bar Continuing Legal Education Practice Manual, 1982). [2]

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[2] D. [§ 4.33] Compensating Balances

> In its purest form a compensating balance is an amount a lender requires a borrower to leave on deposit during the term of a loan. For example, a bank making a $500,000 working capital loan to a company may require as a condition to the loan that the company maintain a demand deposit account with a balance of at least 20% ($100,000) of the principal amount of the loan with the bank. The bank normally would not pay any interest to the borrower on the $100,000, the "compensating balance." It is apparent that, although the lender may have directly delivered $500,000 to the borrower, the borrower only obtains the benefit of $400,000. The principal balance used to calculate the rate of interest under Florida usury laws, therefore, would be limited to the $400,000 amount benefiting the borrower.
>
> Not all compensating balances maintained by a borrower with a lender should be treated as reducing the principal amount of the loan outstanding. The key element in the analysis is not merely whether the borrower keeps a deposit with the lender but whether the maintenance of that balance is contractually required in the loan arrangement between the lender and the borrower. *Appleton Bank v. Fiske, 91 Mass. (8 Allen) 201 (1864)*. Banks, accordingly, often encourage a borrower to keep amounts on deposit with the bank, and in determining a rate of interest to be charged to on a new loan, the banks may consider the average balance kept by the borrower. The amount of those balances, however, will not be deducted from the principal of any loan for purposes of a usury analysis if there was no actual requirement that certain minimum balances be maintained with the lender as a condition of the loan.
>
> E. [§ 4.34] Interest Reserves

[**8] [*1364] In the case before us, the loan documents in evidence contain no bank requirement that either the operation or maintenance of the escrow account was a condition of the loan, and in her affidavit Rebman never stated that it was. Further, the bank records revealed that the deposited funds did not remain in either escrow account during the entire loan period but instead were used to pay monthly interest and principal on Rebman's obligation until these funds were depleted. This evidence is not refuted by Rebman's affidavit. Consequently, there are no facts to be found, nor inferences which remain, after the findings by the trial judge here that the escrow account was merely encouraged by the bank and that the escrow account was established as a convenience for Rebman. Additionally, it is not disputed that Rebman authorized the bank to make withdrawals from the subsequent escrow account, that she executed additional notes to obtain funds to make the accrued payments on the third note, that she made a subsequent deposit to one of the escrow accounts, and that the stated interest rate on the face of each note was within the legal limit. Therefore, there is no indication [**9] that the principal balance was or should be reduced by the amounts placed in the escrow accounts. The only conclusion to be reached in this case is that a greater rate of interest than is allowed by law was neither paid nor agreed to be paid.

Turning to the fourth necessary element, corrupt intent, we note that the statute imposes a penalty only on those lenders who "willfully" violate it. *§ 687.04, Fla. Stat.* (1983). Generally, the question of intent is one of fact. However, in this particular instance where there is no conflict in material facts, that question is one of law for the court. *See Johnson v. Gulf Life Insurance Co., 429 So.2d 744 (Fla. 3d DCA 1983)*. The circumstances surrounding the entire transaction, together with the stated interest rate and the disclaimer clause found on the face of each note, conclusively show that the bank did not willfully or knowingly charge or accept excessive interest in connection with the loan. Moreover, Rebman made neither an allegation nor a showing that the bank had a purposeful intent to violate the law, as was her burden. Therefore we think the trial judge was correct in his finding that the loan is not usurious and that [**10] Rebman is not entitled to cancellation of her obligation. For these reasons, we affirm the summary judgment entered by the trial judge in favor of the bank.

BOARDMAN, EDWARD F., (Ret.) J., Concurs.

GRIMES, A.C.J., Dissents With Opinion.

Dissent by: GRIMES

Dissent

GRIMES, Acting Chief Judge, Dissenting.

An interest reserve, essentially, is a designation of a portion of the amount of a loan to be used to pay interest that will accrue on that loan. For example, in a typical real estate construction loan a lender recognizes that the borrower does not have the funds to pay interest on the loan during construction and expects the interest to be repaid from the proceeds of a permanent mortgage loan obtained after construction is complete or from revenues generated by the sale or operation of the project after completion of construction. Construction frequently is not completed for several years and lenders for purposes of their own financial accounting want to obtain interest during that period even though the borrower does not have the funds to pay that interest. Thus, the expediency has been developed by which the lender loans additional sums to the borrower from time to time to permit that borrower to pay interest to the lender. As the technique has been refined, the amount required for interest is built into the construction loan at the outset. For example, in a $1,000,000 construction project contemplated to take one year to build, a lender might determine that the probable interest that would accrue during the year would be $50,000. The lender then would agree to lend the borrower $1,050,000, permitting the borrower to draw on up to $1,000,000 of that amount for payment of construction costs and up to $50,000 of that amount to repay monthly interest charged by the lender.

No judicial decisions were discovered that deal directly with this point. Borrowers, however, in usury cases, have argued that the amount of the interest reserve should be deducted from the principal outstanding for purposes of making usury calculations because the lender never really disbursed the interest but retained the interest for itself much as is true in a discount loan situation. Although the result argued for in those cases may be correct, it is suggested that the reasoning behind the argument is inappropriate. In fact, the borrower does obtain benefit from periodic disbursements from the interest reserve. The principal balance, therefore, should not be reduced by the amount advanced from the interest reserve. It is possible, however, that a similar result would be reached under Florida's compounding rules that are discussed more thoroughly in § 4.50.

My quarrel with the majority opinion is that it overlooks the fact that this case was decided on summary judgment.

According to *45 Am.Jur.2d Interest and Usury § 113* (1969):

> If as a condition of making a loan the borrower is required to leave part of the money on deposit with the lender, the transaction is usurious if the interest paid for the loan amounts to more than legal interest on the sum actually available for the use of the borrower.

As stated in the annotation at *92 A.L.R. 3d 769, 774 (1979)*, entitled "Leaving Part of Loan on Deposit With Lender as Usury":

> It is generally recognized that if as a condition of making a loan, the borrower is required to leave part of the money on deposit with the lender, the transaction is usurious where the interest paid for the loan amounts to more than the legal interest on the balance left in the borrower's hands [**11] for his actual use.

[*1365] For a case involving the application of this rule under Florida law, see *American Acceptance Corp. v. Schoenthaler, 391 F.2d 64 (5th Cir. 1968), cert. denied, 392 U.S. 928, 88 S. Ct. 2287, 20 L. Ed. 2d 1387 (1968).*

Significantly, in its brief the bank conceded that if the funds in the escrow account were considered as being taken as an advance or forbearance, the effective rate of interest computed according to the formula proved in *St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982)*, would approximate 23%. [3] Therefore, the pivotal question is whether the bank required the establishment of the escrow account as a condition of the loan.

[**12] I find it difficult to believe that Rebman would voluntarily place a portion of the loan proceeds in a non-interest bearing account controlled entirely by the bank if she were not required to do so in order to obtain the loan. In any event, the bank presented no evidence that the opening of the escrow account was not a condition of the loan, and for purposes of summary judgment, the burden of proof was on the bank.

Moreover, if the effective rate of interest was usurious, I cannot see how it can be said on summary judgment that there was no corrupt intent. It may be that the corrupt intent required for usury would be negated by the clause appearing in each note which provides that interest shall not exceed the maximum allowable rate of interest and that any excess shall be applied to the reduction of principal. However, this issue has not yet been argued by either side and disclaimer clauses such as this have not always been effective to preclude a finding of usury. *See Oklahoma Preferred Finance & Loan Corp. v. Morrow, 497 P.2d 221 (Okla. 1972)*; Practice Under Florida Usury Law § 1.21 (Fla. Bar Continuing Legal Educ. Practice Manual, 1982).

I would reverse and remand [**13] for further proceedings in which these issues could be fully explored.

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[3] The bank may have conceded more than necessary because monies in the account were used to meet the interest payments under the loan as they became due. Therefore, even if the escrow account was a condition of the loan, the bank could logically argue that in computing the effective rate of interest, consideration should be given to the fact that appellant was only deprived of the use of the escrow funds until they were applied to meet her interest payments on the loan. This record contains no such computations.

Szenay v. Schaub

Court of Appeal of Florida, Second District

October 15, 1986, Filed

No. 86-393

Reporter
496 So. 2d 883 *; 1986 Fla. App. LEXIS 10183 **; 11 Fla. L. Weekly 2221

JAMES A. SZENAY and CINDY R. SZENAY, Appellants/Cross-Appellees, v. JOHN W. SCHAUB, III, and VALERIE J. DAVIS, Appellees/Cross-Appellants

Prior History: [**1] Appeal and cross-appeal from the Circuit Court for Sarasota County; Grissim H. Walker, Judge.

Case Summary

Procedural Posture
Appellant married couple challenged a judgment from the Circuit Court for Sarasota County (Florida), that foreclosed on two mortgages. Appellee individuals cross-appealed because no attorney fees were awarded.

Overview

Appellant married couple executed a wraparound third mortgage and during it appellee individuals would make quarterly payments on appellant's second mortgage. Appellees paid off the second mortgage after they failed to make a payment and it was in foreclosure. Appellants knew that the second mortgage's terms would continue as long as appellants were current with their third mortgage. Appellant's failed to make the last two payments, and appellees received a judgment of foreclosure. On appeal, the court affirmed the judgment for three reasons. First, substantial competent evidence supported the finding of no usury because even though the mortgage and note had a usurious interest rate appellees did not intend to charge one. Second, because appellants were permitted to continue the payments on the second mortgage as long as the third mortgage's payments were current, and any damages they incurred were caused by their default of the third mortgage. Third, appellees were not entitled to attorney's fees because they allowed the second mortgage to be foreclosed. The court modified the judgment's rate of interest pursuant to *Fla. Stat. ch. 55.03* (1985) because it exceeded 12 percent.

Outcome
Foreclosure judgment was affirmed because appellee individuals did not intend to charge a usurious interest rate, and any damages appellant married couple incurred were from the default of their third mortgage. The court also held appellees were not entitled to attorney's fees because they allowed the second mortgage to be foreclosed. The court modified the judgment's rate of interest because it exceeded the statutory limit.

Counsel: James E. Aker of Icard, Merrill, Cullis, Timm and Furen, P.A., for Appellants/Cross -Appellees.

Scott E. Gordon of Scott E. Gordon, P.A., for Appellees/Cross-Appellants.

Judges: Hall, J. Danahy, C.J., and Grimes, J., concur.

Opinion by: HALL

Opinion

[*884] Appellants James and Cindy Szenay appeal a final judgment of foreclosure. By cross-appeal, appellees John Schaub and Valerie Davis seek attorney's fees.

In 1984, appellants executed a wraparound, third mortgage on their property in favor of appellees as security for a loan. The mortgage was in the amount of $18,269.79. It wrapped around a second mortgage in the amount of $12,769.79, resulting in an actual loan to appellants of $5,500. The terms of the loan required that appellants pay appellees $500 on the 26th day of each month, commencing February 26, 1984, and terminating December 26, 1984. On January 26, 1985, appellants were to pay the remaining principal plus all accrued and unpaid interest which, according to the note and mortgage, would be $15,097.86. Appellees were to be responsible for the quarterly payments on the [**2] interest-free second mortgage on appellants' property during the term of the wraparound mortgage.

On April 22, 1984, appellees failed to make a quarterly payment on the second mortgage, and it was placed in foreclosure. Appellees attempted to have the mortgage reinstated but were unsuccessful and decided to pay it off. They then advised appellants that the favorable terms of the second mortgage would continue as long as appellants were current in their payments on the wraparound mortgage.

On December 26, 1984, appellants failed to make the last monthly payment on the wraparound mortgage, and on January 26, 1985, they failed to tender the final payment. Appellees then instituted a suit in foreclosure. The trial court entered a final judgment of foreclosure for a principal amount of $13,975.62 plus interest and costs. The judgment made no provision for attorney's fees.

Appellants raise three points on appeal. In their first point, appellants argue that the loan documents and amortization schedule reflect a rate of forty-two percent interest on the loan from appellees. Because this is a usurious rate of interest, appellants assert that the final judgment should be reduced in accordance [**3] with the penalty provisions of the usury statute. *§ 687.03, Fla. Stat.* (1985).

Appellees respond that they did not intend to charge appellants a usurious rate of interest. Rather, a genuine mistake was made in calculating the amount of the promissory note. Consequently, appellees maintain, the trial judge correctly adjusted the amount to be paid appellees in accordance with the remedy provided in the promissory note for overpayment of interest.

"Usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent." *Dixon v. Sharp, 276 So.2d 817 (Fla. 1973)*. This determination is the responsibility of the trier of fact.

The trial judge in the present case made no finding of usury in the final judgment. However, in determining the amount of principal appellants owe appellees, the judge implemented the following provision of the promissory note:

> Notwithstanding any provisions in this note to the contrary, no interest, charges, or other payments in excess of those permitted by law [**4] shall accrue or become payable hereunder and any excessive [*885] payments which may be made shall be applied to principal in reduction of the balance of this note.

It thus appears the trial judge found that even though the mortgage and note called for a usurious rate of interest, appellees had no intent to charge appellants such a rate. We agree. There is substantial, competent evidence to support this finding, and it thus represents no abuse of discretion on the part of the trial judge.

In their second point on appeal, appellants argue that they were damaged by the failure of appellees to keep the second mortgage current. We find no merit to this point as appellees had agreed that they would step into the shoes of the second mortgage holder and appellants would be allowed to continue the no-interest payments on the second mortgage until it was paid in full as long as they kept the payments current on the wraparound mortgage. Any damages that they might have incurred were caused by their default on the wraparound mortgage.

In their third point on appeal, with which appellees agree, appellants note that the final judgment states that it shall bear interest at the [**5] rate of eighteen percent a year. However, *section 55.03, Florida Statutes* (1985), provides that all judgments rendered after October 1, 1981, shall bear interest at twelve percent a year. Accordingly, we remand this case to the trial court for correction of the judgment to reflect a rate of twelve percent.

In their cross-appeal, appellees contend that the trial court erred in failing to award them attorneys fees as provided in the note and mortgage. We disagree. We believe that it would be inequitable to award appellees attorney's fees under the circumstances of this case, [1] especially in light of the fact that they allowed the second mortgage to be foreclosed.

The final judgment is affirmed but remanded for correction [**6] in accordance with this opinion.

DANAHY, C.J., and GRIMES, J., Concur.

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[1] *See* *Feemster v. Schurkman, 291 So.2d 622, 2630 (Fla. 3d DCA 1974)*("No indemnity for attorney's fees should be allowed . . . for legal services rendered in attempting to enforce the usury, as distinguished from foreclosing the mortgage for the legally enforceable amount of the debt").

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5904

May 15, 1981

LAND CONTRACTS:

Late payment charges

Late payment charges contained in a land contract for actual, unanticipated late payment, delinquency, default or other such occurrence does not constitute interest subject to the statutory interest rate ceiling for land contracts.

The Honorable Shirley Johnson

State Representative

State Capitol

Lansing, Michigan

You have requested my opinion whether a late payment charge required under the terms of a land contract constitutes interest subject to the statutory interest rate ceiling for land contracts. You advise that the late payment charge is 4 percent of the monthly payment of $475.00, which amounts to a late payment charge of $19.00.

You have indicated that your question concerns a land contract between two individuals. [(1)] 1966 PA 326; MCLA 438.31 et seq; MSA 19.15(1) et seq, Sec. 1c(6), authorizes individuals to enter into land contracts which

> 'provide for a rate of interest not to exceed 11% per annum, which interest shall be inclusive of all the amounts defined as the 'finance charge' in the federal truth in lending act (Public Act 90-321), and the regulations promulgated thereunder.'

Therefore, in order to determine whether a particular charge constitutes part of the interest rate, it is necessary to review the Truth in Lending Act, 82 Stat 146 (1968); 15 USC 1601 et seq, and the regulations promulgated thereunder.

The Truth in Lending Act, supra, Sec. 1605 [(2)] provides for certain charges to be inclusive in the determination of the amount of a finance charge in a consumer credit transaction:

> 'Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:
>
> '(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
>
> '(2) Service or carrying charge.
>
> '(3) Loan fee, finder's fee, or similar charge.
>
> '(4) Fee for an investigation or credit report.
>
> '(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.' (Emphasis added.)

Thus, whether a particular charge is considered to be a finance charge under the Truth in Lending Act, supra, depends on whether it is determined to be an incident to the extension of credit. 12 CFR, Sec. 226.4(c), a regulation promulgated pursuant to the Truth in Lending Act, supra, resolves that issue for late payment charges as follows:

> 'A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence.'

It follows that a late payment charge, if imposed for an 'actual unanticipated late payment,' would be exempt from the purview of the Truth in Lending Act, supra. See Vega v First Federal Savings & Loan Ass'n of Detroit, 433 F Supp 624 (ED Mich, 1977). In Continental Oil Co v Burns, 317 F Supp 194, 198, [n3]) (D Del, 1970), the court gave further explanation to the term 'actual unanticipated late payment':

> 'Since the word 'unanticipated' means 'not foreseen or expected,' it would appear that an 'actual unanticipated late payment' charge would be the antithesis of a charge stemming from a course of conduct where credit is continued even though payments are repeatedly late and late payment charges are periodically imposed.'

Also see Kroll v Cities Service Oil Co, 352 F Supp 357 (ND Ill, 1972), and Garland v Mobil Oil Corp, 340 F Supp 1095 (ND Ill, 1972).

In view of the terms of the federal Truth in Lending Act, supra, and the rules thereunder incorporated by reference by the Legislature in 1966 PA 326, supra, I am constrained to conclude that a late payment charge, required under the terms of a land contract between two individuals, does not constitute interest subject to the statutory interest rate ceiling for land contracts if such charge is imposed for actual unanticipated late payment, delinquency, default or other such occurrence. It must be stressed that the amount of the late payment charge must be reasonable, reflecting the expense of the inconvenience incurred, so as not to constitute a penalty which would be unenforceable at law. Curran v Williams, 352 Mich 278; 89 NW2d 602 (1958).

Frank J. Kelley

Attorney General

(1) See OAG, 1979-1980, No 5765, p 942 (August 28, 1980), for a discussion of permissible interest rates on land contracts when levied by regulated lenders and certain lenders who qualify for an exemption under federal law from state usury ceilings.

(2) This section was amended by 94 Stat 170, 185, effective March 31, 1982.

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6338

January 23, 1986

LAND CONTRACTS:

Late payment charges

USURY:

Impact of late payment charge upon maximum interest rate on land contract

Natural persons who are not regulated or approved lenders may enter into land contracts which provide a different rate of interest as a late payment charge in event of default, provided that the late payment charge is reasonably related to the expense of the inconvenience incurred by the land contract vendor.

Honorable Alan Cropsey

State Senator

The Capitol

Lansing, Michigan

You have requested my opinion on certain questions relating to MCL 438.31c(2); MSA 19.15(1c)(2), as it pertains to the amount of interest which may be charged on a land contract between natural persons who are not regulated lenders. Your questions are:

> (1) May private individuals execute a land contract, consistent with MCL 438.31c(2); MSA 19.15(1c)(2), which provides for an initial rate of interest on the unpaid balance at 7% while the purchaser is not in default and further provides an interest rate of 8% on the unpaid balance for any period during which the purchaser is in default?
>
> (2) Would it matter if the agreed upon initial interest rate was 11%, increasing to 12% if default occurs?

Since your questions are related, they will be considered simultaneously.

MCL 438.31c(2); MSA 19.15(1c)(2), as last amended by 1985 PA 7, reads in pertinent part:

> 'The parties to a note, bond, or other evidence of indebtedness, executed after August 11, 1969, the bona fide primary security for which is a first lien against real property, or a land lease if the tenant owns a majority interest in the improvements thereon, or the parties to a land contract, may agree in writing for the payment of any rate of interest, but the note, mortgage, contract, or other evidence of indebtedness shall not provide that the rate of interest initially effective may be increased for any reason whatsoever . . ..'

The basic issue is whether the prohibition against increasing the initial rate of interest is applicable to land contracts entered into by natural persons who are not regulated lenders.

The Michigan Court of Appeals considered this question in Patel v Holland, 114 Mich App 340, 346; 319 NW2d 553 (1982), lv den 417 Mich 926 (1983), and concluded loans made by persons who are not regulated lenders are exempt by virtue of MCL 438.31c(5); MSA 19.15(1c)(5), from the provisions of MCL 438.31c(2); MSA 19.15(1c)(2). The majority of the court concluded

that the nonescalation of interest provisions of subsection (2) is inapplicable to land contracts between natural persons who are not regulated or approved lenders. It is noted that subsection (5) was amended by 1985 PA 7 to read:

> 'The provisions of subsection (2) shall apply only to loans made by lenders approved as a mortgagee under the national housing act, chapter 847, 48 Stat. 1246, or regulated by the state, or by a federal agency, who are authorized by state or federal law to make such loans.'

Such natural persons must make secured loans under subsection (6) of MCL 438.31c; MSA 19.15(1c). That subsection reads:

> 'Notwithstanding subsection (5), lenders or vendors not qualified to make loans under subsection (5) may make, or may have made, mortgage loans and land contracts specified in subsection (2) on or after August 16, 1971, which mortgage loans and land contracts provide for a rate of interest not to exceed 11% per annum, which interest shall be inclusive of all amounts defined as the 'finance charge' in the truth in lending act . . ..'

Thus, the natural persons entering into land contracts are subject only to the limitations of subsection (6).

The above statutory provision clearly sets forth a ceiling of 11% interest for all land contracts entered into between natural persons who are not regulated or approved lenders. Subsection (6) also provides that the 11% cap shall be inclusive of all 'finance charges' as contemplated by the Truth in Lending Act, 15 USC 1601 to 1667e and the regulations promulgated thereunder.

In light of the above, it is, therefore, necessary to determine whether or not a late charge provision in a land contract between private parties constitutes a 'finance charge' as envisioned by the Truth in Lending Act. If the answer to the above issue is in the affirmative, a late charge provision which increases the initial rate of interest from 11% to 12% would be violative of MCL 438.31c(6); MSA 19.15(1c)(6).

As previously stated in OAG, 1981-1982, No 5,904, p 199, 200 (May 15, 1981), 12 CFR Sec. 226.4(c), a regulation promulgated under the Truth in Lending Act resolves the issue regarding late payment charges by holding:

> 'A late payment, delinquency, default, reinstatement or other such charge, is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence.' (Emphasis added.)

Therefore, since a late charge is not a 'finance charge,' as contemplated by the Truth in Lending Act, such provision will not affect the initially agreed upon rate of interest in the land contract instrument. To that end, it is of little consequence that that provision temporarily provides for an increase in interest from 11% to 12% as opposed to one of 7% to 8%. It is noted that natural persons are limited to 11% maximum interest and may charge reasonable late charges in the event of nonpayment.

OAG, 1981-1982, No 5,904, also clarified the distinction between a late payment charge and an illegal penalty:

> 'I . . . conclude that a late payment charge, required under the terms of a land contract between two individuals, does not constitute interest subject to the statutory interest rate ceiling for land contracts if such charge is imposed for actual unanticipated late payment, delinquency, default or other such occurrence. It must be stressed that the amount of the late payment charge must be reasonable, reflecting the expense of the inconvenience incurred, so as not to constitute a penalty which would be unenforceable at law. Curran v Williams, 352 Mich 278; 89 NW2d 602 (1958).'

It is my opinion, therefore, that natural persons who are neither regulated nor approved lenders may enter into land contracts which provide a different rate of interest as a late payment charge in the event of default, provided that such late payment on the unpaid balance charge is reasonably related to the expense of the inconvenience incurred by the land contract vendor.

Frank J. Kelley

Attorney General

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STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

USURY: Payment of interest with future revenues or profits.

A financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits will not violate usury laws so long as the lender's profit is contingent, and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement.

Opinion No. 7283

May 4, 2015

The Honorable Joe Hune
State Senator
The Capitol
Lansing, MI 48909

You have asked whether royalty financing violates Michigan's usury laws. To answer this question, it is helpful to begin with a brief explanation of what constitutes royalty financing and usury.

Before discussing royalty financing, an understanding of common financing concepts, including the common financing practice of loans, is relevant.

"Financing" is defined as "[t]he act or process of raising or providing funds." Black's Law Dictionary (9th ed. 2009). A common form of financing is debt financing, whereby funds are raised by either issuing bonds or taking a loan from a financial institution. *Id.* "The hallmark of a loan is the absolute right to repayment." *Blackwell Ford v Calhoun*, 219 Mich App 203, 209; 555 NW2d 856 (1996). In addition to the repayment of the principal of the loan, the lender almost always expects to receive compensation for the use of the money loaned. That compensation is termed interest. 15 Mich Civ Jur, Interest, § 1; *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945) ("Interest has been defined as 'a charge for the loan or forbearance of money'"). In a basic loan transaction, the borrower receives a sum of money—the principal of the loan—and promises to repay the principal, over time, with interest.

With royalty financing,[1] the borrower typically agrees to repay the principal with interest *and* a percentage of future revenues or profits—the royalty. See generally, 47 CJS, Interest & Usury, § 232 (2014); Anno: *Agreement for share in earnings of or income from property in lieu of, or in addition to, interest as usurious*, 16 ALR 3d 475. If revenues are low, it may be that no additional payment beyond the agreed interest will be necessary; but if revenues or profits are high, the total amount repaid will be higher.

"Usury is, generally speaking, 'the receiving, securing or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law.'" *Hillman's v Em 'N Al's*, 345 Mich 644, 651; 77 NW2d 96 (1956), quoting 55 Am Jur, Usury, § 2. "Usury consists of several essential elements, generally enumerated as; (1) a loan or forbearance . . . of money . . . ; (2) an understanding between the parties that the principal will be repayable absolutely; (3) the exaction of a greater profit than is allowed by law; and (4) an intention to violate the law." Mich Civ Jur, Usury, § 1. In determining whether usury exists, what matters is the "real nature of the transaction," and not the particular form given it by the parties; the real nature must be determined from the facts and circumstances. *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); Mich Civ Juris, Usury, § 2.

Unless an exception applies, Michigan's usury statute generally prohibits a lender from charging a rate of interest greater than five percent, or, if agreed in writing, seven percent. MCL 438.31.[2] Michigan's criminal usury statute prohibits a lender, unless otherwise authorized by law, from receiving interest at a rate exceeding twenty-five percent. MCL 438.41.

As noted above, under a royalty financing arrangement, when the borrower has high revenues or profits, the lender's total return on the loan—interest payments plus royalty payments—might exceed the law's legal limit for interest. Given this possibility, you ask whether this type of financing arrangement violates Michigan's usury laws.

While there has been little development in this area of the law in Michigan, numerous decisions by courts in other states provide guidance in answering your question.

Usury law is subject to various exceptions, including an exception developed at common law called the "interest contingency rule." *WRI Opportunity Loans II, LLC v Cooper*, 154 Cal App 4th 525; 65 Cal Rptr 3d 205 (2007); *47 CJS, Interest & Usury, § 232*; 16 ALR 3d 475; Restatement (First) of Contracts, § 527. As explained by the California Court of Appeals:

> According to this rule, a loan that will "give the creditor a greater profit than the highest permissible rate of interest upon the occurrence of a condition [ ]is not usurious if the repayment promised on failure of the condition to occur is materially less than the amount of the loan . . . with the highest permissible interest, unless a transaction is given this form as a colorable device to obtain a greater profit than is permissible." Thus, interest that exceeds the legal maximum is not usurious when its payment is "subject to a contingency so that the lender's profit is wholly or partially put in hazard," provided "the parties are contracting in good faith and without the intent to avoid the statute against usury." [*WRI Opportunity Loans II*, 154 Cal App 4th at 534 (citations omitted).]

This rule has been followed by courts in New York and other states. *See, e.g., Hartley v Eagle Insurance Co*, 222 NY 178; 118 NE 622 (1918); *Olwine v Torrens*, 236 Pa Super 51; 344 A2d 665, 667-668 (Pa Super, 1975), and *Dopp v Yari*, 927 F Supp 814 (D New Jersey, 1996). To determine whether the rule applies, courts will "'look to the substance rather than to the form' of the transaction to determine whether the lender's profits are exposed to the requisite risk." *WRI Opportunity Loans II, LLC*, 154 Cal App 4th at 535 (citations omitted). In other words, whether this rule would exempt any particular agreement from being usurious will depend upon the particular facts and circumstances of each agreement.

For example, the facts and circumstances of a royalty financing agreement might show that the amount of the royalty payment, which is based on a share of the borrower's revenues or profits, is not certain, but contingent: business revenues or profits may be less than the amount expected by the parties; they may be within that range; or they may exceed—or even greatly exceed—the range expected. In these instances, courts have determined that, so long as these payments result from a bona fide contingency—that is, the contingency incorporates a real element of risk and is not a sham devised to avoid the usury laws—these payments are not usurious even if they exceed the legal maximum of interest allowed. See *Schiff v Pruitt,* 144 Cal App 2d 493; 301 P2d 446 (1956), *Thomassen v Carr*, 250 Cal App 2d 341, 346–349; 58 Cal Rptr 297 (1967), and *Beeler v H & R Block of Colorado, Inc*, 487 P2d 569, 572 (1971), applying "interest contingency rule."

However, where the facts and circumstances show that the risk to the lender's profit is not sufficiently great, *Teichner v Klassman*, 240 Cal App 2d 514, 516–518; 49 Cal Rptr 742 (1966); *Olwine*, 344 A2d at 667-668, or where the arrangement would result in a return in excess of the legal rate regardless of risk, *Whittemore Homes, Inc*, 190 Cal App 2d 554; 12 Cal Rptr 235 (1961); *Concord Realty Co v Continental Funding Corp*, 776 P2d 1114 (Colo, 1989), the rule will not apply, and the legal limit will still be in force.

In Michigan, "the common law prevails except as abrogated by the Constitution, the Legislature, or this Court." *People v Stevenson*, 416 Mich 383, 389; 331 NW2d 143 (1982). A review of the Constitution, statutes, and case law reveal no provision or decision expressly or impliedly abrogating application of the interest contingency rule.[3] The only Michigan case found touching on this issue is *Scripps v Crawford*, 123 Mich 173; 81 NW 1098 (1900).

In *Scripps*, the defendant purchased the interest of an estate in a laundry business, and agreed with the estate's administrator, Union Trust Company, to pay $1,500 for the estate's interest and "one-half of the net profits that should be earned for five years. The agreement stated that this was to be 'as interest on said loan, and compensation for the good will of the estate in the business . . . .'" *Scripps*, 123 Mich at 174. A number of disputes arose between different parties, and ultimately a claim was made that the defendant's agreement with the Union Trust Company was usurious. *Id*. at 177. The Michigan Supreme Court disagreed, finding nothing unlawful about the arrangement:

> We think the allowance of something for the good will of the business was legitimate, and there is nothing to show that either party understood that an unlawful rate of interest was contemplated. One-half of the prospective net profits was to be paid as interest and as a consideration for the good will. We must therefore hold that the claim of the Union Trust Company, as finally fixed by the agreement of the parties thereto, was a valid claim against [the defendant]. [*Id.*]

While the *Scripps* Court did not expressly discuss the interest contingency rule, it approved an agreement to use profits as payment on interest.

In OAG, 1979-1980, No 5740, p 877 (July 17, 1980), the Attorney General addressed several questions, including whether receipt by a lender of a percentage of profits as consideration for making a mortgage loan constituted interest on the loan so as to make the loan usurious, assuming the legal rate of interest is exceeded. The Opinion began its analysis by defining interest as "compensation paid for the use of money." *Id*., citing OAG, 1975-1976, No 5085, p 717 (December 16, 1976). It then explained:

> "[a]ny fee imposed upon the borrower, other than the reasonable and necessary charges, such as recording fees, title insurance, deed preparation and credit reports recognized in section 1(a) of the Usury Statute, *supra*, in exchange for the lending of money must be taken into consideration in determining the rate of interest being charged." [*Id*., p 879, quoting OAG No 5085, p 717.]

The Attorney General then reasoned that in the situation presented, payment of a percentage of profits would constitute interest:

> In the transaction described in your question, the fee imposed by the lender as consideration for making the loan would consist, in part, of a share in profits of the borrower's business. Being part and parcel of the loan agreement, therefore, *it is clear that such compensation constitutes interest on the loan*. [*Id*., pp 879-880 (emphasis added).]

As support, the Attorney General quoted the following from *Brown v Cardoza*, 67 Cal App 2d 187, 192; 153 P2d 767 (1944) (citations omitted):

> The law is well settled in most jurisdictions . . . that where there is a loan of money to be compensated for by a share in earnings, income or profits, in lieu of or in addition to interest, in determining whether the transaction is usurious the share of earnings, income or profits must be considered as interest.

Given this language, OAG No 5740 could be viewed as foreclosing royalty financing or rejecting the interest contingency rule. But that construction is overbroad. That Opinion stands for the following, narrow proposition that is consistent with decisions of the courts: a lender's share in profits or revenues *that are certain* should be considered as interest for the purposes of the State's usury laws.

In this way, the facts and circumstances of a royalty financing agreement might show that the amount of the royalty payment, which is based on a share of the borrower's revenues or profits, is a certainty; i.e., the revenue or profits are certain or almost certain to occur. This was the situation in *Brown v Cardoza*—the California case relied on by OAG No 5740. In *Brown,* the lender was to receive repayment of the loan with interest plus splitting the profits on the sale of certain property. *Brown*, 153 P2d at 768. As part of its analysis, the court considered whether this "splitting the profits" should be considered interest. *Id*. at 769. The court concluded that it should because, under the terms of the loan, as the contemplated "split" of the profits from the sale of the property, the lenders were receiving a sum certain "bonus" of $300. The very loan papers disclosed the certainty of this sum, and hence, the court found that this sum must be considered interest. *Id*. at 770. In such an instance, the conclusion of both *Brown* and OAG No 5740 is correct and consistent with the above discussion of the interest contingency rule—the payment of a share of profits that are certain constitutes interest, which would be usurious if the legal rate of interest was exceeded.

It is my opinion, therefore, that a financing agreement in which the borrower agrees to repay the principal with interest and a percentage of future revenues or profits, will not violate usury laws so long as the lender's profit is contingent and the parties contract in good faith and without the intent to avoid usury laws. Whether a particular financing agreement is

lawful will depend on the true nature of the agreement as determined by the facts and circumstances surrounding the agreement.

BILL SCHUETTE
Attorney General

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[1] This opinion uses the term "royalty financing" because that is the terminology used in your request. However, this type of financing arrangement is described or referred to in different ways by the courts and treatises.

[2] There are many exceptions to the five- and seven-percent usury limits, including: regulated credit card lenders may charge interest of up to 25% per year, MCL 445.1854; parties to a mortgage on real property may agree to any rate of interest provided that the lender is regulated by an appropriate state or federal agency, MCL 438.31c; corporations may agree in writing to pay a higher rate, MCL 450.1275; certain payday loans with relatively high annual rates are authorized by the Deferred Presentment Service Transactions Act, MCL 487.2121 *et seq*.; and other loans with higher interest rates are regulated by the Regulatory Loan Act, MCL 493.1 *et seq*.

[3] Notably, the Michigan Business and Industrial Development Act, MCL 487.1101 *et seq*., contemplates the use of royalty-based financing, and provides that "interest" "does not include anything of value that is contingent on the performance or value of the borrower including, but not limited to, a percentage of net income of the borrower, royalties, stock in the borrower, warrants to purchase stock in the borrower, and convertibility of debentures." MCL 487.1505(1), (5), and (6).

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http://opinion/datafiles/2010s/op10362.htm
State of Michigan, Department of Attorney General
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EXHIBIT 13

STATE OF MICHIGAN

COURT OF APPEALS

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,

Plaintiff/Counterdefendant-Appellee,

v

PARK STREET GROUP REALTY SERVICES, LLC, PARK STREET GROUP, LLC, and DEAN J. GROULX,

Defendants/Counterplaintiffs-Appellants.

FOR PUBLICATION
June 10, 2021
9:05 a.m.

No. 349909
Oakland Circuit Court
LC No. 2018-163298-CB

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC,

Plaintiff/Counterdefendant-Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, PARK STREET GROUP, LLC, and DEAN J. GROULX,

Defendants/Counterplaintiffs-Appellees.

No. 350159
Oakland Circuit Court
LC No. 2018-163298-CB

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

MURRAY, C.J.

In these consolidated appeals[1] involving a contract dispute and allegations of usury, in Docket No. 349909, defendants, Park Street Group Realty Services, LLC (PSGRS), Park Street Group, LLC (PSG), and Dean J. Groulx, appeal by leave granted[2] the June 27, 2019 order of the trial court granting in part and denying in part defendants' motion for summary disposition under MCR 2.116(C)(10). In Docket No. 350159, plaintiff, Soaring Pine Capital Real Estate and Debt Fund II, LLC, also appeals by leave granted[3] the same order of the trial court. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Groulx, the sole owner of PSGRS and an operating member of PSG, is a licensed attorney. In 2015, he began discussions with plaintiff about receiving a loan that would provide defendants operating capital for their business flipping tax-foreclosed homes. In July 2016, plaintiff prepared a presentation to convince its investors that the loan would be profitable, noting that plaintiff planned to obtain a 5% "upfront fee," 20% interest, and success fees of $1,000 per sale. Plaintiff projected that the loan would "yield a cash-on-cash return of 37.4% and an [internal rate of return (IRR)] of 36.5%."

Plaintiff agreed to loan $500,000 to PSGRS, which was guaranteed by PSG and Groulx, personally. On September 23, 2016, a second tranche of $500,000 was disbursed to PSGRS, an amended loan agreement was signed, and an updated mortgage was provided on properties owned by PSG to secure repayment of the loan. Before that occurred, though, plaintiff issued another proposal to its investors reflecting that the total $1 million loan was "projected to yield a cash-on-cash return of 31.4% and an IRR of 29.6%." Despite there being two separate tranches of loan money, and two sets of documents, the terms relevant to this appeal were the same in all of the documents.

The mortgage note stated that "[i]nterest on the outstanding principal amount of the Loan shall accrue interest [sic] at the Interest Rate of Twenty Percent (20.00%) ('Interest') per annum[.]" PSGRS was also required to pay a "Commitment Fee," listed as $25,000 and due at each closing—$50,000 in total. PSGRS had the responsibility to pay "all closing costs, including by way of description and not limitation, reasonable attorneys' fees incurred by [plaintiff] in connection with the consummation and closing of the Loan." As part of repayment, PSGRS was not required to pay anything for the first two months, but the interest still accrued and would "be capitalized and added to the loan balance . . . ." After that, PSGRS was to make monthly payments on the principal of the loan, with a final "balloon payment of the remaining outstanding principal balance of the Loan, plus all accrued and unpaid Interest," due one year after the loan agreement and mortgage

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[1] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 349909); *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 350159).

[2] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 349909).

[3] *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park Street Group Realty Servs, LLC*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 350159).

note were signed. Because the loan proceeds were to be used by PSGRS to purchase homes, renovate them, and sell them, the loan agreement contained a clause requiring that, "[u]pon consummation of a Home Sale, [PSGRS] shall to pay to [sic] [plaintiff] a success fee in the amount of One Thousand and 00/100 Dollars ($1,000.00) per home or lot sold ('Success Fee')." Importantly, the last relevant term of the contract was a usury-savings clause, which provided that if the interest rate under the contract was determined to be usurious, it would revert to the maximum legal interest rate. Groulx signed all of the mortgages, notes, and guaranties on behalf of PSGRS, PSG, and himself.

After paying plaintiff more than $140,000 in interest, defendants stopped paying on the loans in July or August 2017. In December 2017, plaintiff issued Groulx a demand for payment with the threat of a lawsuit. The demand contained a summary of the amounts still owed—$1,029,811.74 in principal; $34,337.06 in interest through the date of maturity; $67,223.82 in default interest, which would continue to accrue at $715.15 per day; $70,000 in success fees; and $6,153.86 in attorney fees. That gave a total due of $1,207,562.48 as of December 26, 2017, with the interest paid to date and the interest sought in the demand letter constituting 23.4% interest.

When defendants still did not pay, plaintiff filed suit in January 2018. After a lengthy procedural history and discovery period, plaintiff's second amended complaint contained three breach-of-contract claims, one each against PSGRS, PSG, and Groulx; and two claims of fraud. Plaintiff alleged that defendants had made misrepresentations about the businesses and the people involved in the businesses to fraudulently induce plaintiff into giving the loan. Defendants, meanwhile, counterclaimed that plaintiff breached a contract to give $2 million by only providing $1 million, and committed fraud.

After considering a number of different motions for summary disposition, the trial court heard defendants' motion that the wrongful-conduct rule precluded the breach-of-contract claims where the contracts violated the criminal-usury statute, MCL 438.41, by charging an effective interest rate above 25% simple interest per annum. Defendants' arguments relied on allegations that the "commitment fees," "success fees," and two months of compound interest should be considered hidden interest and incorporated to determine the actual interest charged. Defendants supported that argument with an affidavit from an accounting expert, John Fiorrito, C.P.A., in which he averred that the planned rate of return for plaintiff corresponded with a rate of 36.5% simple interest per annum.

Plaintiff argued that the criminal-usury statute was not applicable for a variety of reasons, including that the usury-savings clause had to be enforced as written, and that the claimed instances of hidden interest should not be included in the calculation of interest. Plaintiff insisted that the trial court was required only to consider that the contract stated a rate of 20% simple interest per annum, which was not criminally usurious. Lastly, plaintiff contended that, even if the contract was determined to be criminally usurious, the remedy was to bar plaintiff from collecting interest only. In other words, plaintiff argued that it should still be permitted to collect the $1 million principal of the loan.

The trial court ultimately agreed with defendants that the contract provided for a criminally usurious interest rate. However, the trial court declined to apply the wrongful-conduct rule to bar plaintiff's collection of the principal of the loan, holding that there was not a sufficient causal

nexus between plaintiff's illegal behavior and the claims. The trial court ordered that an upcoming trial would take place on the amount owed, but that plaintiff would not be permitted to introduce evidence of defendants' alleged fraud. These appeals followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

During the trial court proceedings, the parties presented arguments under both MCR 2.116(C)(8) and (C)(10). Because the trial court did not specifically state under which rule the motions were being decided and relied on evidence outside of the pleadings, this issue is appropriately reviewed under (C)(10). "This Court [] reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted).

"Questions of statutory interpretation are also reviewed de novo." *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). "Insofar as the motion for summary disposition involves questions regarding the proper interpretation of a contract, this Court's review is de novo." *Johnson v USA Underwriters*, 328 Mich App 223, 233; 936 NW2d 834 (2019).

B. CRIMINAL-USURY STATUTE AND USURY-SAVINGS CLAUSE

Plaintiff argues that the criminal-usury statute, MCL 438.41, does not apply because of a certain statutory exception, the language of the criminal-usury statute itself, and the existence of the usury-savings clause. Only the latter argument is properly before us.

1. WAIVED ARGUMENTS

Plaintiff's first argument is that the trial court's decision must be reversed because the exception in MCL 438.31c(11) makes the criminal-usury statute inapplicable. Plaintiff, however, did not make that argument in any of its briefs regarding summary disposition, so the issue is unpreserved. "Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court or administrative tribunal." *Marik v Marik*, 325 Mich App 353, 358; 925 NW2d 885 (2018) (quotation marks and citation omitted). Second, plaintiff asserts that the criminal-usury statute does not apply to it because it uses the word "person" to describe who could be guilty of the crime, MCL 438.41, and plaintiff is not a "person." But, as before, plaintiff did not make this argument to the trial court, and therefore it is not preserved for our review. *Marik*, 325 Mich App at 358.

Plaintiff's failure to preserve those arguments results in their waiver. "Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008), citing *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987). "Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal." *Walters*, 481 Mich at 387 (quotation marks and citations omitted). "By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually." *Id*. at 388. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Id*., citing *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891). Thus, because plaintiff failed to raise those arguments to the trial court, they are waived and we decline to consider them.[4]

2. APPLICABILITY AND ENFORCEABILITY OF THE USURY-SAVINGS CLAUSE

Turning now to plaintiff's preserved argument, plaintiff argues that the criminal-usury statute was not violated because the usury-savings clause precluded the contract from having an unlawful interest rate. Stated differently, this argument presents a simple question: does a contract that essentially states "we agree not to charge or receive any interest above that legally permitted," prevent a court from invalidating that contract as violative of public policy (the criminal-usury statute) when the actual interest rate exceeds the statutory maximum?[5]

The question presented is simple, and given the contract language and Michigan law, so too is the answer. On the one hand, we have well-settled law that contracts that require performance of an act in violation of public policy (as announced by the Legislature or, at times, the executive) cannot be enforced by the courts. See *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54-55; 672 NW2d 884 (2003). And pertinent to this case, MCL 438.41 makes it a crime (with limited exceptions) if a person charges, takes, or receives interest at a rate above 25% per annum:

> A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer

[4] Separately, plaintiff's argument regarding MCL 438.31c(11) is not properly before this Court because plaintiff did not raise it in its application for leave to appeal or the supporting brief, and our order granting leave limited the issues to those raised in the application and supporting brief. We therefore decline to consider the issue. MCR 7.205(E)(4); *Ketchum Estate v Dep't of Health & Human Servs*, 314 Mich App 485, 506-507; 887 NW2d 226 (2016).

[5] Whether the criminal-usury statute is rendered inapplicable by a usury-savings clause has not been addressed by this Court in a published opinion. But see *Karel v JRCK Corp*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2012 (Docket No. 304415), p 3-4 (wrongful-conduct rule did not bar claim based on a promissory note that contained a usurious rate, but was not facially usurious).

> or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

The purpose of Michigan's usury statute "is to protect the necessitous borrower from extortion." *People v Lee*, 447 Mich 552, 556-557; 526 NW2d 882 (1994) (quotation marks and citation omitted). "In the accomplishment of this purpose a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of words, the contrivances of form, or the paper tigers of the crafty. We are interested not in form or color but in nature and substance." *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958).

On the other hand, it is equally settled that courts must enforce the language adopted by the parties to a contract, and give effect to all parts of that contract. As was recently restated in *Barshaw v Allegheny Performance Plastics, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 350279); slip op at 3 (citations omitted):

> Thus, we begin our analysis by examination of the core principles of contract interpretation:
>
> > In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy.

See also *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 695; 930 NW2d 416 (2019). When enforcing the unambiguous language of a contract, we must "give effect to every word or phrase as far as practicable," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003) (quotation marks and citations omitted), so as to "avoid an interpretation that would render any part of the contract surplusage or nugatory." *Id*. at 468.

The usury-savings clause appears in the mortgage notes, and states:

> **5. <u>Interest Limitation</u>.**
>
> Nothing herein contained, nor any transaction relating thereto, or hereto, shall be construed or so operate as to require [PSGRS] to pay, or be charged, interest at a greater rate than the maximum allowed by the applicable law relating to this Note. Should any interest or other charges, charged, paid or payable by [PSGRS] in connection with this Note, or any other document delivered in connection herewith, result in the charging, compensation, payment or earning of interest in excess of the maximum allowed by the applicable law as aforesaid, then any and all such excess shall be and the same is hereby waived by the holder, and any and all such excess paid shall be automatically credited against and in reduction of the principal due under this Note. If [plaintiff] shall reasonably determine that the interest rate applicable to this Note (together with all other charges or payments related hereto that may be deemed interest) stipulated under this Note is, or may be, usurious or otherwise limited by law, the unpaid balance of this Note, with accrued

> interest at the highest rate then permitted to be charged by stipulation in writing between [plaintiff] and [PSGRS], at the option of [plaintiff], shall become due and payable thirty (30) days from the date of such determination.

The language of this clause is unambiguous, and will be enforced as written. *Barshaw*, ___ Mich App at ___; slip op at 3. So too will the remainder of the mortgage note, which neither party suggests is otherwise ambiguous. And, under that contract, it is undisputed that the interest rate to be charged and paid is specified to be 20%, well below the statutory maximum. Additionally, the plain language of the savings clause expresses the parties' intention *not* to have defendants charged with, or pay, interest above the maximum rate allowed by law. In other words, to abide by Michigan law. It likewise provides that if the "interest or other charges" are determined to exceed "the maximum allowed by the applicable law," then all of the excess charges are "waived by [plaintiff]," and those that had already been collected would be applied to the principal of the loan. To conclude that the mortgage note was facially usurious, when it plainly states a 20% rate and an intention not to charge or collect a rate above that allowed by law, would render the usury-savings clause surplusage. This we cannot do. *Klapp*, 468 Mich at 468. Consequently, on its face the mortgage note is not violative of the public policy stated in MCL 438.41.

The federal bankruptcy court sitting in Detroit came to the same conclusion under similar circumstances in *In re Skymark Properties II, LLC*, 597 BR 363 (Bankr ED Mich, 2019). There, an allegation was made that a promissory note contained an unlawful interest rate because, when combined, the charging interest and default interest exceeded 25%. *Id*. at 390. The court disagreed, concluding that a usury-savings clause in the note "necessarily means that the interest charged under the Promissory Note cannot exceed the maximum amount permitted by law." *Id*. Because the parties agreed to never charge or collect interest above that permitted by MCL 438.41, the note was not usurious. *Id*. We agree with this conclusion, and hold that the note was not usurious on its face because the parties evinced a clear intent not to charge or pay a rate of interest above that allowed by law.

Other courts have likewise concluded that a contract containing a usury-savings clause, coupled with a stated interest rate at or below the statutory maximum, is not usurious on its face. See, e.g., *In re Dominguez*, 995 F2d 883, 886 (CA 9, 1993) ("Because the interest rate required to be paid under the extension agreement was determined in part by the savings clause, we cannot conclude that the agreement is usurious on its face."); *Woodcrest Assoc, Ltd v Commonwealth Mtg Corp*, 775 SW2d 434, 437-438 (Tex App, 1989) (usury-savings clauses are enforced to defeat a violation of usury laws, but the terms must be construed as a whole and in light of all the circumstances); *Jersey Palm-Gross, Inc v Paper*, 658 So 2d 531, 535-536 (Fla, 1995) (usury-savings clauses should be enforced in appropriate circumstances); *Video Trax, Inc v NationsBank, NA*, 33 F Supp 2d 1041, 1058 (SD Fla, 1998) (presence of usury-savings clause established that lender lacked intent to assess a usurious interest rate). But see *NV One, LLC v Potomac Realty Capital, LLC*, 84 A3d 800, 810 (RI, 2014) (declaring usury-savings clauses "unenforceable as against the well-established public policy of preventing usurious transactions.").

As recognized by the *Jersey Palm-Gross* court, there are legitimate purposes of a usury-savings clause:

> However, we also believe that savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances. For instance, we agree with Judge Pariente's illustration, in the majority opinion below, of the proper utilization of a savings clause:
>
> > Where the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent. [*Jersey Palm-Gross, Inc*, 658 So 2d at 535 (citation omitted).]

By enforcing the usury-savings clause, we give effect to the express intentions of the parties, while enforcing the public policy as outlined in the usury laws. Because of the savings clause, the contract does not "charge" a usurious rate of interest. Nonetheless, as discussed below, the trial court properly found that some of the "fees" within the contract were in actuality additional interest charges, placing at issue whether plaintiff was seeking to "take or receive" monies from defendants as interest that exceeds the statutory maximum, despite (and contrary to) the savings clause.[6]

3. CALCULATION OF INTEREST AND APPLICATION OF MCL 438.41

Although the parties contractually agreed to comply with state usury laws, the trial court found that plaintiff had in fact attempted, through this lawsuit, to collect more than a 25% interest rate, contrary to the contract and state law. Plaintiff argues that the trial court improperly calculated the interest rate and, therefore, improperly applied the criminal-usury statute to preclude the collection of interest.

The parties do not dispute that the loan, mortgage, and guaranty documents show mutual assent for defendants to repay the $1 million loan to plaintiff, plus interest and fees. *Law Offices of Jeffrey Sherbow PC*, 326 Mich App at 695. Instead, the disagreement exists regarding whether

[6] It is certainly possible that unscrupulous lenders could take advantage of borrowers by including within a contract a usury-savings clause while still seeking to collect unlawful interest, with the hope (and perhaps expectation) that the unlawful rates will be paid by the borrower and not be challenged in court. But under the common law of contracts and the statute as written, these clauses are permissible. Moreover, even though the parties to this contract were of equal bargaining power, the plain language of MCL 438.41 and MCL 438.61(2) and (3) is clear—plaintiff was not excused from the criminal-usury statute because it made the loan to a business entity. These statutes do not contain an exception for the parties under this contract. Moreover, the Legislature, under the Michigan Limited Liability Company (LLC) Act, MCL 450.4101 *et seq*., also refused to allow entities formed as LLCs to be excused from the criminal-usury statute. See MCL 450.4212 ("A domestic or foreign limited liability company, whether or not formed at the request of a lender, may agree in writing to pay any rate of interest as long as that rate of interest is not in excess of the rate set forth in [MCL 438.41 to MCL 438.42.]").

plaintiff sought to recover certain fees set forth in the contract that were actually interest charges that, when combined with the 20% interest figure, exceeded the criminally usurious interest rate.

As noted, MCL 438.41 proscribes a person from "knowingly charg[ing], tak[ing] or receiv[ing] any money or other property as interest on the loan . . . at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period." *Id.* The Legislature did not define the term "interest," but caselaw has provided some guidance. "Interest is compensation allowed by law or fixed by the respective parties for the use or forbearance of money, a charge for the loan or forbearance of money, or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge, Inc v Dep't of Treasury*, 420 Mich 226, 242; 362 NW2d 618 (1984) (quotation marks and citations omitted). "Under generally understood and applied principles, it [interest] is merely an incident of the principal and must be accounted for." *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945) (quotation marks and citation omitted). In the simplest terms, "[i]nterest is paid for the use of money." *Coon v Schlimme Dairy Co*, 294 Mich 51, 56; 292 NW 560 (1940).

Turning now to whether the trial court properly calculated the actual interest rate, the parties agree that the contract states that the interest rate on the $1 million total loan was 20% simple interest per annum. Plaintiff insists that the trial court's analysis should have stopped there, because that was the only interest amount agreed to be charged. For their part, defendants argue that the trial court properly looked beyond the specified rate of "interest" in the contract and considered certain fees charged by plaintiff to be interest charges.

In deciding this issue, we first examine the meaning of "per annum." Notably, under the statute, the term 25% "per annum" relates to an interest rate *per year*, but it also applies to calculations of "the equivalent rate for a longer or shorter period." MCL 438.41. The contract, like the statute, also uses the term "per annum," but the contract defines the time period by which that "per annum" would be calculated as "the actual number of days elapsed *on the basis of a three hundred sixty (360) day year* . . . ." Considering the contract provides for a time period shorter than an actual year, the rate of 20% must be adjusted under the statute to determine "the equivalent rate for a longer or shorter period." MCL 438.41. It is a mathematical certainty that a 20% rate charged for 360 days would be higher than for a 365-day period, as the entire 20% would be incurred after 360 days, leaving five additional days on which interest would accrue. Although there may be cases where the actual calculation of that rate is relevant, this case is not one of them. It is enough, as will be explained shortly, that the effective interest rate for the purposes of MCL 438.41 is slightly above 20%.[7]

With that background, we next address the parties' disagreement over whether other contractual fees should be considered interest for purposes of the criminal-usury statute. As noted earlier, interest is "a charge for the loan or forbearance of money, or a sum paid for the use of money, or for the delay in payment of money." *Town & Country Dodge*, 420 Mich at 242 (quotation marks and citations omitted). In determining what constitutes such a charge, we are not bound by the contract's description, as "a court must look squarely at the real nature of the transaction, thus avoiding, so far as lies within its power, the betrayal of justice by the cloak of

[7] As noted, the interest sought in the December 2017 demand letter reflected a 23.4% rate.

words, the contrivances of form, or the paper tigers of the crafty." *Wilcox*, 354 Mich at 504. Michigan courts "are interested not in form or color but in nature and substance." *Id*. And that is why this Court has recognized that Michigan courts "must look beyond form to characterize the real nature of the transaction in order to determine whether the transaction falls within the usury statute." *Paul v US Mut Fin Corp*, 150 Mich App 773, 780; 389 NW2d 487 (1986). Under these decisions, the trial court properly looked beyond the simple interest rate per annum stated in the contract to determine the *actual* interest rate that plaintiff was seeking to receive from defendants.

Of particular importance to this calculation was plaintiff's charge of a $50,000 fee, disbursed in two $25,000 payments when each of the $500,000 tranches were released to PSGRS. Plaintiff argues that the $50,000 fee should not be counted as interest because it was a commitment fee. We held in *Fed Deposit Ins Corp v Kramer*, 100 Mich App 495, 497; 298 NW2d 755 (1980), that a commitment fee was not interest when it "was paid more than 3 weeks prior to the loan," and "[i]n consideration of that fee, the lender bound itself for 115 days to loan to the defendants $110,000 at $6^{3}/_{4}$% interest if defendants applied therefor." The Court reasoned that, because the fee "was a separate transaction distinct from the loan," it was not hidden or disguised interest. *Id*. The implication, though, is that a "commitment fee" that was not paid in advance of the loan, did not bind the lender to give the loan at a future date, and was not a separate transaction from the actual loan, would be considered hidden interest. *Id*.

Such was the case here, where it is not disputed that the $50,000 "commitment fee" was paid by defendants at the time the loan principal was disbursed, did not bind plaintiff to give the loan at a distinct interest rate, and was not a separate transaction from the loan itself. Indeed, in plaintiff's proposal to investors, the $50,000 fees were referred to as a 5% "upfront fee." Therefore, in looking beyond the use of the term "commitment fee" in order to determine the actual nature of the transaction, *Wilcox*, 354 Mich at 504, we conclude that the $50,000 fee was interest at a rate of 5% simple per annum.

Plaintiff attempts to escape this conclusion by arguing that the $50,000 was actually for acceptable fees and costs under the civil-usury statute. MCL 438.31a. Under that statute, "[r]easonable and necessary charges" that "consist of recording fees; title examination or title insurance; the preparation of a deed, appraisal, or credit report; plus a loan processing fee," are not considered interest. *Id*. The problem with this argument is that the contract already required PSGRS to pay all of those fees, and plaintiff actually charged them. In fact, the loan agreement provides that PSGRS was responsible for the closing costs which were made up of title searches, title insurance, and recording fees, and amounted to over $14,000 according to Fioritto's uncontroverted analysis of the loan documents. There was also a separate charge for plaintiff's legal fees of $14,000. Nothing in the record suggests that the $50,000 fee charged at the time the loan was made was used to pay those fees. Instead, as reflected in plaintiff's own internal documentation, the $50,000 amounted to a profit intended to be earned by plaintiff in the form of an upfront fee. Thus, plaintiff's arguments that the $50,000 should be considered a "commitment fee" or a charge for fees and costs arising out of the loan, are without merit. Consequently, the $50,000 fee was actually interest.

When taking the $50,000 fee into account as interest, as explained by Fioritto, the rate sought by plaintiff moves to over 25% simple interest per annum, as proscribed by the criminal-usury statute. MCL 438.41. Thus, considering the earlier conclusion that the stated rate of 20%

per annum in the contract was actually *slightly above* 20% in light of the fact that the contract used 360 days as the length of a year, the additional 5% from the "commitment fees" puts the total effective rate above 25%.

Therefore, there is no material factual dispute that in seeking to "take or receive" interest from defendants through collection of the interest and hidden interest, plaintiff acted contrary to the criminal-usury statute, and the trial court did not err when it granted summary disposition in favor of defendants.[8]

C. WRONGFUL-CONDUCT RULE

The contract itself, with the 20% interest rate and associated fees that were, in fact, also interest, did not allow the court to invoke the wrongful-conduct rule, as the savings clause limited plaintiff to charging no more than the legal maximum rate. Where plaintiff went astray, however, was seeking to collect ("take or receive") through this lawsuit an effective interest rate above the statutory maximum. In other words, although the contract was not facially unlawful as it stated the parties' intent to limit the interest rate charged or collected to no more than 25%, plaintiff's attempt to collect an actual interest rate above the statutory maximum violated MCL 438.41. In light of that fact, and for the reasons set forth below, we hold that the trial court properly applied the wrongful-conduct rule by precluding plaintiff from collecting any interest, but allowing plaintiff to recover the principal of the loan.

"Michigan courts have long recognized the existence of the wrongful-conduct rule." *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). "The wrongful-conduct rule provides that when a plaintiff's action is based, in whole or in part, on his own illegal conduct, his claim is generally barred." *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005) (quotation marks and citation omitted). The wrongful-conduct rule is not an equitable doctrine, *Varela v Spanski*, 329 Mich App 58, 83; 941 NW2d 60 (2019), but is instead a common law maxim that can be applied in two separate ways. *Orzel*, 449 Mich at 558. The first way the rule can be invoked is when the plaintiff's action is based, in whole or in part, on his own illegal conduct, and provides:

> [A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party. (1A CJS, Actions, § 29, p 386. See also 1 Am Jur 2d, Actions, § 45, p 752.) [*Orzel*, 449 Mich at 558 (quotation marks omitted).]

The second way in which the wrongful-conduct rule can apply is when both parties have equally participated in the illegal conduct:

[8] This conclusion renders moot the arguments about the remaining fees and whether the trial court properly considered them as interest. Consequently, we decline to address those issues. See *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018).

> When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim, known as the "doctrine of in pari delicto" generally applies to also bar the plaintiff's claim:
>
> > [A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them. (1A CJS, Actions, § 29, p 388. See also 1 Am Jur 2d, Actions, § 46, p 753.) [*Orzel*, 449 Mich at 558.]

In order for the wrongful-conduct rule to apply to a given case, "plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. at 561. "The rule rests on the public policy premise that courts should not, directly or indirectly, encourage or tolerate illegal activities." *Hashem*, 266 Mich App at 89. However, "[t]he mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule." *Orzel*, 449 Mich at 561. Where an act "amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe work place, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id*. Additionally, "[f]or the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id*. at 564.

As these cases illustrate, the first question we must consider is whether "plaintiff's conduct [is] prohibited or almost entirely prohibited under a penal or criminal statute." *Id*. at 561. As analyzed above, plaintiff violated MCL 438.41, a criminal statute, by seeking to recover interest in an amount exceeding the statutory maximum. Plaintiff contends, however, that the wrongful-conduct rule does not apply because MCL 438.41 has an intent requirement, in that the guilty entity must have "knowingly" violated the statute, and plaintiff believed it was only charging a 20% interest rate and provided security against violating the statute with the usury-savings clause. This argument relies on a misunderstanding of the statutory language, which must be applied as written. *Barshaw*, ___ Mich App at ___; slip op at 3.

Although the statute does use the word "knowingly," it does not suggest that the individual violating the statute must know that they are violating the criminal-usury statute. Instead, the statute proscribes "*knowingly* charg[ing], tak[ing] or receiv[ing] any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period." MCL 438.41 (emphasis added). Thus, the statute pertains to whether plaintiff knew that it was charging or receiving an amount of interest that was higher than the effective rate of 25% simple interest per annum. As we just concluded, there is no genuine issue of material fact that plaintiff knew it intended to collect such a rate when it sought to recover interest at a rate of more than 25% per annum. Indeed, plaintiff's own internal communications showed that the total $1 million loan was "projected to yield a cash-on-cash return of 31.4% and an IRR of 29.6%," and the filing of this lawsuit reflected plaintiff's intent to recover more than what was allowed by contract and statute. Therefore, plaintiff's argument that it did not intend to violate MCL 438.41 fails.

Whether plaintiff should be precluded from collecting all of the money owed under the contract is, however, a different question. As noted, "[f]or the wrongful-conduct rule to apply, a

sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Orzel*, 449 Mich at 564. When "the illegal act is the source of both the civil right and plaintiff's criminal responsibility, a causal nexus is not lacking." *Varela*, 329 Mich App at 82.

Here, the illegal act was the attempted collection through this lawsuit of fees and interest that resulted in a rate that was effectively above 25% simple interest per annum.[9] The mortgage note is clearly related to plaintiff's attempt to collect usurious interest, as the note contains the interest rate (as well as the savings clause). However, it is only incidentally related, as there is no "sufficient causal nexus" between the two, *Orzel*, 449 Mich at 564, because the usurious interest rate was not authorized under the terms of the mortgage note, when giving effect to the usury-savings clause. And, the subject matter of the contract was clearly legal, as was the stated interest rate of 20% per annum. Thus, it was only the additional fees sought by plaintiff, now determined to be interest, that took what was legal and turned it into an illegal interest rate. Because the "punishment should fit the crime," the trial court did not err in concluding that the wrongful-conduct rule did not preclude plaintiff from recovering the principal of the loan, but did preclude it from collecting any interest.

We also reject plaintiff's contention that the criminal punishment within MCL 438.41 precludes application of any other punishment. This argument overlooks the fact that the wrongful-conduct rule requires proof of a violation of a criminal statute, but provides for a remedy that is not criminal in nature. *Orzel*, 449 Mich at 561. Undoubtedly, a criminal statute will have a criminal punishment, but the *Orzel* Court provided that, in addition to that potential criminal penalty, a party is also not permitted to obtain civil damages on the basis of that criminal conduct. Indeed, if plaintiff's argument about the exclusivity of the criminal penalty was correct, then the wrongful-conduct rule would necessarily cease to exist.

Plaintiff's argument that the wrongful-conduct rule should not apply because defendants were more culpable than plaintiff also misses the mark. "An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in pari delicto." *Id*. at 569. "In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries . . . ." *Id*. Plaintiff contends that defendants' culpability is greater because they engaged in fraud when inducing plaintiff to come to the agreement. Plaintiff has not, however, alleged that defendants acted in a criminal manner, but only tortiously. Notably, in analyzing the exception to the wrongful-conduct rule, the Court in *Orzel*, *id*. at 569, began with the premise that both "the plaintiff and defendant have engaged in illegal

[9] As stated above, the usury-savings clause in the mortgage note it is not against public policy. Consequently, if plaintiff had sued and explicitly sought to recover no more than the principal and 25% interest, no illegality would be apparent.

conduct . . . ." Considering that plaintiff has not alleged "illegal" conduct by defendants, but plaintiff has violated a criminal statute, this exception does not apply.[10] *Id*.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens

[10] Although plaintiff argues that the trial court erred by summarily disposing of its fraud claims, the record shows that the trial court did not summarily dispose of those claims, but merely did not schedule a trial for them. Thus, this argument is not ripe for review. See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). Additionally, plaintiff asserts that the trial court should have allowed it to present evidence of that fraudulent behavior at the scheduled trial. Because the trial on plaintiff's breach-of-contract claims is no longer necessary, that argument is moot. See *TM*, 501 Mich at 317.

STATE OF MICHIGAN

IN THE SUPREME COURT

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellee/Cross-Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellants/Cross-Appellees.
_____/

MSC No. 163320
MCOA No. 349909
LC No. 18-163298-CB
(OCCC – Business Court)

CONSOLIDATED WITH

SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC, a Delaware Limited Liability Company,

Plaintiff/Counter-Defendant/
Appellant,

v

PARK STREET GROUP REALTY SERVICES, LLC, a Michigan Limited Liability Company, PARK STREET GROUP, LLC, a Michigan Limited Liability Company, DEAN J. GROULX, an individual, jointly and severally,

Defendants/Counter-Plaintiffs/
Appellees.

MCOA No. 350159
LC No. 18-163298-CB
(OCCC – Business Court)

APPENDIX – VOLUME V
PLAINTIFF/COUNTER-DEFENDANT/CROSS-APPELLANT SOARING PINE CAPITAL REAL ESTATE AND DEBT FUND II, LLC'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED MARCH 18, 2022

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EXHIBIT 14

John Polderman

From: John Polderman
Sent: Thursday, June 30, 2016 1:26 PM
To: Edwin Herbert
Subject: Usury
Attachments: Usury Rates.pdf

Skip,

I cannot find any Michigan case or authority which provides that in a commercial setting with a non-regulated lender, loan fees, points, etc. are deemed interest. However we would want to ensure to calculate the loan on 365 days rather than 360 as that could bump us over. Also some courts have invalidated savings clauses which state that if the amount is valid then the interest is calculated at the maximum highest rate.

The consensus seems to be based on what is "normal and customary" in the industry in evaluating whether additional charges are simply an attempt to get around the statute. We may want to add language that the parties agree that the fee is not for the use or forbearance of money but is supported by independent consideration in exchange for due diligence items, servicing the loan, preparing loan documents, etc.

I also came across the attached chart which you may find helpful.

John

John Polderman
Senior Attorney
Simon PLC Attorneys & Counselors
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Bloomfield Hills, Michigan 48304
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MICHIGAN STATUTORY INTEREST RATE CEILINGS

In addition to the state laws mentioned below, a bank, savings bank or credit union is authorized by a federal law (PL 96-221) to charge the greater of 1 percentage point in excess of the Federal Reserve discount rate or the highest rate permitted by state law to any lender on the type of loan in question (the most favored lender authority). PL 96-221 also preempts state usury ceilings by allowing any rate of interest for virtually all first lien mortgages and mobile home loans as well as first lien mobile home installment contracts. Moreover, under PL 96-221, an individual selling his or her home and taking a first lien on the title or a land contract given in exchange for the sale of unencumbered property could be at any rate of interest. The states had the authority to override the federal preemption of the first lien mortgages and mobile home loans but had to take action before April 1, 1983. The state of Michigan did not take action before the deadline. With regard to other loans, states can override the preemption at any time. PL 96-221 as amended, also preempted certain state usury ceilings applicable to business and agricultural loans. The preemption expired on April 1, 1983.

Also, Title VIII of the Garn-St. Germain Depository Institutions Act of 1982, PL 97-320, entitled "Alternative Mortgage Transaction Parity Act of 1982," authorizes state-chartered banks, credit unions, savings banks and other housing creditors (including licensees under the Mortgage Brokers, Lenders and Servicers Licensing Act and the Secondary Mortgage Loan Act) to make alternative mortgage transactions notwithstanding any provisions of state law which restrict or prohibit the making of such transactions. States had the authority to override the federal preemption but had to take action before October 15, 1985. The state of Michigan did not take action before the deadline.

The following table is divided into two parts. The first part primarily applies to extensions of credit which, with two exceptions, are made exclusively by, "regulated lenders," as defined under the Credit Reform Act (CRA). The two exceptions are real estate mortgages and land contracts by all types of lenders and vendors (some not subject to the Credit Reform Act) and business loans made by all types of lenders (some not subject to the Credit Reform Act). The second part of the table covers extensions of credit by lenders which are not permitted to extend credit under the CRA. Among the lenders appearing in this part of the table, are licensees under the Credit Card Act (CCA). Although the CRA includes licensees under the CCA in the definition of "regulated lenders," CCA licensees cannot exercise powers under the CRA since they remain subject to specific and controlling provisions contained in the CCA.

Business loans as used in this schedule includes agricultural loans. Variable interest rate loans are allowed unless otherwise indicated.

References are to the Michigan Compiled Laws of 1970 (MCL) and the Michigan Statutes Annotated (MSA).

Prepared by: Michigan Department of Consumer and Industry Services
Office of Financial and Insurance Services
Division of Financial Institutions
P.O. Box 30224
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Updated: April 3, 2000

SPC003092

PART I.
LENDERS SUBJECT TO CREDIT REFORM ACT, MORTGAGE LOANS, AND BUSINESS CREDIT EXTENSIONS

LOAN CATEGORY	LEGAL CITATIONS	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	IMPACT OF PL 96-221 OR PL 97-320 WHERE INDICATED	LATE CHARGE
1. Mortgages, Land Contracts					
a. Conventional first lien or land contract by regulated lender, except as in 1c. [1]	Act 326, PA of 1966, MCL 438.31c, MSA 19.15 (1c).	25% per annum	Reasonable loan processing fee by contract.	Allows any rate of interest; PL 97-320 permits full parity on alternative mortgage transactions.	Reasonable late charge by contract.
b. Conventional first lien or land contract by unregulated lender, except as in 1c.	Act 326, PA of 1966, MCL 438.31c, MSA 19.15 (1c)	11% per annum	Loan processing fee not permitted; variable rates not permitted for some lenders.	Allows person selling his/her principal residence, on which there is no prior lien, by first mortgage or land contract to charge any rate.	Reasonable late charge by contract.
c. Loan or land contract in excess of $100,000 secured by first or junior lien on other than single-family dwelling.	Act 326, PA of 1966 MCL 438.31c, MSA 19.15 (1c)	No ceiling	Reasonable loan processing fee by contract for regulated lenders.		Reasonable late charge by contract.
d. Loan secured by junior lien, except as in 1c, 1d(ii), 2a, and 2b.					
i) by bank.	Act 162 of PA 1995	25% per annum	All fees and charges as agreed to by borrower.		Late fee as agreed to by borrower.
ii) by savings bank (includes certain business loans secured by junior liens.)	Act 162 PA of 1995	25% per annum	All fees and charges as agreed to by borrower.		Late fee as agreed to by borrower.
iii) by credit unions	Act 285, PA of 1925; MCL 490.14; MSA 23.494; Act 162, PA of 1995	25% per annum	All fees and charges as agreed to by borrower.		Late fee as agreed to by borrower.

[1] FHA-VA loans are exempted from the Michigan Usury Law by Act 326, PA of 1966, MCL 438.31; MSA 19.15(1), as amended, and Act 2, PA of 1935 MCL 487.751; MSA 23.181, as amended.

LOAN CATEGORY	LEGAL CITATIONS	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	IMPACT OF PL 96-221 OR PL 97-320 WHERE INDICATED	LATE CHARGE
iv) by secondary mortgage licensees (loans may be secured by 1-4 family real property)	Act 125, PA of 1981, MCL 493.71, MSA 26.568(21); Act 162, PA of 1995	25% per annum	Loan processing fee not to exceed 5% of the gross amount of the loan; prepaid finance charge allowed to buy down interest rate; reasonable annual fee on open-end credit.		Greater of $15.00 or 5% of the install-ment payment.
v) by unlicensed person who is selling home, or a builder (loans may be secured by 1-4 family dwelling).	Act 326, PA of 1966, MCL 493.71, MSA 26.568 (21).	11% per annum	Limit: two loans per year; loan processing fee not permitted.		Reasonable late charge by contract.
vi) Realtor representing buyer or seller.	Act 326, PA of 1966, MCL 438.31c, MSA 19.15 (1c).	11% per annum	Limit: two loans per year; loan processing fee not permitted.		Reasonable late Charge by contract.
vii) other unlicensed person MCL 438.31c, MSA 19.15(1c).	Act 326, PA of 1966.	7% per annum	Limit: two loans per year; loan processing fee not permitted.		Reasonable late charge by contract.
2. Business Loans					
a. Loan to unincorporated borrower					
i) by depository financial institution insurance company, finance subsidiary of manufacturer,[2] or a related entity (includes business purpose loan secured by junior lien, except as in 1c).	Act 52, PA of 1970, MCL 438.61, MSA 19.15. (71).	No ceiling	Reasonable loan processing fee by contract for regulated lenders; Must have sworn statement of business purpose if borrower is a natural person.	CUs and S&Ls may charge the rate allowed for business loans by banks.	Reasonable late charge by contract.

[2] Depository financial institution means a state or national bank, state or federal savings bank or savings and loan association, or credit union. Related entity means a business entity other than a natural person whose members, owners, partners, or limited partners include a depository financial institution, insurance company, or finance subsidiary of manufacturing corporation.

SPC003094

LOAN CATEGORY	LEGAL CITATIONS	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	IMPACT OF PL 96-221 OR PL 97-320 WHERE INDICATED	LATE CHARGE
ii) by other lender, except as in 1b and 1c.	Act 52, PA of 1966, MCL 438.61, MSA 19.15 (71).	25% per annum	Must have sworn statement of business purpose if borrower is a natural person; loan processing fee not permitted for certain unregulated lenders.		Reasonable late charge by contract.
b. Loan or other credit extension to a corporation or limited partnership from any source, except as in 1c.	Act 284, PA of 1972, MCL 450.1275, MSA 21.200 (275); Act 213, PA of 1982, MCL 449.1109, MSA 20.1109; Act 259, PA of 1968, MCL 438.41; MSA 19.15 (51).	25% per annum	Reasonable loan processing fee by contract.		Reasonable late charge by contract.
c. Regulated lenders, as defined of under Act 162 of 1995 may make business loans to the extent authorized by law, except as in 1c. except as in 1c.	Act 162 PA of 1995	25% per annum	For depository financial institutions all fees and charges agreed to by borrower. For non-depository institutions processing fee of 2% or amount of loan.		Greater of $15.00 or 5% under Act 162 of the installment payment. For depository institutions late fee as agreed to by borrower.
3. Credit Cards, Auto, and other types of loans (see also 1a, 1c, 1d, 2a, 2b)					
a: Credit card or line of credit agreement by a depository Financial institution.	Act 162 PA of 1995	No ceiling[3]	All fees and charges as agreed to by borrower.	May charge rate authorized Under Act 162 PA of 1995.	Late charge as agreed to by borrower.
b. All other types of loans by depository institutions except as in 1a and 1c.	Act 162 PA of 1995	25% per annum	All fees and charges as agreed to by borrower.	May charge rate authorized Under Act 162 PA of 1995 or 1% + Federal Reserve Discount.	Late charge as agreed to by borrower.

[3] Under section 4201 of the Banking Code of 1999, a bank is authorized to collect interest and charges on loans and extensions of credit as permitted by the laws of this state or of the United States to any lender. A bank, on a credit card loan, can charge the interest rate and fees allowed to a regulated lender under the Credit Reform Act. A savings bank, under section 430 of the Savings Bank Act, is authorized to collect interest and charges on a credit card loan as permitted by the Credit Reform Act. A credit union, under section 14 of the Michigan Credit Union Act, is authorized on a credit card loan to charge the rate of interest allowed by the Credit Reform Act. Also, as a result of the federal most favored lender authority, a federally insured state or national bank, state or federal savings bank, or state credit union, can charge the highest rate of interest allowed under Michigan law to any lender on the type of loan in question.

SPC003095

LOAN CATEGORY	LEGAL CITATIONS	MAXIMUM CONTRACT RATE (SIMPLE INTEREST UNLESS INDICATED OTHERWISE)	OTHER TERMS	IMPACT OF PL 96-221 OR PL 97-320 WHERE INDICATED	LATE CHARGE
4. Loans by Regulatory Loan Companies	Act 162 PA of 1995, Act 21, PA of 1938, MCL 493.1, MSA 23.667(1)	25% per annum	Loan processing fee not to exceed 2% of the loan up to		Greater of $15.00 or 5% of the installment payment.
5. Auto Financing by Licensed Auto Dealers	Act 162 PA of 1995 Act 27, PA of 1950, MCL 492.101, MSA 23.628(1).	25% per annum	Processing fee not permitted; documentary preparation fee up to $40.00.		Greater of $15.00 or 5% of the installment payment.

EXHIBIT 15

167 Ark. 18
Supreme Court of Arkansas.

DUPREE
v.
VIRGIL R. COSS MORTGAGE CO. ET AL.

No. 215.
|
Nov. 3, 1924.
|
Rehearing Denied Jan. 26, 1925.

Synopsis
Appeal from Chicot Chancery Court; E. G. Hammock, Chancellor.

Suit by B. F. Dupree against the Virgil R. Coss Mortgage Company and another. From a decree dismissing his bill for want of equity, plaintiff appeals. Affirmed.

Attorneys and Law Firms

***587** John Baxter, of Dermott, W. W. Grubbs, of Eudora, and R. W. Wilson, of Pine Bluff, for appellant.

W. D. Jones, of Pine Bluff, and John M. Golden, of Dermott, for appellees.

Williamson & Williamson, of Monticello, amici curiæ.

Opinion

HUMPHREYS, J.

Appellant brought suit against appellees in the chancery court of Chicot county to cancel a note and mortgage he executed to Virgil R. Coss Mortgage Company on the 17th day of November, 1920, and by it assigned to the New Milford Security Company, upon the ground that the contract provided for a greater rate of interest than 10% per annum, which rendered it usurious and void under the laws of Arkansas, both as to principal and interest. It was alleged in the bill that appellant procured the loan from the Virgil R. Coss Mortgage Company, an Oklahoma corporation, residing at Muskogee, Okl., through its agent, American Farm Mortgage Company, a partnership composed of H. D. Price and Guy V. Busenburg, which had its office at Pine Bluff, Ark.; that the loan was for $1,300 on its face, payable in 10 years, bearing interest at the rate of 7% per annum from date until paid, and it was agreed in the written application for the loan that $300 of the amount should be deducted as a commission to the American Farm Mortgage Company for procuring the loan, and that, pursuant to the contract, the cash bonus was deducted from the $1,300, which rendered the contract usurious. The mortgage in which the note was described was made an exhibit to the bill. The mortgage and note were executed in Arkansas and made payable at the office of Virgil R. Coss Mortgage Company in Muskogee, Okl. The mortgage also contained the following paragraph:
"It is agreed that the rate of interest herein reserved and charged shall not in any event exceed the maximum legal rate permitted by the laws of Arkansas. If interest in excess of the maximum legal rate has been charged, it is through an error in computation, and it is agreed that any excess collected above the maximum legal rate shall be credited upon any amount, either principal or interest, remaining unpaid when such overcharge is discovered."

The American Farm Mortgage Company filed a demurrer to the bill which was sustained by the court. The other appellees filed separate answers to the bill denying each material allegation therein. The cause was submitted upon the pleadings and testimony adduced, which resulted in a finding that there was no usury in the transaction, and a decree dismissing appellant's bill for the want of equity, from which finding and decree, an appeal has been duly prosecuted to this court.

This is a companion case with that of Virgil R. Coss Mortgage Co. v. Marcus and Malvina Jordan, 267 S. W. 590, appealed to this court from the chancery court of Drew county, involving the same issues. Much of the testimony was taken at the same time to be used and treated as testimony in each case. Learned counsel for appellant has summarized the facts disclosed by the testimony, which we adopt in the main, with some necessary additions, as a statement of the facts by the court. It is as follows:
"About 25 years ago, H. D. Price, who had for a number of years been engaged in the farm loan business, moved from Oklahoma City to Wilburton, Okl., and opened up a bank. This placed him so far out of touch with his eastern investors that he turned over, or was instrumental in turning over, his loans to the Virgil R. Coss Mortgage Company. From Wilburton, H. D. Price went to Keota, where, in addition to the banking business, he was at all

times a farm loan man. When Price and Coss first became acquainted they were competitors in Oklahoma City; afterwards Coss moved to Muskogee, where he is now operating the Virgil R. Coss Mortgage Company. For a number of years, H. D. Price lived at Stiegler, Okl., where Price, and Busenburg, and a Mr. Zebold, operated a farm loan brokerage under the name of the American Farm Mortgage Company. About 8 years ago, Mr. Price disposed of his business at Stiegler and Keota, Okl., and moved to Pine Bluff, Ark., where he and Guy V. Busenburg formed a partnership under the name of American Farm Mortgage Company. Mr. Zebold, who had formerly been with Price and Busenburg at Stiegler, moved to Muskogee and became associated with the Virgil R. Coss Mortgage Company as vice president. For several years prior to this time, the Coss Mortgage Company had been handling loans for the American Farm Mortgage Company. Mr. Coss states that it was generally understood that, if upon the ***588** investigation of the Arkansas territory, he found it a desirable place to make loans, he would handle their business. At that time, the Virgil R. Coss Mortgage Company had never done business in Arkansas, but shortly after the American Farm Mortgage Company was organized at Pine Bluff, it entered the state of Arkansas as a foreign corporation, for the sole purpose of handling loans secured by the American Farm Mortgage Company, and named H. D. Price as its agent for service of summons.

The American Farm Mortgage Company advertised in the papers and by circular letters that it had money to loan on long time paper at a low rate of interest, but confined its business almost exclusively to colored people. When it received an application for a loan from a prospective customer, H. D. Price, the field man of the American Farm Mortgage Company, would go and inspect the property, and if he found it desirable security for the amount applied for, he took the mortgages and notes and then and there, in the name and on the blank forms of the Virgil R. Coss Mortgage Company, and, in some instances, as in the Dupree case, secured a power of attorney from the borrower, designating the American Farm Mortgage Company agent to secure a loan for him, and forwarded same with the application, the mortgages, and notes, direct to the Virgil R. Coss Mortgage Company, always at the time fixing the rate of interest and the length of the loan, and never at any time going into the open market unless the loan was turned down by the Virgil R. Coss Mortgage Company.

The blank mortgages, the principal notes, and the commission notes, all were prepared and furnished by the Virgil R. Coss Mortgage Company, which kept them on hand, and used them in preparing the papers. When the loan application with notes and mortgages were sent to the Virgil R. Coss Mortgage Company, the American Farm Mortgage Company proceeded to inspect the land, to have the title to the land perfected, always had same approved by the attorney for the American Farm Mortgage Company and the Virgil R. Coss Mortgage Company. If it was a big loan, Coss and Price made a joint inspection. When the title was perfected, the money was sent by the Virgil R. Coss Mortgage Company to the American Farm Mortgage Company, and was disbursed in paying off other mortgages, in perfecting the title, and paying for the recording of the papers from the borrower to Coss, and the balance, if any, was turned over by the American Farm Mortgage Company to the borrower. In some cases a first mortgage and a second mortgage were taken, and all the notes secured by same given to the Virgil R. Coss Mortgage Company and the second in the name of the American Farm Mortgage Company, and the notes secured by each mortgage was given to Coss Mortgage Company, and the American Farm Mortgage Company, respectively. In other instances, only one mortgage and one set of notes were taken, and that in the name of Virgil R. Coss Mortgage Company, the commission being deducted at the time the money was disbursed. The work of securing the loan, of perfecting the title, of disbursing the money, and recording the lender's papers were all attended to by the American Farm Mortgage Company. The Virgil R. Coss Mortgage Company advanced the money, found a market for the loan and attended to all other features of the business at the Oklahoma office, each doing about one-half of the work. The commission was then divided between the two companies on a fifty-fifty basis. When payment became due, either on the commission or the principal notes, collections were made by the American Farm Mortgage Company on instructions of the Virgil R. Coss Mortgage Company to the borrower, regardless of how the loan was made, whether two mortgages, one mortgage in the name of Coss, and one in the name of American Farm Mortgage Company, or both to Coss; or whether one mortgage only to Coss, and a cash commission paid. If the borrower failed to pay taxes, they were paid by the American Farm Mortgage Company. If the borrower was delinquent on any payment necessary to the protection of the lender, he was oft times notified by both companies, and always notified by both companies to make payment through the American Farm Mortgage Company.

If the borrower failed to meet his payments and a loss was sustained thereby, the Virgil R. Coss Mortgage Company charged back to the American Farm Mortgage Company its proportion of the loss, thus equally sharing the profits when there was a profit, and equally sharing the loss when there was a loss.

In addition to the connection in Pine Bluff with American Farm Mortgage Company, the Virgil R. Coss Mortgage Company now has a partnership in Ft. Smith, Ark., and their business is handled in the same way and on the same basis."

The testimony also disclosed that appellant agreed, in his written application for the loan, to pay the American Farm Mortgage Company $300 as a commission for procuring the loan, to be deducted from the amount borrowed; that appellant executed his note and mortgage for $1,300, payable in 10 years, at the rate of 7% per annum from date until paid; that ten coupon notes for $91 each were executed to cover the 10 annual interest payments maturing each year; that, pursuant to the agreement in the application a $300 cash bonus was deducted from the loan and equally divided between the Virgil R. Coss Mortgage Company and the American Farm Mortgage Company; that the American Farm Mortgage Company also deducted from the $1,000 balance, $201.63 as expenses, several items of which were not properly chargeable to appellant, only paying appellant in actual cash $798.37 out of the $1,300 loan.

The initial question arising on this appeal for determination is whether or not the American Farm Mortgage Company acted as agent for the Virgil R. Coss Mortgage Company in negotiating the loan, or whether said mortgage company was the exclusive agent of appellant. While the application for the loan constituted the American Farm Mortgage Company the agent of appellant, the services rendered by that partnership to ***589** the Virgil R. Coss Mortgage Company in this and other transactions, convinces us that said partnership was really representing the Virgil R. Coss Mortgage Company, and not appellant. The American Farm Mortgage Company inspected the property, approved the loan, prepared the note and mortgage on blanks furnished by the Virgil R. Coss Mortgage Company, paid over the money to appellant after deducting the expenses and commission, which commission was divided between the two companies, collected the interest on this and other loans, and looked after the payment of taxes on the mortgaged property. The relationship between the two companies, as reflected by the evidence, constituted an agency in the law. Banks v. Flint, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459; Ellis v. Terrell, 109 Ark. 69, 158 S. W. 957, Ann. Cas. 1915C, 1153; Tompkins v. Vaught, 138 Ark. 262, 211 S. W. 361; McHenry v. Vaught, 150 Ark. 612, 234 S. W. 995.

The next question to be determined is whether the contract is usurious. Appellant received in actual cash only $1,000, for which he executed a note to the Virgil R. Coss Mortgage Company in the sum of $1,300, payable in 10 years, with ten coupon notes attached in the sum of $91 each, to cover the interest for a period of 10 years. In order to repay the loan under the contract, he would have to pay $2,291 or $291 more than enough to repay the $1,000 actually received, with interest thereon at the rate of 10% per annum, the highest rate allowable, for 10 years. This is the method of calculation approved in the case of Ellis v. Terrell, 109 Ark. 69, 158 S. W. 957, Ann. Cas. 1915C, 1153; the test announced in that case being whether the borrower would have to pay more than 10% per annum on the money actually received under the contract, if fully executed. The contract is therefore usurious and void under the Arkansas law, unless saved by the clause in the mortgage to the effect that no usury was intended. This clause only related to errors in computation or calculation. No contention is made that the excess charge above the maximum legal rate of interest was the result of errors in computation or calculation. On the contrary, the testimony reveals that appellees intended to charge 7 per cent. per annum and deduct a $300 cash bonus. A clause of this kind cannot prevent the taint of usury attaching to a contract where there was no mistake of fact, but simply a mistake as to the legal effect thereof. Castleberry v. Weil, 142 Ark. 627, 219 S. W. 739.

The next question arising for determination is whether the contract is an Arkansas or an Oklahoma contract. At the time the contract was made, appellant was a resident of Arkansas and the Virgil R. Coss Mortgage Company was a resident of Oklahoma. While it had qualified to do business in this state as a foreign corporation, it still retained its domicile in Oklahoma. The mortgage and note contained a provision making the debt and interest payable at the home office of the Virgil R. Coss Mortgage Company in Muskogee, Okl. There is no direct evidence in the record tending to show why this paragraph was inserted in the contract. No one has testified that it was inserted in order to evade the usury laws of Arkansas, and if such an inference is drawn it must be drawn from the circumstances alone; that the Virgil R. Coss Mortgage Company denied that the American Farm Mortgage Company was its agent and its further claim that it was the purchaser of the note and mortgage in the open market. The inference could be as readily drawn that the contract was made performable in Oklahoma because it was the bona fide residence of the Virgil R. Coss Mortgage Company. In order to indulge the inference that the parties intended to contract with reference to the laws of Arkansas, the evidence should be of sufficient weight to overcome two presumptions to the contrary, the first being that the parties intended to contract with reference to the place of performance, and the second that the

parties intended to contract with reference to the law that would uphold, rather than one that would invalidate, their contract. It is the law that parties residing in different states may, in good faith, contract with reference to the law of either state, but would not be permitted to do so for the purpose of avoiding the force of the usury law in either one of the states. Whitlock v. Cohn, 72 Ark. 83, 80 S. W. 141; Wilson-Ward Co. v. Walker, 125 Ark. 404, 188 S. W. 1184. We do not think the evidence in the case sufficient to overcome the presumption that the parties contracted, in good faith, with reference to the laws of Oklahoma, where the contract is valid and where the penalty for contracting for more than 10% interest per annum works a forfeiture of the interest only.

No error appearing, the decree is affirmed.

On Rehearing.

On motion for rehearing our attention has been called to the fact that at the time the mortgages in question were executed the law of Oklahoma relating to the penalty for usury had been amended by an act of the Legislature in 1916, citing section 5098, Comp. Stats. 1921. We do not understand that the amended statute rendered a usurious Oklahoma contract void or even voidable, as does the law in Arkansas. Stockyards State Bank v. Johnston, 52 Okl. 32, 152 P. 585. The only change the amended statute in the Oklahoma law relative to the penalty for usury was to allow the injured person to plead as a set-off or counterclaim in a suit brought ***590** upon the contract twice the amount of the entire interest collected, recovered, charged, or received in said transaction or in all such transactions between the same parties. The exact language of the proviso in the statute is as follows:

"Provided, further, that when any suit is brought upon any note, bill or other evidence of indebtedness or to foreclose any mortgage or lien given to secure such indebtedness when a greater rate of interest has been collected, reserved, charged, or received than is provided for in the act, the defendant, or his legal representative may plead as a set-off or counterclaim in said action twice the amount of the entire interest collected, reserved, charged or received in said transaction or in all such transactions between the same parties."

Neither Dupree nor Jordan pleaded by way of set-off or counterclaim the benefits to which they were entitled under the Oklahoma statute of 1916, and, having failed to claim the benefit thereunder, cannot now be heard to complain.

The Virgil R. Coss Mortgage Company did not request a rehearing and modification of the opinion; hence the directions to the lower court will not be changed.

For the reasons given, the motion for a rehearing is denied.

McCULLOCH, C. J., and SMITH, J., concur. See 267 S. W. 1119.

All Citations

167 Ark. 18, 267 S.W. 586

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957 F.2d 174
United States Court of Appeals,
Fifth Circuit.

FIRST SOUTH SAVINGS ASSOCIATION and Resolution Trust Corporation, as Conservator, Plaintiffs–Appellees,
v.
FIRST SOUTHERN PARTNERS, II, LTD, Defendants,
Coffee R. Conner and the Estate of Jack Gaulding, Deceased, Defendants–Appellants.

No. 91–2248.
|
April 1, 1992.

Synopsis
In suit by Resolution Trust Corporation (RTC) against guarantors on notes, guarantors filed counterclaim charging usury. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., granted judgment against guarantors, and guarantors appealed. The Court of Appeals, DeMoss, Circuit Judge, held that demand letters and complaint claiming that guarantors were jointly and severally liable for full amount of balance due, when clear language of each guarantee limited liability of each guarantor to "fifty percent (50%) of the outstanding balance of principal" did not constitute the charging of usurious interest under Texas law.

Affirmed.

Reavley, Circuit Judge, concurred in part.

Attorneys and Law Firms

***175** Donald M. Hunt, Carr, Fouts, Hunt, Craig, Terrill & Wolfe, Lubbock, Tex., for defendants-appellants.

Walter J. Cicack, Joseph C. Tixier, Houston, Tex., for First South Sav.

Appeal from the United District Court for the Southern District of Texas.

Before REAVLEY, HIGGINBOTHAM, and DeMOSS, Circuit Judges.

Opinion

DeMOSS, Circuit Judge:

On March 31, 1983, Coffee R. Conner and Jack Gaulding, ("Guarantors"), each executed separate guaranty agreements of a promissory note executed by First Southern Partners, II, Ltd., a Texas limited partnership (of which Conner and Gaulding were the general partners) payable to First Savings Association, Port Neches, Texas, in the amount of $2,790,000, (the "Note"), which was secured by a first mortgage lien on certain real property described in the Note. The specific language of the Guaranty agreements reads as follows:

> "Guarantor absolutely and unconditionally guarantees the prompt, complete, and full payment of all amounts due on the Note from the date hereof through the date a Certificate of Occupancy is issued by the City of Lubbock, Lubbock County, Texas, for all improvements to be constructed on the property more particularly described on Exhibit "B" attached hereto and made a part hereof for all purposes, from and after which date Guarantor's liabilities and obligations hereunder shall be limited to fifty per cent (50%) of the principal balance of the Note outstanding from time to time through the date of maturity, howsoever such maturity may occur, ..."

First South Savings Association ("First South"), succeeded to all of the rights, title, and interest of the original payee of the Note including the rights under the Guaranty agreements. The development covered ***176** by the first lien Deed of Trust suffered the fate of so many other real estate developments in Texas with the result that First South foreclosed upon the property covered by the first lien Deed of Trust in April 1988, bidding $987,000 for the property which amount was credited against sums due and owing under the Note. A year later, First South suffered the fate of so many other lending institutions in Texas and the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as Conservator; and in June 1989 the FSLIC, as Conservator for First South, brought suit against the maker of the Note and Guarantors for the outstanding balance of principal and interest on the Note and another note which is not at issue in this Appeal.

After passage of the Financial Institution Reform Recovery and Enforcement Act of 1989, the Resolution

Trust Corporation ("RTC"), succeeded FSLIC as Conservator of First South, appropriate substitution of parties were made in the lawsuit and the assets of First South were placed in a newly created Federal Savings Association, which was simultaneously placed into conservatorship controlled by the RTC.

Guarantors answered and counterclaimed that First South and RTC had "charged usury" in certain letters and in the Original Complaint filed in this lawsuit, by demanding that the Guarantors each pay all of the principal and all of the interest on the Note when each had only guaranteed one-half of the principal and none of the interest. The dispute was submitted on summary judgment to the trial judge, who granted judgment to First South and the RTC against each of the Guarantors for fifty percent (50%) of the principal balance then outstanding. In his Opinion, the trial judge ruled, somewhat cryptically, against the Guarantors usury defense with the following language:

> "In Texas, the usury defense is available only to a maker of a note. The RTC is suing on the first note for collection from the guarantors. The defendants, as guarantors, may not raise usury as a defense."

We affirm the judgment of the trial court for the following reasons:

A. NO CHARGING OF INTEREST

The principle theory upon which Guarantors rely for their claim of usury is that certain language in the demand letters sent out by the Note holder, and in the Original Complaint, constituted the "charging of interest which is greater than the amount authorized by this Sub-title" in violation of the provisions of Article 5069–1.06(1) and (2) of the Texas Revised Civil Statutes.

Specifically the demand letter of March 9, 1989, contained the following language: "Coffee R. Conner and Jack Gaulding are guarantors of payment on the Notes and are jointly and severally liable for all amounts due thereon." Likewise, the Prayer for Relief in the Original Complaint, stated that plaintiffs were demanding judgment against "Defendants" (which included Coffee R. Conner and the Estate of Jack Gaulding, deceased) "jointly and severally" for the full amount of the principal balance of the Note and for pre-judgment interest on the Note at the highest rate allowed by law from the date of default to the date of judgment.

The two Guaranty agreements are clearly and unambiguously separate Guaranty agreements with no joint liability imposed on the two Guarantors. Likewise, under the clear language of each Guaranty, the liability of each guarantor was limited to "fifty percent (50%) of the outstanding balance of principal" after the Certificate of Occupancy had been delivered; and both parties to this proceeding have treated that condition as having occurred. Consequently the referenced statements in the demand letter of March 9, 1989, and in the Prayer For Relief in the Original Complaint were erroneous.

Although the note holder attempted to remedy these erroneous statements in a subsequent demand letter, and in an amended complaint, the Guarantors take the position that, once uttered, these erroneous statements were not retractable and constituted the "charging of interest greater ***177** than the amount authorized" by Article 5069–1.01 *et seq.,* entitling Guarantors to recover the penalties and offsets contemplated by Article 5069–1.06.

However, the recent case of *George A. Fuller Company of Texas, Inc. v. Carpet Services, Inc.,* 823 S.W.2d 603 decided by the Texas Supreme Court on January 29, 1992, clearly disposes of Guarantors' contention that "charging of usurious interest" can occur in pleadings. In *Fuller,* the Texas Supreme Court held:

> a demand for prejudgment interest contained in a pleading does not make a pleader liable for statutory usury penalties if the pleading seeks the recovery of unlawful prejudgment interest.

Likewise, the Guarantors have not made a convincing case as to the "charging of usurious interest" by the language used in the demand letters in this case. "Interest" is defined by Texas statute as "compensation allowed by law for the use or forbearance or detention of money...." Tex.Civ.Code Art. 5069–1.01(a). A guarantor of a promissory note, however, does not receive such use, forbearance, or detention of money under a promissory note. A demand made to the guarantor only for sums owed by the notemaker under the guaranteed note is, therefore, not a demand for interest. It is simply a demand for the undifferentiated sum of money defined in the guaranty agreement.

In this case, the noteholder clearly characterized the allegedly usurious amounts in the demand letters as amounts owed under the promissory notes. These amounts were not compensation for the *guarantors*' use, forbearance, or detention of money. Therefore, they could not be usurious interest under Texas law.

The principle case relied upon by Guarantors for their conclusion is *Houston Sash & Door Co., Inc. v. Heaner,* 577 S.W.2d 217 (Tex.1979). In that case Heaner had

executed a letter agreement guaranteeing payment of all sums owed by Bedford Corporation (of which he was chairman of the board) to Houston Sash & Door, Inc. In the same letter agreement Heaner also agreed to pay, "interest from the due date of any [Bedford] account to the date of payment at the rate of 12% per annum." The Texas Supreme Court held that the interest rate "contracted for" in the letter guarantee agreement was "greater than the amount authorized by this Subtitle"; and accordingly, *Houston Sash* was liable for the penalty prescribed in Article 5069–1.06(1). It was the "contracting for" language not the "charging" language of Article 5069–1.06 that was involved.

The critical distinction between the *Houston Sash* case and the case before this Court is that here the Guaranty agreement contains no separate interest agreement; and the obligation of the guarantor is simply to pay the sum of money defined in the Guaranty agreement. "It is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money; if neither of these elements exist, there can be no usury." *Crow v. Home Savings Association of Dallas County,* 522 S.W.2d 457, 459 (Tex.1975). Furthermore, while a guaranty agreement may frequently be collateral to a loan or credit transaction, it is not the same thing as a loan or credit transaction; and absent a separate interest provision in the guaranty agreement, as in *Houston Sash,* an erroneous claim as to the amount of money owed under a guaranty agreement is simply that, and not a "charging of interest greater than the amount authorized by this Subtitle" within the contemplation of Article 5069–1.06.

B. SAVINGS CLAUSE

Both the first lien Note and the Guaranty agreements contain usury savings clauses. The pertinent language from the Guaranty agreements is:

> "... and if, from any circumstances whatsoever, fulfillment of any provision of this Guaranty at the time performance of such provision shall be due shall involve transcending the maximum amount of interest prescribed by law then, *ipso facto,* the obligation to be fulfilled by the Guarantor shall be reduced to the maximum limit of interest authorized by law, ..."

***178** The original loan transaction of which the Guaranty agreement was a part involved $2,790,000, and was secured by a Deed of Trust on real property being used for residential purposes, and by assignments of lease rentals to be generated from the apartment project on the property. All parties involved were sophisticated businessmen and lenders. The inclusion of the savings clause evidenced an express intent to structure the entire transaction so as to avoid usurious interest.

Under these circumstances, we treat the erroneous statements in the demand letters and in the Original Complaint as being automatically remedied by virtue of the savings clauses in the underlying documents. *See, Federal Deposit Insurance Corp. v. Claycomb,* 945 F.2d 853, 860–61 (5th Cir.1991) and *Woodcrest Associates, Ltd. v. Commonwealth Mortgage Corp.,* 775 S.W.2d 434, 437–39 (Tex.App.—Dallas 1989, writ denied).

C. USURY PENALTY AND THE RTC

Finally, the defensive remedies asserted by Guarantors are punitive in nature under Texas law. *Steves Sash & Door Co. v. Ceco Corp.,* 751 S.W.2d 473, 476 (Tex.1988). In *Federal Deposit Insurance Corp. v. Claycomb, supra.,* this Court has previously held that claims against the FDIC for usury under the Texas law cannot be asserted because, "such application could have no deterrent effect and would only serve to punish innocent creditors of the failed institution by diminishing available assets." *Id.* at 861. The RTC is the successor agency to the FDIC and we here extend the holding in *Claycomb* as applicable to the RTC in this case.

CONCLUSION

For all of the above and foregoing reasons, the judgment of the district court is AFFIRMED.

REAVLEY, Circuit Judge, concurs in parts B and C only.

All Citations

957 F.2d 174

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843 S.W.2d 790
Court of Appeals of Texas,
Austin.

FIRST STATE BANK, Successor in Interest to Community National Bank, Appellant,
v.
Ronald L. DORST and Clarice Dorst, Appellees.

No. 3–92–109–CV.
|
Dec. 23, 1992.
|
Rehearing Overruled Jan. 27, 1993.

Synopsis
Bank sued to recover remaining balances on promissory notes secured by deeds of trust and makers counterclaimed that deeds of trust were usurious on their face. The 345th District Court, Travis County, James R. Meyers, J., determined that deeds of trust were usurious and rendered judgment that notes and liens securing them be cancelled. Bank appealed. The Court of Appeals, Jones, J., held that savings clauses in deeds of trust could be enforced to avoid violation of usury laws from potential operation of sales clauses which permitted escalation of interest rate upon each sale of property.

Reversed in part and remanded.

Attorneys and Law Firms

***791** Karen P. Davis, Richey & Young, P.C., Austin, for appellant.

Forest D. Cook, Austin, for appellees.

Before CARROLL, C.J., and JONES and KIDD, JJ.

Opinion

JONES, Justice.

This is a usury case. First State Bank ("FSB"), appellant, sued Ronald and Clarice Dorst, appellees, to recover the remaining balance on two promissory notes, each secured by a deed of trust, and to obtain judgment allowing judicial foreclosure of the property securing the notes. The Dorsts counterclaimed that the deeds of trust were usurious on their face. The case was tried to the court on stipulated facts. The trial court concluded that the two deeds of trust were usurious and rendered judgment that the notes and the liens securing them be canceled; that the Dorsts recover their attorney's fees; and that FSB take nothing by its claim. On appeal, FSB complains in a single point of error that the trial court erred in concluding that the deeds of trust were usurious and in rendering judgment that FSB take nothing. We will reverse the judgment of the trial court and render judgment that the Dorsts take nothing on their counterclaim. We will remand the portion of the cause requesting judicial foreclosure to the trial court for further proceedings.

BACKGROUND

FSB is the current owner and holder of two promissory notes executed by the Dorsts on July 12, 1982, and secured by two deeds of trust recorded in the real property records of Travis County, Texas. The notes provided for interest at the rate of 10.875%, with an increase to 11.875% on August 4, 1984. Both deeds of trust contained identical "sales clauses" whereby FSB was entitled to escalate the interest rate by not more than 2% if the property was sold during the term of the note. Neither property was ever sold. In addition, both deeds of trust contained identical "usury savings clauses" whereby FSB disclaimed any right to receive or collect interest in excess of the highest rate allowed by applicable law.

The Dorsts defaulted in the performance of their obligations under the notes and deeds of trust, and the parties agree that as of August 2, 1989, the amount of unpaid ***792** principal and accrued interest on the notes was $62,776.79.

FSB acknowledges in its brief to this Court that since FSB filed this suit, the Dorsts have filed Chapter 7 bankruptcy and been discharged from any personal liability under the notes.

DISCUSSION

In its only point of error, FSB complains that the trial court erred in concluding that the deeds of trust violated Texas usury statutes and in rendering judgment that FSB take nothing by its claim. *See* Tex.Rev.Civ.Stat.Ann. art. 5069–1.06 (West 1987). As reflected in its conclusions of law, the trial court concluded that the deeds of trust were usurious on their face and that the usury savings clauses did not cure such usury.

The Dorsts successfully argued in the court below that the sales clause included in each deed of trust evidenced a contract for usurious interest and, as a result, the savings clause would not allow FSB to escape usury penalties by disclaiming an intention to do what it had contracted to do. In essence, the Dorsts argued that the sales clause must be viewed independently from the savings clause when determining whether the loan documents constitute a contract for usurious interest.

The Dorsts' assertion that the deeds of trust are usurious on their face is based *solely* on the sales clause included in both deeds of trust, which states in pertinent part: "Grantor shall obtain Beneficiary's prior written approval of any sale of the real property herein described ... *and Beneficiary shall have the right to escalate the interest rate at not more than 2% per transaction....*" (Emphasis added.) The Dorsts rely on the general rule that a contract is usurious as a matter of law if there is *any contingency* by which the lender may receive more than the lawful rate of interest. *See Smart v. Tower Land & Inv. Co.,* 597 S.W.2d 333, 341 (Tex.1980); *Dixon v. Brooks,* 678 S.W.2d 728, 729 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The Dorsts argue that the sales clause allowing the lender to escalate the contractual interest rate by up to 2% for each sale of the property could result in an interest rate greater than that allowed by law. Accordingly, they argue, the unlimited nature of this clause makes the deeds of trust usurious as a matter of law.

As suggested by the Dorsts, it is true that *if* the properties were sold multiple times and *if* FSB increased the interest rate 2% each time, the interest rate could potentially exceed the rate allowed by applicable law. Thus, were we to view the sales clause in isolation and apply the general rule regarding contingencies, we might well determine that the deeds of trust were usurious based on this contingency provision.

We conclude, however, that the sales clause cannot be viewed in isolation. Rather, we must consider the contract as a whole in deciding whether it is usurious:

> [W]hen the contract by its terms, *construed as a whole,* is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality. It is presumed that in contracting parties intend to observe and obey the law. For this reason the court will not hold a contract to be in violation of the usury laws unless, upon fair and reasonable interpretation of *all its terms,* it is manifest that the intention was to exact more interest than allowed by law.

Smart, 597 S.W.2d at 340–41 (quoting *Walker v. Temple Trust Co.,* 80 S.W.2d 935 (Tex.1935)) (emphasis added).

In addition to the sales clause, the deeds of trust at issue in the present case also contain identical savings clauses, which expressly provide:

> Nothing herein or in said note contained shall ever entitle Beneficiary, *upon the arising of any contingency whatsoever,* to receive or collect interest in excess of the highest rate allowed by the applicable laws on the principal indebtedness hereby secured or on any money obligation hereunder and in no event shall Grantors be obligated to pay interest thereon in excess of such rate.

***793** (Emphasis added.) Texas courts, beginning with *Nevels v. Harris,* 129 Tex. 190, 102 S.W.2d 1046 (1937), have repeatedly acknowledged the validity of usury savings clauses and have, in appropriate circumstances, enforced such clauses to avoid a violation of the usury laws. *See Woodcrest Assoc. v. Commonwealth Mortgage Corp.,* 775 S.W.2d 434, 437–38 (Tex.App.—Dallas 1989, writ denied) (citing 49 years of case law supporting validity of savings clauses).

The Dorsts acknowledge that Texas courts view savings clauses favorably. They contend, however, that the trial court's judgment is correct because the mere presence of a savings clause in a contract will not rescue a contract that is usurious by its explicit terms. *Nevels,* 102 S.W.2d at 1050; *Woodcrest Assoc.,* 775 S.W.2d at 438. In analyzing the loan documents, the Dorsts argue that the deeds of trust are usurious by the explicit terms of the sales clause, because the operation of the clause is unlimited. In other words, there is no cap to the interest rates FSB may charge. Further, they argue that because the clause is usurious by its explicit terms, the savings clause cannot operate to cure such usury.

The Dorsts' reasoning is circular. They claim that the deeds of trust are explicitly usurious *because* the savings clause may not be considered. A savings clause is ineffective, however, only if it is *directly contrary* to the explicit terms of the contract. In *Nevels,* the supreme court stated:

> Of course we do not mean to hold that a person may exact from a borrower a contract that is usurious under its terms, and then relieve himself of the pains and penalties visited by the law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done.

Nevels, 102 S.W.2d at 1050. As a simple example, a creditor may not specifically contract for a 30% interest rate and then avoid the imposition of usury penalties by relying on a savings clause that declares an intention not to collect usurious interest. In contrast, under the facts of the present case, the savings clause is *not* directly contrary to the explicit terms of the sales clause; rather, the savings clause supplements and explains the intent of the parties in contracting for the sales clause by limiting its application to nonusurious charges of interest.

The Texas Supreme Court has indicated that a savings clause may cure an open-ended contingency provision the operation of which *may or may not* result in a charge of usurious interest. *Smart,* 597 S.W.2d at 340–41. The *Smart* case involved a contract that was potentially usurious depending on the occurrence of a contingency—default in payment on a note. Under the terms of the note, the debtor had prepaid three years worth of interest. The creditor had specifically contracted for retention of unearned prepaid interest in the event of acceleration. Depending on when the default and acceleration occurred, such retention might or might not have resulted in the collection of usurious interest. In construing this contract, the court applied the general rule that a contract is usurious as a matter of law if there is any contingency by which the lender may receive more than the lawful rate of interest. However, rather than look at the clause that allowed the creditor to retain unearned interest in isolation, the court reviewed the contract *as a whole.* The court found the absence of a usury savings clause to be dispositive:

> Having affirmatively provided for the retention of unearned interest, [the creditor] was obliged to make further provisions ensuring that the retention of this interest would not result in a usurious transaction. *Neither the note nor the deed of trust, nor any of the other documents contains any kind of usury savings clause whatever. In the absence of a savings clause,* we find that [the creditor's] expressed authorization to retain excess unearned interest overcomes the presumption of legality accorded to allegedly usurious contracts.

Smart, 597 S.W.2d at 341 (emphasis added) (citation omitted).

***794** This Court, too, has considered the validity of a usury savings clause in the context of a contingency-based usury claim. *See Affiliated Capital Corp. v. Commercial Credit Bank,* 834 S.W.2d 521 (Tex.App.—Austin 1992, no writ). In that case, the appellant claimed that a contingency that could possibly exact usurious interest made the contract usurious on its face and could not be cured by a savings clause. We rejected that claim, concluding that a savings clause will defeat a claim of usury where a contingency may or may not exact usurious interest. *Id.* at 526.

Applying this same analysis to the present case, it is obvious that occurrence of the contingency (sale of the property) would not *necessarily* have resulted in a usurious interest rate. Indeed, numerous sales would have been required before a usurious rate could even have been possible. Because usury was not a necessary result of the occurrence of the contingency, it is appropriate to construe the sales clause in light of the savings clause. Doing so makes clear the parties' intention that FSB not have the right to charge usurious interest in the event of multiple sales of the property securing the deeds of trust. The savings clause has the effect of "capping" the potential interest rate chargeable under the sales clause.

We do not believe that the Dorsts could prevail on their usury claim had the deeds of trust provided in a single sentence that "Beneficiary shall have the right to escalate the interest rate at not more than 2% per transaction; *however, in no event shall Beneficiary be entitled to escalate the interest to a rate in excess of the highest rate allowed by the applicable law."* Reading the sales clause and the usury savings clause together in the present case yields the same result. Usury statutes are penal in nature and, as a result, they must be strictly construed in such a way as to give the lender the benefit of the doubt. *Steves Sash & Door Co. v. Ceco Corp.,* 751 S.W.2d 473, 476 (Tex.1988); *PJM, Inc. v. Walter Clark Advertising, Inc.,* 624 S.W.2d 282, 285–86 (Tex.App.—Dallas 1981, writ ref'd n.r.e.). Under this long-standing rule of construction, we refuse to interpret the usury statutes so broadly as to allow imposition of the harsh usury penalties where the creditor's only "error" was to place a limiting clause in a separate paragraph of the loan documents instead of immediately following the contingency provision. We conclude, therefore, that as a matter of law the deeds of trust in the present case are not usurious. We sustain FSB's point of error.

We reverse that portion of the trial court's judgment cancelling the notes and deeds of trust and awarding the Dorsts attorney's fees and render judgment that the Dorsts take nothing by their counterclaim. We also reverse that portion of the trial court's judgment decreeing that FSB take nothing on its suit for judicial foreclosure; however,

because of the paucity of information in this appellate record regarding the Dorsts' subsequent bankruptcy proceedings, we are reluctant to render judgment as to FSB's request for permission to judicially foreclose on the property securing the notes. Accordingly, we will, in the interest of justice, remand that portion of the cause to the trial court for further proceedings. *See* Tex.R.App.P. 81(c); *U.S. Fire Ins. Co. v. Carter,* 473 S.W.2d 2 (Tex.1971).

All Citations

843 S.W.2d 790

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826 F.Supp. 224
United States District Court, E.D. Michigan, Southern Division.

Uta HEIDE, Plaintiff,
v.
HUNTER HAMILTON LIMITED PARTNERSHIP, Spyros St. Kontos, and J.D.H. Management, Inc. II, jointly and severally, Defendants.

No. 92–CV–77273.
|
June 25, 1993.

Synopsis
Lender brought action to enforce terms of promissory note executed by limited partnership through its general partners, which note consisted of combined principal amounts of prior loans to one of general partners, plus accrued interest. On lender's motion for summary judgment, the District Court, Feikens, J., held that: (1) genuine issue of material fact existed as to whether money was loaned for business or personal purposes, precluding determination on summary judgment of whether interest rate charged was usurious; (2) even assuming that interest rates in prior notes were usurious, lender was not thereby barred from recovering principal amounts loaned; and (3) general partner had consideration to sign promissory note pledging to pay money which second general partner owed to lender.

Motion granted in part and denied in part.

Attorneys and Law Firms

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Patrick A. Karbowski, Butzel Long, Birmingham, MI, for J.D.H. Management.

Basil T. Simon, Peter N. Zingas, Simon, Korachis & Stella, P.C., Detroit, MI, for Hunter Hamilton/Spyros St. Kontos.

OPINION AND ORDER

FEIKENS, District Judge.

Introduction

Plaintiff Uta Heide ("Heide") moves for summary judgment pursuant to Fed.R.Civ.P. 56(a). Plaintiff filed this case to enforce the terms of a promissory note executed by defendant Hunter Hamilton Limited Partnership ("Hunter Hamilton") through its general partners, defendant Spyros St. Kontos ("Kontos") and defendant J.D.H. Management, Inc. II ("J.D.H."). All defendants have admitted execution of the promissory note on May 10, 1991 in answer to the Complaint.

Defendant Kontos executed a guaranty of payment of the promissory note. Plaintiff also seeks to enforce the terms of this guaranty of payment signed by Kontos. In his answer to the Complaint, Kontos admits execution of the guaranty.

Pursuant to the terms of the Note and the Guaranty, plaintiff sent to all defendants a cure notice dated September 23, 1992. Defendant Hunter Hamilton failed to make the payments required under the note and failed to cure after receiving notice of same.

The parties have submitted briefs, and oral arguments have been heard. For the reasons set forth below, pursuant to Fed.R.Civ.P. 56(d), I grant partial summary judgment in plaintiff's favor. Specifically, I grant judgment against all three defendants in the principal amount of $150,000. Because there appear to be questions of material fact, I decline to grant summary judgment to plaintiff with regard to interest charged prior to the May 10, 1991 Note, and I decline to grant summary judgment to plaintiff with regard to the 12% interest charged in the May 10, 1991 Note. I deny plaintiff's request for costs and attorney fees.

Background

On July 27, 1989 and September 8, 1989, plaintiff loaned to defendant Kontos $50,000 and $100,000 respectively. In consideration of the loans made to him, Kontos executed two promissory notes in favor of plaintiff; each note was dated the same day of each transaction. These promissory notes called for repayment of the loan principal together with interest at a rate of 12% on or before twelve months from the date of execution.

As a result of Kontos' inability to repay the principal on accrued interest amounts due under the July 27 and September 8, 1989 promissory notes on or before their respective due dates, Kontos executed two additional promissory notes on October 12, 1990. These October 12, 1990 Notes, with an interest rate of 12%, were intended to replace the July 27 and September 8, 1989 Notes and to allow Kontos six additional months in which ***226** to repay the outstanding principal and accrued interest.

As a result of Kontos' inability to repay the principal and accrued interest on or before the due date in the October 12, 1990 Notes, and as a result of plaintiff's request for additional collateral and security prior to any further extensions of time, the parties entered into an additional promissory note and guaranty of payment on May 10, 1991. The May 10, 1991 promissory note was executed by Kontos in his capacity as general partner of defendant Hunter Hamilton. The May 10, 1991 Note was also executed by defendant J.D.H. in its capacity as general partner of Hunter Hamilton. The May 10, 1991 Note called for a principal loan amount of $182,360.06 with an interest rate of 12%. This amount consisted of the combined principal amounts of $50,000 and $100,000 plus accrued interest at a 12% rate in the amount of $32,260.06. The accrued interest amount was carried over from the previous promissory notes. In addition to this promissory note, Kontos executed a guaranty of payment in his individual capacity guaranteeing both the principal and interest amount set forth in the promissory note of May 10, 1991.

To date, Kontos has made payments of approximately $21,968.

Analysis

I. Usury

A. *Previous Notes*

Defendants argue that the Notes executed prior to May 10, 1991 were usurious. Defendants argue that the monies referred to in the May 10, 1991 documents upon which plaintiff bases her claim consist of amounts carried over from prior related usurious transactions; as a result, say defendants, the transactions upon which plaintiff now attempts to collect are tainted with usury.

Specifically, the 1989 and 1990 notes set interest at a rate of 12% which, under the circumstances, is usurious unless the money loaned was "an extension of credit to a business entity." M.C.L. § 438.61(3). Defendant Kontos has stated in a June 15, 1993 affidavit that the 1989 loan he received from plaintiff was personal to him and used by him to discharge his personal obligations. Kontos declares that as a result of his longstanding personal relationship with plaintiff, she agreed to loan him the money in his individual capacity and personal to him. Kontos states that plaintiff dictated the terms of the promissory notes, including the 12% rate of interest. Thus, defendants argue, the rate of 12% in the 1989 Notes is usurious since it was loaned to an individual for non-business reasons.[1] The same argument applies, contend defendants, to the 1990 Notes.

[1] Generally speaking, if it was a loan to an individual for non-business reasons then the maximum rate of interest could not exceed 7% per annum. M.C.L. § 438.31.

Contrarily, plaintiff Heide states in her May 12, 1993 affidavit that she understood Kontos would use the funds in pursuit of his real estate business; she would not have loaned the money to him for personal purposes. She says she and Kontos never discussed an interest rate in 1989; the interest rate of 12% on the 1989 Note was entirely his idea. She says she relied completely on Kontos, a long-time friend, to prepare an enforceable promissory note.

Accordingly, there is a genuine issue of material fact as to whether the interest rates in the 1989 and 1990 Notes are usurious. As stated above, the amount of $182,360.06 in the May 10, 1991 Note consisted of the combined principal amounts of $50,000 and $100,000, plus previously accrued interest at 12% in the amount of $32,260.06. Thus, because there is a genuine question of material fact as to whether the 12% interest rate in the previous Notes is usurious, I can not grant plaintiff's motion for summary judgment which includes this $32,260.06 amount.

B. *Interest on May 10, 1991 Note*

As stated above, the interest rate charged by plaintiff on the May 10, 1991 Note is 12%. Because this amount is greater than 7%, it is not usurious if there was "an extension of credit to a business entity". M.C.L. §§ 438.61(3), 438.31. Plaintiff argues there was an extension of credit to a business entity because the principal obligor under the May 10, 1991 Note is a partnership. However, it ***227** appears that plaintiff did not loan defendants any new money at the time the May 10, 1991 note was executed. It appears that the only times plaintiff loaned money to any party was on July 27, 1989, and September 8, 1989, when plaintiff loaned defendant Kontos $50,000.00 and $100,000.00, respectively. As explained above, in his June 15, 1993 affidavit, Kontos says he used the funds borrowed from plaintiff for personal obligations and finances. Heide states in her May 12, 1993 affidavit that she understood Kontos would use the funds in pursuit of his real estate business; she would not have loaned the money to him for personal purposes.

Thus, as with the previous Notes, there appear to be questions of material fact as to whether there was an extension of credit to a business, and hence whether the interest rate in the May 10, 1991 Note is usurious. Accordingly, I can not grant plaintiff summary judgment on the 12% interest rate contained in the May 10, 1991 Note.

C. *Principal*

Nevertheless, the majority of the amount of the May 10, 1991 Note—$150,000.00—consisted of previous principal amounts loaned to Kontos by plaintiff. Assuming that the interest rates in the 1989 and 1990 notes were usurious, the issue then becomes: does the taint of usury prevent plaintiff from recovering on the principal amount of the May 10, 1991 Note (*i.e.,* the $150,000.00)? This is a question of law which is ripe for decision on this motion for summary judgment. As explained below, I hold that the taint of usury only prevents plaintiff from recovering any interest; the taint of usury does not prevent plaintiff from recovering the principal amount due her. In other words, even if the May 10, 1991 Note is usurious, Michigan case law has long held that defendants' sole remedy would be an abatement of the usurious interest included in the May 10, 1991 Note. Defendants are not entitled to escape the entire obligation evidenced by the May 1991 Note.

In *Smith v. Stoddard,* 10 Mich. 148, 151 (1862), a foreclosure action, the plaintiff made a series of loans to defendants at usurious interest rates. Subsequently, the parties settled the loans when defendants granted plaintiff a mortgage in real estate and the parties agreed upon a set amount due under the mortgage. As a defense to the foreclosure action, defendants contended that the last mortgage note was usurious because of the usury contained in the prior notes. The court noted that typically a note which renews a prior loan with usurious interest should be abated to the extent of the usurious interest:

> A new security, between the same parties, embracing not only a valid debt, but also a claim for *unpaid* usurious interest, would undoubtedly be founded to that extent on a usurious consideration, and therefore liable to abatement. But the abatement cannot, we think, under our statute, go further. The law does not absolutely avoid contracts for usury, and if parties completely perform them they are remediless.

Id. at 151 (emphasis in original).

Further, the court in *Gardner v. Matteson,* 38 Mich. 200, 203 (1878), said: "It was there held [in *Smith v. Stoddard*] that where in a new security a sum is included for unlawful unpaid interest, the security to the extent of such unlawful interest is without consideration, and therefore liable to abatement to that extent."

Nonetheless, defendants insist that because a portion of the total amount of the May 10, 1991 Note contains accrued interest due from previous allegedly usurious notes, defendants are not obligated to pay any amount in the May 10, 1991 Note.

Defendants cite *Union Guardian Trust Co. v. Crawford,* 270 Mich. 207, 258 N.W. 248 (1935), for the proposition that a prior usurious transaction can taint subsequent transactions, regardless of changes in parties, documents, and security; the taint of usury can only be expunged by the parties knowingly and consensually entering into a new and independent agreement.

In *Union Guardian Trust Co.* plaintiff trust company and defendant borrower entered into a loan transaction in which the defendant borrowed $25,000 from the trust company. As security for the loan, the defendant, among other things, executed a $12,000 ***228** mortgage on real estate and also assigned certain land contracts and other securities to the bank. Thus, $12,000 of the $25,000 loan was secured by a mortgage on real estate while the other $13,000 was secured by other securities and land contracts. Eventually, the parties substituted new securities for the security supporting $8,000 of the loan by

the defendant giving the trust company two mortgages each in the amount of $4,000 in place of the other securities. The defendant claimed the transaction was usurious. The court stated:

> It seems to be the rule that the general principle determining when an indebtedness infected with usury is to be deemed disinfected that if the tainted obligation is, with full knowledge and consent of the borrower finally cancelled or abandoned, and a new obligation, containing no part of the usury is executed in legal form, and supported solely by the moral obligation resting upon the borrower to pay the money actually received with legal interest thereon, such new obligation is valid and enforceable. But so long as the original usurious obligation continues to exist, based upon a consideration in which usury adheres, the taint of usury persists whatever be the form which the subsequent dealings of the parties may cause it to assume, and even though new parties may have been introduced, or the borrower allowed to assume a different relation to the security affected with usury.

Id. at 211, 258 N.W. 248 (citations omitted).

The court held that the original usurious transaction was not purged by substituting the two $4,000 mortgages for the original $8,000 obligation which had originally been secured by other collateral. The court reasoned that this transaction constituted "no independent or different contract ... which, under the authorities would purge the original contract of usury." *Id.* at 212, 258 N.W. 248.

Defendants also claim *Mathews v. Tripp,* 285 Mich. 705, 281 N.W. 412 (1938), supports their proposition. In *Mathews,* the bank loaned defendant borrowers $1,500 secured by a mortgage on real estate. The bank eventually sold and assigned the note and mortgage to the plaintiff. The court held the original loan transaction between the bank and defendant usurious. Plaintiff argued that the taint of usury was waived when defendant "voluntarily entered into an agreement with the assignees of the mortgage as to the balance then due on the mortgage, at which time no question of usury was raised." *Id.* at 709, 281 N.W. 412. The court said:

> If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendent obligations, however remote, can be free of the taint if the descent can be fairly traced.

Id. at 710, 281 N.W. 412.

The court in *Mathews* also said:

> Where a bargain is usurious, an agreement in renewal thereof, of in substitution therefor, which provides for a payment that includes the usurious interest is also illegal, although no excessive interest is promised from the date of the renewal or substitution.

Id. at 710, 281 N.W. 412.

Further, *Gladwin State Bank v. Dow,* 212 Mich. 521, 553, 180 N.W. 601 (1920) quoted *Smith v. Stoddard,* 10 Mich. 148, 150 (1862), for the proposition that:

> When parties have actually paid the usurious interest, and then come to a *bona fide* settlement, and make new securities which include nothing but an actual loan, and are not meant as mere evasions, we do not think the new contract can be regarded as either usurious in itself, or based on a usurious consideration.

Defendants interpret *Gladwin* as saying that a new transaction is free of the taint of usury if the parties completely settle the original transaction and enter into a new transaction which includes an actual loan. Defendants claim that Heide never cancelled or abandoned the original 1989 usurious transaction. Further, they say that the May ***229** 10, 1991 Note is not a settlement between the parties of all former transactions; thus they say the note is usurious.

However, even if the May 10, 1991 transaction contains the taint of usury from previous transactions, the cases cited by defendants still do not say that the entire May 10, 1991 transaction is invalid, thereby freeing defendants from paying any money owed to plaintiff. Indeed, *Union Guardian Trust* itself stated: "Under our statute the entire *interest* is forfeited in usurious contracts and the courts apply all payments of interest, though made as such, upon the principal debt." *Union Guardian Trust Co.,* 270 Mich. at 211, 258 N.W. 248 (emphasis added).

Further, the relevant statutes involved in *Mathews* directly support this view. 2 Comp.Laws 1929, § 9240 (Stat.Ann. § 19.12) provided in relevant part: "if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken, or received, than is allowed by law, the defendant shall not be compelled to pay any *interest* thereon." (emphasis added). 2 Comp.Laws 1929, § 9241 (Stat.Ann. § 19.13) also provided:

> Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or

> received in violation of this act, the court shall declare the *interest* thereon to be void.

(emphasis added).

Thus, defendants have failed to show that the alleged existence of a usurious interest rate in a note or guaranty means that a borrower is relieved from paying the principal owed. The cases cited by defendants themselves make clear that if a usurious rate was involved in the transaction at issue in this case, then the defendants are only relieved of paying the interest.

Currently, M.C.L. § 438.32 says in relevant part: "Any ... lender ... who ... charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs." Thus, even with a usurious interest rate, defendants are still entitled to pay the amount loaned to them by plaintiff.

It would be unjust for a court to say that even though party A loaned money to party B, party B does not have to repay the loan to party A solely because an illegal interest rate was charged by party A. The court would be turning a loan transaction into a gift transaction. As the above authorities make clear, party A's punishment for charging an excessive interest rate is that it forfeits the interest charged to the borrower; party A does not forfeit the entire amount of money it loaned to the borrower.

II. J.D.H.

Regardless if partial summary judgment is entered against the other defendants, defendant J.D.H. argues that partial summary judgment should not be entered against it. J.D.H. argues the May 10, 1991 Note is unenforceable against it for two reasons independent of the usury argument. First, it argues the May 10, 1991 Note lacks consideration as to J.D.H. if the money loaned was used, as defendant Kontos asserts in his June 15, 1993 affidavit, to discharge Kontos' personal debts and not for the construction of the Hunter Hamilton Building (which is real estate owned by both Kontos and J.D.H.).

Further, J.D.H. argues the May 10, 1991 Note was obtained by fraudulent misrepresentation if plaintiff knew at the time she induced J.D.H.'s execution of the Note that the money she loaned to Kontos had already been used to discharge his personal debts and not used toward the construction project. According to J.D.H., Kontos obtained J.D.H.'s execution of the promissory note at plaintiff's behest; Kontos was acting as plaintiff's agent in obtaining J.D.H.'s execution of the promissory note.

Specifically, the president of J.D.H., Jack Hamburger, says in his June 15, 1993 affidavit that when he signed the May 10, 1991 promissory note in his capacity as president of J.D.H., he believed the loan was being used to help finance the construction of the Hunter Hamilton Building. In other words, J.D.H. argues in its June 15, 1993 supplemental ***230** brief that Kontos obtained J.D.H.'s execution of the note based on the representation that the money was used for the parties' real estate business when, in reality, the money had already been spent on Kontos' personal obligations.

However, Jack Hamburger ("Hamburger") does not explicitly say that he believed that the money from plaintiff was being used for the Hunter Hamilton Building based on anything said by Kontos. All Hamburger says in his affidavit on this particular point is that:

> Kontos represented that Heide loaned him money and wanted a promissory note evidencing the loan executed by Hunter Hamilton Limited Partnership and its general partner, J.D.H..... When I signed the note, I believed the loan was being used to help finance the construction of the Hunter Hamilton Building.

Presumably, if Hamburger based this belief on a representation made by someone, particularly Kontos, he would have stated such a crucial fact in his affidavit. The absence of such a crucial statement makes one wonder if Hamburger merely assumed the money from plaintiff was going towards the financing of the Hunter Hamilton Building.

Nonetheless, further statements of Hamburger or anyone else are not needed to dispose of this matter.

In Kontos' June 15, 1993 affidavit he says:

> That as an indication that the true nature of the May 10, 1991 Promissory Notes was merely a pledge by me of amounts due to me from Hunter Hamilton Limited Partnership, entries were made in the books and records of Hunter Hamilton Limited Partnership to reflect my directing of the monies owed to me to Uta Heide. (Refer to financial statements of Hunter Hamilton Limited Partnership reflecting designation of construction accounts payable previously owed to Spyros St. Kontos to Uta Heide).

Exhibit B to Kontos' and Hunter Hamilton's June 15, 1993 supplemental brief is the balance sheet of Hunter Hamilton Limited Partnership for the years 1990 and 1991. The balance sheet as of December 31, 1990 states that Hunter Hamilton had a construction related account

payable of $736,829.00.

The balance sheet of Hunter Hamilton as of December 31, 1991 states there is a note payable of $182,360.00. An asterisk at the bottom of the sheet says the note payable "Reflects $182,360 of previous construction accounts payable owed to Spyros St. Kontos which were pledged to Uta Heide. This entry was made during the 1991 calendar year."

Further, the May 10, 1991 Note itself says that: "For value received, and in recognition of advances *made by Spyros Kontos* to and for the benefit *of the undersigned* which have been used for the development and construction of the improved real estate of the undersigned, the undersigned promises to pay to the order of Uta Heide ... the principal sum of ... [$]182,360.06." (emphasis added). The undersigned are Hunter Hamilton's general partners: Kontos and J.D.H. Thus, by signing the May 10, 1991 Note, J.D.H. admitted that it was promising to pay the amount Kontos owed to plaintiff because Kontos had made advances to J.D.H. for the improvement of real estate owned by Kontos and J.D.H.

Based on the revelations in Kontos' affidavit and the balance sheets of Hunter Hamilton, the court concludes as a matter of law that Hunter Hamilton (through its general partners Kontos and J.D.H.) agreed to pay the amount Kontos owed Heide because Hunter Hamilton owed at least the same amount to Kontos. As a general partner of Hunter Hamilton, J.D.H., through its president Jack Hamburger, signed the 1991 Note at issue. Thus, because J.D.H. owed money to Kontos, who owed money to Heide, J.D.H. had consideration to sign the note pledging to pay the money Kontos owed to Heide. Whether J.D.H. knew the loan from Heide to Kontos was going to be used by Kontos exclusively for his own personal purposes, and whether Kontos told Hamburger the money was going to be used for the Hunter Hamilton Building, are simply immaterial to the question of whether J.D.H. is obligated on the principal amount of $150,000. It does ***231** not matter what Kontos did or said to Hamburger to persuade him to sign the note obligating J.D.H. to pay funds to Heide because J.D.H., as a general partner of Hunter Hamilton, already owed money to Kontos, who already owed money to Heide.[2]

[2] In plaintiff's June 21, 1993 reply brief, plaintiff appears to argue that because the sums due under the May 10, 1991 Note replaced sums due directly to Kontos for construction related payables, plaintiff did in fact loan money to Hunter Hamilton. As the text of this opinion makes clear, I agree that the sums due under the May 10, 1991 Note replace sums due directly to Kontos for construction related payables, but it does not follow as a matter of law that plaintiff loaned money to Hunter Hamilton. If, for example, Kontos used the money he borrowed from Heide to finance construction-related projects to which Hunter Hamilton was a party, then arguably one could say plaintiff loaned money to Hunter Hamilton. There is conflicting evidence, though, on whether Heide loaned money to Kontos, who then loaned that same money to Hunter Hamilton. As explained in the text, Kontos' affidavit explicitly says he used the money Heide loaned him for personal purposes.
Hunter Hamilton's balance sheets together with Kontos' affidavit show that Hunter Hamilton owed Kontos a sum of money. Instead of paying some of the money owed to Kontos, Hunter Hamilton agreed to pay plaintiff the money Kontos owed her. There is no indisputable evidence which would allow me to say as a matter of law that plaintiff loaned money to Hunter Hamilton for business purposes. Indeed, there is no indication on Hunter Hamilton's balance sheets of an increase in assets due to a loan from plaintiff. Thus, as I stated in a previous section in the text, I can not grant summary judgment to plaintiff on the 12% interest charged in the May 1991 Note.

Conclusion

In sum, as a matter of law, all three defendants are obligated to pay plaintiff the sum of $150,000.[3] Because there appear to be questions of material fact as to whether a usurious rate of interest existed on any of the notes existing between the parties, I can not say as a matter of law what interest plaintiff is entitled to, if any.

[3] A hearing will have to be held to determine if the amount of $21,968 already paid by Kontos to plaintiff was a payment of principal or a payment of interest. If this amount was a payment of principal, then defendants will be entitled to credit $21,968 to the amount of $150,000 which I now hold defendants must pay plaintiff. If this amount of $21,968 was a payment of interest, then the defendants' defense of usury may have been waived. If it was a payment of interest, then defendants will be required to pay the full principal amount of $150,000, and defendants will, most likely, have to pay interest to plaintiff as well.

IT IS SO ORDERED.

All Citations 826 F.Supp. 224

End of Document

995 F.2d 883
United States Court of Appeals,
Ninth Circuit.

In re H. Frank DOMINGUEZ, Debtor. Alan D. SMITH, Chapter 11 Trustee of the Estate of H. Frank Dominguez, Appellant, v. David MILLER; Denyse Miller; H. Frank Dominguez; Edward McDonald, Office of the U.S. Trustee, Appellees.

No. 91–56312.
|
Argued and Submitted Dec. 7, 1992.
|
Decided May 4, 1993.
|
As Amended on Denial of Rehearing July 8, 1993.

Synopsis
Lenders filed proof of claim against borrower's bankruptcy estate arising out of loan agreements which specified interest rate of 17%. Bankruptcy trustee objected to claims as usurious. The Bankruptcy Court ruled that although 17% interest rate exceeded maximum legal rate under California law, savings clause in loan extension agreement evidenced parties' intent not to violate usury law and operated to reduce interest rate to highest rate allowable. Trustee appealed. The Bankruptcy Appellate Panel affirmed on ground that loan did not violate California's usury law. Bankruptcy trustee appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) under California law, loan extension agreement stating 17% interest rate was not usurious on its face in light of fact that interest required to be paid was determined in part by savings clause which limited rate to that rate legally allowable, and (2) bankruptcy court's finding that parties intended for savings clause in loan extension agreement to limit rate of interest in effect under agreement to maximum nonusurious rate was not clearly erroneous.

Affirmed.

Attorneys and Law Firms

***885** Marjorie S. Steinberg, Tuttle & Taylor, Los Angeles, CA, for appellant.

David M. Stern, Stern, Neubauer, Greenwald & Pauly, Santa Monica, CA, for appellees.

Leonard A. Goldman, Goldman, Gordon & Lipstone, Los Angeles, CA, for debtor Frank Dominguez.

Edward McDonald, Los Angeles, CA, Office of the U.S. Trustee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before: CANBY, BOOCHEVER, and THOMPSON, Circuit Judges.

Opinion

CANBY, Circuit Judge:

In this case we decide whether a loan contract is usurious when it specifies an interest rate that exceeds the maximum allowed under California's usury law, but also provides that if payments exceed the maximum legal interest rate, the amount in excess will be applied toward the principal.

BACKGROUND

This case involves two loans that appellees David and Denyse Miller made to Dominguez, the debtor in bankruptcy, and a subsequent agreement to extend the time for repayment of the loans. The extension agreement specified an interest rate of 17% and contained a "savings clause" which provided:

> In the event Borrower pays any interest on the ... Promissory Notes ... and it is determined that such rate[ ] ... [was] in excess of the then legal maximum rate, then that portion of the interest payment representing an amount in excess of the then legal maximum rates shall be deemed a payment of principal and applied against the principal of the ... Note.

Under California law, a loan is usurious if it specifies an interest rate that exceeds the higher of 10% annually or 5% plus the rate that the Federal Reserve Bank of San Francisco charges federal reserve banks. At the time the Millers and Dominguez entered into the extension agreement the maximum non-usurious rate was 16.5%.

Dominguez filed a petition for bankruptcy under Chapter 11, and the Millers filed against the estate claims arising from the loans and the extension agreement. Alan Smith, trustee of the bankrupt estate, objected to the claims, contending that, because the 17% interest rate was usurious, the Millers were precluded from recovering any interest on the loans, and the amount already paid as interest should be set off against the amount of principal still owing. *See* Cal. Const. art. 15, § 1; Cal.Civ.Code § 1916–1 to –3 (West Supp.1993).

The bankruptcy court rejected Smith's arguments. The court held that, although the 17% interest rate exceeded the maximum legal rate, the savings clause evinced the parties' intent not to violate the usury law and, thus, operated to "rectif[y] the error" by reducing the interest rate to 16.5%, the highest rate allowable. The Bankruptcy Appellate Panel upheld the lower court's ruling. According to the Panel, "[t]he usurious character of a transaction is determined by the amount of interest agreed to be paid at the time of making the loan." It was therefore necessary to ascertain the mutual intent of the parties at the time they entered into the agreement, the Panel concluded. Accepting as not clearly erroneous the bankruptcy court's finding that the parties intended to apply the maximum legal interest rate, the Panel held that the loan did not violate California's usury law.

STANDARD OF REVIEW

Interpretation of a contract involves mixed questions of law and fact which we review *de novo*. *Miller v. Safeco Title Ins. Co.,* 758 F.2d 364, 367 (9th Cir.1985); *see also In re Carroll,* 903 F.2d 1266, 1269 (9th Cir.1990) (bankruptcy court's conclusions of law are subject to *de novo* review). Questions of the interpretation of state law are also subject to *de novo* review. *Port of Portland v. Water Quality Ins. Syndicate,* 796 F.2d 1188, 1195 (9th Cir.1986). We review for clear error, however, the bankruptcy court's findings of fact. *Carroll,* 903 F.2d at 1269; *In re Moreggia* ***886** *& Sons, Inc.,* 852 F.2d 1179, 1181 (9th Cir.1988).

DISCUSSION

There is no dispute that the 17% interest rate specified in the extension agreement exceeded the maximum rate allowed by California's usury law. The primary question in this appeal is whether, in view of the fact that the extension agreement states a usurious interest rate, the savings clause should be given effect. We hold that it should and affirm the decisions of the Bankruptcy Appellate Panel and bankruptcy court.

California's usury law imposes virtually strict liability on lenders. Whether a loan or forbearance is usurious is determined by the total amount of interest required to be paid between the date of execution and the date of maturity. *Penzner v. Foster,* 170 Cal.App.2d 106, 338 P.2d 533, 535 (1959). When a loan or forbearance is usurious on its face, it is not a defense to a charge of usury that the lender did not intend to violate the law or know that the rate exceeded the maximum allowable. *Abbot v. Stevens,* 133 Cal.App.2d 242, 284 P.2d 159, 163 (1955). Intent is relevant, however, when the rate of interest to be charged cannot be ascertained from the face of the agreement. In such a case, the court must have recourse to extrinsic evidence to determine what interest rate the parties intended to apply. *Id.* 284 P.2d at 163; *Arneill Ranch v. Petit,* 64 Cal.App.3d 277, 134 Cal.Rptr. 456, 462 (1976).

Smith contends that the extension agreement is usurious on its face, and that the court should not inquire into what interest rate the parties intended to apply. We disagree. No court applying California's usury law has held that an agreement is conclusively presumed to be usurious simply because it states an interest rate that exceeds the maximum allowable, regardless of whether other parts of the agreement have a bearing on the interest rate actually in effect. Indeed, in one of the few cases dealing with the validity of savings clauses under the usury law, the California Court of Appeal rejected this approach. *Arneill Ranch v. Petit* concerned whether a loan agreement was usurious because it set interest by a formula based on the prime rate, which in time led to a rate in excess of that allowed by the usury statute. *Arneill,* 134 Cal.Rptr. at 458. The agreement also provided for compounding of interest, with a savings clause that stated that the interest compounded would not exceed the highest rate permitted by law. The court held that the clause created an ambiguity because it was not clear whether it limited only

the compound interest that could be charged, or whether it limited all interest under the agreement to a lawful rate.

Rather than hold, as the Appellant urges us to do here, that the agreement was *prima facie* usurious simply because it provided for an interest rate that exceeded the maximum allowable, the *Arneill* court ruled that the savings clause could have the effect of contractually limiting the rate at which the creditors could collect interest of any kind on the debt. According to the court, whether the contract was usurious depended on extrinsic evidence of what interest rate the parties intended to apply when they entered the contract. *Arneill,* 134 Cal.Rptr. at 460, 466–68.[1]

[1] Smith asserts that the holding in *Heald v. Friis–Hansen,* 52 Cal.2d 834, 345 P.2d 457 (1959), compels us to conclude that the extension agreement is usurious. We disagree. The lenders in *Heald* had entered into a series of loans specifying an interest rate in excess of the maximum legal rate and had later pencilled into the loan documents a lower, non-usurious rate. The loan agreements did not contain savings clauses nor did the creditors intend at the time they made the loans to charge the lower rate. The court held that because the loans were made at a usurious rate of interest they violated the usury law. In our case, on the other hand, the trier of fact has ruled that the parties originally intended to charge interest that did not exceed the legal rate.

We adhere to the *Arneill* court's analysis. Because the interest rate required to be paid under the extension agreement was determined in part by the savings clause, we cannot conclude that the agreement is usurious on its face.

Indeed, the more cogent question is whether the agreement is non-usurious on its face. The Bankruptcy Appellate Panel stated ***887** that the savings clause created "at the very least, an ambiguity" that precluded a ruling that the agreement was usurious on its face. The Panel was being cautious; there is no ambiguity in the terms of the savings clause. The clause is clearly written to override the regular interest provision if that provision would result in a usurious rate. The bankruptcy court and Bankruptcy Appellate Panel, however, were aware of the danger that such a clause could be a subterfuge or sham, designed to permit the collection of a usurious rate of interest without an appearance of violation of the law. It was therefore appropriate to take evidence, as the bankruptcy court did, on what the parties entering the agreement intended the actual interest rate to be.[2] *See Abbot,* 284 P.2d at 162–63; *see also Jones–Hamilton Co. v. Beazer Materials & Services, Inc.,* 973 F.2d 688, 692 (9th Cir.1992) (noting that under *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.,* 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), extrinsic evidence is always admissible to explain meaning of, but not to vary, contract terms).

[2] As the Bankruptcy Appellate Panel recognized, the requisite intent for a violation of the usury law is an intent to charge a particular rate that happens to exceed the statutory maximum; there is no requirement of an intent to violate the law. *Burr v. Capital Reserve Corp.,* 71 Cal.2d 983, 80 Cal.Rptr. 345, 349, 458 P.2d 185, 189 (Cal.1969).

The bankruptcy court found that the parties intended for the savings clause to limit the rate of interest in effect under the agreement to the maximum non-usurious rate. Smith contends that this finding is clearly erroneous. According to Smith, the fact that, for years after the agreement was executed, the Millers continued to apply a 17% interest rate to the loan demonstrates that the agreement is usurious.

While we acknowledge that a party's conduct subsequent to an agreement is strong evidence of the party's intent on entering into the agreement, *Kennecott Corp. v. Union Oil Co. of Cal.,* 196 Cal.App.3d 1179, 242 Cal.Rptr. 403, 410 (1987), we do not accept Smith's implication that evidence of subsequent conduct should be used to the exclusion of other reliable evidence of the party's intent.[3] The bankruptcy court based its finding on the uncontroverted testimony of David Miller and his agent, who drafted the extension agreement. Both Miller and his agent testified that they intended that the savings clause limit the amount of interest chargeable under the extension agreement to the maximum non-usurious rate. The bankruptcy court was entitled to credit this testimony, supported as it was by the terms of the savings clause itself. We conclude, therefore, that the bankruptcy court's finding is not clearly erroneous.

[3] We note that, at the time of the loan extension, to determine whether an interest rate was usurious required ascertainment of the rate that the Federal Reserve Bank of San Francisco charged federal reserve banks and then the addition of five percent. A lender could easily be mistaken as to the current charge of the Federal Reserve Bank of San Francisco so that an innocent error could result. Thus, the provision for applying, on principal, any interest in excess of the legal rate could well be a bona fide effort to comply with the law rather than a calculated means of collecting illegal interest with a safeguard in case the

borrower became aware of the excess charge.

Accordingly, we hold that the extension agreement does not violate the usury law, because the savings clause operates to limit the interest rate to the maximum non-usurious rate. The judgment of the Bankruptcy Appellate Panel is

AFFIRMED.

All Citations

995 F.2d 883

End of Document

597 B.R. 363
United States Bankruptcy Court, E.D. Michigan, Southern Division.

IN RE: SKYMARK PROPERTIES II, LLC, et al.,[1] Debtors.

1 This case is being jointly administered with the case of Skymark Properties SPE LLC, Case No. 19-40248.

Case No. 19-40211 Jointly Administered
|
Signed February 21, 2019

Synopsis

Background: Chapter 11 debtor limited liability company (LLC) that owned towers of commercial office building filed motion to use cash collateral, seeking an order permitting debtor to use, as "cash collateral," rental income derived from leases of space in the towers. Lender filed an objection to the cash collateral motion

Holdings: The Bankruptcy Court, Thomas J. Tucker, J., held that:

prepetition assignment of rents was effective to transfer ownership of the rents from debtor to mortgage creditor under Michigan law;

under Michigan law, execution of assignment of rents, recording of assignment of rents, and default under the mortgage were sufficient to transfer ownership of rents to mortgage creditor, without occurrence of other steps, receding from *In re Madison Heights Grp., LLC*, 506 B.R. 728;

"equities of the case" exception to the general rule that prepetition security interests extended to collateral acquired postpetition did not apply to lender's ownership of rents that were due and paid by debtor's tenants postpetition;

alleged errors in mortgage's legal description, without any specific facts about the alleged errors, were insufficient to permit the bankruptcy court to question the validity, priority, or extent of lender's mortgage lien; and

where promissory note contained a provision specifying that interest charged under the note could not exceed the maximum amount permitted by law, lender did not violate Michigan usury statute.

Motion denied.

Attorneys and Law Firms

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Robert A. Weisberg, Christopher A. Grosman, Carson Fischer, P.L.C., Bloomfield Hills, Michigan, Attorneys for Southfield Metro Center Holdings LLC.

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Jonathan B. Frank, Maddin, Hauser, Roth & Heller, P.C., Southfield, Michigan, Attorney for Laila Alizedah, Troy Wilson, and Arash Missaghi.

OPINION REGARDING THE DEBTOR'S CASH COLLATERAL MOTION

Thomas J. Tucker, United States Bankruptcy Judge

*365 I. Introduction

These jointly-administered cases came before the Court for a hearing on February 6, 2019, on three motions, namely:

(1) the joint motion by state court receiver NAI Farbman (the "Receiver") and secured creditor Southfield Metro Center Holdings, LLC (the "Lender") entitled "Joint Motion by Receiver NAI Farbman and Secured Creditor Southfield Metro Center Holdings LLC (I) to Dismiss or Suspend the Bankruptcy Case, or in the Alternative, (ii) for Relief under Section 543(c) and (d) of the Bankruptcy Code" (Docket # 32 in Case No. 19-40248, the "Joint Dismissal Motion");

(2) the motion by the Lender entitled "Motion by Secured Creditor Southfield Metro Center Holdings LLC to Dismiss or Suspend the Bankruptcy Case" (Docket # 24 in Case No. 19-40211, the "Dismissal Motion"); and

(3) the motion by the Debtor Skymark Properties SPE, LLC entitled "Debtors' Motion for Entry of an Interim and Final Order Permitting the Use of Cash Collateral" (Docket # 60 in Case No. 19-40248, the "Cash Collateral Motion").[2]

[2] Although the Debtors' cases are being jointly administered, the Cash Collateral Motion was filed only in the case of the Debtor SPE.

On February 7, 2019, confirming action taken by the Court at the conclusion of the February 6, 2019 hearing, the Court entered an order requiring certain parties to supplement the record in specific ways.[3] The required supplements have been filed.[4] The Court has reviewed the motions, the briefs in support of the motions, the responses to the motions, the replies in support of the motions, all exhibits attached to the pleadings, the supplements filed in response to the February 7 Order, and the entire record, and concludes that, for the following reasons, no further hearing is required, and that the Cash Collateral Motion must be denied, and the Joint Dismissal Motion and the Dismissal Motion should be granted. This opinion concerns only the Cash Collateral Motion. Today the Court is filing a separate opinion regarding the Joint Dismissal Motion and the Dismissal Motion.

[3] *See* "Order Regarding Motions Heard on February 6, 2019 (Docket # 66 in Case No. 19-40211, the "February 7 Order").

[4] *See* Docket ## 67, 69, 71, 75, 82 in Case No. 19-40211.

II. Jurisdiction

This Court has subject matter jurisdiction over this bankruptcy case and this contested matter under 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1), and Local Rule 83.50(a) (E.D. Mich.). This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(M) and 157(b)(2)(O).

This proceeding also is "core" because it falls within the definition of a proceeding "arising under title 11" and of a proceeding "arising in" a case under title 11, within the meaning of 28 U.S.C. § 1334(b). Matters falling within either of these categories in § 1334(b) are deemed to be core proceedings. *See Allard v. Coenen (In re Trans–Industries, Inc.)*, 419 B.R. 21, 27 (Bankr. E.D. Mich. 2009). This is a proceeding "arising under title 11" because it is "created or determined by a statutory provision of title 11," *see id.*, ***366** including Bankruptcy Code § 363. And this is a proceeding "arising in" a case under title 11, because it is a proceeding that "by [its] very nature, could arise only in bankruptcy cases." *See id.* at 27.

III. Background

A. The Debtors and their properties

Debtor Skymark Properties SPE, LLC ("SPE") owns three towers (Towers 100, 200, and 300) of a commercial office building located at 27100, 27200, and 27300 West Eleven Mile Road, Southfield, Michigan, containing approximately 537,605 square feet of rentable floor space. The commercial space in Tower 300 is fully occupied. Tower 100 is 46.20% occupied, and Tower 200 is only 9.79% occupied. The consolidated occupancy of all three towers collective is 42.36%.[5] Stefanini, Inc. ("Stefanini"); Federal-Mogul Corporation ("Federal-Mogul"), n/k/a Tenneco, Inc. ("Tenneco"); and Sterling Food Services are three of the tenants of SPE. Stefanini occupies approximately 49,071 of rentable square feet in Tower 100, consisting of "3 entire floors, and a portion of [the] first floor of Tower 100[.]"[6] Tenneco occupies 3,550 square feet on the first floor of Tower 100 and the corridor between Towers 200 and 300.[7]

[5] *See* Ex. L to Docket # 32-2 in Case No. 19-40248 ("Farbman Management Group October 2018 - September 2019 Metro Office Complex Consolidated

Summary," (the "Consolidated Summary") at pdf. p. 59. Towers 100, 200, and 300 are collectively referred to as the "Metro Office Complex" in the Consolidated Summary.

[6] *See* Ex. L to Docket # 32-2 in Case No. 19-40248 (the Consolidated Summary) at pdf. p. 59; Aff. of Christopher Mourad (Docket # 32-1) at pdf. p. 87. Christoper Mourad is the General Counsel for Stefanini.

[7] *See* Ex. L to Docket # 32-2 in Case No. 19-40248 (the Consolidated Summary) at pdf. p. 59.

Debtor Skymark Properties II LLC ("Skymark II") owns the fourth tower (Tower 400) of the commercial office complex. Tower 400 is located at 27350 West Eleven Mile Road, Southfield, Michigan, has no tenants, is unoccupied, and is not currently fit for occupation.

Skymark Properties Corporation ("SPC") is the sole member of each of the Debtors. Liberty and York Corporation ("L & Y") is the sole shareholder of SPC. L & Y has a single shareholder, but there is a dispute as to who is currently that shareholder. Laila Alizadeh ("Alizadeh") and Morteza Katebian a/k/a Ben Katebian ("Katebian") each allege to be the sole shareholder of L & Y.[8]

[8] Katebian filed a lawsuit in the United States District Court for the Eastern District of Michigan against the Debtors and others, Case No. 18-13379, alleging that he is the sole shareholder of L & Y and is authorized to act on its behalf. That case is currently pending.

B. The pre-petition loans

Pre-petition, the Debtors SPE and Skymark II (collectively, the "Debtors" or "Borrower") obtained a loan in the original principal amount of $ 17.35 million (the "Loan") from GreenLake Real Estate Fund LLC ("GreenLake").

1. The original loan documents

In connection with the Loan, on December 30, 2016, the Debtors, by SPC, their sole member, and through SPC's authorized agent Katebian, signed a document entitled "Promissory Note Secured by Mortgage" (the "Promissory Note"),[9] ***367** promising to repay the principal loan amount of $ 17.35 million at a fixed non-default interest rate of 11%, as well as other sums provided for in the Promissory Note, according to the terms of the Promissory Note.[10] The Promissory Note provided for a balloon payment of the outstanding amounts due on the "Maturity Date" of December 31, 2019.[11] The Promissory Note was "secured by a first priority Mortgage, Security Agreement, Assignment of Rents and Leases and Fixture Filing (the 'Mortgage') of [December 30, 2016] on the Property [as defined in the Promissory Note] and the other Loan Documents."[12] "Property" was defined in paragraph 1.19 of the Promissory Note as follows:

> The real property located at 27100, 27200, 27300 and 27350 (the "**100, 200 and 300 Towers**") West Eleven Mile Road, Southfield, Michigan consisting of the following
>
> Tax Parcel Numbers:
>
> 24-18-351-Q16,
>
> 24-18-351-Q17, and
>
> 24-18-351-QlB
>
> And for the Tower 400 Funding, 27350 West Eleven Mile Road, Southfield, Michigan with (the "**400 Tower**") Tax Parcel Number 24-18-351-D07
> as more particularly described in the Mortgages[13]

The reference to "Tower 400 Funding" was a reference to a loan that Skymark II had obtained from Mercury Capital Funding LLC ("Mercury") "in the amount of $ 1,300,000" (the "Mercury Loan").[14] SPE had guaranteed the Mercury Loan. On account of that loan, Tower 400 was encumbered, and "Mercury filed a UCC financing statement against the 100, 200, & 300 Towers."[15] Out of the proceeds from the $ 17.35 million loan amount, "$ 1,300,000 [was] to be held back by Lender ... to be used to refinance the debt in favor of Mercury ...."[16]

[9] A copy of the Promissory Note is attached as Exhibit 1 to Docket # 55 in Case No. 19-40211.

[10] *See* Promissory Note (Ex. 1 to Docket # 55-2 in Case No. 19-40211) at pdf. p. 1, 19-20. The typewritten

name of Katebian under his signature line is misspelled as "Katabian." It is likewise misspelled under signature lines in other Loan Documents.

11 *Id.* at 1 ("**Notice to Borrower**"), ¶ 1.6 ("**Maturity Date**") (bold in original).

12 *Id.* at pdf. pp. 2 ¶ 1.19 ("**Property**"), 14 ¶ 13 ("**Mortgage**") (bold and underlining in original).

13 *Id.* at pdf. p. 2 ¶ 1.19 ("**Property**") (bold in original).

14 *Id.* at pdf. p. 5 ¶ 1.22(i)i.1.

15 *Id.*

16 *Id*. at pdf. p. 2 ¶ 1.11(d) ("**Use of Loan Proceeds**") (bold in original).

Under the Promissory Note, the "Loan Documents" are:

> (a) [The Promissory] Note
>
> (b) The Guaranty
>
> (c) The Mortgage for the 100, 200 & 300 Towers
>
> (d) The Mortgage for the 400 Tower
>
> (e) Correction Agreement
>
> (f) Pledge and Security Agreement for the 100, 200 and 300 Towers
>
> (g) Pledge and Security Agreement for the 400 Tower;
>
> (h) Lease Subordination Agreements for each Tenant;
> (I) any other documents evidencing or securing the obligations under this Note, as such documents may be modified from time to time.[17]

17 *Id*. at pdf. p. 3 ¶ 1.20 ("**Loan Documents**") (bold in original).

***368** The Promissory Note, in relevant part, required that Troy Wilson ("Wilson") "shall at all times be the employee of the [Debtors] or [their] affiliates who is principally responsible for the day to day management of [Towers 100-400]" and the Debtors' business operations.[18] The Promissory Note also required that "SPC shall at all times own 100% of [the Debtors];" that "L & Y shall at all times own 100% of SPC;" and that "Morteza Katebian shall at all times own 100% of L & Y."[19] SPC, L & Y and Katebian each personally guaranteed the amount due and other obligations of the Debtors under the terms of the Promissory Note, and they were all jointly and severally liable on such guaranty.[20]

18 *Id.* at pdf. p. 3 ¶ 1.22(a) ("**Additional Covenants**") (bold in original).

19 *Id.* at ¶ 1.22(b) ("**Additional Covenants**") (bold in original).

20 *Id*. at pdf. pp. 1 ¶ 1.9 ("**Guarantor**"), 9 ¶ 4.3 ("Guarantor") (bold and underlining in original).

The Promissory Note noted that one of the tenants of SPE—Federal-Mogul, had the right to reduce the percentage of the space it was leasing in Tower 100. It stated, in relevant part: "The lease with Federal-Mogul gives the tenant the option to relinquish up to 50% of the Premises in exchange for a termination fee of 24 months' rent for the space relinquished."[21]

21 *Id.* at pdf. p. 4 ¶ 1.22(d) (Federal-Mogul Reduction of Premises) (underlining in original). A copy of the Lease referred to in the Promissory Note between SPE and Stefanini is attached as Ex. D to Docket # 32-1 in Case No. 19-40248 at pdf. pp. 38-72.

"Upon an occurrence and during the continuance of an Event of Default" under the Promissory Note, GreenLake had the right, among other things, to "[d]eclare the total unpaid principal balance of the indebtedness evidenced [in the Promissory Note], together with all accrued but unpaid interest thereon and all other sums owing, immediately due and payable and all such amounts shall thereafter bear interest at the Default Rate."[22]

22 *Id.* at pdf. p. 15 ¶ 16.

Paragraph 15 of the Promissory Note defined an "Event of Default." It stated:

> 15. Defaults; Acceleration. The occurrence of the following shall be deemed to be an event of default ("Event of Default") hereunder:
>
> 15.1. Borrower's failure to pay (as a result of insufficient balance in the Account) any payment of principal or Interest due (plus any applicable late fee) within 5 business days after due pursuant to the terms of this [Promissory] Note;
>
> 15.2. Any failure to comply with any covenant, condition or obligation under the terms of this [Promissory] Note which is not cured within 15 days after written notice to Borrower, or if more time is reasonably required to cure the default given the nature of the default, then up to 30 days after written notice to Borrower;
>
> 15.3. Any representation or warranty under this Agreement was inaccurate when made or becomes inaccurate;
>
> 15.4. Any default under the terms of the Mortgage or other Loan Documents or any guaranty executed in connection with this [Promissory] Note;
>
> 15.5. There is a material adverse change in the financial condition of Borrower or any guarantor for the Loan, or the physical condition of the Property or the improvements thereon which could materially affect Borrower's ability to perform its obligations under the Loan Documents or Guarantor's ability to perform its obligations under the Guaranty;
>
> ***369** 15.6. **The occurrence of any Bankruptcy Event**; or
> 15.7. Borrower sells any portion of the Property in violation of the restrictions on transfer contained in the Mortgage.[23]

23 *Id.* at pdf. p.15 ¶ 15 (emphasis added).

One of the Events of Default, a "Bankruptcy Event," is defined to include:

> (5) (the appointment of a receiver (other than a receiver appointed at the direction or request of [the] Lender under the terms of the Loan Documents), liquidator, custodian, sequestrator, trustee or other similar officer who exercises control over Borrower or any substantial part of the assets of any Borrowers[.][24]

24 *Id.* at pdf. p. 7 ¶ 1.26(b).

In conjunction with execution of the Promissory Note, on December 30, 2016, SPE granted GreenLake a mortgage (the "Mortgage") on the properties it owned located at 27100, 27200, and 27300 West Eleven Mile Road, Southfield, Michigan (Towers 100-300) to secure the loan amount and its other obligations to GreenLake under the Promissory Note.[25] The Mortgage defined "Loan Documents" as "(I) The Promissory Note, (ii) this Mortgage, (iii) any documents defined as Loan Documents in the Promissory Note and (iv) other documents delivered by Mortgagor in connection therewith."[26]

25 A copy of the Mortgage is attached as Exhibit C to Docket # 72-3 in Case No. 19-40248 at pdf. pp. 11-44.

26 Ex. C to Docket # 72-3 in Case No. 19-40248 at pdf. p. 13 Art. 1, § 1.1(g).

In Section 3.13 of the Mortgage, the Mortgagor promised to "preserve and protect the Property" and to "ensure that the Property is maintained in good condition and repair."[27]

27 *Id.* at pdf. p. 23 Art. 3, § 3.13 ("**Maintenance of Property**") (bold and underlining in original).

Article 5 of the Mortgage is captioned "**ASSIGNMENT OF RENTS AND LEASES** [(bold and underlining in original caption)]." It provides, in relevant part:

> Section 5.1 **Assignment**. To secure the payment of the Indebtedness and the ... performance and discharge of the Obligations, **Mortgagor hereby absolutely and unconditionally assigns, sells, transfers and conveys to Mortgagee all of its right, title and interest in and to all Leases, whether now existing or hereafter entered into, and all of its right, title and interest in and to all Rents.** Mortgagee does not assume any of Mortgagor's liabilities under any leases by this assignment. **This assignment is an absolute**

assignment and not an assignment for additional security only. So long as no Event of Default shall have occurred and be continuing, Mortgagor shall have a revocable license from Mortgagee to exercise all rights extended to the landlord under the Leases, including the right to receive and collect all Rents and to hold the Rents in trust for use in the payment and performance of the Obligations and to otherwise use the same. The foregoing license is granted subject to the conditional limitation that no Event of Default shall have occurred and be continuing. Upon the occurrence and during the continuance of an Event of Default, whether or not legal proceedings have commenced, and without regard to waste, adequacy of security for the Obligations or solvency of Mortgagor, **the license herein granted shall automatically expire *370 and terminate, without notice by Mortgagee (any such notice being hereby expressly waived by Mortgagor).** Mortgagor further agrees that it will, from time to time, upon demand therefor, deliver to Mortgagee an executed counterpart of each and every Lease then affecting all or any portion of the Property.

Section 5.2 **Collection of Rents**. If an **Event of Default** occurs under this Mortgage, or any of the other Loan Documents, then, to the extent permitted by law,: Mortgagee may collect the Rents, personally or through a receiver, (I) as long as the default exists, including during the pendency of any foreclosure proceedings, and/or during any redemption period. The collection of such Rents by Mortgagee shall in no way waive the right of Mortgagee to foreclose this Mortgage in the event of such an Event of Default. Mortgagor consents to a receiver if Mortgagee thinks it is necessary or desirable, in its sole and absolute discretion, to enforce its rights under this provision. Mortgagee shall be entitled to all the rights conferred by [Mich. Comp. Laws Ann. §] 554.231 et seq., MSA 26.1137(1) et seq. and [Mich. Comp. Laws Ann. §] 554.211 et seq., MSA 26.1131et seq. **Mortgagor hereby consents to and authorizes and directs the lessees under the Leases and any successors to the interest of said lessees, upon demand and notice from Mortgagee of Mortgagee's right to receive the Rents and other amounts under such Leases, to pay to Mortgagee the Rents and other amounts due or to become due under the Leases, and said tenants shall have the right to rely upon such demand and notice from Mortgagee and shall pay such Rents and other amounts to Mortgagee without obligation or right to determine the actual existence of any default or event claimed by Mortgagee as the basis for Mortgagee's right to receive such Rents and other amounts notwithstanding any notice from or claim of Mortgagor to the contrary, and Mortgagor shall have no right or claim against said tenant for any such Rents and other amounts so paid by said tenant to Mortgagee.**

Section 5.3 **Perfection Upon Recordation**. Mortgagor acknowledges that Mortgagee has taken all actions necessary to obtain, and that **upon recordation** of this Mortgage Mortgagee shall have, to the extent permitted under applicable law, **a valid and fully perfected, present assignment of the Rents arising out of the Leases and all security for such Leases.** To the extent permitted by applicable law, Mortgagor acknowledges and agrees that **upon recordation of this Mortgagee's interest in the Rents shall be deemed to be fully perfected, "choate" and enforced as to Mortgagor and all third parties**, including, without limitation, any subsequently appointed trustee in any case under the Bankruptcy Code without the necessity of commencing a foreclosure action with respect to this Mortgage, making formal demand for the Rents, obtaining the appointment of a receiver or taking any other affirmative action.

Section 5.4 **Bankruptcy Provisions**. Without limitation of the absolute nature of the assignment of the Rents hereunder, Mortgagor and Mortgagee agree that (a) this Mortgage shall constitute a "security agreement" for purposes of Section 552(b) of the Bankruptcy Code, (b) the security interest created by this Mortgage extends to property of Mortgagor acquired before the commencement of a case in bankruptcy and to all amounts paid as Rents and (c) such security interest shall extend to all Rents ***371** acquired by the estate after the commencement of any case in bankruptcy. **Notwithstanding this provision, the Mortgagor acknowledges that upon an Event of Default, the Rents shall constitute property of the Mortgagee and shall not constitute property of the Mortgagor's bankruptcy estate in any subsequently commenced case under the Bankruptcy Code**.[28]

[28] *Id.* at pdf. pp. 31-32 Art. 5, §§ 5.1-5.4 (emphasis added).

"Any breach of or failure to perform any obligation under Mortgage or any of the Loan Documents after any express cure period has elapsed [was] an 'Event of Default' " under the Mortgage.[29] The Mortgage gave GreenLake the right, among other rights, to accelerate the entire outstanding amount of the Loan upon an "Event of Default:"

(a) Acceleration. Declare the Indebtedness to be

> immediately due and payable, without notice, presentment, protest, notice of intent to accelerate, notice of acceleration, demand or action of any nature whatsoever (each of which hereby is expressly waived by Mortgagor), whereupon the same shall become immediately due and payable. At the Mortgagee's option, Mortgagee may bring suit therefor and take any and all steps and institute any and all other proceedings that Mortgagee deems necessary or advisable in its sole discretion to enforce its rights, to collect the Indebtedness and to enforce the Obligations, including without limitation all amounts due under the [Promissory] Note and other Loan Documents, and to protect the lien of this Mortgage.[30]

29 *Id.* at pdf. p. 26 Art. 4, § 4.1 ("**Event of Default**") (bold and underlining in original).

30 *Id.* at pdf. p. 26 Art. 4, § 4.2(a) ("Acceleration") (underlining in original).

The Mortgage was recorded with the Oakland County Register of Deeds on January 9, 2017.[31]

31 *Id.* at pdf. p. 11.

2. The Amended Loan Documents

On January 25, 2017, Skymark II, and SPE, as the "Borrower;" SPC, L & Y, and Katebian, as the "Guarantor;" and GreenLake, as the "Lender," executed an amendment to the Promissory Note, entitled "First Amendment to Promissory Note Secured by Mortgage" (the "Amended Promissory Note").[32] The Amended Promissory Note, in relevant part, increased the amount of the Loan from $ 17.35 million to $ 17.7 million; provided for Tower 400, located at 27350 West Eleven Mile Road Southfield, MI, and owned by Skymark II, to serve as additional collateral to secure the increased loan amount, and amended some of the terms of the Loan.[33] In the Amended Promissory Note, the parties "acknowledged that the term '400 Tower Funding' as provided in Section 1.11(d) of the [Promissory] Note contained a scrivener's error and should have been $ 1,350,000 [rather than $ 1,300,000]" and agreed that "the term '400 Tower Funding' shall hereinafter mean $ 1,700,000.000."[34] Katebian signed the Amended Promissory Note on behalf of himself; SPC (as the "Sole Director"); L & Y (as the "Sole Director"); Skymark II ***372** (as "Authorized Person"); and SPE (as "Authorized Person").[35]

32 A copy of the Amended Promissory Note is attached as Exhibit 2 to Docket # 55-2 in Case No. 19-40211.

33 *See* Amended Promissory Note (Ex. 2 to Docket # 55-2 in Case No. 19-40211) at pdf. p. 1 ¶¶ D, F, 1.

34 *Id.* at pdf. p. 1 ¶ 1.

35 *Id*. at pdf. pp. 7, 9, 11, 13.

In conjunction with the execution of the Amended Promissory Note, SPE and Skymark II also executed a document entitled "First Amendment to Mortgage" ("Amended Mortgage") on January 25, 2017, under which they granted GreenLake a mortgage on all of their "right, title, and interest" in the real property they owned (Towers 100-400) to secure their obligations under the Amended Promissory Note.[36] Skymark II and SPE signed the Amended Mortgage by its sole member SPC. Katebian signed on behalf of SPC as its "Authorized Agent."[37]

36 *See* Amended Mortgage (Ex. C to Docket # 72-3 in Case No. 19-40248) at pdf. p. 3 ¶¶ 1-4.

37 *Id.* at pdf. pp. 5-6.

The Amended Mortgage was recorded with the Oakland County Register of Deeds on February 21, 2017.[38]

38 *Id.* at pdf. p. 2.

Both the Mortgage and the Amended Mortgage contained a scrivener's error in the legal description of the real property located at 27300 West Eleven Mile Road Southfield, MI (Tower 300), because it was based on the tax description for that property, which was erroneous. First American Title Insurance Company issued a title commitment for the property owned by SPE and located

at 27100, 27200, and 27300 West Eleven Mile Road Southfield, Michigan with the erroneous legal description for 27300. The City of Southfield has since corrected the error in the tax description of the 27300 property.[39]

39 *See* Exs. A-D of "Receiver's Supplement Regarding Joint Dismissal Motion" (Docket # 67 in Case No. 19-40211).

C. The 2018 state court lawsuit against SPE, and the appointment of the Receiver

On March 12, 2018, one of the tenants of Tower 100 - Stefanini, filed a lawsuit against SPE in the Oakland County Circuit Court, (Case No. 2018-164324-CB, the "2018 State Court Lawsuit"), alleging certain defaults by SPE under a lease between Stefanini and SPE dated July 21, 2016 as amended on March 29, 2017 (the "Lease").[40] On July 30, 2018, Stefanini filed an emergency motion for the appointment of a receiver (the "Receivership Motion"). On August 22, 2018, the state court entered an order entitled "Stipulation and Order to Resolve Certain Issues" (the "August 22, 2018 Order"), which in relevant part, required SPE to (1) begin work on remodeling the lobby and the restrooms of the first floor (the "Lobby Buildout") "on or before August 20, 2018" and to "diligently complete the required [Lobby B]uildout under Section 15.01 [of the Lease];" (2) "strictly comply with its further obligations under the Court's July 31, 2018 Order regarding DTE," and to pay to DTE $ 367,245 on September 4, 2018; and (3) "pay its debt service to its lender (including real property taxes reserves) and maintain all utility service to the property [located at] ... 27100-27300 West 11 Mile Road, Southfield, Michigan" and ... pay Drobot Custom Building, Inc. ("Drobot") and Johnson Control Incorporated ("JCI") the unpaid balances owed to each person within thirty (30) days of this Order."[41] ***373** With regard to the pending Receivership Motion, the August 22, 2018 Order stated:

> 4. The hearing on [the Receivership Motion] is adjourned without date. However, once the Lobby Buildout is completed in Paragraph 1, DTE is paid as required by Paragraph 2 and Drobot and JCI are paid under Paragraph 3, [Stefanini] shall immediately withdraw [the Receivership Motion] without prejudice and shall confirm that it has done so in writing to [SPE's] counsel. Notwithstanding the foregoing, Stefanini shall be entitled to seek all rights or remedies available under the Lease or applicable law relating to any future or unknown events, occurrence, actions and/or omissions by [SPE].[42]

40 A copy of the state court docket for that case is attached as Exhibit A to Docket # 75-1 in Case No. 19-40211. A copy of the Lease is at Docket # 32-1 in Case No. 19-40248 at pdf. pp. 38-72, 78-90.

41 August 22, 2018 Order (attached as Ex. I to Docket # 32-2 in Case No. 19-40248) at pdf. pp. 26-27 ¶¶ 1-3.

42 *Id.* at pdf. p. 28 ¶ 4.

Later, on September 26, 2018, after holding "emergency hearings on July 30, 2018 and August 10, 2018 [and] ... adjourned hearings on August 16, 2018, September 12, 2018 and September 26, 2018," the state court "found that [SPE] has violated (a) the terms of the [L]ease between the [Stefanini] and [SPE] and (b) various Orders of this Court in this case;" and that good cause existed for the appointment of a receiver. The state court granted the Receivership Motion, and entered an order appointing the Receiver (the "Receiver Order").[43] Under the Receiver Order the Receiver was authorized "to take possession, custody, and control of [SPE's real property at Towers 100, 200, and 300] (the 'Property')[.]"[44] The Receiver Order authorized the Receiver "to take immediate possession and full control of" all of SPE's property — *i.e.*, the following property which was defined as "Receivership Property:"

> 1. The Property, and all tangible and intangible property used or useable in connection with the operation of the Property, including, without limitation, insurance premium refunds, insurance proceeds, condemnation awards, utility deposits and deposits of every other kind related to the Property causes of actions;
>
> 2. All cash, cash on hand, checks, cash equivalents, deposit accounts, bank accounts, cash management or other financial accounts, bank or other bank deposits and all other cash collateral (all wether now existing or later arising), all current and past-due earning, revenues, rents, accounts, accounts receivables, CAM charges, issues and profits (all whether unpaid accrued, due, or to become due), **all claims to rent**, cash collateral, lease termination or rejection claim, any and all tax refund proceeds from tax appeals (whether now existing or later arising), insurance premium refunds or

proceeds, and all other gross income derived with respect to the Property or business operations at the Property, regardless of whether earned before or after the entry of this Order, wherever located and from whomever may have possession) collectively, "Income");

3. The leasehold obligations relating to current tenants of the Receivership Property, Federal-Mogul LLC (f/k/a Federal-Mogul Corporation) and its related entities (collectively, "Federal-Mogul") and Stefanini, Inc. ("Stefanini" and collectively with Federal-Mogul, the "Tenants") and any future tenants of the Receivership Property, if applicable, and **the Tenants shall make rental payments, as required, directly to the Receiver**, and shall not be required to ***374** make additional or duplicate payments as provided or required under the respective leases to any third partes including to [SPE] unless the Court orders otherwise;

4. All fixtures trade fixture and tenant improvements of every kind or nature located in or upon or attached to the Property.

5. All permits, licenses, other contracts or other intangible property pertaining the Property and the operation of the Property;

6. All trade names and trademarks owned or used by [SPE] or its agents, representatives, or affiliates in connection with the Property;

7. All books, records, accounts and documents that in any way relate to the Property or Income; and
8. All other property, estate, right, title an interest of [SPE] relating to the Property.[45]

43 *See* Receiver Order (Ex. J. to Docket # 32-2 in Case No. 19-40248) at pdf. p. 31.

44 *Id.*

45 *Id*. at pdf. pp. 32-33 (emphasis added).

The Receiver was given broad powers and authority over the Receivership Property, including the authority "**to collect and receive all rents**, accounts receivable, revenues, profits and Income derived from the Property."[46] The Receiver Order also granted the Receiver the authority

[t]o determine and report to the Court and [Stefanini], and the Tenants as to whether any Income received by [SPE] relating to the Property since July 21, [2016] has been used for purposes other than paying debt service and other expenses relating to the Receivership Property, including making a determination as to whether money that has been paid to [SPE] ... has been diverted or paid to any other entity related to or affiliated with the owners, members, parties, or equity interest holders of [SPE.][47]

46 *Id.* at pdf. pp. 34-35 (emphasis added).

47 *Id.* at pdf. p. 35 ¶ 12.

Stefanini did not name GreenLake as a party to the 2018 State Court Lawsuit. GreenLake filed a motion to intervene, and a motion for relief from the Receiver Order. The state court granted GreenLake's motion to intervene, but denied its motion for relief from the Receiver Order.[48]

48 *See* docket of the 2018 State Court Lawsuit (Ex. A to Docket # 75-1 in Case No. 19-40211); Stefanini's "Motion for Relief From September 26, 2018 Order Appointing Receiver" (Ex. 9 to Docket # 55-11 in Case No. 19-40211).

After his appointment, the Receiver created a report summarizing of some of the deficiencies it found in Towers 100-300 (the "Receiver Report").[49] The report was made after conversations the Receiver had with the tenant Stefanini and references complaints made by Stefanini about certain violations of its lease with SPE. The Receiver Report detailed the conditions which impacted tenants Stefanini and Federal-Mogul. It stated, in relevant part:

Tower 100:

There are several deficiencies in Tower 100 concerning the elevators, HVAC systems, and roof leaks, among other concerns, all detailed below. There are also several violations to the Stefanini lease detailed below.

The elevators in Tower 100 parking deck are completely inoperable. One elevator is boarded up completely. In talking with the facility manager at Stefanini, there has been an ongoing water issue with the roof of the walk way between the building and the

parking deck that has allowed water to run down to the ***375** elevator pits.... Tenant expressed that when the elevators would go down in the building in the past that the owner was non-responsive and per the lease (Section 8.05) there are [to] be two elevators operational 24/7....

The HVAC equipment has been an issue for Stefanini, the existing tenant in the building. They have not had heat dating back to last winter and were told several pipes burst last year on the vacant floors. In walking the vacant floors, it was observed that much of the baseboard piping is broken, some beyond repair, and needing immediate replacement....

During rain storms the roof to the walkway would leak. In addition, the broken drain pipe was causing water to pour into the parking deck. This would make the entrance to the parking deck and walkway a slip hazard for the tenant. Stefanini has minor leaks on their 7th floor from the roof that have not been addressed....

The parking deck security system is inoperable. The gates to the parking deck were removed since it would not open. The cameras are inoperable in the parking deck as well. Since the elevators do not work, the parking deck is not ADA compliant.

There are several cracked/broken windows throughout the property. On the 3rd floor there is a clearly broken window that has not been fixed or boarded up....

Per the Stefanini lease, ownership is to provide a lobby to the standards for the 3rd floor lobby. The lobby has not been completed. There are no ceiling tiles, no flooring, or bathrooms. Most of the 1st floor has been gutted but very little has been started. Mold was found on the wallcovering, peeled back from the wall. There is an ongoing leak in what was the men's restroom that was not addressed but a trash can was put in place to catch water.... The heating units put in place in the corridor on the 1st floor do not work according to the facility manager at Stefanini. In addition, because the tenant cannot get a Certificate of Occupancy, a 24/7 fire watch is in place.

Per the lease for Stefanini (Section 8.09 of the Lease) and Federal Mogul, 24/7 security is to be provided. This was not in place upon arrival to the property but the receiver has [contacted] the service and security guards are not monitoring the property.

Per the Stefanini lease, janitorial service was to be provided by ownership. Janitorial companies have turned over many times due to lack of payment. Stefanini currently contracts their own janitorial service for their space....

There are two generators at the property, one is rented (payment status unknown) and does not have the capacity to service Federal Mogul and Stefanini. The original generator was removed because it was inoperable and replaced with a smaller one knowing that it would need to be upgraded if another tenant moved in besides Federal Mogul. Per Stefanini lease, owner is to provide back-up generator service (Section 8.10). With respect to the generator, the fuel tanks are half full and to everyone's knowledge the fuel is long overdue for testing....

Stefanini's facility manager mentioned that there is condensation in the stairwells....

There are outstanding balances with DTE for Tower 100 and Tower 300 and shut off notices were issued.... Tax Parcel 76-24-18-351-018 — 2018 taxes and water currently due equate to $ 120,763.63. Of this balance due, $ 56,966.55 ***376** is for water. The total balance due for this tower is inclusive of late fees and interest thru October 31, 2018.[50]

[49] *See* Ex. K to Docket # 32-2 in Case No. 19-40248 at pdf. pp. 53-57.

[50] *Id.* at pdf. pp. 54-55. The problem of outstanding balances owed to DTE Electric Company is also documented at Exhibit H to Docket # 32-2 in Case No. 19-40248. In a letter dated September 17, 2018, the Executive Director of Chase Customer service wrote to DTE Electric Company informing it regarding a check in the amount of $ 70,000 whose maker was "Skymark Foods Limited": " THE CHECK IS FRAUDULENT" and had been "returned unpaid." (Ex. H to Docket # 32-2 at pdf. pp. 20-23.)

According to the Receiver Report, the Receiver has made progress in addressing these deficiencies in Tower 100. The actions that the Receiver has taken include the following.

> [The Receiver] has identified the leak [in the roof of the walk way between the building and the parking deck] and have repaired the roof and a broken drain pipe to stop the water from flowing into the parking deck.... Receiver is working with an elevator contractor to do a complete assessment on the elevators....
>
> [The Receiver's] HVAC contractor has been onsite

> welding pipes and working to get the boilers operational in this building. All HVAC, including chemical treatment, is currently being assessed for a full report.
>
> ... [The] Receiver's roofing contractor is assessing all roofs of the receivership property.
>
> ...
>
> [The] Receiver has contacted a window company to board or replace window if window is in stock on site.
>
> ...
>
> [The] Receiver is bidding out janitorial services for the property.

On October 25, 2018, the Receiver filed a motion for the state court to approve a budget that the Receiver attached to the motion. On November 8, 2018, the state court entered an order granting that motion and approving the Receiver's proposed budget, through December 31, 2018 (the "Budget Order").[51] The Budget Order stated:

> IT IS ORDERED that:
> 1. The Motion is granted and that certain budget attached as Exhibit B to the Motion is approved through December 31, 2018, as to all re[ ]ccuring expenses. Repair and maintenance items over $ 7,500 are subject to approval of ... GreenLake .... If [GreenLake] does not approve the items, the Receiver may petition the court for approval. The Receiver shall file and obtain all permits necessary to complete the Stefanini [B]uildout. The proposed capital improvements of the fire panel and generators is subject to further review of [GreenLake] or court approval. Any objections of [GreenLake] to the Stefanini [B]uildout shall be filed on or before Nov. 26th 2018.[52]

51 *See* "Order Approving Budget Through December 31, 2018" (attached as Ex. D to Docket # 59-1 in Case No. 19-40211) at pdf. p. 50-52.

52 *Id.* at pdf. p. 52.

On November 27, 2018, the state court entered a stipulated order which amended the Budget Order and the Receiver Order.[53] The Receiver, GreenLake, and Federal-Mogul all consented to the entry of the order. That order eliminated the language in the Receiver Order that permitted ***377** GreenLake to take "any other action permitted under the [L]oan [D]ocuments or applicable law," and added language that permitted the Receiver's expenditures under the Budget in the Budget Order to be "within 10% of any line item but [with] no change to the overall amount ... except for material property damage or health/safety issues, and the timing of such does not allow the Receiver to seek Court approval, which the Receiver shall promptly seek."[54] The order also revised how "Income" under the Receiver Order was to be applied. In this regard, it stated:

> 3. Section VII of the Receiver Order is amended and replaced in full as follows:
>
> Income shall be applied as follows:
>
> 1. First, to incurred but unpaid fees and expenses as provided for in the Budget.
>
> 2. Next, to the creditors in accordance with priorities under Michigan law.
> 3. Finally, any surplus to be held pending further order of the Court.[55]

53 *See* "Stipulated Order Regarding Budget and Amending Order Appointing Receiver" (Ex. E to Docket # 59-1 in Case No. 19-40211) at pdf. p. 53-56.

54 *Id.* at pdf. p. 55.

55 *Id.* at pdf. pp. 55-56.

On December 19, 2018, the state court entered an order, which stated, in pertinent part:

> It is hereby ordered that [SPE] shall produce by January 15, 2019 books and records in its possession, custody, or control that evidence payments made to DTE for July 21, 2016 to present.
>
> It is further ordered that the Receiver shall supplement his report based on the information provided by [SPE].
>
> It is further ordered that [SPE] shall pay DTE $ 418,650.49 in 8 equal monthly installments of $ 52,331.31 each.
> It is further ordered that [SPE] shall replenish funds in its firm's IOLTA Account within 30 day[s] of payment to DTE, so that $ 100,000 is maintained in the account

until [SPE's] obligations to DTE under the Order are sati[s]fied.[56]

56 Ex. 4 to Docket # 55-5 in Case No. 19-40211.

D. The assignment of the Mortgage Loan Documents to the Lender

On December 18, 2018, the Lender was assigned all of the right title and interest GreenLake had in all of the Loan Documents.[57] This included the Promissory Note, the Amended Promissory Note, the Mortgage, and the Amended Mortgage.

57 This was done by the Lender, on December 18, 2018, entering into an agreement with GreenLake entitled "Assignment of Mortgage Loan Documents (*see* Ex. E to Docket # 72-5 in Case No. 19-40248), and by the Lender entering into an "Assignment and Assumption Agreement" with Premier Equities, Inc. ("Premier"). Premier had previously, on November 16, 2018, entered into a Loan Purchase Agreement with GreenLake under which it had purchased loan documents described in that agreement from GreenLake. (*See* Ex. E to Docket # 72-5 in Case No. 19-40248; Ex. F to Docket # 72-7 in Case No. 19-40248 (Aff. of Scott Shefman) at ¶¶ 2-3. Scott Shefman is the authorized representative of the Lender. (Aff. of Scott Shefman at ¶ 1.)

E. The notice of default and acceleration of the entire debt owed by Debtors

On December 24, 2018, the Lender provided a written notice to SPE, Skymark II, L & Y, SPC, Katebian, and John Premo, Esq. of Kickham Hanley PLLC, of default by SPE and Skymark II under the terms of the Loan Documents and of the acceleration of the total debt SPE and Skymark II owed under the Loan Documents (the "Acceleration Notice"). The Acceleration ***378** Notice stated that the defaults included, but were not limited to:

> A. Borrower's failure to make payments as required under the terms of the Loan Documents from October l, 2018 to the present;
>
> B. The appointment of a Receiver in that certain action entitled: *Stefanini, Inc. v Skymark Properties SPE LLC, et al*, State of Michigan, Oakland County Circuit Court Case No. 2018-164324-CB (the "Receivership Action"); and
>
> C. Unapproved transfer of ownership interests in Borrower on or about July 14, 2017.[58]

The Acceleration Notice stated that "[b]ecause of the above defaults, and other occurring and continuing defaults, the Lender has elected to accelerate the maturity of the Loan and to declare the entire Loan balance to be immediately due and payable."[59] The Acceleration Notice stated further that "[d]ue to the Borrower's default, and occurring and continuing other defaults, the interest rate under the Loan increased to the Default Rate" and that "[t]he Loan now bears interest at the interest rate of "25% per annum effective as of December 31, 2016[.]"[60] The Acceleration Notice calculated the amount outstanding on the Loan as follows:

58 Ex. G to Docket # 72-7 in Case No. 19-40248 at pdf. p.3.

59 *Id.* at pdf. p. 4.

60 *Id.*

Principal:	$17,700,000.00
Interest (10/2018-12/2018):	486,750.00
Default Interest (12/30/2016-12/30/2018):	5,024,833.33
Unpaid Monthly Tax Impound (l0/2016-12/2018):	107,100.00
Insurance Premiums:	36,733.25
Late Charges:	1,818,675.00
Total:	**$25,174,091.58**

> plus all interest accruing after that date, any prepayment premiums or yield maintenance payment as provided for in the [Promissory] Note, and all costs, expenses and attorneys' fees incurred by Lender, and less any amounts held by Lender in escrow reserve accounts, if any.[61]

61 *Id.*

The Acceleration Notice demanded that the Borrower "pay the Lender **$ 25,174,091.58** on or before January 4,

2019 at 2:00 p.m. local time."[62]

62 *Id.*

The Acceleration Notice provided in relevant part, that due to the Borrower's default, the Lender was entitled to the rental income from Towers 100-300. It stated:

> Due to the Borrower's defaults, [the] Lender is now entitled to rents and other income ("**Rental Income**") derived ***379** from the Mortgaged Property under the leases pursuant to the Mortgage, Assignment of Rents and other Loan Documents. Any license previously granted to Borrower to collect Rental Income was immediately revoked upon your initial default under the Loan documents, without notice, and this Rental Income must be immediately turned over to the Lender. Demand is made that you immediately deliver all such Rental Income to the Lender. Demand is made that you immediately deliver all such Rental Income to the Lender, in the form received by you to the Lender at the address provided above. Nothing in the foregoing is intended to modify any of the rights granted to the Receiver in the Receivership Action.[63]

63 *Id.* at pdf. p. 5 (**Rents**) (bold and underlining in original).

F. The 2019 state court lawsuit

The Lender also filed a state court lawsuit against Skymark II in the Oakland County Circuit Court, based on Skymark II's defaults under the Loan Documents.[64] The various defaults by Skymark II included "the failure of [Skymark II] and Skymark SPE to pay the Indebtedness (as defined therein) and to preserve and protect the Mortgaged Property (as defined in the Mortgages) and to maintain the Mortgaged Property in good condition and repair, all of which constitute an Event of Default (as defined in the Mortgages)."[65] The Lender moved for the appointment of a receiver of Skymark II's property, including Tower 400, and a hearing on that motion was scheduled for January 7, 2019.

64 *See* Ex. F to Docket # 72-7 in Case No. 19-40248 (Aff. of Scott Shefman) at pdf. p. 4 ¶¶ 7-8.

65 *Id.* at 4.

G. The Debtors' bankruptcy cases

On January 8, 2019, each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, commencing Case Nos. 19-40211 (for the Debtor Skymark II) and 19-40248 (for the Debtor SPE). On January 28, 2019, the Court granted the Debtors' motion for joint administration of the Debtors' bankruptcy cases.[66]

66 *See* Docket ## 38, 68 in Case No. 19-40248.

The Debtor SPE filed its Cash Collateral Motion on January 22, 2019. On January 28, 2019, the Lender, the Receiver, the Office of the United States Trustee, and the Debtors filed a stipulation for entry of an order entitled "Interim Order Authorizing Receiver's Use of Rents Under [§§] 543(c)(1) and (2)."[67] The stipulating parties consented to a temporary order allowing the Receiver's continued collection and use of rents from the tenants of SPE's property. The Court entered the stipulated order on January 28, 2019.[68] That Order authorized the Receiver's collection and use of rental income from tenants of Towers 100-300, "for the specific purposes stated in the Budget attached to the Stipulation,... and only under the terms and conditions set forth in th[e] Order."[69] This authority to collect and use the rents expires when the Court enters a final order ruling on the merits of the Cash Collateral Motion and the Dismissal Motion, or 90 days after the petition date, whichever is earlier.[70]

67 Docket # 46 in Case No. 19-40211.

68 Docket # 47 in Case No. 19-40211.

69 Docket # 47 at pdf. p. 3 ¶ K.

70 *Id.* at 4 ¶ 2.

***380 IV. Discussion of the Cash Collateral Motion**

The Cash Collateral Motion seeks an order permitting SPE to use, as "cash collateral," the rental income derived from leases of space in Towers 100, 200, and 300. The Lender filed an objection to the Cash Collateral Motion (Docket # 72, the "Lender's Objection").

A. The assignment of rents issue

The Lender objects to the Cash Collateral Motion on several grounds. First and foremost, the Lender argues that there is no "cash collateral" that either Debtor can use in these cases. In the case of Skymark II, it is undisputed that the Debtor has no income and no property that currently can be considered cash collateral. The real estate owned by that Debtor, referred to by the parties as Tower 400, is vacant and is not generating any rental income or other income. Nor is there any other asset that is, or that can become, cash collateral in that Debtor's case.

In the case of SPE, that Debtor's real estate, referred to by the parties as Towers 200, 300, and 300, does generate rental income, paid on a monthly basis by existing tenants. SPE contends that such income, as well as the rental income that has been collected by the Receiver, is cash collateral that SPE can use, if it provides adequate protection in the form proposed by the Cash Collateral Motion.

The Lender argues that none of the rental income is property of the bankruptcy estate, so none of it can be used by SPE as cash collateral. It is not property of the bankruptcy estate, according to the Lender, because of the assignment of rents granted to the Lender by SPE in the Mortgage. According to the Lender, because of that assignment of rents and because pre-petition, SPE defaulted under its Promissory Note and Mortgage, ownership of the rents belong to the Lender, and SPE has no ownership interest in rents. SPE disputes the Lender's argument.

The parties agree that the ownership of the rents is determined under Michigan law. And SPE agrees to this much: that when the mortgage contains an assignment of rents like the one in this case, the assignment of rents is effective to transfer ownership of the rents to the mortgage creditor, when the following five events have occurred: "(1) execution of assignment of rents; (2) recording of assignment of rents; (3) default under the mortgage; (4) recording of notice of default; and (5) service of recorded notice of default and instrument creating assignment of rents on tenants."[71] SPE concedes that where all five of these steps have occurred before the filing of a bankruptcy case, the bankruptcy debtor has no ownership interest in rents that can be considered property of the bankruptcy estate, and cannot use rents as cash collateral under 11 U.S.C. § 363(c)(2). All of this, and more, is now clear based on Michigan law. *See generally Town Ctr. Flats, LLC v. ECP Commerical II, LLC (In re Town Ctr. Flats, LLC)*, 855 F.3d 721 (6th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 328, 199 L.Ed.2d 211 (2017); Mich. Comp. Laws Ann. §§ 554.231, 554.232.

71 Combined Br. in Response to Joint Dismissal Mot. (Docket # 55-1 in Case No. 19-40211) at 32 (citing Mich. Comp. Laws Ann. §§ 554.231, 554.232).

The Lender goes further than SPE, and argues that under Michigan law, a transfer of ownership of the rents to a mortgage creditor occurs as soon as steps 1-3 above have occurred, even if steps 4 and 5 have not occurred. That is what happened in this case. As SPE's counsel correctly admitted during the hearing, steps 1-3 above occurred before the filing of this bankruptcy ***381** case. It is undisputed that SPE executed the assignment of rents as part of its execution of the Mortgage, that the Mortgage and its assignment of rents were recorded, and that SPE defaulted under the Mortgage, all pre-petition. And the parties agree that steps 4 and 5 did not occur. That is, it is undisputed that there was no notice of default recorded, and that no notice of default was served upon the tenants. SPE argues that because these steps did not occur, SPE retains its ownership interest in the rents, subject to a security interest in favor of the Lender, and that SPE's interest in the rents is property of the bankruptcy estate, which may be used as cash collateral.

The Court agrees with the Lender on this issue, and concludes that the occurrence of steps 1-3 is sufficient to transfer ownership of the rents to the mortgage creditor under Michigan law, without the occurrence of steps 4 and 5. Steps 4 and 5 are necessary only to place the tenants on notice of the requirement to pay rent to the mortgage creditor instead of SPE, and to bind the tenants to do so. But after steps 1-3 have occurred, any rent paid by the tenants to SPE are the property of the Lender, not SPE, and SPE merely holds those rents it receives as property of the Lender.

Support for these conclusions is found in the wording of the relevant Michigan statutes, and the case law construing such statutes, including the most recent decisions of the Michigan Court of Appeals, and the recent decision of the United States Court of Appeals for the Sixth Circuit in the *Town Center Flats* case, cited above.

First, the relevant Michigan statutes clearly draw a distinction between the events that must occur in order to deem the assignment of rents binding and effective against the debtor/mortgagor (also referred to in the statutes as the "assignor"), on the one hand, and the further events that must occur for such assignment to be binding and effective against the debtor's tenants. The two statutes are Mich. Comp. Laws Ann. §§ 554.231 and 554.232. Section 554.231 states:

> Sec. 1. Hereafter, in or in connection with any mortgage on commercial or industrial property other than an apartment building with less than 6 apartments or any family residence to secure notes, bonds or other fixed obligations, it shall be lawful to assign the rents, or any portion thereof, under any oral or written leases upon the mortgaged property to the mortgagee, as security in addition to the property described in such mortgage. **Such assignment of rents shall be binding upon such assignor only in the event of default in the terms and conditions of said mortgage, and shall operate against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds for the county in which the property is located of a notice of default in the terms and conditions of the mortgage and service of a copy of such notice upon the occupiers of the mortgaged premises.**

Id. (emphasis added). Section 554.232 states:

> Sec. 2. **The assignment of rents, when so made, shall be a good and valid assignment of the rents** to accrue under any lease or leases in existence or coming into existence during the period the mortgage is in effect, **against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of such mortgage, and shall be binding upon the tenant under the lease or leases upon service of a copy of the instrument *382 under which the assignment is made, together with notice of default as required by section 1.**

Id. (emphasis added) (footnote omitted).

The most recent Michigan appellate decisions on this issue hold that the transfer of ownership in rents from the assignor/mortgagee to the creditor/mortgagor occurs as soon as steps 1-3 listed above have occurred, even in the absence of steps 4 and 5 occurring. *Otis Elevator Co. v. Mid-America Realty Investors*, 206 Mich.App. 710, 522 N.W.2d 732, 733, 734 (1994); *Bioresource, Inc. v. City of Detroit*, No. 288263, 2010 WL 935647, at *4 (Mich. Ct. App. March 16, 2010) (per curiam); *TGINN Jets, L.L.C. v. Hampton Ridge Properties, L.L.C.*, Nos. 294622, 297844, 2013 WL 4609208, at *19 (Mich. Ct. App. Aug. 29, 2013) (per curiam).[72]

[72] Of these three cases, *Otis Elevator* is a published decision, and therefore "has precedential effect under the rule of stare decisis." Mich. Ct. R. 7.215(C)(2). *Bioresource* and *TGINN Jets* are unpublished decisions. Under applicable rules, they may be cited as persuasive authority. As this Court has explained:

> Under Mich. Ct. R. 7.215(C)(1) "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." However, Michigan courts may consider unpublished opinions as persuasive authority. *See, e.g., People v. Green*, 260 Mich.App. 710, 680 N.W.2d 477, 484 n.5 (2004)("Although unpublished opinions are not binding precedent, [Mich. Ct. R.] 7.215(C)(1), we utilize it as a guide and view it as persuasive in light of the limited case law in this area."); *Cedroni Assocs., Inc. v. Tomblinson, Harburn Assocs.*, 290 Mich.App. 577, 802 N.W.2d 682, 709 & n.5 (2010) (Kelly, J., dissenting) (viewing a per curiam unpublished opinion of the Michigan Court of Appeals as "[m]ore persuasive and on point" than a published opinion relied on by the majority).

McCallum v. Pixley (*In re Pixley*), 456 B.R. 770, 788 n. 19 (Bankr. E.D. Mich. 2011); *see also Wells v. THB America, LLC* (*In re Clements Mfg. Liquidation Co., LLC*), 486 B.R. 400, 403 n. 8 (Bankr. E.D. Mich. 2012) (unpublished Michigan Court of Appeals decisions may be cited as persuasive authority); *Paris Meadows, LLC v. City of Kentwood*, 287 Mich.App. 136, 783 N.W.2d 133, 139 n. 3 (2010) (quoting *Mich. Envtl. Council & Pub. Interest Research Grp. in Mich. v. Mich. Pub. Serv. Comm'n.* (*In re Application of Ind. Mich. Power Co.*), 275 Mich.App. 369, 738 N.W.2d 289 (2007)) (unpublished opinions of the Michigan Court of Appeals may be "considered instructive or persuasive"); *Cox v. Hartman*, 322 Mich.App. 292, 911 N.W.2d 219, 228 (2017) (same).

Otis Elevator was a garnishment action by a judgment creditor who sought to obtain the rental payments of the tenants of a building owned by the judgment debtor. But the judgment debtor had granted a mortgage to its lender, with an assignment of rents. The mortgage had been recorded, and the debtor had defaulted, all before the judgment creditor began its garnishment action. It was only a month *after* the garnishment action began that the mortgage creditor served the tenants of the building with

a notice of default and a copy of the mortgage agreement. 522 N.W.2d at 732-733. The Michigan Court of Appeals held that the debtor no longer had an interest in the rents *from the time of its default* under the mortgage, so that the rents could not be garnished. The court stated:

> [The judgment creditor] argues that in order to avail itself of the rent assignment provision in the mortgage, [the mortgage holder] was required to serve the building tenants with notice of default in the mortgage as required by [Mich. Comp. Laws §] 554.231; M.S.A. 25.1137(1). In response, [the mortgage holder] argues that once it recorded the mortgage and the mortgagor's default, the assignment of rents was valid and enforceable as between the mortgagor ([the debtor]) and mortgagee. ... **Thus, [the mortgage holder] contends that [the judgment creditor] could not garnish *383 the rents because [the debtor] no longer had an interest in the rents. We agree with the position of [the mortgage holder].**
>
> ...
>
> Notably, the statutory language [of Mich. Comp. Laws §] 554.231 states that such an "assignment of rents shall be binding upon such assignor only in the event of default ...." **Thus, the mortgagor's default is sufficient to finalize the mortgagee's interest in the rents as against the mortgagor. The additional language requiring service of notice of default upon the "occupiers" or tenants concerns the operation of the assignment as against the tenants, not as against the assignor.**

Id. at 733 (emphasis added).

In the *Bioresource* case, decided in 2010, the Michigan Court of Appeals again held that an assignment of rents is effective to give the mortgage creditor ownership of the rents when steps 1-3 have occurred, and that steps 4 and 5 are not necessary to obtain this result. The court followed its earlier decision in *Otis Elevator* in reaching this result:

> Here, although Paragraph 16 of the mortgage agreement required the mortgagor to assign leases to the mortgagee "[a]s additional security" and permitted the mortgagee to collect rent in the event of default in accordance with [Mich. Comp. Laws §] 554.231, the city maintains that [the mortgagee's] failure to record and serve a notice of default on [the tenant] and the city was fatal to [the mortgagee's] claim for the [rent] under [Mich. Comp. Laws §] 554.231. **Such an argument, however, misapprehends the plain language of the statute.**
>
> As *Otis Elevator Co. v. Mid–America Realty Investors*, 206 Mich. App. 710, 713-714, 522 N.W.2d 732 (1994), explains:
>
> > Notably, the statutory language states that such an "assignment of rents shall be binding upon such assignor only in the event of default ...." Thus, the mortgagor's default is sufficient to finalize the mortgagee's interest in the rents as against the mortgagor. The additional language requiring service of notice of default upon the "occupiers" or tenants concerns the operation of the assignment as against the tenants, not as against the assignor.
>
> Consequently, **under the plain language of the statute, the assignment of rent to [the mortgagee] became binding upon [the] default on the mortgage. Thus, [the mortgagor's] right to the rent was not contingent upon the filing or service of default.** *Id.* Rather, **the filing and service provision of [Mich. Comp. Laws §] 554.231 merely serves to protect the tenant with respect to whether rent is owed to the mortgagor or mortgagee and " 'does not affect the rights between mortgagor and mortgagee.' "** *Id.* at 714, 522 N.W.2d 732.

Bioresource, 2010 WL 935647, at *4 (emphasis added) (citation omitted).[73]

[73] In addition to citing the *Otis Elevator* case, the court in *Bioresource* also noted the 1985 bankruptcy court case of *In re P.M.G. Properties*, 55 B.R. 864 (Bankr. E.D. Mich. 1985). *Bioresource,* 2010 WL 935647, at *2. The *P.M.G.* case interpreted and applied the Michigan statutes at issue, [Mich. Comp. Laws] §§ 554.231 and 554.232, to mean that "a mortgagor's interest in rents made subject to an assignment of rents pursuant to [the statutes] is automatically terminated upon default by the mortgagor." *P.M.G.*, 55 B.R. at 870. The *P.M.G.* court held that this result does not require steps 4-5, and held that "[t]he requirement that the mortgagee file a notice upon the occupiers serves the ... purpose ... to protect the occupiers of the premises. This requirement does not condition the right of the mortgagee against the mortgagor." *Id.* (citations omitted).

***384** In the *TGINN Jets* case, decided in 2013, the Michigan Court of Appeals also held that only steps 1-3 must occur in order to entitle the mortgagor to the rents under an assignment of rents:

> Plaintiffs argue that, even if a default event occurred, [the mortgage creditor] did not have a superior right to the rents because it failed to record notice of the default with the register of deeds and serve such notice on [the tenant]. We disagree. [Mich. Comp. Laws §] 554.231 provides that an assignment of rent "shall operate

> against and be binding upon the occupiers of the premises from the date of filing by the mortgagee in the office of the register of deeds ... of a notice of default ... and service of a copy of such notice upon the occupiers of the mortgaged premises." **This provision is concerned with the operation of the assignment against the tenant, not the assignor of the rents.** *Otis Elevator Co*, 206 Mich. [Ct.] App[.] at 714. Therefore, the trial court correctly determined that plaintiffs could not establish priority to the rents based on this portion of [Mich. Comp. Laws §] 554.213.

TGINN Jets, 2013 WL 4609208, at *19 (emphasis added).

More recently, in 2017, the United States Court of Appeals for the Sixth Circuit interpreted and applied the Michigan assignment of rents statutes in the *Town Center Flats* case, cited above. The precise issue before this Court was not presented or decided in *Town Center Flats*, because the mortgagor in that case met all five steps (steps 1-5). *See* 855 F.3d at 726 n.1. Nonetheless, the court of appeals repeatedly used language indicating that steps 1-3 are sufficient to transfer ownership of the rents to the mortgage creditor. For example, in its concluding section, the court stated: "Mich. Comp. Laws § 554.231 allows for transfers of ownership when an agreement to assign rents indicates an intention to do that, has been recorded, and default has occurred." 855 F.3d at 728. Earlier in its opinion, and citing, among other cases, the *Otis Elevator* case, the court stated:

> Michigan courts generally discuss assignments of rents under § 554.231 as ownership transfers. ... Once an assignee has: 1) entered into an agreement to assign rents; 2) recorded that agreement; and 3) default has occurred, then the assignee's rights "are perfected and binding against the assignor" and the assignor "no longer has [a] valid property interest in the rents." [*Otis Elevator Co.*, 522 N.W.2d at 734]. The assignor has the legal right to collect the rents directly from tenants once notice of the default has been filed in the county's register and served on the tenants. Mich. Comp. Laws §§ 554.231, 554.232. Michigan courts have generally treated the assignment of rents as a transfer of ownership once the agreement has been completed and recorded and a default has occurred. *See Otis Elevator*, 522 N.W.2d at 733 (stating "once [the assigner] recorded the mortgage and the mortgagor's default, the assignment of rents was valid and enforceable as between the mortgagor ... and the mortgagee.") *Otis Elevator* implies that this should be regarded as a transfer of all rights in the rents. 522 N.W.2d at 733 (finding that the assignor "no longer has an interest in the rents.").

855 F.3d at 725-26.

Later, in a 2018 case, the Sixth Circuit quoted with approval from the language ***385** above in *Town Center Flats*, and reiterated that "the assignment of rents effectuate[s] a transfer of ownership upon default under Michigan law." *WBCMT 2003-C9 Island Living, LLC v. Swan Creek Ltd. P'ship*, 738 Fed. App'x. 833, 837-38 (6th Cir. 2018).

As noted in footnote 73 above, an older bankruptcy court case from this district held in 1985 that under the Michigan assignment of rents statutes, the occurrence of steps 1-3 is sufficient to transfer ownership of rents to the mortgagee, even without the occurrence of steps 4 and 5. *In re P.M.G. Properties*, 55 B.R. at 870. But that view was not unanimous among the older bankruptcy cases. SPE cites two older bankruptcy cases that it says supports its view, that all five steps are necessary before a mortgagor obtains ownership of rents under an assignment of rents: *In re Mt. Pleasant Ltd. P'ship*, 144 B.R. 727, 734 (Bankr. W.D. Mich. 1992) and *In re Coventry Commons Assocs.*, 143 B.R. 837 (E.D. Mich. 1992).

The *Mt. Pleasant*, case does support SPE's position, but the *Coventry Commons* case does not. In *Mt. Pleasant*, the bankruptcy court discussed an assignment of rents under Michigan law, and held that when steps 1-3 have occurred, but steps 4 and 5 have not, "the debtor has at least the bald legal right to collect the rent," and therefore has a right to use the rents as cash collateral, provided that "there is adequate protection of the creditor's interest[.]" *See* 144 B.R. at 734. That case also held that where steps 1-5 all have been completed, "the debtor has lost the legal right to collect the rents[, and t]herefore, the rents cease to be property of the [bankruptcy] estate." *Id.*

Coventry Commons does not support SPE's argument that all five steps must occur before ownership of the rents transfers to the mortgagee. *Coventry Commons* held that steps 1-3 were sufficient to give the mortgagee a perfected present *security interest* in the rents, and that steps 4 and 5 were not necessary "when the [mortgagee] seeks to enforce an assignment of rents against the assignor only," as opposed to enforcing it against the tenants. 143 B.R. at 838. *Coventry Commons* did not hold that completion of steps 1-3, or even of steps 1-5, caused *a transfer of ownership* of the rents to the mortgagee. That issue apparently was not argued by the parties in *Coventry Commons*. But the later cases discussed above, such as *Otis Elevator* and *Town Center Flats*, held that there is an actual transfer of ownership of the rents to the mortgagee.[74] *Coventry Commons* does support this Court's distinction, discussed above, between the effect of steps 1-3 and the effect of steps 4 and 5. In that way, it

undercuts SPE's argument.

[74] In addition to the *Mt. Pleasant* case and the *Coventry Commons* case, a bankruptcy court decision from 1994 held that an assignment of rents merely gives the mortgagee a security interest in the rents, rather than absolute ownership. *See In re Newberry Square, Inc.*, 175 B.R. 910, 915 (Bankr. E.D. Mich. 1994). But that holding was rejected in later cases, including the Sixth Circuit's 2017 decision in *Town Center Flats*.

As discussed above, it is true that the *Mt. Pleasant* case supports SPE's position. But to that extent, the Court respectfully disagrees with that case. *Mt. Pleasant* was decided before the three Michigan Court of Appeals cases discussed above, beginning with *Otis Elevator*. Based on those more recent Michigan appellate cases, as well as the Sixth Circuit's recent discussions of Michigan law on assignment of rents in *Town Center Flats* and *WBCMT 2003-C9 Island Living*, described above, this Court holds that under Michigan law, ***386** only steps 1-3 are necessary in order to transfer ownership of rents to the mortgagee under an assignment of rents provision like the one involved in this case.[75]

[75] The undersigned judge discussed an assignment of rents in *In re Madison Heights Grp., LLC*, 506 B.R. 728 (Bankr. E.D. Mich. 2013). In that case, this Court stated that steps 1-5 "are required in order for a creditor to obtain 'complete enforcement of an assignment of rents.' " 506 B.R. at 730 (citations omitted). For this proposition, the Court cited the *Mt. Pleasant* case and *In re Woodmere Investors Ltd. P'ship*, 178 B.R. 346, 358-59 (Bankr. S.D.N.Y. 1995) (a bankruptcy case in which all five steps had occurred pre-petition). But in *Madison Heights Grp., LLC*, this Court found that there was no dispute that steps 1-5 all had occurred pre-petition. *See Madison Heights Grp., LLC*, 506 B.R. 728, 730 (Bank. E.D. Mich. 2013); *see also In re Madison Heights Grp., LLC*, 506 B.R. 734, 737-39 (Bankr. E.D. Mich. 2014) (opinion denying motion for reconsideration). So in *Madison Heights*, this Court was not called upon to decide whether steps 1-3 alone were sufficient to transfer ownership of the rents under Michigan law.
To the extent this Court's language in *Madison Heights Grp., LLC* indicates that all five steps are necessary to transfer ownership of the rents to the mortgagee, rather than steps 1-3 being sufficient, the Court now retreats from such a position, based on *Otis Elevator* and the other Michigan appellate cases cited above.

When steps 1-3 are completed, but steps 4 and 5 have not yet been completed, the tenants have a right to continue paying rent to the debtor, and have no duty to pay rent to the mortgage creditor. In that situation, however, rents paid to the debtor are, and remain, property of the mortgage creditor, and the debtor holds such rents as such. In a case like this one, where a receiver was appointed to collect the rents, the receiver holds the rents collected for the mortgagee, who owns the rents under the assignment of rents. *See WBCMT 2003-C9 Island Living, LLC v. Swan Creek Ltd. P'ship*, 738 Fed. App'x. 833, 838 (6th Cir. 2018). And the mortgagee's ownership of the rents extends to rents collected by the debtor or the receiver even before the debtor defaulted, as well as after default. *See 7800 W. Outer Road Holdings, L.L.C. v. College Park Partners, L.L.C.*, No. 303182, 2012 WL 2402010, at *4-5 (Mich. Ct. App. June 26, 2012) (per curiam).

B. Other issues

For the reasons described above, the Court concludes that there is no cash collateral that SPE can use in this case. The rental income from the SPE's tenants, and the right to receive that income, belongs entirely to the Lender, unless and until SPE fully pays its debt to the Lender, or redeems SPE's real estate after a foreclosure sale. The Cash Collateral Motion therefore must be denied.

SPE makes several other arguments in support of its Cash Collateral Motion, but none of those arguments changes the result just described.

1. SPE's argument based on Bankruptcy Code § 552(b)

SPE argues that for various reasons, the Lender's security interest in the rents should not be deemed to extend to rents paid by SPE's tenants after the commencement of the bankruptcy case, "based on the equities of the case," within the meaning of 11 U.S.C. § 552(b). This argument fails because the "equities of the case" exception, which is an exception to the general rule that pre-petition security interests extend to collateral acquired post-petition, applies only to the question of whether a creditor's "security interest" will extend to such post-petition acquired property. It does not apply to the Lender's *ownership* of rents that come due and that are paid by SPE's tenants post-petition. ***387** Because the Lender owns such post-petition rents, and SPE does not, § 552(b) does not permit the Court to limit the Lender's ownership rights in the rents that are paid post-petition. Section 552 states:

> (a) Except as provided in subsection (b) of this section, **property acquired by the estate or by the debtor** after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.
>
> (b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, **then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case** to the extent provided by such security agreement and by applicable nonbankruptcy law, **except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.**
>
> (2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and **if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property** or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, **then such security interest extends to such rents** and such fees, charges, accounts, or other payments **acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.**

11 U.S.C. § 552 (emphasis added).

Based on the bolded language quoted above, § 552(a) does not apply here, because the rents are not property "acquired by the estate or by the debtor" after the commencement of the case. Sections 552(b)(1) and 552(b)(2) do not apply, because the issue is whether the Lender's *ownership* of the rents extends to post-petition rents. Sections 552(b)(1) and 552(b)(2) do not address that issue, and are limited in application to rents acquired by "the estate" post-petition. Because the rents are not property of the estate, they are not acquired "by the estate." So these sections do not give the Court any authority to limit the Lender's *ownership rights* in the post-petition rents, based on the "equities of the case" or otherwise.

SPE has cited no contrary authority.

Even if the § 552(b) "equities of the case" exception could apply here, the Court would not exercise its discretion under that exception to limit the Lender's security interest or ownership interest in the rents acquired post-petition. The "equities of the case" would not justify such a limitation in this case. SPE's arguments about the "equities of the case" are not persuasive. SPE's equities arguments are (1) that the Lender has failed to provide SPE with a loan payoff statement, as requested by SPE's counsel on January 25, 2019, which SPE says is needed so it can ***388** continue to seek to refinance the Loan with another lender; and (2) that the Lender is charging a "criminally usurious interest rate" on its loan, in violation of Michigan law.

These arguments fail. First, at this point in time, the detailed Acceleration Notice that the Lender provided to the Debtors on December 24, 2018 is sufficient under the circumstances to inform the Debtors of the approximate amount currently needed to pay off the Loan, and the exact amount can easily be calculated and obtained from the Lender if and when SPE actually obtains approval of a refinancing loan from another lender. Second, the Court finds that the Lender is not violating the Michigan usury statute, for the reasons discussed in subsection (d) below.

For these reasons, the Court finds that SPE would not be entitled to any relief any under § 552(b) based on the "equities of the case," even if that section could apply to the Lender's ownership interest of post-petition rents, which it does not.

2. The Lender's failure to file a U.C.C. financing statement in Delaware

SPE argues that because SPE is a Delaware limited liability company, the Lender had to file a U.C.C. financing statement in Delaware, the state of the Borrower's incorporation, citing 6 Del. C. § 9-307(e). A U.C.C. financing statement was filed in Michigan, but not in Delaware. SPE argues that the Lender's failure to file in Delaware means that the Lender is "not perfected in any of the Skymark Properties, SPE's personal property."[76]

[76] Debtors' Combined Br. in Response to Joint Dismissal

Mot. (Docket # 55-1 in Case No. 19-40211) at 30.

In an argument SPE made only in the hearing, and not in its pre-hearing brief or other papers, SPE argues that all rents paid by SPE's tenants to the Receiver became SPE's personal property once they were paid to the Receiver, and held by the Receiver in the form of cash or a bank deposit. As such, the paid rents became collateral for which the Lender had to have filed a U.C.C. financing statement in Delaware. Thus, SPE argues, the Lender did not have a perfected security interest in the paid rents. From this, SPE argues that any claimed security interest or claim of ownership by the Lender in the rents that were paid to the Receiver is subject to challenge and avoidable.

SPE has not cited any authority in support of this argument, and the Court must reject it. SPE does not dispute that the Lender has had at all times a perfected mortgage in SPE's real property and a perfected interest by virtue of the assignments of rents, by virtue of the recording in 2016 of the Lender's Mortgage. And, as this Court has discussed in Part IV.A of this opinion, the SPE's right to receive rents and the rents became the sole property of the Lender as soon as SPE defaulted under the Mortgage. The first default by SPE under the Mortgage occurred at least as early as the date on which the Receiver was appointed, on September 26, 2018. *See* Part III.B.1 of this opinion (appointment of a receiver is an Event of Default). This means that all rents that were paid to the Receiver by the tenants were property of the Lender, and the Receiver has been holding all such rents as property of the Lender. Because the rents paid to the Receiver at all times were property of the Lender, there was no need for the Lender to perfect a security interest in *SPE's personal property* — the paid rents were not SPE's property. For these ***389** reasons, SPE is simply wrong in asserting, without authority, that the Lender's security interest and assignment of rents became unperfected when the rents were paid by the tenants to the Receiver.

3. The alleged error in the legal description of SPE's property in the Mortgage

In their brief, the Debtors asserted that the Lender's "mortgage (and amendment) contains several errors in the legal description," as noted in "a draft title commitment policy from First American Title [Insurance Company] (Exhibit 8)." SPE then stated that the "Debtors reserve all rights to challenge the validity, priority, and extent of [the Lender's] lien on [the] Debtors' real properties. *See* *Vandenbosch v. Edlund (In re Vandenbosch)*, 405 B.R. 253, 264 (Bankr. W.D. Mich. 2009)[.]"[77]

77 Debtors' Combined Br. in Response to Joint Dismissal Mot. (Docket # 55-1 in Case No. 19-40211) at 31.

The Court construes this argument by SPE as nothing more than a reservation of rights to later challenge the validity, priority, and/or extent of the Lender's Mortgage lien, rather than a present challenge of any of those things. This is apparent from the wording of SPE's brief, quoted above, and from the fact that SPE failed to properly support or develop any argument about the validity of the Lender's Mortgage. SPE has failed to allege any specific facts about alleged error(s) in the Mortgage's legal description that could even arguably make the Lender's Mortgage invalid, or otherwise limit the scope of that Mortgage in any way, under Michigan law. In their brief, and during the hearing, SPE's counsel did not identify what the alleged errors in the Mortgage's legal description were, and in fact, said that he did not know what the alleged errors were. Nor did he present any sort of reasoned argument as to why any alleged error(s) affected the validity or extent, or the possible avoidability, of the Lender's Mortgage in any way under applicable law. The "Exhibit 8" cited in SPE's brief, a draft title commitment policy from First American Title [Insurance Company], merely stated, with respect to the Mortgage, the following "NOTE: Above document contains an error in the legal description."[78] During the hearing, the Court asked SPE's counsel what the error was in the legal description, and SPE's counsel stated that he did not know.

78 Docket # 55-10 (Ex. 8 at Docket # 55 in Case No. 19-40211) at "page 8 of 14," item 20.

The factual and legal assertions and the argument made by SPE regarding any alleged error in the Mortgage's legal description clearly are insufficient to permit the Court to question the validity, priority, or extent of the Lender's Mortgage lien. And they are insufficient to negate the Court's conclusion, which the Court now makes, that the Lender has sufficiently demonstrated, for purposes of the Court's decision on the Cash Collateral Motion, the validity, priority, and extent of the Lender's Mortgage lien. *See* 11 U.S.C. § 363(p)(2).[79]

79 During the hearing, the attorney for the Receiver stated that he had learned from American First Title [Insurance Company] that the only alleged error in the legal description in the Lender's Mortgage was in a

metes-and-bounds description for one of the real estate parcels, where at one place, the description stated "East" when it should have stated "West." The Receiver provided further details on this point in a supplement filed after the hearing. (Receiver's Supplement Regarding Joint Dismissal Motion (Docket # 67 in Case No. 19-40211)).
Such an error in the legal description appears to be too trivial, and not of such a nature, to have any impact on the validity, priority, or extent of the Lender's Mortgage in the Debtors' real property. *See, e.g., Fuhrman v. Wilmington Sav. Fund Soc'y, FSB (In re Fuhrman)*, No. 17-21073-DOB, 596 B.R. 342, 346–49, 2018 WL 6722365, at *3-4 (Bankr. E.D. Mich. Dec. 18, 2018) (granting summary judgment against a Chapter 13 debtor's claim seeking to avoid a mortgage because of an error in the metes-and-bounds legal description). In this respect, this case is quite different from the *Vandenbosch* case, cited by SPE. In that case, a mortgage was successfully avoided by a Chapter 7 Trustee because it only contained a legal description of an entirely different piece of property — "the vacant lot adjacent to the property, rather than the "Property itself." *See Vandenbosch*, 405 B.R. at 264.

***390 4. SPE's usury argument**

SPE argues that the Lender is charging interest, including default interest, on its Loan that exceeds the maximum 25% rate permitted under the Michigan usury statute, Mich. Comp. Laws Ann. § 438.41. Because of this, SPE argues, the Lender is barred from recovering any "interest, late fees, court costs or attorney fees," citing Mich. Comp. Laws Ann. § 438.32.[80]

80 Debtors' Combined Br. in Response to Joint Dismissal Mot. (Docket # 55-1 in Case No. 19-40211) at 29-30.

The Lender is not in violation of Michigan's usury statute. As the Lender correctly points out, the Promissory Note, at paragraph 18, contains a provision that necessarily means that the interest charged under the Promissory Note cannot exceed the maximum amount permitted by law. That provision states:

> 18. Usury. It is the specific intent of the Borrower and Lender that this [Promissory] Note bear a lawful rate of interest, and if any court of competent jurisdiction should determine that the rate herein provided for exceeds that which is statutorily permitted for the type of transaction evidenced hereby, the interest rate shall be reduced to the highest rate permitted by applicable law, with any excess interest theretofore collected being applied against principal or, if such principal has been fully repaid, returned to Borrower on demand. More specifically, the calculation of Interest in this [Promissory] Note shall not exceed 25% when considering all fees or other costs which are interpreted as interest.[81]

81 Promissory Note (Ex. 1 to Docket # 55-2 in Case No. 19-40211) at pdf. p. 16 ¶ 18.

Under the Promissory Note, by definition, the interest due under the Loan contract between the parties cannot exceed the maximum rate allowed by Michigan's usury statute.

Furthermore, even if the Loan was in violation of the Michigan usury statute, the Lender would still be entitled to recover repayment of the full principal amount of its Loan, under Mich. Comp. Laws Ann. § 438.32, which was $ 17.7 million as of December 30, 2018. *See Washburn v. Michailoff*, 240 Mich.App. 669, 613 N.W.2d 405, 410 (2000) (citation omitted) ("[W]hen a lender seeks to enforce a usurious contract, the borrower is entitled to have any previously paid interest applied against the outstanding principal.). Because of such debt, the fact remains that the Lender owns the rents from SPE's real estate, which means that there is no "cash collateral" that SPE can use.

5. SPE's "net rents" argument

SPE argued during the hearing that even if the Lender did become the owner of the rents upon the SPE's default, that ownership only extends to the "net rents," meaning only the rents left over after the rents are first used to pay the reasonable expenses of maintaining and operating SPE's commercial office property. But SPE has cited no authority under Michigan ***391** law to support this argument, and the Court is not aware of any such authority. Rather, the statutes and cases discussed in Part IV.A of this opinion clearly indicate that the Lender obtained ownership of all rents, not just the "net rents," under the assignment of rents.

V. Conclusion

For the reasons stated in this opinion, the Court must deny the Cash Collateral Motion. The Court will enter a separate order denying that motion.

All Citations

597 B.R. 363

End of Document

658 So.2d 531
Supreme Court of Florida.

JERSEY PALM-GROSS, INC., Petitioner,
v.
Henry PAPER, et al., Respondents.

No. 84158.
|
July 20, 1995.

Synopsis
Lender brought action against borrower for repayment of short-term loan, and borrower asserted usury defense. The Circuit Court, Palm Beach County, Richard B. Burk, J., found the loan usurious. On appeal, the District Court of Appeal, Pariente, J., 639 So.2d 664, affirmed and certified conflict to the Supreme Court. The Supreme Court, Anstead, J., held that: (1) usury savings clause did not preclude finding of usury, and (2) share of partnership obtained by lender in partial consideration for loan was valuable enough for loan to violate usury laws.

Affirmed.

Overton, J., concurred and filed opinion in which Wells, J., concurred.

Attorneys and Law Firms

***532** Daniel S. Pearson and Lucinda A. Hofmann of Holland & Knight, Miami, for petitioner.

Robert W. Weinberger of Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, for respondents.

Opinion

ANSTEAD, Justice.

We have for review *Jersey Palm-Gross, Inc. v. Paper,* 639 So.2d 664 (Fla. 4th DCA 1994), in which the Fourth District certified conflict with *Forest Creek Development Co. v. Liberty Savings & Loan Ass'n,* 531 So.2d 356 (Fla. 5th DCA 1988), *review denied,* 541 So.2d 1172 (Fla.1989). We have jurisdiction. Art. V, § 3(b)(3), Fla.Const. We approve the decision below, and disapprove *Forest Creek* insofar as it holds that a usury savings clause precludes, as a matter of law, a finding of usury.

FACTS AND PROCEDURAL HISTORY

We quote the following relevant facts from the Fourth District opinion below:

> The borrowers [Henry Paper and Anthony V. Pugliese, III] were partners in a real estate partnership which required capital to build a multi-tenant office building. The partnership owned land consisting of three prime lots in West Palm Beach worth $1,700,000, subject to a purchase money mortgage of $1,100,000 that was due shortly. To satisfy the purchase money mortgage and construct an office building on the land, the borrowers went to a ***533** bank to secure a loan. After obtaining an appraisal of the partnership assets and the project, the bank agreed to lend the partnership most of the needed capital. The loan amount, however, was $200,000 short of the estimated partnership needs. The borrowers needed a "bridge-the-gap loan."
>
> The borrowers approached Walter Gross (Gross), a real estate developer, and suggested that he become an equity partner in the partnership for an investment of $200,000. Gross reviewed the partnership assets and appraisal. Fully aware of the partnership's financial picture and needs, he refused to become an investor, but agreed to lend the partnership $200,000 and charge an interest rate of 15% for eighteen months, amounting to $45,000 in interest charges. By the time of closing, Gross had formed the appellant corporation, Jersey Palm-Gross, Inc., for the purpose of making the loan.
>
> Shortly before closing, Gross presented the borrowers with loan documents which included a demand for a 15% equity interest in the partnership as additional consideration for making the loan. Gross did not attempt to hide his motives for exacting an interest in the partnership. He testified that the partnership interest was an inducement to make the loan, even though he had previously agreed to loan the money at a 15% interest rate. Gross knew the value of the partnership based on the borrowers' disclosures and was aware of the borrowers' urgent need for funds. The borrowers were in desperate financial straits. With closing

> imminent, they were in no position to bargain or to seek another source of the money.
>
> The lender brought suit when the borrowers failed to repay the loan. The borrowers' defense was that the loan was usurious from its inception, and therefore, an unenforceable debt because the consideration for the loan, which included the partnership interest and the 15% interest rate, totaled 45% per annum in interest.
>
> ....
>
> The trial court here made factual findings, on the evidence presented, that the net equity value of the partnership at the time the loan was made, based on partnership assets of $1,700,000 and debts of $1,100,000, was $600,000.... The trial court correctly calculated the effective interest rate at 45% per annum over the eighteen month loan period, with the partnership interest of $90,000 (15% interest in partnership valued at $600,000) added to the $45,000 in interest charges (15% interest rate on loan of $200,000). The cost of the loan totaled $135,000, which was an effective interest rate of 45% on a loan of $200,000 for the eighteen month period of the loan.

639 So.2d at 666. After a non-jury trial, the trial court concluded that Gross had "knowingly and willingly" charged and accepted a usurious consideration in exchange for making the $200,000 loan transaction. Consequently, the trial court found the promissory note and guarantee unenforceable as usurious and ordered that Gross forfeit the entire principal amount of the loan pursuant to section 687.071(7), Florida Statutes (1991).

On appeal, Gross argued that the trial court had failed to properly consider a usury savings clause contained in the promissory note in determining the issue of intent. The Fourth District upheld the trial court's finding of usury and, in its analysis, posed the following question:

> [W]hether the existence of a contractual disclaimer of intent to violate the usury laws commonly known as a "usury savings clause" in the loan documents in this case removes the determination of usurious intent from a factual inquiry and conclusively proves as a matter of law that the lender could not have "willfully" or knowingly charged or accepted an excessive interest rate.

639 So.2d at 668. In answering this question in the negative, the Fourth District held that "[a] usury savings clause is one factor to which the finder of fact should look in determining whether all of the circumstances surrounding the transaction support a finding of intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned." *Id.* at 671.

***534** *LAW AND ANALYSIS*

The Florida Legislature enacted Chapter 687, Florida Statutes (1993), to protect borrowers from paying unfair and excessive interest to overreaching creditors. This chapter sets limits on interest rates and prescribes penalties for the violation of those limits. Section 687.071(2), Florida Statutes (1993), defines criminal usury as the willful and knowing charge or receipt of interest in excess of 25% per annum. *Id.* The civil penalty for violating this statute is forfeiture of the entire principal amount. § 687.071(7), Fla.Stat. (1993).

In *Chandler v. Kendrick,* we defined "willful" in the following manner:

> A thing is willfully done when it proceeds from a conscious motion of the will, intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so. "Willful" is sometimes used in the sense of intentional, as distinguished from "accidental," and, when used in a statute affixing a punishment to acts done willfully, it may be restricted to such acts as are done with an unlawful intent.

108 Fla. 450, 452, 146 So. 551, 552 (1933). We also explained the purpose and meaning of the usury statute:

> The very purpose of statutes prohibiting usury is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans.... It is not fully determined by the fact of whether the lender actually gets more than the law permits, but whether there was a *purpose in his mind to get more* than legal interest for the use of his money, and whether, by the terms of the transaction and the means employed to effect the loan, he may by its enforcement be enabled to get more than the legal rate.

Id. Subsequently, in *Dixon v. Sharp,* 276 So.2d 817, 820 (Fla.1973), we noted that: "[U]sury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, *but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent.*" *Id.* Moreover, "the question of intent is to be gathered from the circumstances surrounding the entire transaction." *Id.* at 821 (quoting *River Hills, Inc. v. Edwards,* 190 So.2d 415, 423-24 (Fla. 2d DCA 1966)).

Consequently, the ultimate arbiter on the issue of intent is the trial court because "the question of intent is one of fact." *Rebman v. Flagship First Nat'l Bank,* 472 So.2d 1360, 1364 (Fla. 2d DCA 1985).

SAVINGS CLAUSES

A usury savings clause is a provision in a loan agreement that attempts to negate any other provisions in the agreement that might result in the extraction of an illegal rate of interest. The effect of a usury savings clause on a claim of usury has been addressed by several of our appellate courts. In *Forest Creek,* the Fifth District affirmed, without discussion, the dismissal of a count based on usury where the mortgage note contained a usury savings clause which provided:

> In no event shall the amount of interest due or payment in the nature of interest payable hereunder exceed the maximum rate of interest allowed by applicable law, as amended from time to time, and in the event any such payment is paid by the undersigned or received by the Holder, then such excess sum shall be credited as a payment of principal, unless the undersigned shall notify the Holder, in writing, that the undersigned elects to have such excess sum returned to it forthwith.

531 So.2d at 357.

The Second District has approved of the trial court's consideration of a similar savings clause in determining whether a lender intended to charge excessive interest. In *Szenay v. Schaub,* 496 So.2d 883, 884 (Fla. 2d DCA 1986), the lenders contended that a genuine error had been made in calculating the amount of interest in the promissory note. Pursuant to the provisions of a usury savings clause, the trial court denied a usury claim and made an adjustment to the parties' agreement to bring the interest charged within legal limits. The district court held that although the agreement may have technically ***535** provided for a usurious rate of interest, the trial court acted within its fact-finding authority in relying upon the savings clause to determine that the lender had no intent to charge such an amount. 496 So.2d at 884. Similarly, in *First American Bank & Trust v. International Medical Centers, Inc.,* 565 So.2d 1369, 1374 (Fla. 1st DCA 1990), *review denied,* 576 So.2d 286 (Fla.1991), the First District, while not directly addressing the effect of a savings clause, made the following observation:

> We do note that provisions in loan documents limiting the amount of interest payable to that authorized under applicable law have been recognized as valid and enforceable in this state and provide a complete defense to a charge of usury. In a case such as this, where the effective interest rate found to be usurious is so near the allowable maximum depending on disputed legal principles of valuation, a strong showing indeed must be made to invalidate such provisions in the loan documents.... We do not, however, find it necessary to review the sufficiency of the record to support the trial court's adverse ruling on this issue.

Id. (citation omitted).

Because of the lack of extensive discussion, we cannot be certain of the circumstances present in *Forest Creek.* However, contrary to any implied holding in that case, we conclude that a usury savings clause cannot, by itself, absolutely insulate a lender from a finding of usury. Rather, we approve and adopt the Fourth District's holding, that a usury savings clause is one factor to be considered in the overall determination of whether the lender intended to exact a usurious interest rate. Such a standard strikes a balance between the legislative policy of protecting borrowers from overreaching creditors and the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful interest rate.

In rejecting the use of a savings clause as an absolute bar to a usury claim, we note, as have other courts, that a contrary holding would permit a lender to "relieve himself of the pains and penalties visited by law upon such an act by merely writing into the contract a disclaimer of any intention to do that which under his contract he has plainly done." *First State Bank v. Dorst,* 843 S.W.2d 790, 792 (Tex.Ct.App.1992) (quoting *Nevels v. Harris,* 129 Tex. 190, 102 S.W.2d 1046, 1050 (1937)). If approved, we believe this practice would undermine public policy as set by the legislature and defeat the purpose of Florida's usury statute. Indeed, such a practice might encourage lenders to charge excessive interest, since, even if caught, the only penalty would be the loss of the excess interest.

However, we also believe that savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances. For instance, we agree with Judge Pariente's illustration, in the majority opinion below, of the proper utilization of a savings clause:

> Where the actual interest charged is close to the legal rate, or where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent.

Jersey Palm-Gross, 639 So.2d at 671. While not exhaustive, this illustration captures the essence of the legitimate use of a savings clause. This illustration is also consistent with the way savings clauses were discussed or applied in *Szenay* and *First American Bank & Trust.*

THIS CASE

We agree with the district court that there is no indication that the trial court in this case failed to apply the correct legal standard for determining usury or erred in its treatment of the savings clause. There is substantial competent evidence in the record to support the court's finding of usury. For example, there is evidence that the lender directly sought and received a 15% interest in the partnership, in addition to the 15% interest on the loan as initially agreed. The lender also knew "that the borrowers had an urgent need for the money." *Jersey Palm-Gross,* 639 So.2d at 668. These circumstances support the trial court's finding of an intent on the part of the lender to extract an ***536** excessive rate of interest, and this finding, in view of those circumstances, is consistent with the law set out in *Chandler* and *Dixon.*

In addition, we note that there is no complex loan transaction involved here or any claim of a mistake in the mathematical calculations like that seen in *Szenay;* neither is the interest charged close to the legal limit as discussed in *First American Bank & Trust.* In short, unlike *Szenay* and *First American Bank & Trust,* there are no circumstances present that would require the trial court to apply the usury savings clause to avoid the excessive interest. Further, the entire additional consideration of the 15% interest in the venture would have to be stricken to avoid the excessive interest charged. As noted in *First State Bank,* that would clearly be giving effect to a lender's "disclaimer of any intention to do that which under his contract he has plainly done." We decline to mandate such an outcome here.

It is also noteworthy that the usury savings clause in this case was not included in the agreement granting the lender a 15% interest in the partnership. Rather, the savings clause was contained only in the promissory note which, of course, contained a provision for lawful interest of 15%, and contained no reference to the additional consideration demanded by the lender. Under such circumstances, it is questionable whether the savings clause was even intended to apply to the separate agreement for an interest in the venture.

Jersey Palm-Gross, Inc. also asserts that the trial court should have concluded that the instant transaction, while arguably providing for an excessive interest rate on the date of closing, was reduced to nothing more than a speculative hope for profit after the partnership incurred a debt of approximately $2,000,000 to finance its development project. We disagree.

First, it is important to note that at the same time the venture incurred a debt of $2,000,000, it received an asset of $2,000,000 in the form of proceeds of the development loan. Second, and more importantly, however, section 687.03(3), Florida Statutes (1993), in pertinent part instructs that:

> [A]ny payment ... charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest shall be valued as of the date received and shall be spread over the stated term of the loan, advance of money, line of credit, forbearance to enforce collection of a debt, or other obligation for the purpose of determining the rate of interest.

Pursuant to this section, the trial court was required to value the partnership interest as of the date received, which was March 27, 1990. The evidence presented at trial fully supports the trial court's valuation of the venture's worth on this date.

Lastly, if a trial court accepted the lender's position, it would be speculating as to the real estate development venture's chances of success at the time the lender joined the venture. That speculation, of course, could result in the lender's interest in the venture being set at an estimated value ranging from worthless to one many times its initial value. While there may be instances that might permit or require such speculation, we find no error in the trial court's failure to do so under the circumstances presented here. There is a sound and substantial basis in the evidence for the trial court's valuation, and for its ultimate finding on the usury issue.

Accordingly, we approve the Fourth District decision below and disapprove *Forest Creek* insofar as it is inconsistent with this opinion.

It is so ordered.

GRIMES, C.J., and SHAW, KOGAN, HARDING and WELLS, JJ., concur.

OVERTON, J., concurs with an opinion, in which WELLS, J., concurs.

OVERTON, Justice, concurring.

I concur because I believe that the trial judge, under the state of this record, could believe that the lender in this instance, at the time of making the loan, intended to charge a usurious rate of interest irrespective of the ***537** savings clause in the loan documents. I write to emphasize that a savings clause is still a valid factor-but not the exclusive factor-in determining the intent of the lender at the time of making the loan. A savings clause should have the purpose of assuring that usurious interest is not charged. The borrower, as the movant or claimant, has the burden of proof to establish the usurious intent of the lender.

WELLS, J., concurs.

All Citations

658 So.2d 531, 20 Fla. L. Weekly S389

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591 F.2d 47
United States Court of Appeals,
Ninth Circuit.

The KISSELL COMPANY, Defendant-Appellant, v. Forrest GRESSLEY and Emily Gressley, husband and wife, and Mountain View Garden Apartments, Plaintiffs-Appellees.

No. 76-3039.
|
Jan. 25, 1979.
|
Rehearing Denied March 2, 1979.

Synopsis
Apartment project developer and others sued mortgage banking company for wrongfully retaining mortgage on a piece of property after a description of that property was erroneously inserted into mortgage to which lender was entitled as security for land purchase, land development and apartment construction loans. The United States District Court for the District of Arizona, William P. Copple, J., rendered judgment against mortgage company, and it appealed. The Court of Appeals, James M. Carter, Circuit Judge, held that: (1) borrower developer's unrebutted testimony on profits he expected to make on project was not so uncertain or conjectural as to preclude their recovery; (2) remand was required to determine duplicate recovery in regard to sale of one tract; (3) even if only earned loan fees were viewed as interest, loans were usurious where effective interest rates still exceeded 18% Per year, and (4) although it was not contended that loan agreement was usurious on its face, savings clause did not permit lender to escape liability for usury where it was lender's wrongful act which caused developer to stop development and which triggered acceleration of loan payment schedules.

Affirmed in part and remanded in part.

Attorneys and Law Firms

***48** Burton M. Apker (argued), Neville, Laliss & Tanner, Evans, Kitchel & Jenckes, Phoenix, Ariz., for defendant-appellant.

John P. Otto (argued), Philip Gerard (argued), Phoenix, Ariz., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Arizona.

***49** Before ELY and CARTER, Circuit Judges, and GORDON THOMPSON, Jr., District Judge.[*]

[*] Honorable Gordon Thompson, Jr., District Judge, Southern District of California, sitting by designation.

Opinion

JAMES M. CARTER, Circuit Judge:

In this diversity case, Kissell, a mortgage banking company, appeals from judgment rendered against it for having wrongfully retained a mortgage on a piece of property after a description of that property was erroneously inserted into a mortgage to which Kissell was entitled as security for certain loans. The Gressleys and Mountain View Garden Apartments (hereinafter referred to collectively as Gressley) recovered $119,785.93 in actual and punitive damages on this count. Kissell also appeals from a determination that it charged a usurious rate of interest on the loans. Under Arizona law, a usurer must return to the borrower all interest paid on a usurious loan. Under this count, Gressley recovered an additional $27,850.00.

The facts show that Gressley, a housing developer in Arizona, signed loan agreements totalling $690,000 with Kissell in 1972. Of that amount, $52,000 was used to purchase the land, $73,000 was to be used to develop the land, and $565,000 was to be used to construct apartment dwellings on the land.

The loan agreements called for interest rates ranging between 73/4% And 81/2%, or 2% Over the prime rate at specified New York banks, adjusted according to which rate was higher. Kissell also charged loan fees of $1,040 on the land purchase loan, $1,460 on the land development loan, and $5,650 for the construction loan. Finally, Gressley signed an agreement which obligated him to pay to Kissell $203 for each of the 37 units in the eventual development for which the permanent buyer did

not obtain permanent financing from Kissell. This was apparently intended to motivate Gressley to persuade permanent buyers to finance through Kissell. Gressley gave Kissell, in advance, a note for $7,511 ($203 X 37) and was to be reimbursed pro tanto for each unit Kissell financed. It is the character of this money which determines whether the charges Gressley paid were usurious.

The property in question consisted of a parcel divided into 37 lots and a contiguous piece known as "tract A". Although both parcels were paid for with the $52,000 land purchase loan money, the trial court found that only the 37 lots were intended to serve as security for the loans. Kissell does not dispute that finding here. After Gressley executed mortgage documents on the 37 lots, they were given to Kissell, who then inserted tract A into the description of the property and recorded the mortgage. Later, when Gressley attempted to obtain separate financing to develop tract A, the cloud on his title was discovered and the other lender refused to go ahead. Kissell held tract A hostage, claiming it was always intended to secure the loans, and demanded payment for its release. Kissell does not dispute the trial court's holding that this retention of the mortgage on tract A was wrongful.

Apparently as a result of Kissell's refusal to release tract A, Gressley was unable to continue with either project. He sold his interest in them to another developer for $187,000 and paid off Kissell. Count I of Gressley's complaint below was for recovery of the value of tract A and other damages arising out of Kissell's refusal to release it.

Of the $690,000 originally committed, Kissell actually disbursed only $165,201.89 before the project went sour and the controversy discussed above arose. Gressley paid a total of $29,684.01 in charges and fees for that money, and Count II of his complaint below sought recovery of those charges and fees under Arizona usury laws.

The trial court awarded Gressley damages under Count I in the following amounts:
$40,000.00 as the value of tract A,

$73,200.00 as lost profits on the project(s), and

***50** $15,000.00 as punitive damages.

This was reduced by $8,414.07, which was that portion of the profits on the sale of the entire project attributable to tract A. As to Count II the court found that, of the money paid as charges and fees, $27,850.88 constituted interest, and because it was usurious, Gressley was entitled to recover it. Thus, his total recovery amounted to $147,636.81.

I. ISSUES
A. Damages
1. Were the lost profits Gressley expected to earn on the project so speculative as to preclude their inclusion in the damage award?

2. Did the damages award include any duplicate recovery?

B. Usury

1. Did the individual charges which Gressley paid constitute interest on the funds received so as to make the loan usurious?

2. May Kissell avoid usury on these facts by means of a savings clause which purports to negate usurious intent and provides for a reduction in the interest rate if it exceeds the rate allowed by law?

II. DISCUSSION

A. Damages

1. Were lost profits too speculative ?
Kissell admits liability for its wrongful refusal to release the mortgage on tract A, but it challenges the size of the award. It argues that, in light of the depressed housing market in Maricopa County where the development was located, Gressley should not have recovered any lost future profits because they were too speculative. Kissell cites United States Fidelity & Guaranty Co. v. Davis, 3 Ariz.App. 259, 413 P.2d 590 (1966) for the proposition that where the fact of damages is not proved, there can be no recovery, and it contends that its concession on the issue of liability for damages is not enough to prove the fact of lost future profits as part of those damages.

Gressley's evidence showing expected profits consisted of his own testimony on past experience with similar projects. This was supported by exhibits accepted into evidence which gave substance to his claims. Kissell

chose not to rebut that evidence.[1] Under Nelson v. Cail, 120 Ariz. 64, 583 P.2d 1384, 1387 (1978) such evidence is sufficient as prima facie proof of loss of expected profits. Once the Fact of loss is thus proven, courts will not quibble over the numbers involved, but will use a lenient approach to measurement of those damages. See, e. g., Id.; L.H. Bell & Associates, Inc., v. Granger, 112 Ariz. 440, 543 P.2d 428 (1975); Isenberg v. Lemon, 84 Ariz. 340, 327 P.2d 1016 (1958). In light of Gressley's unrebutted testimony on the profits he expected to earn on the project, we can not say that such profits were so uncertain, contingent, conjectural, or speculative as to preclude their recovery. See Fireman's Fund Insurance Co. v. Shawcross, 84 Nev. 446, 442 P.2d 907 (1968). Compare Schuldes v. National Surety Corp., 27 Ariz.App. 611, 557 P.2d 543 (1976); United States Fidelity & Guaranty Co. v. Davis, supra.

[1] No evidence on the alleged depressed housing market was presented at trial; Kissell raises it for the first time here.

2. Duplicate recovery ?

As noted above, part of Gressley's award included $40,000, which the trial court found to be the full value of tract A at the time Gressley was forced to sell it. Kissell contended at oral argument that this represented to some unspecified extent a double recovery, because the sale price of the entire project ($187,000) included recovery of some of the value of tract A. Gressley, on the other hand, argued that the sale price of the project included only the value of the 37 lots, plus improvements thereon, and that, in effect, he was forced to relinquish his interest in tract A without compensation. Although the record is not entirely clear on the matter, we are of the ***51** opinion that there probably was duplicate recovery, and we remand for a factual determination of the amount.

There are two reasons for our conclusion. First, Mr. Gressley's testimony at trial indicates that his interest in tract A was given up for value. When asked on direct examination about the sale of his interest in the project, Mr. Gressley testified as follows:

"I found a buyer and I endeavored to sell just the project lots 1 through 37 and retain Tract A. My buyers knew what had happened and knew what was going on and they would not buy it without buying the whole thing, and they paid me $187,000 for the project." Transcript A at 62.

Later, on cross-examination, the following exchange took place between Mr. Gressley and counsel for Kissell:

"Q: To whom did you ultimately sell Mountain View?

"A: P & K Development.

"Q: What was the sale price?

"A: $187,000.

"Q: And that included what?

"A: The loan payoff to the Kissell Company and the balance to me.

"Q: What did P & K get from you for its money?

"A: It got all of Tract A and the 1 through 37 lots and the houses in the stage of construction that they were, the four units." Transcript A at 97.

The foregoing suggests to us that the sale price of the entire project included some payment for release of Gressley's interest in tract A.

Second, the trial court itself gave tacit recognition of Gressley's having been compensated to some extent for tract A when it reduced his damages by $8,414.07 and designated this amount as profits attributable to tract A which were realized upon the sale. We do not understand how Gressley could have profited from the sale of tract A if he did not recover at least what he paid for it.[2]

[2] This, in turn, suggests to us a possible formula for determining the extent to which Gressley recovered the value of tract A when he sold the entire project. We propose it for consideration on remand, but leave it to the trier of fact to determine the actual amount. The trial court found that tract A comprised 36.8% of the area of the entire project. It then multiplied 36.8% by the profits Gressley made on the sale ($21,798.11) and came up with $8,414.07 as profits attributable to tract A. (Actually 36.8% of $21,798.11 is $8,021.70. Either the arithmetic was wrong, or else the percentage figure was incorrectly typed; $8,414.07 is 38.6% of $21,798.11.) If the same percent (36.8%) is multiplied by the cost of the whole parcel ($52,000), the resulting figure ($19,136) would be the amount Gressley recovered which represents the value of tract A. The difference between that amount and the value of tract A at the time it was sold ($40,000 - $19,136 = $20,864) would be the increase in value between purchase and sale, of which Gressley was deprived because of Kissell's wrongful acts. Gressley would be entitled to recover this amount.

Double recovery is disfavored. See generally Adams v. Dion, 109 Ariz. 308, 509 P.2d 201 (1973); Ball Corp. v. George, 27 Ariz.App. 540, 556 P.2d 1143 (1976). It should be particularly avoided where, as here, punitive as well as compensatory damages were assessed. See Erie Basin Metal Products v. United States, 150 F.Supp. 561, 138 Ct.Cl. 150 (1957). We therefore remand, and direct the trial court to reduce Gressley's judgment by an amount equal to that portion of the value of tract A which Gressley recovered when he sold the entire project for $187,000.

B. Usury

1. Were the loans usurious ?

Kissell next contends that the $7,511 paid on the note should have been characterized as a commitment fee for permanent financing, and under Altherr v. Wilshire Mortgage Corp., 104 Ariz. 59, 448 P.2d 859 (1968), would not be considered interest. In the alternative, it argues, the note should have been viewed as front-end interest on the permanent loan, not as interest on the interim financing. In either case, the objective sought is to reduce the effective interest rate on the money loaned to below the maximum allowed by law.

***52** The trial court treated the money as commitment fees, but found that, under Altherr, supra, it could still be viewed as interest. We agree with that view.

We do not find it necessary to rehash the excellent analysis found in Altherr. Suffice it to say that under Altherr, whether or not a commitment fee is interest depends upon all the facts and circumstances surrounding its assessment.

"Where a reasonable commitment fee is charged under proper circumstances, the failure of the borrower to use part or all of the money committed, will not of itself make the charge unreasonable or illegal. The determination of its legality requires an ad hoc approach. Pertinent factors would be the tightness or looseness of money, the amount of the fee, the rates prevailing in the short-term money market where the lender might keep the funds while waiting for the borrower to call for the loans, etc. What would be a reasonable fee at one time might be unreasonable at another. Each case must necessarily require a decision on its own facts, and no case would be authority for another with slightly different circumstances." 448 P.2d at 864.

Furthermore, if a lender exacts fees and charges for loans that exceed the maximum allowed by law, then there is a prima facie showing of usury and the lender has the burden of proving those fees and charges were not interest, but rather fees for services rendered or reasonable commitment fees.[3]

[3] 448 P.2d at 864. This rule was stated in the context of a discussion of delivery fees, or fees for services rendered, as interest. Such fees are not normally viewed as interest unless they are unreasonable. We see no principled reason for distinguishing between delivery fees and commitment fees for purposes of assigning the burden of proving them reasonable. Both must be earned before they will not be viewed as interest, and a court is entitled to examine all the facts and circumstances surrounding the assessment of each fee in order to determine if they were so earned. Under these circumstances, the burden of proof should rest in the same place. See Kamrath v. Great Southwestern Trust Corp., 27 Ariz.App. 102, 551 P.2d 92 (1976).

Here, no evidence at all was presented, either for or against the reasonableness of the commitment fees. Because, under the formula for computing effective interest rates applied here the validity of which Kissell does not dispute the rate exceeded 18% per year, the burden shifted to Kissell to prove that what it characterized as commitment fees were reasonable. It failed to meet that burden.

Kissell's contention that the $7,511 should be treated as front-end interest on the permanent loans is likewise without merit because it specifically disclaimed in the loan agreement any intention of charging such front-end interest.

Kissell makes a third argument pertaining to the loan fees charged on the purchase, development and construction loans. It contends that those fees should be viewed as interest spread over the entire amounts of the loans for the entire life of the loans. This is consistent with Altherr, which also teaches that such loan fees are interest only to the extent they are earned, and if they are not earned, they should be returned to the borrower without being treated as interest. 448 P.2d at 865. However, even if Kissell's view is adopted, so that only the earned loan fees are viewed as interest, the effective interest rate still exceeds 18% per year.

We affirm the lower court in its holding that the $7,511 was interest on the interim loans, and that the effective interest rate which Gressley paid was usurious. The

proper remedy under such circumstances is the return to the borrower of all interest paid. A.R.S. s 44-1202.

2. The savings clause

Kissell's final argument is that a "savings clause" in the loan agreement negates the intent element necessary to finding usury and thus purifies what might otherwise be a usurious transaction. The clause provides for interest rates that fluctuate with the prime rate at certain New ***53** York banks, and purports to require the total interest rate to stay below the maximum rate allowed by law.

While it is true that intent is a necessary prerequisite to usury, it is not true, as would necessarily follow from Kissell's argument, that the lender must have a specific intent to commit usury. Rather, if the lender intends to charge the fees he does, and those fees are in fact usurious, the intent element is satisfied. This conclusion is strongly suggested in Houchard v. Berman, 79 Ariz. 381, 383, 290 P.2d 735, 737 (1955) where the court states:

"If the face of the contract reflects a usurious charge, the intent will be presumed, otherwise the circumstances surrounding the transaction must show such intent."

Clearly, if a loan agreement is usurious on its face, and no interpretation of the agreement would allow a conclusion that it is not usurious (Starkovich v. Southwest Savings and Loan Ass'n, 14 Ariz.App. 382, 483 P.2d 795 (1971)), a savings clause will not salvage it. See Southwestern Investment Co. v. Hockley County Seed and Delinting, Inc., 511 S.W.2d 724 (Tex.Civ.App.1974); Terry v. Teachworth, 431 S.W.2d 918 (Tex.Civ.App.1968). That is not the case here because neither party contends that the loan agreement was usurious on its face. Nevertheless, Kissell can not escape liability for usury. It was Kissell's wrongful acts with respect to the tract A mortgage which caused Gressley to stop development of the project and which triggered the acceleration of the loan payment schedule. The trial judge so found, and that finding is not disputed. Acceleration compressed the time period over which the fees paid were spread for purposes of computing interest, and the effective rate was thus made usurious. Under those circumstances, to allow Kissell to avoid the consequences of usury merely because a savings clause was inserted into the boilerplate of the loan agreement would seriously undermine the principles outlined in Altherr, supra.

Our holding that Kissell's contention regarding the savings clause is without merit is limited to the situation where interest charges exceed the rate allowed by law And the reason for that excess lies in some wrongdoing on the part of the lender. This is not inconsistent with the principles found in Southwestern Investment Co., supra, and Terry v. Teachworth, supra, and will not unduly threaten the ability of lenders to grant loans with variable interest rates, thereby enabling them to remain in business in a volatile money market.

III. CONCLUSION

The case is remanded to the district court for a factual determination of the extent to which Gressley recovered the value of tract A when he sold the project to the new developer, and for a reduction in the judgment accordingly. In all other respects, the decision is AFFIRMED.

All Citations

591 F.2d 47

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

MIDWEST BUSINESS CREDIT, L.L.C.,
Plaintiff–Appellant,
v.
TTOD LIQUIDATION, INC. and Lapeer Plating & Plastics, Inc.,
Defendants–Appellees.
and
Dott Acquisition, L.L.C., Defendant.

Docket No. 305569.
|
Nov. 27, 2012.

Lapeer Circuit Court; LC No. 10–043082–PD.

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

Opinion

PER CURIAM.

***1** Midwest Business Credit, L.L.C., a Nevada company with its principal place of business in Illinois ("Midwest"), appeals as of right from the trial court's final order on July 25, 2011, dismissing Midwest's remaining claims against the debtor, Dott Acquisition, L.L.C. ("the debtor"). Midwest primarily contests the trial court's prior grant of summary disposition pursuant to MCR 2.116(C)(10) to defendants TTOD Liquidation, Inc. and Lapeer Plating & Plastics, Inc. ("defendants"), both Michigan companies, in its order on December 6, 2010.[1] For all the following reasons, we affirm in part, reverse and remand in part.

[1] The court did not immediately enter a final order after granting summary disposition to defendants in part because the court initially stayed its order and refused to release defendants' $250,000 deposit pending Midwest's application for leave to appeal with this Court. Midwest sought the stay because it was concerned about the lack of a remedy in the event this Court reversed the trial court's dispositive decision, as the trial court permitted defendants to use and consume the collateral in the ordinary course of business. After this Court denied leave to appeal in *Midwest Business Credit LLC v. TTOD Liquidation, Inc.,* unpublished opinion per curiam of the Court of Appeals, issued June 15, 2011 (Docket No. 301540), the trial court returned the deposit, released all restrictions on the use of the collateral, and later entered the final order by dismissing the debtor.

I. FACTUAL BACKGROUND

This case primarily involves a dispute between two creditors, Midwest and TTOD Liquidation, Inc. ("TTOD"), over their respective rights in the debtor's collateral—inventory comprised of manufacturing materials for use in fabricating chrome-plated, plastic-molded automobile parts. The debtor, a bankrupt Michigan company who defaulted on its loan obligations to both Midwest and TTOD, is not a party to this appeal. The disputed collateral is comprised of the debtor's inventory, as well as all inventory records and insurance proceeds of the inventory, worth approximately $3,000,000.

The loan agreement between Midwest and the debtor ("Midwest loan") contained a choice of law provision, which specified that the terms of the agreement would be governed by Illinois law. The agreement provided the debtor with a $500,000 line of credit, while interest would be charged at: (1) five percent higher than the prime rate; and (2) upon default, the lesser of 23 percent a year, or the highest rate permitted under Illinois Law. To protect Midwest's investment and establish the creditors' respective priorities in the debtor's inventory, Midwest and TTOD independently entered into the Intercreditor and Lien Subordination Agreement ("Intercreditor Agreement"), which granted Midwest priority over TTOD in the debtor's inventory to the extent of the "Midwest Obligations," while acknowledging that TTOD claimed priority over the remaining inventory. "Midwest Obligations" was defined as "[t]he obligations of Debtor to Midwest, not exceeding in the aggregate $500,000 in principal plus interest thereon and all fees costs, and expenses incurred in connection therewith, that are now

or hereafter secured by all or a portion of the Midwest Senior Collateral and the TTOD Senior Collateral." Additionally, the Intercreditor Agreement restricts both Midwest and TTOD from taking "any action" with respect to each others' senior collateral, and permits each party to "interpose as a defense or plea the making of this Agreement," and do so "in its name or in the name of the Debtor" if either party acts to enforce the lien over each other's senior collateral.

When the debtor defaulted on its loan obligations, TTOD evicted the debtor from its facility and leased the space to Lapeer Plating & Plastics, Inc. ("LPP"), and permitted LPP to use and consume the collateral in order to produce automobile parts. However, TTOD required LPP to sequester a portion of the collateral that allegedly equaled the value of the Midwest Obligations. When TTOD failed to guarantee that none of the collateral was being consumed and failed to immediately permit Midwest to inspect the collateral, Midwest filed the instant complaint to recover all the collateral in order to satisfy the outstanding balance on the Midwest loan, which was $684,986. Midwest also sued TTOD for breach of the Intercreditor Agreement and both statutory and common law conversion.

***2** Following oral arguments, the trial court granted defendants' motion for summary disposition. The court initially found that TTOD held a valid security interest in the debtor's inventory, evidenced by the fact that TTOD presented its UCC–1 covering the collateral. However, defendants did not submit a signed security agreement from the debtor during this motion.[2] The court also found that, in the 18 months since Midwest executed the Midwest loan, "interest has accrued in the amount of $487,845.22," which constituted an interest rate in excess of 25 percent a year and qualified as criminal usury in Michigan.[3] Although unstated, the trial court implicitly held that the Midwest loan was unenforceable as a matter of law in Michigan because the interest rate constituted criminal usury, notwithstanding the usury savings clause in the parties' agreement. The trial court held that defendants could invoke the usury defense because the Intercreditor Agreement granted TTOD the right to raise the debtor's defenses when Midwest attempted to foreclose on the TTOD Senior Collateral, and because the debtor assigned LPP all its property rights. Without commenting on whether Michigan or Illinois law applied, the court noted that Midwest was not exempt from usury under Illinois law because the statute it referenced, 815 ILCS 205/4(1)(c), did not expressly exempt loans made to limited liability companies from usury restrictions. Finally, the court held that Midwest failed to raise a genuine issue of material fact regarding its claims because it offered no proof that defendants had converted the collateral, and defendants proved that: (1) they sequestered the Midwest Senior Collateral; (2) they permitted Midwest to inspect the collateral; and (3) they only used it in the ordinary course of business after the court granted them permission to do so. Accordingly, the trial court granted summary disposition to defendants on all claims.

[2] Defendants, in a later proceeding, submitted the security agreement between TTOD and the debtor, which created a security interest over all of the debtor's interest to secure the debtor's loan obligations to TTOD.

[3] Although not calculated by the trial court, this amounts to an average yearly interest charge of $325,230.15, or a 65.05 percent interest rate, over the life of the loan.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a dispositive motion. *Shay v. Aldrich,* 487 Mich. 648, 656; 790 NW2d 629 (2010). When analyzing a motion for summary disposition under MCR 2.116(C)(10), the court evaluates whether a genuine issue of material fact exists. *Coblentz v. Novi,* 475 Mich. 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes an issue where reasonable minds could differ. *Allison v. AEW Capital Mgt., LLP,* 481 Mich. 419, 425; 751 NW2d 8 (2008). The trial court may not make factual findings or weigh witness credibility on disputed factual matters when deciding a dispositive motion. *Anzaldua v. Neogen Corp.,* 292 Mich.App 626, 637; 808 NW2d 804 (2011).

Statutory interpretation invokes questions of law that are reviewed de novo by this Court. *Briggs Tax Service, LLC v. Detroit Public Schools,* 485 Mich. 69, 75; 780 NW2d 753 (2010). When interpreting a statute, the court's goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v. Mackinaw Twp.,* 282 Mich.App 621, 628–629; 765NW2d 31 (2009) (citation omitted). Further, the construction of contractual language is a question of law, which is reviewed de novo by this Court. *Shay,* 487 Mich. at 656. Finally, conflicts of law are

reviewed de novo. *Frederick v. Federal–Mogul Corp.,* 273 Mich.App 334, 336; 733 NW2d 57 (2006).

III. CHOICE OF LAW

***3** Although Midwest initially argues that defendants lack standing to raise the usury defense, the outcome of this matter depends on whether Michigan or Illinois law controls in this dispute. Midwest argues that, in refusing to honor the parties' choice of law provision contained in their contract, the trial court erroneously concluded that Midwest lacked an enforceable security interest in the collateral because the Midwest loan agreement was unenforceable under Michigan law, on the grounds that the charged interest rate constituted criminal usury. We agree.

When deciding whether to enforce the parties' contractual choice of law, the parties' expectations "must be balanced with the interests of the states." *Hudson v. Mathers,* 283 Mich.App 91, 96; 770 NW2d 883 (2009). Our courts have historically honored a choice of law provision contained in a contract, unless: (1) the chosen state lacks a substantial relationship to the parties or the transaction; (2) there is no reasonable basis for adopting the law of the chosen state; or (3) it "would be contrary to a fundamental policy of [Michigan] which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties." *Chrysler Corp. v. Skyline Industrial Services, Inc.,* 448 Mich. 113, 126; 528 NW2d 698 (1995), quoting Restatement Conflict of Laws, 2d, § 187(2)(b).

Under the facts presented by the parties, it is clear that the chosen state of Illinois has a substantial relationship to the parties and the transaction. In its brief during the motion for summary disposition, Midwest presented uncontested evidence showing that: (1) the debtor contacted Midwest in Illinois, which is its principal place of business, in order to obtain the Midwest loan; (2) some of the direct negotiations occurred in Illinois; (3) the debtor sent all loan documents and payments to Midwest at its Illinois office; (4) the loan documents were executed in Illinois; (5) the loan was underwritten in Illinois; and (6) the funds were transferred to the debtor from an Illinois account. While Michigan undoubtedly possesses a substantial relationship to the parties and transaction, this fact does not invalidate Illinois's clear relationship to the parties and the transaction, as the debtor travelled to Illinois in order to procure the loan.

If there is an exception under Illinois law for charging what has otherwise been defined as a "usurious" interest rate on business loans to LLCs, then there exists a reasonable basis for the parties to adopt Illinois law, as doing so would permit Midwest to charge a higher interest rate than permitted under Michigan law. Defendants claim that Illinois law is unclear as to the status of usury restrictions regarding LLCs. However, 805 ILCS 180/1–30(7) unambiguously permits LLCs to incur liabilities and borrow money at any interest rate, regardless of any usury restrictions under Illinois law. Because the Illinois Legislature unambiguously expressed, as a matter of policy, its intent to permit LLCs to borrow at "any rate of interest," the parties' dispute over the type of entities subject to the "business loan" exception from usury under 815 ILCS 205/4(1)(c) is irrelevant. Moreover, the Appellate Court of Illinois has clearly stated that, under Illinois law, defendants cannot assert a usury defense. "[T]he defense of usury is a personal one and not available to a [corporation]." *Jones & Brown, Inc. v. W E Erickson Constr. Co.,* 73 Ill App 3d 481, 483; 391 N.E.2d 1097 (1979). For the purposes of 815 ILCS 205/4(1)(a), an LLC is considered a corporation, and thus loans made to an LLC are exempt from the usury restrictions in the Illinois Interest Act. *Asset Exchange II, LLC v. First Choice Bank,* 2011 IL App (1st) 103718; 953 N.E.2d 446, 451–452; 352 Ill Dec 207 (2011) ("There is no dispute here that [the] plaintiff is a corporation within the meaning of the Illinois Interest Act, and thus the Act does not apply to [the] plaintiff's loan agreement with the Bank."). Therefore, because Illinois law exempts usury restrictions on loans made to LLCs such as the debtor, there is a reasonable basis for adopting Illinois law.

***4** Finally, we hold that Michigan does not have a materially greater interest than Illinois in seeing its own laws enforced because our policy concerns regarding usury are not implicated in this case. "A fundamental policy may be embodied in a statute which (1) makes one or more kinds of contracts illegal or (2) which is designed to protect a person against the oppressive use of superior bargaining power." *Martino v. Cottman Transmission Sys., Inc.,* 218 Mich.App 54, 60–61; 554 NW2d 17 (1996). The debtor, a sophisticated commercial entity, sought out Midwest in Illinois to obtain financing for its business operations. In this scenario, the debtor was fully aware of what it was getting into when it negotiated and agreed to the terms of the Midwest loan. Illinois arguably has a strong interest in seeing its contracts enforced according to its own laws, particularly when out-of-state

debtors seek funding from its in-state creditors. As Midwest notes, Michigan has a policy interest in seeing its contracts honored and in interpreting usury restrictions narrowly, especially in the context of commercial transactions between business entities. *Minthorn v. Haines,* 169 Mich. 169, 171; 134 NW 1113 (1912); see *Allan v. M & S Mortgage Company,* 138 Mich.App 28, 37–39; 359 NW2d 238 (1984). Any countervailing policy concerns are further mitigated by the fact that the debtor is no longer a party to this dispute and will therefore be unaffected by the outcome. Moreover, contrary to defendants' assertions, the Midwest loan is not an "illegal contract" because the contractual language in the agreement clearly prohibits Midwest from charging the debtor interest in excess of 23 percent a year.[4] Therefore, the trial court should have honored the parties' choice of law provision and held that the Midwest loan did not violate Illinois' usury laws. Accordingly, we hold that the trial court committed error requiring reversal by finding that Midwest lacked an enforceable security interest in the collateral.[5]

4 Even if this agreement could be construed as a criminally usurious contract under Michigan law, we note that defendants are conflating a criminally usurious contract with an "illegal contract" that is unenforceable in its entirety. An "illegal contract" is one that is unenforceable on the grounds that the illegal provision is an essential part of the contract. See *Miller v. Radikopf,* 394 Mich. 83, 88–89; 228 NW2d 386 (1975). Under these facts, the interest rate was clearly a nonessential part of the agreement because the subject matter of the contract involved a business loan regarding the acquisition of operating capital. Also, when there is a specific statutory remedy for usury, and this remedy does not include rendering the contract unenforceable in its entirety, construing the contract as "illegal" would improperly create a greater remedy than provided by the Legislature. MCL 438.32; *Lawsuit Financial, LLC v. Curry,* 261 Mich.App 579, 590–591; 683 NW2d 233 (2004). "[A] usurious rate of interest does not make an instrument void." See *Shaw Inv. Co. v. Rollert,* 159 Mich.App 575, 580; 407 NW2d 40 (1987).

5 As we hold that the trial court should have applied Illinois law, we need not address plaintiff's arguments concerning whether the court correctly applied Michigan law in determining that the Midwest loan was unenforceable.

IV. RIGHT TO INVOKE THE USURY DEFENSE

Midwest next challenges defendants' "standing"[6] under both Michigan and Illinois law to invoke the usury defense because they were not parties to the Midwest loan. However, as we have decided that Illinois law is controlling, defendants cannot assert the usury defense. As noted above, under Illinois law, the defense of usury is not available to a corporation, including an LLC. *Jones & Brown, Inc.,* 73 Ill App 3d at 483; *Asset Exchange II, LLC,* 953 N.E.2d at 451–452. Thus, as both defendants and the debtor are considered "corporations," and corporations may not assert the usury defense under Illinois law, they lack the right to raise this defense.

6 Although the parties claim to raise the issue of "standing," in context it is clear that they are equivocating on the meaning of this word. The parties are contesting defendants' right to assert a defense, not this Court's propriety in determining whether defendants have an interest in a claim that is "distinct from the general public." See *Lansing Schools Education Association v. Lansing Bd of Ed,* 487 Mich. 349, 378; 792 NW2d 686 (2010).

V. TTOD'S SECURITY INTEREST

Midwest next challenges the trial court's finding that TTOD had a valid security interest in the collateral because TTOD offered no proof during the dispositional hearing of its alleged security interest in the collateral. We agree. During the dispositional hearing, TTOD only produced the following as evidence of its purported security interest in the collateral: (1) its judgment and injunction against the debtor from its independent case in *TTOD Liquidation, Inc. v. Dott Acquisition, Inc.,* Oakland Circuit Court No. 09–102138; and (2) its UCC–1 financing statement covering the collateral. However, the court documents made no reference to any collateral that TTOD had in the debtor's property, so this evidence does not establish that defendants had a valid security interest in the collateral.

***5** Further, a financing statement does not attach a security interest to collateral; it merely perfects an existing security interest. MCL 440.9310. To attach a security interest to collateral, the secured party must: (1) have the debtor authenticate a security agreement specifically describing the collateral; (2) value must be

given; and (3) the debtor must have rights in the collateral. MCL 440.9203(2); *Michigan Tractor & Machinery Co. v. Elsey,* 216 Mich.App 94, 97–98; 549 NW2d 27 (1996). While defendants claim that Midwest is bound by its admission that TTOD had a valid security interest in the collateral, this matter involves a question of law, and "an admission regarding a point of law is not binding on a court." *Ann Arbor Tenants Union v. Ann Arbor YMCA,* 229 Mich.App 431, 440; 581 NW2d 794 (1998). Although defendants later submitted its security agreement into the record as an exhibit to its motion on January 24, 2011, to modify a prior order, this does not cure the error because the trial court may only consider the documentary evidence "then filed in the action or submitted by the parties." MCR 2.116(G)(5). By relying on TTOD's UCC–1 in the absence of a signed security agreement, the trial court erred by finding as a matter of law that TTOD had an enforceable security interest in the collateral and basing its summary disposition decision on this finding.[7]

[7] Midwest alternatively avers that there is an outstanding factual dispute as to whether the debtor fully repaid its loans to TTOD, which—if true—would void TTOD's security interest in the collateral. As this Court already held that TTOD failed to establish its security interest in the collateral, this issue is moot.

TTOD claims that Midwest is collaterally estopped from contesting TTOD's security interest in the debtor's collateral because these issues were conclusively decided in its independent case against the debtor. Although defendants present no legal analysis on this issue, "[c]ollateral estoppel precludes relitigation of issues between the same parties." *VanVorous v. Burmeister,* 262 Mich.App 467, 479; 687 NW2d 132 (2004). The elements of collateral estoppel are: "(1) a question of fact essential [i.e. necessary] to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v. Titus,* 481 Mich. 573, 585; 751 NW2d 493 (2008). Mutuality of estoppel exists where there is substantial identity of the parties in the two proceedings. *Dearborn Heights Schools District No. 7 v. Wayne County MEA/NEA,* 233 Mich.App 120, 126–127; 592 NW2d 408 (1998) (noting that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter"). However, our Supreme Court has held mutuality of estoppel is not required when a party is asserting defensive collateral estoppel to defend against "a party who has already had a full and fair opportunity to litigate the issue." *Monat v. State Farm Ins. Co.,* 469 Mich. 679, 695; 677 NW2d 843 (2004). As Midwest was not a party to the prior proceeding, it did not have a full and fair opportunity to litigate this issue. Additionally, neither Midwest nor the debtor are in privity with each other, as they were adverse parties to this litigation. Therefore, it is clear that collateral estoppel does not prevent Midwest from challenging the validity of TTOD's security interest in the collateral.

VI. SUMMARY DISPOSITION

***6** Midwest finally argues that the trial court improperly granted summary disposition to defendants when it was clear that Midwest was entitled to judgment as a matter of law pursuant to MCR 2.116(I)(2) on its breach of contract and conversion claims.[8] We agree in part and disagree in part.

[8] Midwest also argues that summary disposition was premature because the actual interest rate Midwest charged the debtor is in dispute. Midwest also argued that the lower court should have interpreted the scope of the "Midwest Obligations" as including all fees, interest, costs, and expenses above the initial $500,000 principal balance. However, due to our resolution of the above issues, these questions are now moot.

Midwest argues that it was entitled to judgment as a matter of law on its breach of contract and conversion claims. Defendants respond by asserting that Midwest itself breached the Intercreditor Agreement by taking legal action to acquire the entire inventory, worth $3,000,000, to satisfy its $500,000 senior interest. Based on all the preceding analysis, Midwest had a perfected security interest in the debtor's inventory, with priority to the extent of $500,000. Although the Intercreditor Agreement specified that TTOD had priority over the remaining collateral, TTOD's ability to enforce the Agreement is contingent upon its capacity as a secured party to the collateral. As TTOD failed to establish a valid security interest in the collateral during the motion for summary disposition, the court should have treated TTOD as an unsecured party to the collateral, only holding an outstanding money judgment against the debtor. Accordingly, defendants had no rights to the collateral and were required to relinquish it to Midwest, who had priority as to the entire inventory. TTOD was not permitted to take "any action" against Midwest's

collateral. Because TTOD failed to deliver the collateral to Midwest and permitted LPP to consume the collateral in its business operations, Midwest offered sufficient proof to establish that TTOD breached the Intercreditor Agreement by interfering with Midwest's interest in the collateral. The fact that TTOD permitted Midwest to inspect the collateral did not cure TTOD's refusal to cease consumption and relinquish the collateral to Midwest. Similarly, because TTOD had no enforceable security interest in the collateral, Midwest did not breach the Intercreditor Agreement by rightly demanding its collateral. Accordingly, the trial court erred in granting summary disposition to TTOD on the breach of contract claim.

Similarly, Midwest has presented evidence that TTOD committed common law conversion. Common law conversion is defined as a "distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Dep't of Agriculture v. Appletree Marketing, LLC,* 485 Mich. 1, 13–14; 779 NW2d 237 (2010) (citation and quotation marks omitted). Additionally, "[c]onversion may occur when a party properly in possession of property uses it in an improper way, for an improper purpose, or by delivering it without authorization to a third party." *Id.* at 14. The undisputed facts establish that TTOD delivered possession of the collateral to LPP and permitted LPP to consume the collateral in its business operations. By doing so, TTOD could be found to have committed common law conversion because it "delivered the collateral without authorization to a third party" and "used [the collateral] in an improper way." *Id.*[9] Accordingly, the trial court erred in granting summary disposition to TTOD on this claim.

[9] Although the debtor later assigned all its assets to LPP, this occurred long after TTOD leased the facility to LPP and permitted LPP to use the collateral.

***7** In contrast, statutory conversion, a cumulative claim to common law conversion that permits recovery of treble damages, occurs if a defendant commits either of the following actions:

> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted. [MCL 600.2919a(1).]

In light of the record, Midwest presented no evidence supporting its claim of statutory conversion against TTOD, so the trial court did not err in granting summary disposition to TTOD on this claim. The record establishes that TTOD did not convert the property for its own use, but rather permitted LPP to use it for its own purposes. Additionally, Midwest presented no evidence that TTOD knowingly converted the collateral. In fact, but for TTOD's failure to timely submit its security agreement, it would have shown that it had an enforceable security interest in the collateral. Thus, in only permitting LPP to consume collateral that allegedly exceeded the value of the amount owed to Midwest, TTOD cannot be said to have knowingly converted the collateral.

Finally, Midwest argues that the trial court erred by prematurely granting summary disposition before discovery was complete. "A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Anzaldua,* 292 Mich.App at 636 (citation and quotation marks omitted). Midwest submitted a discovery request, asking TTOD in part to furnish all records pertaining to: (1) the debtor's outstanding debt to TTOD; (2) TTOD's security interest in the collateral; and (3) the methodology behind how TTOD calculated and sequestered the Midwest Senior Collateral. As these documents were pertinent to establishing TTOD's security interest—and priority—in the collateral, the trial court erred in prematurely granting summary disposition because there was a fair likelihood that this information could have established whether TTOD breached the Intercreditor Agreement by converting the Midwest Senior Collateral. However, because discovery was incomplete, the trial court also did not err in failing to grant summary disposition to Midwest on its breach of contract and common law conversion claims.

VII. CONCLUSION

Because the Midwest loan was not usurious under Illinois law and was not an unenforceable "illegal" contract, Midwest has shown that it had an enforceable security interest in the debtor's collateral. While TTOD failed to properly establish below its security interest in the collateral, the trial court improperly granted summary

disposition to defendants before discovery was complete. Accordingly, we hold that the trial court erroneously granted summary disposition to defendants on all claims, as TTOD was only entitled to summary disposition on the statutory conversion claim. Accordingly, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

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84 A.3d 800
Supreme Court of Rhode Island.

NV ONE, LLC, et al.
v.
POTOMAC REALTY CAPITAL, LLC, et al.

No. 2012–262–Appeal.
|
Feb. 18, 2014.

Synopsis
Background: Commercial borrows brought action against commercial lender alleging that interest rate in their loan agreement was usurious. Borrowers moved for partial summary judgment. The Superior Court, Providence County, 2011 WL 6470557, Michael A. Silverstein, Associate Justice, granted the motion. Lender appealed.

The Supreme Court, Suttell, Chief Justice, held that as a matter of first impression, usury savings clause was unenforceable and did not validate otherwise usurious contract.

Affirmed.

Attorneys and Law Firms

***801** Richard G. Riendeau, Esq., Providence, for Plaintiff.

Kurt T. Kalberer II, Esq., Providence, for Defendant.

Present: SUTTELL, C.J., GOLDBERG, FLAHERTY, ROBINSON, and INDEGLIA, JJ.

OPINION

Chief Justice SUTTELL, for the Court.

In a case of first impression, we are asked to determine whether a usury savings clause in a commercial loan document validates an otherwise usurious contract. In view of the facts and circumstances of this case, we conclude that it does not; we hold, therefore, that the promissory note at issue is void as a matter of law.

The defendant, Potomac Realty Capital, LLC, (PRC or defendant) appeals from the Superior Court's grant of partial summary judgment in favor of plaintiffs, NV One, LLC, Nicholas E. Cambio, and Vincent A. Cambio (collectively, NV One or plaintiffs). The defendant asserts that the trial justice erred when he granted plaintiffs' motion for partial summary judgment on liability for violation of the usury statute, G.L.1956 § 6–26–2, by declaring the usury savings clause of the parties' loan agreement unenforceable. For the reasons set forth in this opinion, we affirm the judgment of the Superior Court.

I

Facts and Procedural History [1]

[1] Only a portion of the record was certified to this Court. The facts, which are not disputed, are gleaned largely from the trial justice's written decision. The trial justice relied almost exclusively on the complaint and the August 17, 2011 affidavit of Nicholas E. Cambio and the exhibits attached thereto.

In 2007, plaintiffs sought a loan to rehabilitate and renovate a former post office located at 1190 Main Street in the Town of West Warwick (property). On July 17, 2007, NV One entered into a loan agreement with PRC and signed a promissory note (note) for the principal amount of $1,800,000; as security for the loan, NV One granted a mortgage, assignment of leases and rents, security agreement, and fixture filing with respect to the property. The plaintiffs Nicholas E. Cambio and Vincent

***802** A. Cambio also personally guaranteed the loan.

In addition to the note, mortgage, and related documents, at the closing of the loan the parties executed a Sources and Uses of Funds sheet and a Loan Disbursement Authorization (all collectively, the loan documents). The loan documents established both an "interest reserve" and a "renovation reserve," set initially at $62,500 and $940,000, respectively. Monthly interest-only payments were due on the first day of each calendar month until the loan's maturity date of August 1, 2008, on which date final payment of both the unpaid interest and unpaid principal was to be made. The note set an interest rate at "the greater of 5.3% or the LIBOR Rate, plus 4.7%."[2] The note also set a "default rate" at "the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest, if any, which may be collected * * * under applicable law." The loan documents also imposed fees, including an exit fee of $18,000 and an origination fee of $25,000. The Sources and Uses of Funds sheet also notes a previous deposit of $15,000, raising the total value of the loan to $1,815,000.

[2] LIBOR, which stands for "London Interbank Offered Rate," is defined as "[a] daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year." Black's Law Dictionary 1027 (9th ed. 2009).

At the heart of this case are the maximum interest provisions contained in both the note and the mortgage; as the trial justice noted in his decision, "[t]hese provisions attempt to conform the instruments to the local usury laws, and they are commonly known as usury savings clauses." Section 4.4 of the note, titled "Maximum Amount," provides a usury savings clause, which reads in pertinent part:

> "A. It is the intention of Maker [NV One] and Payee [PRC] to conform strictly to the usury and similar laws relating to interest from time to time in force, and all agreements between Maker and Payee, whether now existing or hereafter arising and whether oral or written, are hereby expressly limited so that in no contingency or event whatsoever, whether by acceleration of maturity hereof or otherwise, shall the amount paid or agreed to be paid in the aggregate to Payee as interest hereunder or under the other Loan Documents or in any other security agreement given to secure the Loan Amount, or in any other document evidencing, securing or pertaining to the Loan Amount, exceed the maximum amount permissible under applicable usury or such other laws (the 'Maximum Amount').
>
> "B. If under any circumstances Payee shall ever receive an amount that would exceed the Maximum Amount, such amount shall be deemed a payment in reduction of the Loan owing hereunder and any obligation of Maker in favor of Payee * * * or if such excessive interest exceeds the unpaid balance of the Loan and any other obligation of Maker in favor of Payee, the excess shall be deemed to have been a payment made by mistake and shall be refunded to Maker."

Although the parties executed the loan documents, the entire $1.8 million principal balance was not disbursed at the closing of the loan, nor was it ever fully disbursed to NV One. The trial justice attributed this, in part, to the holdbacks for the $940,000 renovation reserve and the $62,500 interest reserve.[3] Although the loan documents ***803** required both reserves to be placed in escrow, PRC never actually placed funds in escrow, nor did it segregate the funds in any way. Critically, section 2.12 of the note provided that NV One would not accrue any interest on the reserved funds.

[3] The interest reserve was increased from $62,500 to $63,000 on September 1, 2007.

At the time of closing there was a net funding disbursement of $761,478.54; and, in January 2008, a disbursement of $143,877.50 was made from the renovation reserve at the request of NV One.

The note contained a provision in section 2.7 allowing the parties to extend the date of maturity for up to an additional twelve months, provided certain conditions were met. Pursuant to that provision, on August 1, 2008, NV One paid PRC $18,000 in consideration for the execution of an allonge,[4] which extended the maturity date by ten months to June 1, 2009. The $18,000 and the interest payments on the allonge were paid out of the interest reserve. By September 2008, NV One had received $995,997.50 of the $1.8 million loan. By November 2008, the interest reserve was exhausted. By the new date of maturity, NV One received, at most, $1,007,390.52 on the $1.8 million loan.

[4] Although the document itself is titled "Allonge to Note" and is referenced by the trial justice and the parties as such, "allonge" appears to be a misnomer. Black's Law Dictionary defines "allonge" as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when

the original paper is filled with indorsements." Black's Law Dictionary 88 (9th ed. 2009).

Although PRC never disbursed the entire $1.8 million loan amount, it routinely charged NV One interest for the entire loan amount. In his decision, the trial justice noted that "[p]rior to the allonge, PRC charged interest at ten percent (10%) of the total $1.8 million, when as little as $761,478.54 was disbursed." From the time of the execution of the allonge in August 2008 through February 2009, "PRC charged NV One interest at a rate of twelve percent (12%) of the total $1.8 million, despite the fact that at its height, $1,007,390.52 was actually disbursed to NV One." On February 23, 2009, PRC sent NV One a notice of default for failing to complete renovations within the time provided in the security agreement, and provided a thirty-day cure period, after which it would impose the default interest rate. In March 2009, at the end of the thirty days, "PRC charged NV One the [d]efault rate of twenty-four percent (24%) interest calculated upon the $1.8 million face amount of the [n]ote." The trial justice found that "[w]hen the interest charged is applied in the context of the amount actually disbursed, the rate exceeds twenty-one percent (21%) essentially throughout the loan." The trial justice further found that "PRC never adjusted the amount of interest charged to lower it below twenty-one percent (21%)."

Due to NV One's alleged failure to pay off the loan by the maturity date of June 1, 2009, on October 9, 2009, PRC sent NV One a notice of default and payment demand. On November 5, 2009, pursuant to its rights under the mortgage, PRC sent a foreclosure notice to NV One.[5] In addition, on or about November 19, 2009, PRC sent a demand notice to plaintiffs Nicholas E. Cambio and Vincent A. Cambio demanding payment pursuant to their personal guarantees. On December 14, 2009, plaintiffs filed a verified complaint against PRC claiming fraud, breach of contract, and usury, and seeking injunctive relief preventing foreclosure on the property and ***804** collection from the personal guarantors.[6] On August 16, 2011, plaintiffs filed a motion for summary judgment with respect to liability on count 3 of the complaint, alleging violations of the Rhode Island usury law.[7]

[5] Neither of these letters are contained in the record certified to this Court nor are they contained in either party's appendices.

[6] The plaintiffs subsequently amended the complaint on December 22, 2009, and April 26, 2010.

[7] General Laws 1956 § 6–26–2.

On December 16, 2011, the trial justice filed a written decision granting plaintiffs' motion for partial summary judgment. On January 11, 2012, the trial justice entered an order[8] declaring the loan usurious and void, voiding the mortgage, and removing the liens on the property from the land records. In his written decision, the trial justice found that "[i]t is clear on the record of undisputed facts that the rate was undoubtedly usurious, at least for some period." In reaching that decision, the trial justice stated that the Rhode Island usury statute generally sets the maximum allowable rate of interest at 21 percent. He further noted that "[t]o determine whether an interest rate is usurious, the value for computing the maximum permissible interest is not the amount on the face of the loan, but, rather, the actual amount received by the borrower." He then analyzed the interest rates PRC charged during each period of the loan (10 percent, 12 percent, and 24 percent) and determined that, because these percentages were calculated using the entire $1.8 million loan amount—as opposed to the $1,007,390.52 PRC actually distributed to NV One—"[t]here can be no doubt that these interest amounts charged exceeded twenty-one percent (21%) of the disbursed loan."

[8] The order was not contained in the record certified to this Court.

The trial justice next considered the applicability of the usury savings clause "in light of the public policy, legislative intent, and plain meaning of the Rhode Island usury law." The trial justice embarked on an extensive analysis of the policies behind Rhode Island usury jurisprudence, as well as the law in states with substantially developed usury law, such as Texas, Florida, and North Carolina. In ultimately declining to honor the usury savings clause and granting plaintiffs' motion for partial summary judgment, the trial justice stated that "[l]ending effect to a usury savings clause would contradict this state's articulated public policy in favor of the borrower and against usurious transactions."

The defendant timely appealed the January 11, 2012 order. The trial justice then stayed his ruling for forty-five days and, after a February 17, 2012 meeting with the parties' attorneys, issued a further stay pending consideration of the motion by this Court. The motion to stay came before this Court on March 14, 2012, after

which this Court vacated the trial justice's stay but enjoined plaintiffs from alienating the property without prior authorization from this Court.

On appeal, PRC does not challenge the factual findings of the trial justice; rather it contends that the trial justice "erred when [he] granted [NV One's] motion for partial summary judgment on liability for violation of [G.L.1956] § 6–26–2 by declaring the usury savings clause of the loan agreement unenforceable." The enforceability of usury savings clauses is an issue of first impression before this Court, and PRC argues that such clauses should be enforceable under Rhode Island law. In its reply brief, PRC maintains that the trial justice "erred in failing to perform a proper analysis when it rendered a commercial ***805** contract term unenforceable on the grounds of public policy."

II

Standard of Review

"This Court reviews the grant of summary judgment *'de novo,* employing the same standards and rules used by the hearing justice.' " *Carreiro v. Tobin,* 66 A.3d 820, 822 (R.I.2013) (quoting *Great American E & S Insurance Co. v. End Zone Pub & Grill of Narragansett, Inc.,* 45 A.3d 571, 574 (R.I.2012)). "[S]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Id.* (quoting *Employers Mutual Casualty Co. v. Arbella Protection Insurance Co.,* 24 A.3d 544, 553 (R.I.2011)). This Court "will affirm a lower court's decision only if, after reviewing the admissible evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Great American E & S Insurance Co.,* 45 A.3d at 574).

III

Discussion

Liability for usurious interest rates in Rhode Island is well settled and clear. The maximum allowable interest rate is a statutory construct whereby interest rates in excess of 21 percent per annum are deemed usurious. Section 6–26–2(a). Contracts in violation of § 6–26–2 are usurious and void, and the borrower is entitled to recover any amount paid on the loan. Section 6–26–4. The lender's subjective intent to comply with the usury laws is immaterial. *Burdon v. Unrath,* 47 R.I. 227, 231, 132 A. 728, 730 (1926). In order to determine whether an interest rate is usurious, the face amount of the loan is irrelevant; instead, the maximum allowable interest is calculated based on the amount actually received by the borrower. *See Industrial National Bank of Rhode Island v. Stuard,* 113 R.I. 124, 125, 318 A.2d 452, 453 (1974). Because neither party disputes the material facts, *i.e.,* that PRC charged NV One interest in excess of the permissible 21 percent maximum,[9] the applicability of the usury savings clause is determinative of whether NV One is entitled to judgment as a matter of law.

[9] Despite the fact that the parties agree that the interest rates were usurious, this Court reviews grants of summary judgment *de novo,* and we will review the numbers to either confirm or deny the usury violation.

PRC's Usurious Interest Rate

Setting aside for the moment the usury savings clause, it is abundantly clear to this Court that the loan between PRC and NV One was usurious. However, because only a portion of the record was certified to this Court and the numbers contained therein are undisputed, we will not belabor the analysis any more than is necessary to determine usury. According to PRC's Loan Activity Report, from the inception of the loan on July 17, 2007, through August 31, 2007, PRC disbursed only $797,500 of the entire $1.8 million loan amount. In accordance with the Sources and Uses sheet of the loan document, the $62,500 interest reserve and the $940,000 renovation reserve—which constitute the balance of the loan—were required to be placed in escrow by PRC. However, according to Nicholas E. Cambio's sworn affidavit, these funds were not placed in escrow, but were merely established as "journal entries" by PRC. Nevertheless, PRC charged NV One interest at a rate of 10.125 percent for August 2007, calculated ***806** against the entire $1.8 million loan amount, for a total interest charge of $15,693.75.

The fact that PRC calculated the interest amount against

the face amount of the loan as opposed to the amount of the disbursed funds is of critical importance to the usury determination. *See Industrial National Bank of Rhode Island,* 113 R.I. at 125, 318 A.2d at 453. For instance, the August interest charge, when calculated against the actual disbursed amount, as is necessary to determine usury, results in an effective interest rate of 23.17 percent per annum.[10] Because PRC and NV One entered into a valid loan contract, and the 23.17 percent interest rate that PRC charged exceeds the 21 percent maximum interest rate set out in § 6–26–2, it is clear to us that the loan was usurious and therefore void.[11]

10 The $15,693.75 averages out to $506.25 per day in interest charges, and a total of $184,781.25 per year. In order to generate $184,781.25 in annual interest on a $797,500 loan (the actual disbursed amount), interest must be charged at a rate of 23.17 percent.

11 It bears mentioning that during the entire life of the loan PRC routinely calculated interest against the $1.8 million amount, despite the fact that the most that PRC ever disbursed to NV One was $1,007,390.52. Thus, the actual interest rate was in excess of 21 percent for the majority of the loan.

However, one need not engage in complex arithmetic in order to discern usury in PRC's loan. In the event of default by NV One, the note imposed a default interest rate at "the lesser of (a) twenty-four percent (24%) per annum and (b) the maximum rate of interest, if any, which may be collected * * * under applicable law." This 24 percent interest rate is usurious on its face. *See* § 6–26–2. Moreover, during the default period, PRC did not attempt to conform the charged interest to the maximum rate allowable by law (21 percent), but instead demanded the full 24 percent. The following sequence of events is illustrative. On February 23, 2009, PRC sent NV One a notice of default,[12] providing NV One with thirty days to cure the default before PRC would impose the default interest rate. On April 8, 2009, PRC sent another letter[13] indicating that NV One had defaulted and PRC would be imposing the default interest rate, retroactive to March 24, 2009. Finally, on November 19, 2009, PRC sent the Cambios a demand for payment pursuant to their personal guarantee, demanding full payment of the $1,007,390.52, plus an additional $464,487.62 in back interest and fees. The back interest PRC demanded—$382,800—consists partly of $296,800 in interest charged during the default period of March 24, 2009, through November 17, 2009. PRC calculated this latter figure by applying the default 24 percent rate to the $1.8 million face value of the loan. The 24 percent rate is facially usurious irrespective of the loan amount; however, when calculated against the actual disbursed amount, that rate skyrockets to 43.48 percent per annum,[14] more than double the maximum permissible interest rate. Therefore, it is apparent to this Court that not only did PRC charge a usurious interest rate, but it made no attempt to lower the interest charges to conform to the maximum permissible interest rate.

12 This notice is not contained in the record certified to this Court.

13 Once again, not in the record.

14 PRC charged the default rate of 24 percent for the 239 days of the default period from March 24, 2009, through November 17, 2009, for an interest charge of $1,200 per day. $1,200 per day amounts to $438,000 annually, which, when calculated against the $1,007,390.52 disbursed amount, results in an annualized interest rate of 43.48 percent.

***807 The Usury Savings Clause**

Having determined that the loan is usurious, we turn now to the applicability of the usury savings clause.[15] It is well settled in Rhode Island that "a contract term is unenforceable only if it violates public policy." *Gorman v. St. Raphael Academy,* 853 A.2d 28, 39 (R.I.2004). A contract, or a term contained therein violates public policy only if it is: "[1] injurious to the interests of the public, [2] interferes with the public welfare or safety, [3] is unconscionable; or [4] tends to injustice or oppression." *Id.* (quoting *City of Warwick v. Boeng Corp.,* 472 A.2d 1214, 1218 (R.I.1984)). In order to decide whether the enforcement of a usury savings clause violates public policy, we must first determine the public policy underlying the usury laws in general. Although some states' statutes explicitly articulate the policy behind their usury laws,[16] the Rhode Island usury statutory scheme is relatively brief and makes no mention of public policy or legislative intent. *See* chapter 26 of title 6. It is therefore incumbent upon this Court to discern the public policy undergirding the usury laws. To that end, we begin by first examining the plain language of the statute.

15 We begin this analysis by rejecting PRC's contention

that the case should be remanded because the trial justice "erred in failing to perform a proper analysis when [he] rendered [the usury savings clause] unenforceable on the grounds of public policy." Because this Court reviews grants of summary judgment *de novo,* whether or not the trial justice failed to conduct a proper analysis with regard to the usury savings clause has no bearing on PRC's appeal. *See Carreiro v. Tobin,* 66 A.3d 820, 822 (R.I.2013).

16 *See, e.g.,* N.C. Gen.Stat. Ann. § 24–2.1(g) (West 2007) ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws."); Wash. Rev.Code Ann. § 19.52.005. (West 1999) ("[The usury statutes] are enacted in order to protect the residents of this state from debts bearing burdensome interest rates; * * * and in recognition of the duty to protect our citizens from oppression generally.").

The pertinent language of the Rhode Island usury statute states, without qualification, that "no person, partnership, association, or corporation loaning money * * * shall, directly or indirectly, reserve, charge, or take interest on a loan, whether before or after maturity, at a rate which shall exceed * * * twenty-one percent (21%) per annum * * *." Section 6–26–2(a). The use of the word "shall" evinces a certainty; in other words, a lender that charges interest in excess of 21 percent is liable for usury. Additionally, the fact that the Legislature explicitly delineated only one specific exception[17] to the maximum interest rate indicates a consideration (and rejection) of any and all other circumstances whereby a lender may charge interest in excess of 21 percent. The criminal usury statute, § 6–26–3 criminalizes "willful[ ] and knowing[ ]" violations of the maximum interest rate, thereby further underscoring the immateriality of a lender's intent in determining civil usury under § 6–26–2. Because the lender's intent to charge an interest rate exceeding the permissible maximum is immaterial to a determination of usury (and the invocation of penalties resulting therefrom), it is clear that the Legislature intended an inflexible, hardline approach to usury that is tantamount to strict liability.[18]

17 *See* § 6–26–2(e) (no limit on interest rate for a commercial borrower, over $1,000,000, where loan is not secured against principal residence of the borrower, and *pro forma* analysis by a certified CPA indicates that loan is capable of being repaid).

18 We are not confronted in this case with a good faith bookkeeping error, be it human or electronic.

***808** This rigid approach is borne out in the historically strict enforcement of the statute and its predecessors through the years. In a 1926 decision concerning a prior usury statute, this Court rejected a lender's argument that he had intended to abide by the maximum interest limits, holding that lack of intent "is no excuse for the violation of the statute." *Burdon,* 47 R.I. at 231, 132 A. at 730. The Court stated that "[t]o hold otherwise would violate an established principle of law, and would furnish to avaricious lenders a convenient excuse for an evasion of the law." *Id.* Three years later, the Court once again denied a lender's contention that his lack of intent to violate the statute should alleviate his liability for usury. *Colonial Plan Co. v. Tartaglione,* 50 R.I. 342, 344, 147 A. 880, 881 (1929). The Court rejected the notion that a borrower can contract with a lender to pay more than the permissible interest rate because "[t]o permit it would open the door to the very abuses and opportunities to take advantage of small borrowers which the statute is designed to prevent." *Id.* In 1951, this Court, in upholding the recovery of both interest and principal payments by an aggrieved borrower remarked that "[p]lainly the policy of the legislature was to provide severe penalties against the lender for his violation of the statute as the best method in its judgment to prevent usurious transactions." *Nazarian v. Lincoln Finance Corp.,* 77 R.I. 497, 505, 78 A.2d 7, 10 (1951). In what was seemingly a note of caution to future lenders, the Court warned that "[i]f the result seems harsh the penalty can be avoided easily by writing loan agreements that exact no more than the law allows." *Id.* Although these cases concern prior iterations of the usury statute, the underlying policy consistent throughout the decisions is readily apparent: Usurious interest rates are to be avoided at all costs and the onus is on the lender to ensure compliance with the maximum rate of interest.

The strict policy against usurious transactions has continued in the case law concerning the current usury statute. In a 1982 decision permitting a debtor to waive the defense of usury, this Court acknowledged a "clear legislative intent to provide severe penalties against lenders who violate the usury laws," and noted that the usury statutes clearly manifest "[a] strong public policy against usurious transactions." *DeFusco v. Giorgio,* 440 A.2d 727, 732 (R.I.1982).

Although not binding on this Court, two decisions from the U.S. District Court for the District of Rhode Island concerning usury in the context of bankruptcy proceedings are illustrative of the public policy

underlying the usury statute. In declining to apply the *in pari delicto* doctrine against a borrower of a usurious loan, the district court judge, citing § 6–26–2, found that "Rhode Island usury law places the burden of charging a legal interest rate on the lender." *Sheehan v. Richardson,* 315 B.R. 226, 240 (D.R.I.2004), *aff'd,* 185 Fed.Appx. 11 (1st Cir.2006). The judge further rejected the notion that the borrower agreeing to the terms of the loan absolves the lender from liability for usurious interest rates, stating that "[d]espite mutual assent to the terms, Rhode Island statutes do not punish the borrower." *Id.* at 241. Yet perhaps the most telling reflection of the rigidity of the usury statute is the Bankruptcy Court's decision in *In re Swartz,* where the court found that a $4 filing fee—which accounted for the only interest in excess of the maximum interest rate—rendered the entire loan usurious. *In re Swartz,* 37 B.R. 776, 779 (Bankr.D.R.I.1984). The "[d]raconian tenor" of the statute, the judge noted, is "intended to protect borrowers from hidden and pernicious interest charges, and places total ***809** responsibility upon the lender for strict compliance." *Id.* at 779 & n. 5. The judge continued: "To allow a lender who has collected or retained fees in excess of the legal limit to plead 'innocent mistake' after discovery of the overcharge by the debtor, would surely invite precisely the kind of abuse which the statute is designed to prevent." *Id.* at 779.

In our opinion, the analyses of the Bankruptcy Court, as well as the prior opinions of this Court accurately and convincingly evince the public policy behind the usury statute: For protection of the borrower, it is incumbent upon the lender to ensure full compliance with the provisions for maximum rate of interest, and, apart from the explicit exception in § 6–26–2(e), anything short of full compliance renders the transaction usurious and void.

PRC argues that because the two parties are "sophisticated business entities," they should be bound by the usury savings clause to which they agreed, and that allowing NV One to void the loan would not further public policy. In support, PRC offers a series of statutes from foreign jurisdictions, all of which foreclose corporations from asserting usury as a defense. While most corporations may indeed be better able to protect themselves from avaricious lenders than other less sophisticated borrowers, PRC's argument entirely misses the mark. The Rhode Island usury statute not only contemplated lender/borrower relationships between commercial business entities, but provided a statutory exception to usury for that very situation. That exception to the maximum rate of interest is laid out in § 6–26–2(e), which provides:

> "Notwithstanding the provisions of subsection (a) of this section and/or any other provision in this chapter to the contrary, there is no limitation on the rate of interest which may be legally charged for the loan to, or use of money by, a commercial entity, where the amount of money loaned exceeds the sum of one million dollars ($1,000,000) and where repayment of the loan is not secured by a mortgage against the principal residence of any borrower; provided, that the commercial entity has first obtained a pro forma methods analysis performed by a certified public accountant licensed in the state of Rhode Island indicating that the loan is capable of being repaid."

By its plain language, this allows a lender to charge any interest rate it pleases without the possibility of a usury violation, provided that certain conditions are met in advance of the loan.[19] There is a binary dynamic implicit in the usury statute whereby a lender is either bound by the maximum interest provision and all its constituent penalties, or it is completely free from them. In our opinion, the very existence of this exception underscores the policies of borrower protection and lender accountability ingrained in the usury statute and its companion case law by recognizing that some borrowers are different, and thus not entitled to the statute's "drastic" protections. *See Colonial Plan Co.,* 50 R.I. at 345, 147 A. at 881.

[19] It bears mentioning that, because the two parties are commercial entities, the loan exceeded $1,000,000, and was not secured by either of the Cambios' primary residences, the loan at issue surely qualified for the exception. By not securing the requisite *pro forma* analysis, PRC failed to avail itself of the exception and is therefore bound by the maximum interest rate.

With these underlying public policies in mind, we turn next to the applicability of savings clauses in general. In our view, the enforcement of usury savings clauses would entirely obviate any responsibility ***810** on the part of the lender to abide by the usury statute, and would, in essence, swallow the rule. As articulated *supra,* there is a strong public policy against usurious transactions, with lenders—typically in a better position to understand the terms of the loan—bearing the burden of compliance. *See DeFusco,* 440 A.2d at 732. If lenders could circumvent the maximum interest rate by including a boilerplate usury savings clause, lenders could charge excessive rates without recourse. This would have the reverse effect of incentivizing lenders to attempt to charge excessive interest rates because, at worst, the lender could invoke the savings clause and the interest rate would simply be reduced to the highest acceptable rate without any penalty to the lender. There is no doubt that such a mechanism

runs completely afoul of the clear public policy against usurious transactions.

In addition to incentivizing usurious interest rates, giving effect to usury savings clauses would rest the burden of ensuring compliance squarely on the shoulders of the borrower. We firmly agree with the analysis of the Supreme Court of North Carolina, which, in declining to allow a lender to invoke a usury savings clause to shield itself from liability for usury, stated:

> "The [usury] statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A 'usury savings clause,' if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protection and penalties." *Swindell v. Federal National Mortgage Association,* 330 N.C. 153, 409 S.E.2d 892, 896 (1991).

We have no doubt that the inclusion of usury savings clauses in loan contracts would lead to results that are injurious to the money-borrowing public, as well as potentially unconscionable or tending towards injustice or oppression. *See Gorman,* 853 A.2d at 39. We therefore hold that, in loan contracts such as the instant loan, usury savings clauses are unenforceable as against the well-established public policy of preventing usurious transactions.

Based on our *de novo* review, after viewing the evidence in the light most favorable to PRC, it is clear to this Court that the loan was a usury in violation of § 6–26–2. Furthermore, because we hold that the usury savings clause is unenforceable on public policy grounds, there are no remaining issues of material fact and NV One is entitled to judgment as a matter of law. Therefore the trial justice's grant of partial summary judgment for NV One on count 3 was proper, and we have no cause to reverse his decision.

IV

Conclusion

For the reasons set forth in this opinion, we affirm the judgment of the Superior Court. The record shall be returned to the Superior Court.

All Citations

84 A.3d 800

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964 S.W.2d 708
Court of Appeals of Texas, Corpus Christi-Edinburg.

Maurice PENTICO and Pauline Pentico, Appellants,
v.
MAD–WAYLER, INC. and David C. Madsen, Individually, Appellees.

No. 13–96–277–CV.
|
Feb. 12, 1998.
|
Rehearing Overruled April 30, 1998.

Synopsis
Borrowers filed usury action against lenders. The 139th District Court, Hidalgo County, Micaela Alvarez, J., denied lenders' motion for summary judgment and granted borrowers' motion for summary judgment. Lenders appealed. The Court of Appeals, Federico G. Hinojosa, Jr., J., held that: (1) lenders' mere brushing aside its miscalculation of late charges as "erroneous" and presenting arguments based on correct figure did not establish defense to borrowers' usury claim as matter of law; (2) late charges initially demanded by lenders had to be added to conventional interest rate agreed upon by parties in note when determining total compensation charged by lenders for purposes of determining usury; (3) application of spreading of interest doctrine to compute total amount of interest allowable over term of loan established that interest and late charges assessed by lenders as of date of lawsuit were not usurious; (4) past due interest became new and independent debt for which additional interest could be charged at maximum lawful rate; and (5) lack of any evidence on terms of any agreement for additional loan and on dates on which borrowers mailed payments precluded summary judgment on usury claims based on interest charged on sum that was not part of original note or charged during alleged "interest free period."

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***710** Kelly K. McKinnis, McAllen, for Appellants.

William E. Corcoran, Law Office of William E. Corcoran, McAllen, for Appellee.

Before DORSEY, FEDERICO G. HINOJOSA, Jr. and CHAVEZ, JJ.

***711 OPINION**

FEDERICO G. HINOJOSA, Jr., Justice.

This is a usury case. The trial court granted the motion for summary judgment of appellees, Mad–Wayler, Inc. and David C. Madsen, Individually, and ordered that appellants, Maurice Pentico and Pauline Pentico, forfeit the principal sum of $96,590 and pay a penalty of $35,931.26. By two points of error, appellants contend the trial court erred by denying their motion for summary judgment and by granting appellees' motion for summary judgment. We affirm the trial court's order denying appellants' motion for summary judgment. We reverse the trial court's order granting appellees' motion for summary judgment and remand the case to the trial court for further proceedings.

Background

On June 10, 1987, appellants loaned Mad–Wayler $100,000. A promissory note and deed of trust to secure the loan were prepared by Royce Brough, a principal in Mad–Wayler, and executed the same day. The note was guaranteed by Brough and David C. Madsen, also a principal in Mad–Wayler, Inc. According to the terms of the note, interest accrued on the unpaid balance at the rate of ten percent per annum, and interest on matured, unpaid amounts accrued at the rate of twelve percent per annum. For the first nine months, monthly payments of $1,000 were to be made on the principal, with the first payment being due on July 10, 1987. Interest for those nine months was to be paid on April 1, 1988. Effective April 10, 1988, principal and interest were to be paid in monthly installments of $2,000. The note was to be fully paid by

February 1, 1991.

Between July 1987 and September 1989, only one payment was made on time. Typically, payments were made one week or more late. After March 1989, payments were not made in full; Mad–Wayler sent two or three separate checks totaling $2,000 for each month. On September 20, 1989, ten days after the September payment was due and not received, appellants hand-delivered a letter and an amortization schedule to Madsen and demanded that Mad–Wayler remit payment of the overdue September loan installment plus late charges by September 25. After examining the amortization schedule appellants sent, Madsen realized that the late charges had been grossly miscalculated. On September 22, appellees filed a lawsuit charging appellants with usury. On or about September 29, appellants prepared a new amortization schedule reflecting the correct late charges. Appellants were not served with the lawsuit until November 1, 1989.

The trial court's docket sheet reflects that between November 1989 and April 1994, the parties filed motions and counter-motions, engaged in extensive discovery, and attempted mediation. Appellants moved for summary judgment in April 1994, but it was denied in July 1994.[1] Appellees then filed a motion for summary judgment, and it was granted. This appeal followed.

[1] Appellants filed a motion for *partial* summary judgment in November 1992. The docket sheet reflects that no hearing was held on this motion, and it was never ruled on. In April 1994, appellants filed a "First Amended Motion for Summary Judgment." The language of the order of July 1994 does not include the word "partial" in overruling appellants' motion for summary judgment.

Standard of Review

In their brief, appellees point out that appellants have failed to include appellees' request for admissions from appellants in the record. Appellees contend that failure to include appellants' admissions requires us to summarily affirm the trial court's summary judgment. The burden is on the appellant to present a complete record of what the trial court had before it in ruling on a motion for summary judgment. Tex.R.App. P. 50(d) (amended August 15, 1997) (current version at Tex.R.App. P. 35.3);[2] ***712** *Beck & Masten Pontiac–GMC, Inc. v. Harris County Appraisal Dist.,* 830 S.W.2d 291, 295 (Tex.App.—Houston [14th Dist.] 1992, writ denied). Missing items are presumptively held to support the trial court's judgment. *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 689 (Tex.1990). Nonetheless, we will not automatically affirm the ruling as it is far from obvious that the trial court relied on the missing evidence or that the omitted portion of the record is essential to ascertaining the basis of the court's decision. *See Gupta v. Ritter Homes, Inc.,* 633 S.W.2d 626, 628 (Tex.App.—Houston [14th Dist.] 1982) (contents of missing portion of record were not asserted in motion for summary judgment and immaterial to trial court's ruling), *aff'd in part, rev'd in part on other grounds,* 646 S.W.2d 168 (Tex.1983); *cf. Alcantar v. Edelstein's Better Furniture,* 818 S.W.2d 547, 548 (Tex.App.—Corpus Christi 1991, no writ) (summarily overruling point of error due to omission of obviously pertinent evidence); *DeBell v. Texas Gen. Realty, Inc.,* 609 S.W.2d 892, 893 (Tex.Civ.App.—Houston [14th Dist.] 1980, no writ) (documents omitted from record were relied on by trial court and cited in summary judgment order). The appellees' motion for summary judgment must stand or fall on its own merits. *McConnell v. Southside Indep. Sch. Dist.,* 858 S.W.2d 337, 341 (Tex.1993); *Freedom Communications, Inc. v. Brand,* 907 S.W.2d 614, 618 (Tex.App.—Corpus Christi 1995, no writ).

[2] Under the new rules of appellate procedure effective September 1, 1997, it is now the responsibility of the trial court clerk to file the record. Tex.R.App. P. 35.3. We note, however, that the transcript in the instant case was due more than one year before the new rules went into effect.

When both parties move for summary judgment and one motion is granted and the other is overruled, the appellate court should consider all questions presented to the trial court, including whether the losing party's motion should have been overruled. *Jones v. Strauss,* 745 S.W.2d 898, 900 (Tex.1988). Each party must carry its own burden as the movant and, in response to the other party's motion, as the non-movant. *James v. Hitchcock Indep. Sch. Dist.,* 742 S.W.2d 701, 703 (Tex.App.—Houston [1st Dist.] 1987, writ denied). To prevail, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes v. Galveston County,* 861 S.W.2d 861, 862 (Tex.1993). When both parties move for summary judgment, this court has the authority to (1) affirm the judgment, (2) reverse the judgment and render the judgment that the trial court should have rendered, or (3) reverse the judgment and remand the case to the trial

court for further proceedings. *Members Mut. Ins. Co. v. Hermann Hosp.,* 664 S.W.2d 325, 328 (Tex.1984).

Appellants moved for summary judgment in April 1994. On July 13, 1994, the trial court heard and denied appellants' motion. On July 21, 1994, appellees filed their motion for summary judgment, and it was granted in April 1996. Even though the motions for summary judgment in this case were filed and ruled upon at different times, we will review both motions because appellants complain the trial court erred in granting appellees' motion for summary judgment and in denying their motion for summary judgment.

A movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex.1989); *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548–49 (Tex.1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon,* 690 S.W.2d at 549; *Rios v. Texas Commerce Bancshares, Inc.,* 930 S.W.2d 809, 814 (Tex.App.—Corpus Christi 1996, writ denied). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *Nixon,* 690 S.W.2d at 549; *Rios,* 930 S.W.2d at 814. If the movant establishes that he is entitled to summary judgment, the burden shifts to the nonmovant to show why summary judgment should be avoided. *Casso,* 776 S.W.2d at 556.

Where the summary judgment order specifies the grounds on which it bases summary judgment, we limit our review to those grounds. *State Farm Fire & Cas. Co. v. S.S.,* 858 S.W.2d 374, 380 (Tex.1993); *Delaney v. University of Houston,* 835 S.W.2d 56, 58 (Tex.1992); *Cox v. Upjohn Co.,* 913 S.W.2d 225, 228 (Tex.App.—Dallas 1995, no writ). The summary judgment will be affirmed on appeal if the specified grounds are meritorious. *S.S.,* 858 S.W.2d at 380; *River Consulting, Inc. v. Sullivan,* 848 S.W.2d 165, 168–69 (Tex.App.—Houston [1st Dist.] 1992, writ denied). Even if the motion contained ***713** other independent grounds on which summary judgment was sought, the grounds specified in the order are the only ones on which summary judgment may be affirmed. *Carlisle v. Philip Morris, Inc.,* 805 S.W.2d 498, 518 (Tex.App.—Austin 1991, writ denied).

Appellants' Motion for Summary Judgment

By their second point of error, appellants contend the trial court erred in denying their motion for summary judgment.

After reviewing appellants' motion for summary judgment, we find that it is stylistically an answer to appellees' petition and cites no legal authority in its arguments. In the motion, appellants argue that they are entitled to summary judgment because, contrary to appellees' assertions, they have not charged more than twice the amount of interest allowed by law. They argue that total interest on the note up to the date of maturity ($34,466.83) plus properly re-calculated late charges of $88.83 is well within the $35,000 maximum interest that could have been charged. Appellants do not explain how they arrive at any of these figures. Elsewhere in the motion, appellants argue that the applicable interest cap is $42,067.30, but they do not clarify why this number should be used instead of, or in addition to, the $35,000. They acknowledge that the late charges of $11,977.26 were miscalculated, but downplay the significance of the charges and do not utilize them in calculations. Other than labeling the $11,977.26 in late charges "erroneous," appellants ignore this central issue.

Appellees' lawsuit relies largely on the alleged impropriety of the outrageous late charges to establish usury. Article 5069–1.06(a) allows creditors to establish that a miscalculation was the result of an "accidental and bona fide error" and avoid penalties for usury. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.06(a) (Vernon 1987) (current version at Tex. Fin.Code Ann. § 305.101 (Vernon Pamph.1998)).

Merely brushing the miscalculation aside as "erroneous" and presenting arguments based on the correct figure does not establish that the issue is settled as a matter of law. *See William C. Dear & Assoc., Inc. v. Plastronics, Inc.,* 913 S.W.2d 251, 254 (Tex.App.—Amarillo 1996, writ denied) (miscalculation or typographical mistake exemplifies bona fide error but must be supported by evidence of honest mistake); *Karg v. Strickland,* 919 S.W.2d 722, 725 (Tex.App.—Corpus Christi 1996, writ denied) (finding sufficient evidence that ignorance of material fact lead to miscalculations). We hold that the trial court did not err in denying appellants' motion for summary judgment. Appellants' second point of error is overruled.

Appellees' Motion for Summary Judgment

By their first point of error, appellants complain the trial court erred in granting appellees' motion for summary judgment.

Appellees' motion for summary judgment also contained no arguments and no citations of law, other than the penalty prescribed for usury. Appellees merely presented the factual grounds upon which they believed they were entitled to summary judgment.

In the order granting the motion, the trial court granted each ground prayed for by appellees. The trial court determined that appellants committed usury by (1) assessing late charges on each payment made between July 1987 and September 1989, (2) charging "interest on interest" a total of fourteen times, (3) charging twelve percent interest on a sum loaned that was not part of the original note, and (4) charging interest on each payment made during an "interest free" period. The court also found that Mad–Wayler had never defaulted on the loan and, therefore, never triggered the guarantee. According to the trial court's order, as a result of the unilateral and illegal actions of the appellants, the note was voided, rendering the guarantee without force and effect and releasing the guarantor, David Madsen, from any further liability or obligation on the guarantee.[3] All of these grounds rest on the common issue—whether appellants committed usury.

[3] A separate suit filed by appellants against the other guarantor, Royce Brough, is pending.

In response to appellees' motion for summary judgment, appellants argued that the ***714** "spreading doctrine" covered the late charges and other interest and had to be applied in order to avoid a finding of usury. The order granting appellees' motion for summary judgment recited precisely the grounds prayed for by appellees. It appears that, as urged by appellees, the trial court did not apply the spreading doctrine. Therefore, we will discuss the definition of usury, the spreading doctrine and its application, and the nature of the late charges before determining whether the grounds for summary judgment were meritorious.

Usury

The essential elements of a usurious transaction are: (1) a loan of money, (2) an absolute obligation that the principal be repaid, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex.1982); *Starcrest Trust v. Berry,* 926 S.W.2d 343, 354 (Tex.App.—Austin 1996, no writ). Contracting for, charging, or receiving interest greater than the maximum amount allowed by law is usury. Tex.Rev.Civ. Stat. Ann. art. 5069–1.01(d) (Vernon 1987) (current version at Tex. Fin.Code Ann. § 301.001 (Vernon Pamph.1998)); *Karg,* 919 S.W.2d at 725.

Usury statutes are penal in nature and must be strictly construed. *Steves Sash & Door Co., Inc. v. Ceco Corp.,* 751 S.W.2d 473, 476 (Tex.1988); *Texas Commerce Bank–Arlington v. Goldring,* 665 S.W.2d 103, 104 (Tex.1984). The purpose of the usury statute is to penalize those who intentionally charge an interest in excess of that allowed by law. *Guetersloh v. C.I.T. Corp.,* 451 S.W.2d 759, 761 (Tex.Civ.App.—Amarillo 1970, writ ref'd n.r.e.). If there is any doubt as to the legislative intent to punish the activity complained of, the doubt must be construed in favor of the lender. *Steves Sash & Door Co.,* 751 S.W.2d at 476; *Goldring,* 665 S.W.2d at 104; *Hatzenbuehler v. Call,* 894 S.W.2d 68, 69 (Tex.App.—San Antonio 1995, writ denied).

Usury, Saving Clauses, and the Spreading Doctrine

The note contains a savings clause which states as follows:

> It is further expressly agreed that interest on this note will not be charged in excess of the highest legal rate specified by the Laws of the State of Texas and that future adjustments will be made to avoid the payment of interest in excess of such limits.

Such a "savings clause" reflects an intent by the parties to comply with the usury laws and indicates that the spreading of interest should be used to avoid a charge of usury. *See Woodcrest Assoc., Ltd. v. Commonwealth Mortg. Corp.,* 775 S.W.2d 434, 437–38 (Tex.App.—Dallas 1989, writ denied) (citing forty-nine years of case law supporting validity of savings clauses). Unless a contract is usurious by its explicit terms, the savings clause must be given effect and enforced to avoid violation of the usury laws. *First State Bank v. Dorst,* 843 S.W.2d 790, 793 (Tex.App.—Austin 1992, writ denied); *Edmondson v. First State Bank of Mathis,* 819 S.W.2d 605, 606 (Tex.App.—Corpus Christi 1991, no writ). If the amount of interest charged has exceeded the maximum interest that may be charged on the debt, the savings clause cannot be given effect. *Victoria Bank & Trust Co. v. Brady,* 779 S.W.2d 893, 902 (Tex.App.—Corpus Christi 1989), *aff'd in part, rev'd in part on other*

grounds, 811 S.W.2d 931 (Tex.1991). Texas courts have repeatedly acknowledged the validity of usury savings clauses and enforced such clauses to defeat a violation of the usury laws. *See, e.g., Tanner Dev. Co. v. Ferguson,* 561 S.W.2d 777, 782 (Tex.1977).

The Texas Supreme Court has established that contracts are tested for usury by spreading the interest over the entire term of the contract. *Tanner Dev. Co.,* 561 S.W.2d at 786–87. The term "spreading" is defined as a method of allocating the total interest provided for in a loan agreement over the full term of the loan. *Groseclose v. Rum,* 860 S.W.2d 554, 558 (Tex.App.—Dallas 1993, no writ). In *Tanner,* the Supreme Court held that when interest payments, over the whole term of the loan, do not exceed the amount authorized by law, usury penalties cannot be imposed merely because a loan's interest rate exceeds the statutory limit in any particular year. *Tanner Dev. Co.,* 561 S.W.2d at 787. As of September 1, ***715** 1975, Article 5069–1.07(a) adopted the "spreading doctrine" of *Nevels v. Harris,* 129 Tex. 190, 102 S.W.2d 1046 (Tex.1937), with regard to loans secured by real estate. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.07 (Vernon 1987) (current version at Tex. Fin.Code Ann. § 302.101 (Vernon Pamph.1998)); *Conte v. Greater Houston Bank,* 641 S.W.2d 411, 415 (Tex.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

Appellees argue that the spreading doctrine is inapplicable for several reasons. First, they assert that the deed of trust securing the note "preserved no security interest in real property because it described a non-existent note." Appellees contend that because the deed of trust recites payments of $850, while the note reflects initial monthly installments of $1,000 (altered by agreement from $850), the deed of trust cannot conclusively be related to the promissory note at issue. We reject this contention.

Except for the altered amount of initial payments, the face of the note and the terms reflected in the deed of trust match exactly. Moreover, the handwriting and signatures are identical. The alteration on the face of the note is initialed by the parties or their representatives. We have no doubt that the note and deed of trust are related instruments. Effectively, the promissory note and the deed of trust are one instrument and must be construed together. *Starcrest Trust,* 926 S.W.2d at 351–52. Furthermore, where there is conflict between the terms of the note and the language of the security instrument, whether deed of trust or mortgage, the latter must yield. *Odell v. Commerce Farm Credit Co.,* 124 Tex. 538, 543, 80 S.W.2d 295, 297 (Tex. Comm'n App.1935, no writ).

Contrary to appellees' contentions, it is not necessary to wait until the loan is paid in full before applying the spreading doctrine. *See, e.g., Groseclose,* 860 S.W.2d at 556 (doctrine applied in eighth year of ten year loan); *R.V. Indus. v. Urdiales,* 851 S.W.2d 306, 307 (Tex.App.—San Antonio 1992) (doctrine applied in sixth year of twenty year loan), *rev'd on other grounds,* 851 S.W.2d 216, 216 (Tex.1993). Only if the loan is actually paid off before the end of the term must we spread the interest over a shorter period. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.07(a); *Coppedge v. Colonial Sav. & Loan Ass'n,* 721 S.W.2d 933, 937 (Tex.App.—Dallas 1986, writ ref'd n.r.e.).

Finally, the spreading doctrine may be applicable whether or not a note is usurious on its face. The Texas Supreme Court has held that either a contract for *or* a charge of *or* receipt of usurious interest may trigger penalties. *Windhorst v. Adcock Pipe & Supply,* 547 S.W.2d 260, 261 (Tex.1977). Therefore, any of these occurrences may permit application of the spreading doctrine to avoid the penalties for usury as well. In addition, the savings clause evidences an intent to avoid committing usury. *Woodcrest Associates,* 775 S.W.2d at 438. Thus, if it is reasonably possible to give some effect to the savings clause, we must interpret it in a manner which will avoid usury. *Id.* at 438–39.

Late Charges as Interest

Late charges fall into the category of a contingent additional charge which are treated as interest and added to the interest contracted for if a payment is received after the expiration of the grace period. *Dixon v. Brooks,* 678 S.W.2d 728, 731 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Late charges are not "interest" under the common-law definition of that word, but the statutory definition of "interest" covers the late charges because the definition includes compensation for the obligor's detention of money past the date it is due and payable. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.01(a) (Vernon 1987) (current version at Tex. Fin.Code Ann. § 301.002(a) (Vernon Pamph.1998)); *Hardwick v. Austin Gallery of Oriental Rugs, Inc.,* 779 S.W.2d 438, 443 (Tex.App.—Austin 1989, writ denied). The late charges calculated on this debt, as shown in the amortization schedule prepared at the behest of appellants, are patently erroneous[4] ***716** and all parties acknowledge they are incorrect. Nonetheless, the late charges initially demanded by appellants must be added to the conventional interest (10%) agreed upon by the parties in arriving at the total

compensation charged by appellants and in determining the applicability of the forfeiture provisions found in art. 5069–1.06. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.06 (Vernon 1987);[5] *Dixon v. Brooks,* 604 S.W.2d 330, 333 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Watson v. Cargill, Inc., Nutrena Div.,* 573 S.W.2d 35, 42 (Tex.Civ.App.—Waco 1978, writ ref'd n.r.e.).

[4] The incorrect formula applied was:
[(principal *balance* x 12%) ÷ 365] x number of days late.
According to the note, "all past due principal and interest due ... shall bear interest from maturity at the rate of 12% per annum." We interpret this to refer to the due payment rather than the outstanding balance of the note. Thus, the correct formula is:
[(principal *payment* + interest charges) x 12% x number of days late] ÷ 360.
We have used 360 days because a standardized accounting year has 360 days. The incorrect formula results in late charges ranging from 11% to 56% of each installment payment or 40 to 388 times greater than the correct charges.

[5] Repealed by Act of June 19, 1997, 75th Leg., R.S., ch. 1008, § 6(a) 1997 Tex. Sess. Law Serv. 3602 (Vernon 1997). This section was not recodified as the prescribed penalties were deemed too harsh. We note that the applicable penalties were greatly modified and reduced. *See* Tex. Fin.Code Ann . § 305.001 (Vernon Pamph.1998).

Under article 5069–1.06, the term "charges" means the unilateral act of placing on an account an amount due as interest. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.01(a) (Vernon 1987) (current version at Tex. Fin.Code Ann. § 301.002(a) (Vernon Pamph.1998)); *see Windhorst,* 547 S.W.2d at 261; *Coppedge,* 721 S.W.2d at 936. The unilateral act can be a debiting of an amount due or an act by the lender constituting a demand for payment, *e.g.,* the inclusion of usurious interest in a statement of indebtedness submitted to the debtor. *Coppedge,* 721 S.W.2d at 936; *Concrete Constr. Supply, Inc. v. M.F.C., Inc.,* 636 S.W.2d 475, 477 n. 1 (Tex.App.—Dallas 1982, no writ). A usurious charge may be contained in an invoice, a letter, a ledger sheet or other book or document. *Danziger v. San Jacinto Sav. Ass'n,* 732 S.W.2d 300, 304 (Tex.1987); *Augusta Dev. Co. v. Fish Oil Well Servicing Co., Inc.,* 761 S.W.2d 538, 542 (Tex.App.—Corpus Christi 1988, no writ). We conclude that the amortization schedule which accompanied the demand letter sent by appellants constituted a "charge" of interest by appellants.

Appellees relied on *Fisher v. Westinghouse Credit Corp.,* 760 S.W.2d 802 (Tex.App.—Dallas 1988, no writ), to establish that the spreading doctrine cannot be applied to late charges. The court in *Fisher* declared that a late fee which is computed as interest on past due interest, accruing daily, and not a one-time charge, is considered a separate agreement to be tested for usury separate from any underlying contract. *Fisher,* 760 S.W.2d at 807. After reading the cases cited in support of this unique proposition, and noting that no other courts of appeal have adopted it, we decline to follow *Fisher.*

Four Grounds for Summary Judgment

The trial court granted appellees' motion for summary judgment on four grounds. The first ground was that appellants committed usury in assessing late charges on late payments made between July 1987 and September 1989. Having determined that the late charges are interest and that the note contains a savings clause, we must apply the spreading doctrine to determine if the interest charged is usurious.

We find conflicting evidence in the record concerning the correct amount of the debt. The face of the promissory note shows the original debt to be $100,000. However, amortization schedules prepared by appellees start with $105,000. Appellees presented no schedules based on a beginning balance of $100,000. This strongly suggests that appellees believed their initial indebtedness was $105,000. However, because the request for admissions from appellants is missing from the record, we presume appellants admitted the correct initial balance was $100,000 and perform our calculations accordingly.

Article 5069–1.07(a) adopted the spreading doctrine set forth in *Nevel* s. Tex.Rev.Civ. Stat. AnnN. art. 5069–1.07(a); *see also Nevels,* 129 Tex. at 196, 102 S.W.2d at 1049; ***717** *Conte v. Greater Houston Bank,* 641 S.W.2d 411, 416 (Tex.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). The *Nevels* rule provides that the lender takes the amount of the loan proceeds, multiplies it by the allowable rate of interest per year, and then multiplies that amount by the term for repayment. *Danziger,* 732 S.W.2d at 306 n. 1. The total amount is the maximum amount of interest a party is entitled to charge over the term of the loan. *Id.*

Applying the *Nevels* formula to the instant case, we take the loan proceeds ($100,000.00), multiply it by the rate of interest (10%), and multiply that amount by the term of repayment (3.5 years).[6] We conclude that $35,000 is the

maximum amount of interest allowed in this case.

[6] Under the terms of the promissory note dated June 10, 1987, the loan was to be fully paid by February 1, 1991.

Between July 1987 and September 1989, appellants charged $21,033.65 for interest and $11,977.26 for incorrectly calculated late charges; the total amount being $33,010.91. In spite of the miscalculation of late fees, appellants have not charged more interest than is due over the term of the loan. Because the amount of interest charged as of September 1989 does not exceed the maximum interest permissible for the entire period (from July 1987 to February 1991), we find that the trial court's first ground for summary judgment is not supported by the evidence.

Furthermore, the savings clause permitting adjustments as necessary to avoid the charging of excess interest must be given effect, and the record reflects that appellants were not allowed to make adjustments.

In their second ground for summary judgment, appellees argued that appellants committed usury by "charging interest on interest" a total of fourteen times. According to appellees, the addition of the erroneous late charges to the outstanding balance resulted in an increase of the principal balance over the previous month's balance on fourteen separate occasions. Therefore, when the following month's interest was computed on the principal balance, it constituted a charging of interest on interest. Appellees cite no authority to support this tortured definition.

Black's Law Dictionary defines "compound interest" as "interest upon interest; *i.e.,* when the interest of a sum of money is added to the principal, and then bears interest, which thus becomes a sort of secondary principal." Black's Law Dictionary 286 (6th ed.1990); *Spiller v. Spiller,* 901 S.W.2d 553, 557 (Tex.App.—San Antonio 1995, writ denied); *see also Bothwell v. Farmers' & Merchants' State Bank & Trust Co.,* 120 Tex. 1, 7, 30 S.W.2d 289, 291 (Tex.1930). Past due or "matured" interest becomes a new and independent debt for which additional interest may be charged at the maximum lawful rate. *Bothwell,* 120 Tex. at 7, 30 S.W.2d at 291; *Dixon,* 678 S.W.2d at 731. The terms of the note allowed appellants to charge a late fee for overdue payments. We have already determined that such charges are interest. Such interest is not *per se* usurious. In *Crider v. San Antonio Real–Estate Bldg. & Loan Ass'n,* the supreme court stated:

> [I]t is generally held that, even when the debt bears the highest interest allowed by law, a stipulation that in case it be not paid at maturity the interest, as well as the principal, shall bear interest at the same [*i.e.* highest] rate, is not usurious. The ruling is placed upon the ground that the debtor has it in his power to avoid the additional interest by paying the debt as it falls due. Some of the cases treat the interest upon the matured interest as a penalty for the default in payment; and in *Lloyd v. Scott,* 4 Pet. 225, it is said that where a person undertakes to pay "a specific sum, exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, for the reason that by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty."

Crider v. San Antonio Real–Estate Bldg. & Loan Ass'n, 89 Tex. 597, 600, 35 S.W. 1047, 1048 (Tex.1896).

***718** Appellants were not only entitled to late charges, but to interest accumulated on the unpaid charges as liquidated demands. *See Spiller,* 901 S.W.2d at 556–57 (citing 13 Tex. Jur. 3d *Consumer & Borrower Protection* § 38 (1993)). A creditor is entitled to interest on money wrongfully withheld in the same manner and for the same reason as the creditor is entitled to interest on overdue principal wrongfully withheld. *Spiller,* 901 S.W.2d at 556–57. This does not result in true compounding of interest. *See Dixon,* 678 S.W.2d at 731; *see also* 13 Tex. Jur. 3d *Consumer & Borrower Protection* § 38 (1993). We find the trial court's second ground for granting summary judgment to be without merit.

As the third ground for summary judgment, the trial court found that appellants committed usury by charging twelve percent interest on a sum of $5,000 that was not part of the original note. We presume appellants admitted the $5,000 was not part of the original note and that they did not loan the sum directly to Mad–Wayler. However, there is some evidence in the record of an agreement between Royce Brough and Mad–Wayler concerning a debt owed by Brough to appellants and that Mad–Wayler assumed the payments on that debt. A presumption that appellants admitted no such agreement existed would run contrary to the evidence in the record. There is, however, no evidence concerning the terms of the agreement and no basis for us to make any reasonable inferences or presumptions about those terms. As the agreement was apparently between appellees and Brough, it is far more likely that the pertinent information is in the hands of the appellees than the appellants.

It is impossible to apply the test for usury on these $5,000 as the conditions, balance, term, and interest rate of the

loan are unknown. We find that the trial court's finding of usury is not supported by the evidence.

The final ground upon which summary judgment was granted is that appellants committed usury by charging interest during an "interest free period" on each payment made. When interest is charged during an interest free period, it is usury as a matter of law. *Houston Sash & Door, Inc. v. Heaner,* 577 S.W.2d 217, 221 (Tex.1979); *Jim Walter Homes, Inc. v. Valencia,* 679 S.W.2d 29, 34 (Tex.App.—Corpus Christi 1984), *aff'd as modified,* 690 S.W.2d 239 (Tex.1985).

Appellees asserted that remittance by mail was authorized and that depositing the properly addressed payment with prepaid postage in the mail constituted payment. *Cox v. Gulf Ins. Co.,* 858 S.W.2d 615, 616 (Tex.App.—Fort Worth 1993, no writ); *American Cas. Co. v. Conn,* 741 S.W.2d 536, 538 (Tex.App.—Austin 1987, no writ); *Fant v. Miller,* 218 S.W.2d 901, 903 (Tex.Civ.App.—Texarkana 1949, writ ref'd n.r.e.). Appellees argued that the date payment was mailed, rather than the date of receipt, controlled the date from which calculations for late charges could be made. The note on its face does not authorize payments by mail; nevertheless, a pattern of dealing may establish such authorization. *Cox,* 858 S.W.2d at 616. The amortization schedules prepared by both appellants and appellees list the dates upon which the payments were credited to appellees' debt. Even if we were to presume appellants admitted authorizing payments by mail, and the dates of the amortization schedule reflect the date of receipt, we cannot infer the actual date the payment was mailed. It is unreasonable to impose the presumption that the mailing dates are acknowledged in appellants' admissions as that knowledge is known solely by appellees.[7]

[7] Although the rules of procedure view postmarks as *prima facie* evidence of the date of mailing for purposes of filing documents with the court, Tex.R. Civ. P. 5; Tex.R.App. P. 4 (amended August 15, 1997) (current version at Tex.R.App. P. 9.2(b)(2)), postmarks are not conclusive evidence of the date an item was mailed in other contexts. *Hausmann v. Texas Sav. & Loan Ass'n,* 585 S.W.2d 796, 801 (Tex.Civ.App.—El Paso 1979, writ ref'd n.r.e.); *see also General Elec. Supp. Co. v. Utley–James of Tex., Inc.,* 857 F.2d 1010, 1012 (5th Cir.1988) (commenting on unsettled point in Texas law). Appellees made no assertions and presented no evidence of the dates they contend payments were mailed. *See Jimmy Swaggart Ministries v. City of Arlington,* 718 S.W.2d 83, 86 (Tex.App.—Fort Worth 1986, no writ) (clerk's testimony concerning preparation and dispatch of notices raised presumption of mailing date); *see also General Elec. Supp.,* 857 F.2d at 1012 (comparing holdings of Texas courts in *Hausmann* and *Jimmy Swaggart Ministries* with regards to proof of mailing).

***719** We find no evidence in the record showing the dates appellees mailed their payments. We find no basis for the trial court's finding that an "interest free period" existed, let alone was violated.

Because we find the grounds cited by the trial court in its order granting summary judgment are not established, we hold the trial court erred in granting appellees' motion for summary judgment. We sustain appellants' first point of error.

Release of Guarantor

In the order granting summary judgment, the trial court also found that (1) no default on the note occurred which would trigger the guarantee, (2) appellants' actions had voided the note, and (3) the guarantee was of no force and effect because of the appellants' actions. Madsen was released from all liability and obligations on the guarantee. Having found that summary judgment was not proper as to Mad–Wayler, we also find that it is not proper as to Madsen. Because none of appellees' grounds for summary judgment conclusively established as a matter of law that the note is void, we hold there is no valid reason to release Madsen as a guarantor.

We affirm the trial court's order denying appellants' motion for summary judgment. We reverse the trial court's order granting appellees' motion for summary judgment and remand the case to the trial court for further proceedings.

All Citations

964 S.W.2d 708

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583 F.2d 155
United States Court of Appeals,
Fifth Circuit.

Jess RICKMAN, Plaintiff-Appellant,
v.
MODERN AMERICAN MORTGAGE CORPORATION, Nancy Skelton and Federal NationalMortgage Association, Defendants-Appellees.

No. 76-4155.
|
Nov. 2, 1978.

Synopsis
Borrower brought action against lenders charging usury in which one lender filed counterclaim for recovery of amount of check sent lender and dishonored by borrower. The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered take nothing judgment against plaintiff on usury claim and an $8,250 award to defendant on counterclaim, and plaintiff appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the record did not support borrower's usury claim on contracting for or receiving theories.

Affirmed.

Attorneys and Law Firms

***156** John F. Morehead, Austin, Tex., for plaintiff-appellant.

J. P. Jones, Gregory Huffman, Harry Roberts, Jr., Dallas, Tex., for Modern American Mortg. Corp.

Duncan E. Boeckman, Dallas, Tex., for Federal Nat. Mortg. Ass'n.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

Opinion

LEWIS R. MORGAN, Circuit Judge.

This is a usury case arising under the laws of Texas and arriving at this court by way of diversity jurisdiction. The appeal follows a take nothing judgment entered against plaintiff Rickman on his usury claim and a $8,250 award to defendant Modern American Mortgage Corporation (Modern American) on its counterclaim. Another defendant-appellee is Federal National Mortgage Association (Federal National) which purchased the controverted mortgage from Modern American.

The allegedly usurious loan was made to finance a development scheme launched by Rickman in 1969. Planning to construct a mobile home park in Terrell, Texas, Rickman and an associate contacted Modern American in early 1970 seeking a loan to be insured by the Federal Housing Authority. Rickman obtained an FHA commitment and secured a non-recourse loan from Modern American in the principal amount of $577,000 to be repaid over the course of 40 years. Loan disbursements began in August, 1970 and continued through January, 1972 until at least $478,948.69 was advanced either to Rickman or for his benefit. In February, 1972 Modern American assigned its entire interest in the Deed of Trust and note to Federal National.[1]

[1] By this agreement, Federal National agreed to purchase a ratable participating share of 95% Of each monthly disbursement made by Modern American.

Unfortunately, the mobile home project failed. No monthly payments were ever made by Rickman and in February, 1972 ***157** Federal National declared a default and foreclosed. At the foreclosure sale, Federal National purchased the project for roughly $400,000. Subsequently, title was transferred to the FHA in return for a settlement of Federal National's claim for mortgage insurance proceeds. This settlement included the transfer of 20-year FHA debentures and a small amount of cash to Federal National.

Fortunately for Rickman, the financial collapse of his project did not reach his personal finances. He was not personally obligated on the loan he had secured. Nor had he made any payments against the loan. Subsequent to the failure and foreclosure, though, he brought this suit asserting that the loan transaction by Modern American and Federal National was usurious. Allegedly, the agreement exacted various front-end financing charges that were tantamount to interest.[2] The appellant contends

that when this "front-end interest" is added to the interest charged on the face of the note, the result is an effective interest rate in excess of the 10% Statutory limit. Accordingly, Rickman claims entitlement to the statutory penalty of double the amount of the illegal excess. The district court rejected this claim and we affirm that holding.

[2] The appellant claims the following front-end charges constituted interest:

(1) Federal National's Discount $27,181.41

(2) Federal National's Financing Fee $11,542.00

(3) Purchasing and Marketing Fee..... $ 2,885.00

When these sums are added to the interest eo nomine of $46,865.79, the total amount of alleged interest is $88,474.70.

Preliminarily, the defendants-appellees challenge Rickman's right to the protection of the usury laws urging that he is not an "obligor" within the meaning of the Texas statute. In general, American courts deny protection from usury to persons such as Rickman who neither pay nor are obligated to pay on a usurious loan. 91 C.J.S. Usury s 72a. However, currently, in Texas, the question is not entirely free from doubt. In 1967, the usury statute was revised and the phrase "person paying the same" was replaced by "obligor." See Note following 15 Vernon's Ann.Civ.Stat. art. 5069-1.06 (1971). While the former language would clearly dispose of the nonpaying Rickman, the broader term "obligor" offers less certainty and has not been construed by a Texas court. There is at least an argument that because his property was subjected to the obligation, the appellant was entitled to protection from usury. Cf. Ellis v. Security Underground Storage, Inc., 329 S.W.2d 313, 315 (Tex.Civ.App.1960). Therefore, although entertaining serious doubts as to Rickman's status as an obligor, we turn to a more clearly settled basis of Texas law to resolve this case.[3]

[3] The defendants-appellees contend that the FHA, rather than Rickman, is the real "obligor" in the transaction. Technically, though, the FHA might well be viewed as a "guarantor" of the loan and, as such, would probably be denied the benefit of usury laws. Vernon's Ann.Tex.Stat. art. 1302-2.09 (1971). Universal Metals & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 879 (Tex.1976). Thus, if Rickman is denied the opportunity to bring suit, it is entirely possible that no party would be able to challenge the allegedly usurious practices of Modern American and Federal National.

Even if the appellant were an obligor, his claim could not prevail on the merits. We need not dissect the potential liabilities of the two lenders Modern American and Federal National because it is clear that even when combined, their actions do not offend Texas' usury law. The statutory provision governing Rickman's suit is Section 5069-1.06 of the Revised Civil Statutes of Texas which provide:

(1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received, and reasonable attorney fees . . .

Texas courts have emphasized that this language is disjunctive thereby providing alternative theories of recovery that include the contracting, charging or receipt of usurious interest. Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260 (Tex.1977). In ***158** present case, there is no serious argument that the parties contracted for or charged usurious interest. The district judge properly interred any such contention through a two-step analysis of the loan contract. First, the court subtracted the front-end charges from the stated principal to arrive at the true principal in accordance with settled Texas doctrine. E. g., Adleson v. B. F. Dittman & Co., 124 Tex. 564, 80 S.W.2d 939, 940 (1935). Next, the court juxtaposed this new figure of the true principal against the interest payments required by the contract to compute the true rate of interest. Imperial Corporation of America v. Frenchman's Creek Corp., 453 F.2d 1338 (5th Cir. 1972). In this way, the impact of front-end charges was spread over the entire 40 year life of the agreement yielding a true interest rate of 9.89316%. Accordingly, the court correctly absolved the defendants of usury under the contracting for and charging theories.

While accepting that, by its terms, the contract was not necessarily usurious, the appellant maintains that the exercise of the acceleration clause, and the subsequent settlement with the FHA, enabled the defendant to extract usurious interest through the loan agreement. Thus, the appellant urges that the defendant incurred liability for usury by Receiving excessive interest. According to this argument, the true principal was roughly $478,000, the total amount actually dispersed to the appellant. By declaring a default and foreclosing, the defendants were allegedly demanding payment for the full amount of stated principal $577,000. Such an amount, being claimed just 16 months after the execution of the loan transaction, would obviously entail an annual return well in excess of

10% Of the initial outlay. Not only was a usurious sum demanded through the exercise of acceleration, but the appellant argues that an illegal sum was actually received via the FHA settlement. Because this was a settlement in full, it discharged pro tanto the entire indebtedness claimed by Federal National; since the amount of that claimed indebtedness was usurious, the full compensation received for it arguably amounted to the receipt of a usurious sum.

Though intriguing, the appellant's argument must fail. Even assuming that full settlement of a claimed debt constitutes receipt of the entire sum claimed for usury purposes, the effect of the savings clause in this contract cannot be overlooked.[4] This clause provides that, irrespective of other contractual terms, the amount of interest owed the lender cannot exceed lawful limits. Thus, when Federal National asserted its claim for the debt by accelerating the loan, this claim was automatically reduced bringing the interest rate to the legal limit of 10%.

[4] The savings clause provides as follows:
In the event any item, items, terms or provisions contained in this instrument are in conflict with the laws of the State of Texas, this instrument shall be affected only as to its application to such item, items, terms or provisions, and shall in all other respects remain in full force and effect. It is understood and agreed that in no event and upon no contingency shall the maker or makers of the note secured hereby, or any party liable thereon or therefor, be required to pay interest in excess of the rate allowed by the laws of the State of Texas. The intention of the parties being to conform strictly to the usury laws as now or hereinafter construed by the Courts having jurisdiction.
We reject the appellant's claim that this language is insufficient. Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1048 (1937).

If the (saving clause) can be given effect, and, as already said, it must be given some effect if it is reasonably possible to do so . . . it denies the note-holder the right to collect more than the principal debt and 10 per cent. interest per annum . . .
Imperial Corp. of America v. Frenchman's Creek Corp., supra, quoting, Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1049-1050 (1937). Therefore, when Federal National pressed its demand for the full amount due under the contract, it claimed an amount automatically constricted within the bounds of law thereby eliminating the ***159** possibility that illegal interest was claimed.[5] Accordingly, even assuming that the value assigned to the FHA settlement is to be derived from the amount of Federal National's claim against the appellant, both the claim and the settlement were confined within lawful parameters.

[5] Thus, the defendants-appellees may not be said to have "charged" illegal interest. As discussed earlier, by its terms, the contract did not "charge" illegal interest. Moreover, because of the savings clause, the amount charged by the act acceleration was automatically confined within permissible boundaries.
Like the district court, we are assuming only for purposes of argument that the front-end charges constituted interest. Thus, our decision in no way resolves the status of the alleged interest; such a determination presents a question of fact for the district court. Frenchman's Creek, 453 F.2d at 1344.

Moreover, a similar result obtains when the FHA settlement accorded its actual value rather than attributing to it the value of the claimed indebtedness. The appellant owed principal in at least the amount of $478,948.69. This sum, which was advanced periodically from September, 1970 until January, 1972 permitted a lawful accrual of interest totalling some $175,000[6] by the time of the FHA settlement in September, 1974. Thus, Federal National could receive from the FHA as much as the combination of these sums, some $650,000, without enjoying more than the lawful 10% Return on the original outlay. In fact the face value of the debentures was in the amount of $564,150. This was safely under the amount permitted by statute. We therefore conclude that Federal National did not receive usurious interest on the loan, and, as discussed earlier, no excessive interest was contracted for or charged. Accordingly, appellant's claim for usury must fail.

[6] All parties agree that at least $478,948.69 was actually disbursed. The following computations are contained in Federal National's brief and are not disputed by the appellant:

Advances	To or For Borrower	Interest at 10% From Date of Advance to February 1, 1972

1.	8/14/70	$69,392.89	$10,190.30
2.	9/25/70	19,945.55	2,699.48
3.	10/1/70	38,763.20	5,182.59
4.	11/9/70	71,467.51	8,791.48
5.	12/17/70	13,732.88	1,546.36
6.	1/8/71	21,817.16	2,325.17
7.	3/3/71	51,979.87	4,770.76
8.	3/15/71	89,581.53	7,927.35
9.	4/8/71	66,788.61	5,471.18
10.	8/25/71		
Final	1/20/72	35,479.49	116.64
TOTALS:		$478,948.69	$49,021.31

It is further calculated that from the time of default in February 1972 until the time of the FHA settlement in September 1974 interest accrued at 10% For an additional amount of $126,363.72. Thus, by the time of the FHA settlement, the permissable return was $654,200, some $90,000 less than the amount of the face value of the FHA debentures.

The appellant also challenges the district court award of $8,250 on the counterclaim of Modern American. This sum was recovered after the appellant dishonored a check delivered to Modern American as part of an escrow agreement. In the proceedings below, the appellant failed to raise any defense to the counterclaim. His assertion in this appeal that the escrow agreement was violated comes too late. Fed.Rules Civ.Proc. rule 8(c). See e. g., Funding Systems Leasing Corporation v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976). The judgment of the lower court is therefore

AFFIRMED.

All Citations

583 F.2d 155

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901 F.Supp.2d 1267
United States District Court, D. Montana, Helena Division.

SAYPO CATTLE CO., Plaintiff,
v.
RMF DEEP CREEK, LLC a Delaware limited liability company, and First Montana Title Company of Helena, a Montana corporation, Defendants.
and
RMF Deep Creek, LLC, Counter–Plaintiff,
v.
Saypo Cattle Co., Counter–Defendant.

No. CV 11–10–H–CCL.
|
Sept. 28, 2012.

Synopsis
Background: Borrower, which entered into loan transaction and option agreement with lender, brought action against lender, raising claims arising out of their transactions, including usury claim. Parties filed cross-motions for summary judgment on borrower's claims and lender's counterclaims.

Holdings: The District Court, Charles C. Lovell, Senior District Judge, held that:

option agreement and loan were separate transactions;

Montana's usury statute did not apply to option agreement; and

doctrine of unclean hands applied under Montana law to preclude borrower from asserting equitable defense of promissory estoppel to bar lender's counterclaim for breach of option contract.

Defendant's motion granted.

Attorneys and Law Firms

***1268** James H. Goetz, Trent M. Gardner, Goetz Gallik & Baldwin, Bozeman, MT, for Plaintiff.

Charmaine G. Yu, Jonathan R. Bass, Naomi Rustomjee, Coblentz Patch Duffy & Bass, San Francisco, CA, Mark D. Etchart, Browning Kaleczyc Berry & Hoven, Helena, MT, for Defendants/Counter–Plaintiff.

James H. Goetz, Trent M. Gardner, Goetz Gallik & Baldwin, Bozeman, MT, for Counter–Defendant.

OPINION & ORDER

CHARLES C. LOVELL, Senior District Judge.

Before the Court are the parties' cross-motions for summary judgment. The matter came on regularly for hearing on September 6, 2012. Plaintiff was represented by Mr. James H. Goetz and Mr. Trent M. Gardner. Defendant was represented by Mr. Jonathan R. Bass and Mr. Mark D. Etchart. Having received oral argument and having reviewed the briefs and all the record, the Court is prepared to rule.

Pursuant to Fed.R.Civ.P. 56, Plaintiff moves for

1. partial summary judgment as to RMF's Third Counterclaim alleging Fraud (Doc. 31);

2. partial summary judgment as to RMF's First and Second Counterclaims for Breach of Contract (seeking the Court's ruling that (1) the Loan/Promissory Note and the Option Agreement constitute a single integrated transaction; and (2) RMF's Loan to Saypo is usurious) (Doc. 53); and

3. partial summary judgment as to RMF's Fifth Counterclaim for breach of contract (claimed right to exercise the Option) (Doc. 102).

RMF moves for summary judgment as to the Amended Complaint in its entirety, pursuant to Fed.R.Civ.P. 56. In the alternative, RMF seeks partial summary judgment as to Saypo's usury claims and defenses (requesting specific findings of material fact pursuant to Rule 56(g), Fed.R.Civ.P.).

***1269 STATEMENT OF FACTS**

In early 2010, Jack Salmond wished to sell his 12,000 acre ranch (dba Saypo Cattle Ranch) in Teton County, Montana. At the time, Salmond was an 80% shareholder in Saypo Cattle Company. Salmond retained a real estate broker to help him sell the property and his agent, James Esperti, contacted Daniel Schlager, President of Conservation Solutions, LLC, as a potential buyer, inviting him to visit Montana for a tour of the property. Conservation Solutions, LLC, a Wyoming conservation investment company, was indeed interested in buying the property, and its two principals, Daniel Schlager (President) and Jamie Crowley (Vice President), visited the Saypo Cattle Ranch in March 2010, touring the property with Jack Salmond, Esperati, and another brokerage agent, B. Elfland. Liking what they saw, Schlager and Crowley began negotiating with Salmond regarding purchase of the property. There were complications. Salmond was the majority shareholder in Saypo, but Saypo was in various stages of litigation (threatened and actual) with its minority shareholders regarding the Saypo Ranch. One of the minority shareholders had recorded a lis pendens on the Ranch. Salmond had fallen behind in his payments to buy out a minority shareholder. Also, one of Saypo Ranch's neighbors held a right of first refusal on any sale of the Saypo Ranch, effective until April 1, 2011. Finally, as part of a marital property settlement, Salmond owed $2.5 million to his ex-wife, who held a mortgage on the property, and a balloon payment was coming due in April, 2011.

In short, Saypo did not have a clean title to convey to Conservation Solutions or to any other purchaser.

Saypo shared with Schlager and Crowley the results of a 2010 appraisal performed by Clark Wheeler for the Nature Conservancy that valued the Ranch at approximately $11 to $12 million for conservation easement purposes. (Docs. 94–5 & 94–6, Second Aff. Jonathan Bass, Exs. T–U.) Salmond believed that the $14 million price was a fair one, and he so stated that it was a "fair and reasonable price" in his written description of the deal for the Saypo Board of Directors. (Doc. 78–4, Bass Aff., Ex. D.)

Schlager and Crowley's only interest was in purchasing the Ranch. Conservation Solutions (in which Schlager and Crowley were the two principals) had no interest in lending Saypo money, and they would not have done so but for the fact that it would facilitate its purchase of the Ranch.

This was an arms-length transaction in which Saypo and Jack Salmond were represented by Saypo's attorney, Neal Christensen, and in which virtually every significant term of every agreement was the subject of extensive negotiation. After weeks of negotiations, in May, 2010, Saypo and Conservation Solutions/RMF[1] arrived at certain agreements that would bring the parties somewhat closer to the desired purchase and sale of the property: (1) RMF would lend Saypo $5 million at 6% interest (promissory note to be secured by a mortgage on the Saypo Ranch) to permit Saypo to obtain clear title to the Ranch; and (2) Saypo would give RMF an option to purchase the Ranch for $14 million during the exercise period of April 2, 2011, until May 2, 2013. For the next month, well into mid-June 2010, the parties and their attorneys drafted, redrafted, and revised ***1270** their documents. The details of these agreements are important to the disputes and arguments of the parties, and must necessarily be scrutinized more closely.

[1] RMF Deep Creek is a single-member limited liability company formed under the laws of the State of Delaware, with its principal place of business in the State of Colorado. RMF's single member is Conservation Solutions Partners II LLC. RMF was formed on June 15, 2010, by Conservation Solutions for the purpose of purchasing the Saypo Ranch.

Document No. 1: The Loan Agreement. On June 24, 2010, the parties agreed that RMF would lend $5 million at 6% interest without any payment required for two years ("the Initial Term") until June 1, 2013 (the "Maturity Date"), at which time Saypo could unilaterally extend the loan for an additional two years until June 1, 2015 (the "Extended Maturity Date"). It was important to Salmond that he have a five-year loan and that he not be required to make any payment on it for five years (although the parties agreed that Saypo could pay off the loan at any time). Thus, under the terms of the Promissory Note, Saypo was required to make no payments on the $5 million loan for five years. However, during the last two years between the Maturity Date and the Extended Maturity Date, a higher interest rate of at least 13.5% would apply. In no event, however, was the interest rate to be permitted to rise above the legal limitation fixed by Montana's usury statute, which at this time was 15% interest, pursuant to the "Limitations on interest" clause. Thus, Saypo negotiated for, and received, a five-year term during which no payments would be required prior to the Note coming due on June 1, 2015. Although the initial maturity date came within three years, the parties negotiated for and expected that, unless Saypo repaid the loan early,

their agreement would result in a five-year loan term.

However, the parties anticipated that early in that five-year period ending on June 1, 2015, much would be settled regarding the Saypo Cattle Ranch. As of June, 2010, the Saypo Ranch was on the real estate market and might be sold to a third-party. One of the Ranch's neighbors might then exercise his right-of-first-refusal on or before April 1, 2011. After that, RMF might exercise its option to purchase the property for $14 million between April 2, 2011, and May 2, 2013. Thus, the parties had good reason to hope and even to expect (especially given RMF's genuine desire to purchase the property) that the Saypo Ranch would be sold before the first Maturity Date of June 1, 2013. If the property were not sold by that date, the parties expected that Saypo would extend its payment deadline (unilaterally and without penalty) another two years until the Extended Maturity Date of June 1, 2015.

In addition to the 6% interest payment, the Promissory Note also provided that if the Ranch were to be sold to a third-party, a Shared Appreciation Payment ("SAP") of $1.75 million would be paid by Saypo to RMF, and the SAP would first come due on June 1, 2013 (subject, however, to Saypo's unilateral right to extend the due date, without making any payment, for another two years). The Promissory Note explains that the parties acknowledged that the very fact that the loan allowed Saypo to clear its title would in itself result in a substantial increase in the marketability and the ultimate dollar value of the Ranch. The parties therefore agreed to share that increment of appreciation attributable to and derived from the $5 million loan, and the parties fixed RMF's share at $1.75 million as the Shared Appreciation Payment. However, RMF agreed to waive its right to the $1.75 million SAP under two conditions: first, RMF would waive the SAP if it (RMF) purchased the property by exercising its Option; second, RMF would waive the SAP if Saypo paid RMF a different payment provided for by the Option Agreement, called the "Sale Prior to Exercise Payment" ("SPEP").

***1271** The Shared Appreciation Payment (or SAP) is mirrored by a similar obligation undertaken by RMF. In RMF's Contingent Promissory Note, representing the terms by which RMF agreed to purchase the Ranch for $14 million, RMF agreed that if it purchased the Ranch and then resold it to a third party, RMF would pay a Shared Appreciation Payment to Saypo consisting of about 40% of the sales RMF's profit on resale. (Doc. 60, Schlager Aff., ¶ 16.)

The Court notes that the Promissory Note thus tended to encourage Saypo to sell the Ranch to RMF by means of several different provisions: (1) the low interest rate of 6% encouraged Saypo to sell the ranch during the first three years of the loan rather than extend the loan into an additional two-year period at a higher interest rate, (2) no payments were required on the loan until after RMF's Option period elapsed, meaning that Saypo could sell the Ranch to RMF and then simply repay the $5 million loan from the proceeds of the sale thereby alleviating the need to find some other source of funds for repayment of the loan, and (3) the $1.75 million Shared Appreciation Payment would be waived entirely if Saypo sold the Ranch to RMF. It is apparent from the documents that RMF structured its side of the deal to favor a Saypo–RMF sale. It is clear from these documents that RMF's overriding interest was to purchase the Ranch and not to lend money. It is also apparent that while Saypo clearly desired to sell the Ranch, Saypo's primary goal in June 2010 was to borrow a substantial amount of money to clear title and allow a sale.

Document No. 2: The Option Agreement. On June 24, 2010, the parties agreed that Saypo would grant RMF an Option to Purchase the Saypo Ranch during the exercise period of April 2, 2011, to May 2, 2013, for the sum of $14 million. As consideration for the Option, RMF agreed to pay Saypo $250,000 Option Fee immediately and another $125,000 on May 2, 2011. RMF also agreed to pay Saypo a monthly payment (referred to as the "Consideration for Information Gathering and Plan Preparation") of $10,417 beginning on May 2, 2012, until the closing of RMF's purchase of the Ranch or RMF's notice of abandonment of the Option or May 2, 2013, whichever came first. These monthly payments to Saypo represented payments for Saypo's preparation of a plan for RMF's future management of the Ranch and for collection of historical, conservation, and management information regarding the Ranch. The Option Agreement also contains a provision whereby the parties agree to enter into a separate Management Consulting Agreement between RMF and Jack Salmond (worth $285,000 over three years, *see* Doc. 60, Aff. of Schlager, ¶ 17), whereby Salmond agrees to serve as paid consultant to RMF in managing the property during the three years following RMF's purchase of the property.

Under the Option, if RMF exercises its Option to Purchase, RMF agrees to pay Saypo $7,150,000 for the Ranch (cash and loan forgiveness), plus a Contingent Note for $6,558,856 secured by a mortgage. Saypo agrees to credit RMF with any prior monthly payments made and the $250,000 Option Fee.

Clearly, RMF hoped to purchase the Ranch. Salmond did

not give up hope of obtaining a better price, however. Salmond and Christensen negotiated for and received a ten-month period (June, 2010 to April 1, 2011) within which Salmond could sell the property to a third party. However, this right was not free. RMF negotiated for a payment in exchange for Saypo's retention of a right to sell to a third party. The SPEP thus represents the dollar value that the parties negotiated to permit Saypo ***1272** to sell the property to a third party on or before April 1, 2011, despite RMF's Option to Purchase. It is a form of compensation to RMF for Saypo's demanded right to sell to a third party despite RMF's Option. Under the Option, if Saypo sells the Ranch to a third-party prior to the Option Exercise Period (*i.e.,* prior to April 2, 2011), then Saypo agrees to refund RMF's $250,000 Option Fee and to pay RMF 14% of the third-party sale consideration received by Saypo. This 14% payment is called the "Sale Prior to Exercise Payment" or "SPEP", and in the briefing has occasionally been referred to as the "Lost Opportunity Payment," the "Option Termination Payment," or the "Buyback Payment." Upon Saypo's payment of this SPEP to RMF, the Option terminates and both parties are released from all obligations under the Option.

Under the Default provision of the Option, if either party is required to retain an attorney to enforce the Option, the defaulting party agrees to pay the prevailing party's reasonable attorney fees.

The Court notes that RMF structured its side of the Option agreement to encourage Saypo to sell the Ranch to RMF through several different provisions: (1) Saypo is required to make a substantial payment to RMF (the 14% SPEP) if Saypo sells the Ranch to a third-party before the Option Exercise Period; (2) RMF waives the 14% SPEP if Saypo sells the Ranch to RMF; (3) Saypo will receive additional payments (the $125,000 payment on May 2, 2011, the monthly $10,417 payments beginning on May 2, 2012, and Salmond's Management Consulting Fee), if Saypo forgoes any opportunity to sell the property to a third party prior to RMF's Option Exercise Period.

Clearly, RMF structured its side of the deal for the purpose of encouraging Saypo to sell the Ranch to RMF and discouraging Saypo from selling the Ranch to third parties. Equally clear, Saypo structured its side of the deal for two purposes. Saypo's first purpose was to obtain cash funding (the $5 million loan, the $250,000 Option Fee, the additional $125,000 Option Fee, and the $10,417 monthly payments beginning in May, 2012), which cash would permit Saypo to clear its title, thus paving the way for sale, and would also permit Saypo to fund its Ranch operations during the pendency of the Loan and the Option. Saypo's second purpose was to obtain a well-defined offer to purchase the Ranch from RMF, while still retaining its ability to seek yet another higher offer.

Saypo's Sale to a Third Party. Although RMF brought Saypo to the dance, it did not get to take Saypo home. Just two months after the Saypo–RMF deal was struck, Saypo did find a buyer who made a better offer on the Ranch. On August 27, 2010, Gordon Dyal offered Saypo $20.5 million for the Ranch, and Saypo agreed to accept that offer. The Dyal sale would exclude an important piece of the Ranch known as the 40–acre property.[2] The closing was set for November 12, 2010. RMF agreed to cooperate with Saypo to assist it in closing the Dyal sale, but RMF expected to be repaid the following sums from the Dyal sale proceeds: the principal sum of $5,000,000 on the Note and Mortgage, 6% interest in the amount of $111,780.82, a refund of its Option Fee of $250,000, and an Option Termination Fee (referred to in the Option agreement as the "Sale Prior to Exercise Payment" or "SPEP") of $2,870,000.00. This latter fee, which is specified in paragraph 3 of the ***1273** "Option to Purchase Real Estate" agreement between RMF and Saypo, represents 14% of the consideration that Gordon Dyal paid Saypo for the Ranch.

[2] Under the terms of RMF's Option, RMF's $14 million offer included purchase of the 40–acre parcel, but Salmond was to retain a life estate in that property. This small parcel of property covered by the Option agreement was not sold to Dyal, and is still owned by Jack Salmond.

In order to effectuate the closing, RMF's principal, Daniel Schlager, settled these terms by email with Saypo's attorney, Neal Christensen, who replied to Schlager's email by approving a total payout figure of $8,231,780.82 (broken down into subunits of $5,00,000, $111,780.82, $250,000, and $2,870,000). Saypo attorney Christensen then emailed Rena Spangler, the Manager of First Montana Title Company, and he informed her that "[t]he payoff to RMF for the Mortgage and Option will be as shown below: a total of $8,231,780.82." (Doc. 43–9.) Christensen added, "I'll be sending you an actual payoff certificate for this amount, but thought it would be helpful for you to have the number." (Doc. 43–9.)

Based on the parties mutual understanding of RMF's payout at the time of the Dyal closing, Schlager executed a Release of Mortgage and Termination of Option and emailed them to the Rena Spangler, the Manager of First Montana Title Company, on the closing date of November 12, 2010, with instructions that they were to be

recorded after RMF was wired its share of the proceeds of the Saypo–Dyal closing.

While these closing preparations were being made, however, Saypo was in the midst of working to delay the closing after discovering on September 27, 2010, (through its accountant) that it could obtain a significant tax advantage (approximately $4 million in tax savings) if it closed the sale in 2011. The closing was rescheduled for January 5, 2011. RMF informed Saypo's attorney, Neal Christensen, that its payout figure would change because the 6% interest would continue to accrue on the $5 million loan between November 12, 2010, and January 5, 2011. RMF's release documents were already in the possession of the title company since November, and the escrow agent merely needed a revised Payout Certificate for closing.

Communications Between the Parties to Prepare for Final Saypo–Dyal Closing. On Thursday, December 23, 2010, Rena Spangler emailed Dan Schlager and asked him for "a payoff statement valid through 1/6/11 with a daily interest figure for the Saypo/RMF Creek loan?" On Friday, December 24, 2010, Dan Schlager replied to Rena Spangler, and told her that he was visiting relatives for the holidays and asking whether he could provide the payoff statement on January 3. Rena Spangler replied by email on Wednesday, December 29, 2010, telling Schlager that January 3rd would be fine to get the Payout Certificate to her, "but if there is any way to get the amount verbally sooner, I'm sure Saypo and their attorney would be happy."

Dan Schlager then emailed Neal Christensen on Friday, December 31, 2010, and gave him RMF's itemized list of pay-off figures, saying:

> Good afternoon Neal,
>
> I hope that you are in the midst of a very pleasant holiday season filled with family and friends. Best wishes from Jamie and I for a very happy and healthy New Year.
>
> I hope that the year will begin with a successful close of the Saypo transaction upon which you have labored long and hard and to great effect. Rena, from First Montana Title Co., e-mailed me inquiring about a pay-off amount for our loan, so I am assuming that all remains on track for the January 5, 2011 close. Is everything on schedule and in order for a closing on January 5?
>
> ***1274** I thought it best to relay a pay-off figure to you for your review prior to sending one to Rena. Here it is:

$5,000,000.00	(loan principal)
$ 156,986.30	(interest for 191 days based on 365 day year, including final day: 6/29/10–1/5/11)
$ 250,000.00	(return of option payment)
$2,276,986.30	(TOTAL PAY–OFF AMOUNT DUE)

Interest per day = $821.91

> Please review and confirm, after which I will pass final figure pay-off and daily interest figures along to Rena.
>
> Have a wonderful New Year's!
>
> Best regards,
>
> Dan

(Doc. 78–9, Aff. Jonathan Bass, Ex. I at 2.)

Neal Christensen replied to Schlager's email on Friday, December 31, 2010, at 8:37 p.m., as follows:

> Dan,
>
> Yes, I've enjoyed lots of family time during the Christmas days, and will spend New Years Eve with friends.
>
> The calculations below [referring to Schlager 12/31/10 email] appear correct, consistent with the November figures except as to 6% interest which you have updated through 1/5/11.
>
> Yes, we're still on track for a 1/5/11 closing. Hopefully no surprises from Letterman in the New Year.
>
> Thanks,
>
> Neal

(Doc. 78–9, Aff. Jonathan Bass, Ex. I at 2.)

Schlager replied to Rena Spangler by email on Friday, December 31, 2010, "Per your earlier inquiry, below are the pay-off figures (and I have confirmed them with Neal Christensen. Total pay-off: $8,276,986.30; Interest per day: $821.91."

Rena Spangler replied to Schlager on Monday, January 3, 2011, at 8:38 in the morning, and sent a copy of her email to Neal Christensen:

> I'm assuming that the difference is in the interest figure and will adjust my figures accordingly. What day is the revised payoff good through so I can adjust the total to conform to the actual day I will wire funds? And could you forward wire instructions for the payoff?

Dan Schlager replied by email less than three hours later,

> Yes, your assumption is correct—just the interest figure changed. The revised payoff is good through January 5, 2011. I have attached revised RMF Escrow Instructions reflecting the January 5 close date and a revised RMF Payoff Certificate. The Escrow Instructions will require your and Neal's signatures. Please return a fully executed version to me. The Payoff Certificate includes the wiring instructions for RMF. Let me know if you need anything else from us, and thank you again for your handling of this transaction.

Neal Christensen replied to Dan Schlager on January 3, 2011 at 2:57 pm, also sending a copy of his email to Rena Spangler and Jamie Crowley:

> Dan and Rena,
>
> I think the date of payoff certificate referenced in paragraphs A.1.b.(2) and C.3 should be changed from 11.12. 10 to 1.3.11.
>
> Should I just mark it up that way and sign it, or do you want Dan to make the changes and resubmit for our signature.
>
> Let me know,
>
> ***1275** Neal

Schlager replied by email to Neal Christensen (copying the email to Rena Spangler and Jamie Crowley) at 5:04 pm: "Thanks Neal for catching that error. Please just mark it up and sign it. Dan"

Neal Christensen then replied as follows:

> From: Neallaw [address redacted]
>
> Sent: Monday, January 3, 2011 2:49 PM
>
> To: Dan Schlager [address redacted]
>
> Cc: Rena Spangler [address redacted], Jamie Crowley [address redacted], Jack Salmond [address redacted]
>
> Subject: Re: Saypo/Dyal transaction
>
> *Attach: 1.3.11 RMF Escrow Instructions (edited and signed by Neal).pdf*
>
> Dan and Rena,
>
> Here it is, marked-up, initialed and signed.
>
> Thanks,
>
> Neal

(Doc. 43–12, Aff. Daniel Schlager, Ex. L, emphasis

added.) With this last email, Neal Christensen signed the Escrow Instructions, already executed by Daniel Schlager for RMF, and emailed them to First Montana Title Company on behalf of Saypo, confirming the $8,276,986.30 total payout to RMF from the Dyal sale proceeds.

On the basis of these communications between the parties, the Saypo–Dyal closing stayed on track for Wednesday, January 5, 2011, with First Montana Title Company acting as escrow agent.

Saypo Files Suit on January 3, 2010. Although on December 31, 2010, Schlager asked Christensen, "Is everything on schedule and in order for a closing on January 5?" and Christensen replied, "Yes, we're still on track for a 1/5/11 closing[,]" apparently not everything was really on track.

On December 31, 2010, while Saypo's transaction attorney, Neal Christensen, was reassuring RMF that they would receive their $8 million payout, Saypo's litigation attorney, Kevin Jones, was preparing a complaint to be filed in state district court to prevent RMF from receiving their $8 million payout. In fact, on January 3, 2011, the day that Saypo's attorney, Neal Christensen (with notification to Jack Salmond, sole shareholder of Saypo) signed and dated the Escrow Instructions and emailed them to First Montana Title Company, thereby instructing First Montana Title to wire $8 million to RMF at the end of the Dyal closing-Saypo was, at 11:07 a.m. of that same day, filing a Complaint in Lewis and Clark County, First Judicial District, charging RMF with usury.

On January 4, 2011, Saypo's attorney Kevin Jones filed an Amended Complaint that added First Montana Title Company of Helena as a Defendant to its suit and sought a preliminary injunction against Defendant First Montana Title Company to prevent it from distributing to RMF that portion of the closing proceeds claimed by Saypo to represent usurious interest ($2,734,520.55).[3] Also on January ***1276** 4, 2011, Kevin Jones filed a Certification Regarding Notice of Hearing at 1:54 p.m. Apparently Jones had presented his Motion for Temporary Restraining Order that morning to the state court, because one of his affidavits in support thereof was filed stamped on January 4, 2011, at 9:56 a.m. (Doc. 1–2 at 49.) The fact that the Motion for Temporary Restraining was not actually file stamped by the clerk until January 5, 2011, at 3:35 p.m., is not particularly relevant here. In his January 4, 2011, Certification Regarding Notice of Hearing, Jones states that he had been informed "this morning" by the Clerk of Court that a hearing had been scheduled on the Motion for Temporary Restraining Order for 2:30 p.m. that very day. Jones avers that he "made reasonable effort" between 11:10 and 11:15 a.m. to notify RMF and Daniel Schlager by telephoning his office phone number on the Conservation Solutions, LLC letterhead. Jones also avers that he left a detailed message on both Mr. Schlager's voice mail and Mr. Crowley's voice mail as to the 2:30 p.m. hearing, but neither returned the phone call.

[3] The Motion for TRO states that "RMF has asserted that it expects to be paid $8,276,986.30 at Closing in connection with the payoff of the $5,000,000.00 Note, including $3,126,986.30 of Loan Interest." (Saypo arrived at this total interest amount by adding the 6% interest payment of $156,986.30, a $100,000 Loan Origination Fee paid out of the loan principal, and the $2.87 million SPEP/Option Termination Fee provided under the Option agreement.) Saypo asserts that the 15% maximum amount of interest permitted by Montana statute for the loan period (191 days) equals $392,465.75. Since Saypo had already paid $100,000.00 as a Loan Origination Fee, Saypo asserts that it is liable for only $292,465.75 in interest, certainly not the $3,026,986.30 amount being demanded at closing by RMF. The difference between these two last figures provides the disputed interest amount, which is defined by the Amended Complaint to be $2,734,520.55. In its Amended Complaint, Saypo seeks treble damages of $6,253,972.60 under Montana's usury statute, Mont.Code Ann. § 31–1–108.

In order to be perfectly clear about the matter, Saypo followed up its Amended Complaint by filing a Motion for Temporary Restraining Order on January 5, 2011, at 3:35 p.m., against RMF and First Montana Title Company to prevent the title company from disbursing proceeds in the amount of $2,734,520.55 (*i.e.,* to deduct that amount from RMF's total payout of $8,276,986.30 as opposed to following the Escrow Instructions) *and* to require the title company to record RMF's previously-executed "Satisfaction of Mortgage" and "Termination of Option". Saypo asserted that "RMF will not be prejudiced in any way by the recording of these documents, since all sums claimed owing to RMF and necessary to satisfy the conditions for the release of RMF's Mortgage and the release of RMF's recorded Option to Purchase either will be distributed to RMF from closing or held by this Court with adequate security." (Doc. 1–2 at 45.) Further, Saypo offered to interplead with the state district court the disputed amount ($2,734,520.55) and another half of that amount ($1,367,260.28) contributed by Saypo from its net proceeds to cover "any claimed interest charges and attorney fees and costs" in the event RMF were to prevail on the usury claim. Thus, Saypo offered $4,101,780.70 to be held by the clerk of the state district court pending the resolution of the complaint.

RMF Scrambles to Catch Up. On January 4, 2011, at about 2:45 p.m., Daniel Schlager, who was in Denver but not at his office, learned from James Crowley that a voice mail had been delivered to Crowley's office telephone by a man purporting to be Saypo's attorney about a hearing to be held on that day at 2:30 p.m. in Helena regarding Saypo's request for a temporary restraining order. Schlager's secretary confirmed that a similar message had been left for him at his office. The messages had been left on office voice mail, despite the fact that Saypo's attorney, Neal Christensen, was in regular contact with Schlager and Crowley via their cell phones and email. Late in the day Schlager was able to review the complaint. Late that evening, on January 4, 2011, Schlager retained a Montana attorney, Mike Lilly, to represent RMF's interests at the continuation of the TRO hearing in state district court on January 5, 2011.

At that hearing, the parties submitted a stipulation to the court agreeing that the Dyal closing could proceed as scheduled, that all of Saypo's proceeds (over $12 million) would be held by the title company for 10 days pending further negotiations between the parties, that the title company would record RMF's Satisfaction of Mortgage ***1277** and Termination of Option to Purchase (without which, the Dyal sale could not close), and that the title company would be dismissed from the action. (Doc. 108–6 Aff. Naomi Rustomjee, Ex. F: Doc. 108–7, Ex. G.)

On January 20, 2011, Saypo and RMF filed a stipulation in the state court case that requested a court order directing First Montana Title Company to disburse to RMF $5,542,467.75, to disburse to Saypo $5,391,222.99, and to deposit the remainder of the funds ($4,101,780.83) with the clerk of court. The stipulation notes that of the funds deposited with the clerk, $2,734,520.55 represented a sum that was to be distributed to RMF at closing, and $1,367,260.28 represented a sum that was to be distributed to Saypo at closing. These sums, totaling $4,101,780.83, continue to be held by the Clerk of Court of the First Judicial District, Lewis and Clark County. The state district court entered the requested order on January 21, 2011. (Doc. 108–8, Aff. Naomi Rustomjee, Ex H; Doc. 108–9, Ex. I.)

On April 29, 2011, Schlager informed Salmond by letter that RMF was exercising its option to purchase the Ranch and would be ready to close the transaction within 30 days. Schlager asserts that Saypo procured RMF's termination of the Option "under false pretenses." Schlager states that RMF rescinds its termination. Schlager notes that a second Option payment of $125,000 is due on May 2, 2011, but "under the present circumstances, we do not believe that payment is due." Schlager states that if the payment is due, RMF will make it upon reasonable assurances that Saypo has the ability to convey the Ranch to RMF in accord with the Option. On May 14, 2011, Jack Salmond responded to Schlager's letter by stating that he disagreed within everything in the letter and requesting all future communications to be made through counsel. (Doc. 108–19, Aff. Naomi Rustomjee, Ex. P; Doc. 108–20, Ex. Q.)

STANDARD OF REVIEW

Fed.R.Civ.P. 56(a) permits a party to seek summary judgment "identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." A district court may grant summary judgment as to particular claims or defenses when one of the parties is entitled to judgment as a matter of law. Summary judgment or adjudication is appropriate when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Matsushita Elec. Indus. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.,* 809 F.2d 626, 630 (9th Cir.1987). The purpose of summary judgment is to "pierce the pleadings and assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec.,* 475 U.S. at 586, n. 11, 106 S.Ct. 1348.

On summary judgment, a court must decide whether there is a "genuine issue as to any material fact," not weigh the evidence or determine the truth of contested matters. Fed.R.Civ.P. 56(a), (c); *see also, Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence of the party opposing summary judgment is to be believed and all reasonable inferences from the facts must be drawn in favor of the opposing party. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505; ***1278** *Matsushita,* 475 U.S. at 587, 106 S.Ct. 1348. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251–252, 106 S.Ct. 2505.

The moving party, in supporting its burden of production,

"must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.,* 210 F.3d 1099, 1102 (9th Cir.2000); *see also, Soremekun v. Thrifty Payless, Inc.,* 509 F.3d 978, 984 (2007) (moving party may prevail "by pointing out that there is an absence of evidence to support the nonmoving party's case"). A "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial" to entitle the moving party to summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[T]o carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact." *Nissan Fire,* 210 F.3d at 1102. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

"The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.' " *Aydin Corp. v. Loral Corp.,* 718 F.2d 897, 902 (9th Cir.1983) (quoting *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288–289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505.

DISCUSSION

Plaintiff's Usury Claim.

Plaintiff claims that the $2.87 million Sale Prior to Exercise Payment, or SPEP, is interest on the $5 million loan. This is so, according to Plaintiff's theory of the case, because the Loan Agreement and the Option to Purchase Real Estate are not two separate transactions but a single integrated transaction. The Option's SPEP, in Plaintiff's view, is nothing more than a disguised interest payment on the loan.

However, under Montana law, interest is defined to be compensation *for* "the use, or forbearance, or detention of money...." *See Scarr v. Boyer,* 250 Mont. 248, 818 P.2d 381, 382 (1991). The Option agreement makes clear that the payment of the SPEP is in exchange *for* the right of the optioner (Saypo) to sell the property to a third-party despite the optionee's agreed-upon right of purchase. Thus, the SPEP payment does not appear on its face to be interest, but instead appears to be a payment for a valuable right. Although the two contracts were executed contemporaneously by the same parties and relate to the same matter, and therefore are to be interpreted one in light of the other, *see* Mont.Code Ann. § 28–3–203, the two contracts cannot logically be merged together.[4]

4 "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together." Mont.Code Ann. § 28–3–203. This statute provides a rule of contract interpretation, not a formula for merger of contracts. *See Tin Cup County Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.,* 347 Mont. 468, 200 P.3d 60, 67 (2008).

***1279** The Court rejects Plaintiff's theory for the following reasons. The Loan and the Option are clearly two separate contracts that together comprise the deal struck by RMF and Saypo. They cannot be merged into one, however, because each agreement is supported by separate and adequate consideration. First, the $5 million loan is supported by the payment of interest as stated in the Promissory Note, and, second, the Option agreement is supported by separate payment of $250,000 and $125,000. *See S & N Equipment v. Casa Grande Cotton Finance Co.,* 97 F.3d 337, 342 (9th Cir.1996) (payments under collateral agreement can be treated as disguised interest on loan agreement where collateral agreement lacks independent value); *Handi Inv. Co. v. Mobil Oil Corp.,* 550 F.2d 543, 545 (9th Cir.1977) (not finding collateral payments to be loan interest even when borrower required to enter into collateral agreement as a condition of the loan of money). Thus, under *Handi Inv. Co.,* even if Saypo had been *required* to enter into the Option agreement as a *condition* of the loan (which condition never even was discussed by RMF and Saypo, so clear were the desires of the parties: Saypo to borrow and RMF to buy), that condition would still not transform Saypo's payments required by the Option agreement into disguised interest on the loan. Again, this case presents absolutely no evidence of collusion between the parties to evade the usury statute, and Saypo presents no evidence either that RMF intended to evade the usury statute, or did not provide adequate compensation in exchange for the Option, or charged an unreasonable price for the third-party sale provision.

In addition, the Option agreement is a valid independent

contract. *See Lee v. Shaw,* 251 Mont. 118, 822 P.2d 1061, 1063 (1991) (option agreement "is a right acquired by contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time"). The relinquishment of a legal or contractual right is sufficient consideration to support a contract. *Rickett v. Doze,* 184 Mont. 456, 603 P.2d 679, 680 (1979); *Naylor v. Hall,* 201 Mont. 59, 651 P.2d 1010 (1982); *Van Atta v. Schillinger,* 191 Mont. 472, 625 P.2d 73, 75 (1981) (agreement to be party to collateral contract can be consideration for an option agreement). In this case, the Option was bargained for at arms-length, and Saypo's attorney assisted in the drafting of the Option. Under the Option, RMF bargained for the right to purchase the property, and the terms of the purchase were defined by the exhibits to the Option, such as the Contingent Promissory Note and the Consulting Agreement. Saypo bargained for two cash payments for the Option ($250,000 and $125,000), the right to sell to a third-party under specified circumstances, a loan, an acceptable purchase price for the Ranch ($14 million) to be paid by RMF, and for $10,417 in monthly payments during each month of a single year in the Option Exercise Period. The consideration RMF paid to Saypo for the Option agreement was not only adequate, but substantial. There is no triable fact as to the adequacy of the consideration.

Montana's usury statute does not apply to the Option agreement because the Option agreement is not a loan of money. *See Nyquist v. Nyquist,* 255 Mont. 149, 841 P.2d 515, 518 (1992) (unconditional obligation to repay is prerequisite of loan agreement). Saypo had no unconditional obligation to pay the SPEP; instead, the SPEP is a conditional obligation dependent on whether Saypo sells the Ranch to RMF or to a third-party. There is no loan and ***1280** no usurious interest rate or usurious payment.

At his deposition, Jack Salmond testified that at the time he executed the agreements in June, 2010, he considered them to be two separate transactions, each with its own financial terms and consideration. (Doc. 61–1, Aff. Naomi Rustomjee, Ex. A, Depo. Jack Salmond, 93:3–24.) Only later, in December, 2010, after conversations with his attorney, did he begin to view it otherwise. Indeed, had Saypo repaid the loan the day after it was made, as it was permitted to do without penalty, the Option agreement would have continued on as a stand-alone contract.

Certainly, if RMF had no interest or intention of purchasing the Ranch, and if the Option were merely a sham agreement, *see American Insurers Life Ins. Co. v. J.E. Regenold,* 243 Ark. 906, 423 S.W.2d 551, 552 (1968), *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E.2d 823 (1971), and *Najarro v. SASI Int'l, Ltd.,* 904 F.2d 1002, 1004 (5th Cir.1990), then this Court could and would look closely for disguised interest on the loan. Likewise, if there were even a scintilla of evidence that the parties colluded to cover up a usurious interest rate, *see Mission Hills Dev. Corp. v. Western Small Business Inv. Co.,* 260 Cal.App.2d 923, 67 Cal.Rptr. 505 (Cal.Ct.App.1968); *First Nat. Bank v. Danek,* 89 N.M. 623, 556 P.2d 31 (N.M.1976), then again this Court would look closely for disguised interest on the loan. Those are not the facts of this case, however.

Although the Shared Appreciation Payment ("SAP") of $1.75 million is not pled in the Amended Complaint in support of the usury claim, even assuming that the SAP is interest on the $5 million loan, this Court does not find the loan's interest to be usurious because the term of the loan is clearly five years (June 29, 2010 to June 1, 2015). According to both parties, Saypo bargained for and obtained a five-year loan. (Doc. 42–2, Aff. Naomi Rustomjee, Ex. A, Salmond Depo., 140:14–141:1; Doc. 42–3, Ex. F, Christensen Depo., 242:14–25; Doc. 79, Schlager Aff. ¶ 20.) Saypo wanted to pay a low interest rate (6%) in the short term (three years) because it hoped it could pay the loan back by selling the ranch at a high price before RMF's option became effective on April 2, 2011. (Doc. 78–2, Aff. Jonathan Bass, Ex. B, Salmond Depo., 140:7–13.) Saypo was not absolutely certain that it could pay the loan back within three years, however, so it bargained for and received the unilateral right to extend the loan term two extra years (without payment) by agreeing that a higher interest rate would apply during the last two years. Essentially, Saypo had no repayment obligation until June 1, 2015. When the SAP under the Promissory Note is treated as interest on a five-year loan term, and added to the actual interest paid by Saypo ($111,780.82), the total interest paid still does not exceed Montana's limit of 15% per annum over the five-year term. *See Pentico v. Mad–Wayler, Inc.,* 964 S.W.2d 708, 714 (Tex.App.1998) ("[C]ontracts are tested for [facial] usury by spreading the interest over the entire term of the contract."); *see also Imperial Corp. of America v. Frenchman's Creek Corp.,* 453 F.2d 1338 (5th Cir.1972) (true term of loan was initial term plus extensions provided for in contract). It appears that Saypo bargained for a five-year term, and that it was in fact a loan having a term of five years.

However, the loan term is a relatively unimportant peripheral issue, because the central issue remains whether or not the *Option's* SPEP is disguised interest. There are no Montana 'disguised' interest cases, but in the

past, Montana courts have looked to the law of Texas on the subject of usury, because Montana's usury statute is similar to that of Texas. *See* ***1281** *Scarr v. Boyer,* 250 Mont. 248, 818 P.2d 381, 383 (1991) (noting similarities between Montana and Texas usury law, adopting "reasoning" of Texas courts); *Anderson v. Traveler's Insurance,* 13 Mont. B.R. 91 (D. Mont 1992) (adopting Texas law regarding usury savings clause); *In re Brummer,* 147 B.R. 552 (D.Mont.1992) (applying Texas usury law to analyze Montana's usury statute).

Under Texas law, a party claiming usury under a theory of disguised interest must prove either that the parties colluded to evade the usury law or that the lender intended to evade the usury law. *Richards v. Moody,* 422 S.W.2d 200, 202 (Tex.App.1967) (borrower claiming usury based on a "multiple-cornered transaction" not usurious on its face must prove "a corrupt agreement or scheme to cover usury" that was in "full contemplation of the parties"); *see also Handi Inv. Co. v. Mobil Oil Corp.,* 550 F.2d 543, 545 (9th Cir.1977) (when form of transaction appears non-usurious, California law requires borrower to prove that lender intended to evade usury law).

Texas courts look to the substance of the transaction to determine whether a collateral agreement imposes disguised interest. *See, First State Bank of Bedford v. Miller,* 563 S.W.2d 572 (Tex.1978); *Loomis v. Blacklands Production Credit Association,* 579 S.W.2d 560, 563 (Tex.App.1979) (conditioning collateral purchase of stock on agreement to lend money does not result in collateral payments being treated as disguised interest because borrower receives independent value in the stock); *First Bank v. Tony's Tortilla Factory, Inc.,* 877 S.W.2d 285 (Tex.1994) (Because account holder received independent value, bad check fee is not interest even though a loan is created when bank covers payment for account-holder).

In this case, Saypo received independent value for the SPEP under the Option by bargaining for and receiving the very valuable right to sell the Ranch to a third party despite the existence of the Option agreement. Just how valuable this right was to Saypo is indicated by the $20.5 million price paid by Gordon Dyal for the Ranch on January 5, 2011. In fact, both the loan agreement and the option agreement have independent value.

If Plaintiff's theory were the law, one could never safely enter into any non-loan agreement contemporaneously with a loan agreement, for fear that the consideration for the non-loan agreement would later be deemed to be interest on the loan. Furthermore, the fact that these agreements cross-reference each other is of no importance to the ultimate question whether there is one transaction or two. Although certain events under one agreement triggered consequences under another agreement, these separate agreements were independently enforceable. For example, Saypo might repay the $5 million loan, but the Option agreement would continue in force and effect. Conversely, RMF might decline to purchase the property and allow the Option to expire, but the Promissory Note would continue in force and effect. The fact that the Promissory Note states the order in which payments are to be credited (late charges first, interest second, principal third, payments on the mortgage fourth, Shared Appreciation Payment fifth, SPEP sixth), and includes in that list a payment (the SPEP) which is due under the Option, does not inevitably lead to the conclusion that the SPEP is sham interest or that there is a single integrated transaction. In fact, RMF claims that Saypo's attorney negotiated for that language to protect Saypo's interests. (Doc. 108–18, Aff. Naomi Rustomjee, Ex. O, Depo. James Crowley, 123:3–8.)

Furthermore, there is not one scintilla of evidence that the parties colluded to evade Montana's usury statute. In fact, one of RMF's proposals, rejected by Saypo, was ***1282** simply to do the entire loan at 15 percent interest. (Doc. 108–17, Aff. Naomi Rustomjee, Ex. N, Depo. Daniel Schlager, 101:9–14.) While there is some suggestion in the record that Saypo's attorney wondered whether the loan agreement was usurious at the time the documents were being drafted and also that he might have thought during the drafting stage that Saypo might be justified in a future breach of the Option agreement on usury grounds, there is no need for the Court to make such a finding. The Court can and does find, however, that RMF did not intend to impose a usurious interest rate on its loan to Saypo.

Finally, the usury savings clause in the Promissory Note saves the Note from any facial claim of usury. In Montana, usury savings clause have been validated. *See Poulsen's, Inc. v. Wood,* 232 Mont. 411, 756 P.2d 1162 (1988). In this case, the interest rate under the Promissory Note is not fixed but fluctuates according to the actions of the parties at various points in time. If for example, Saypo chose to sell the property to RMF between April 1, 2011, and May 2, 2013, Saypo's interest rate on the $5 million loan would be 6%. If Saypo chose to sell the property to a third-party on June 1, 2013 (just past RMF's Option Exercise Period), however, a Shared Appreciation Payment ($1.75 million) would be added to the 6% interest to result in an interest rate interest rate of approximately 8% over a five-year term or 13.6% over a three-year term. There are other possible interest rates depending on other changes in the factual circumstances.

In any event, the usury savings clause was used by the parties as a regulator of the Note's fluctuating interest rate to protect the borrower from having to pay usurious interest on the Note. The usury savings clause, contained in the Promissory Note, is not in the forefront of our attention, however, because Plaintiffs's primary argument is that a payment due under the *Option* agreement makes the interest rate on the Note usurious.

The Court will therefore deny Saypo's second motion for partial summary judgment (Doc. 53), which seeks a ruling that there is one transaction and that the interest on the loan is usurious. The Court cannot agree with either proposition. While Saypo granted RMF an Option to Purchase the Ranch at a cost to RMF of $250,000 paid in 2010 and $125,000 paid in 2011, Saypo also negotiated for and received an opportunity to sell the Ranch to a third party at a cost to Saypo of 14% of the third-party sale price. This negotiated price was high, at least in part, because RMF did not want Saypo to sell the Ranch to a third party. This was an arms-length transaction, and Saypo was represented by counsel. The SPEP was bargained for and fairly obtained under all the circumstances. It was mirrored by a similar provision running in the opposite direction in Saypo's favor. The easy way for Saypo to avoid paying the SPEP was simply to sell the Ranch to RMF pursuant to the Option. If that option did not suit Saypo because it could obtain a better third-party offer, the SPEP actually benefitted Saypo by telling Saypo precisely what its cost would be to 'buy back' RMF's Option. Thus Saypo could judge accurately the financial benefit of any third-party offers. The harder way for Saypo to avoid paying the SPEP was to file the instant litigation.

Defendant RMF's Motion for Summary Judgment as to Saypo's Amended Complaint

For all the reasons stated above, Defendant RMF's Motion for Summary Judgment (Doc. 77), which is premised on the assertion that there is no genuine material issue of fact as to its liability on the Amended Complaint, is well taken. RMF has no liability as to Saypo's usury claim in the Amended Complaint.

***1283** *Plaintiff's Motion for Partial Summary Judgment as to RMF's Fifth Counterclaim.*

Saypo asserts that it is entitled to partial summary judgment as to RMF's Fifth Counterclaim for breach of the Option contract, by which Counterclaim RMF seeks to enforce its option to purchase the Ranch (but not against good faith purchasers for value, presumably meaning Gordon Dyal). (Doc. 102.) This Fifth Counterclaim is predicated on the Fourth Counterclaim, by which RMF claims that it is entitled to rescind its termination and exercise its option to purchase the Ranch, as in fact RMF did attempt to do by letter dated April 29, 2011. (Doc. 108–19, Aff. Naomi Rustomjee, Ex. P.) (In its rescission letter, RMF also offered to pay to Saypo the second Option payment of $125,000, coming due on May 2, 2011, if reasonable assurances of a forthcoming transfer of the Ranch under the Option could be made by Saypo.)

In response to the Fifth Counterclaim and in seeking partial summary judgment on the Fifth Counterclaim, Saypo contends that RMF consented to the third-party sale by its stipulation on January 5, 2011, and that RMF cannot now exercise an option that RMF previously terminated. However, Saypo seems to miss the point that RMF does not wish to rescind its Option but to rescind its Termination. Saypo contends also that it is not possible for it to convey the Ranch to RMF, although Saypo concedes that it does still own the 40–acre parcel. RMF believes that its Option agreement covered both the 12,000 acre parcel and the 40–acre parcel. (Doc. 108–17, Rustomjee, Ex. N., Depo. Dan Schlager, 46:16–47:13.) Saypo concedes that the Option did cover both the 12,000 acre parcel and also the 40–acre parcel. (Doc. 113 at 12.) Saypo's argument that RMF cannot now rescind its Termination of the Option, because RMF terminated its Option, merely begs the question. Saypo correctly points out that RMF's Option agreement provided for not only a life estate in Jack Salmond as to the 40–acre parcel, but it also provided *Saypo* an option to purchase the 40–acre parcel back from RMF at a price based on a fair market appraisal. (Doc. 113 at 13; Doc. 114–3, Aff. Trent Gardner, Ex. 3, Depo. Daniel Schlager, 50:7–15.)

The parties' second stipulation, dated January 20, 2011, calls for the title company to disburse $5,542,467.75 to RMF and to disburse $5,391,222.99 to Saypo, depositing the remainder of the funds ($4,101,780,83) with the state clerk of court, but it specifies that *the release of funds is not to be "construed as a release, waiver or compromise of the parties' rights and claims in this action.*" (Doc. 108–8 at 3; emphasis added.) Clearly, by agreeing that the title company should record RMF's Termination of Option, RMF released and waived any right it had under the Option as against Gordon Dyal. However, it appears that, as against Saypo, RMF did not on January 5 or January 20 stipulate to a release or waiver of its rights

under the Option. Moreover, it does appear to the Court that a genuine issue of fact exists regarding whether Saypo procured the Satisfaction of Mortgage and the Termination of Option from RMF by fraud.

Saypo defends against the Fifth Counterclaim by asserting that the equitable doctrine of promissory estoppel should bar RMF's Fifth Counterclaim for breach of the Option contract. Saypo's theory is that it acted in reliance upon RMF's stipulation dated January 5, 2011, that the third-party sale should go forward. That stipulation states that "immediately upon closing today Title Company shall record the Satisfaction of Mortgage and the Termination of Option to Purchase, thereby ***1284** providing clear title to the non-party purchaser...." (Doc. 108–7 at 3–4.) Saypo further argues that it would not have closed the Dyal sale had RMF not agreed to it. With this last assertion, the Court cannot agree. On the day prior, January 4, 2011, Saypo had already filed an Amended Complaint and Motion for TRO requesting that the state district court *order* the title company both to record RMF's Satisfaction of Mortgage and the Termination of Option and also to withhold from RMF the SPEP payment (or cash equivalent). The stipulation offered a convenient route to getting what it wanted, but Saypo would have continued to seek the district court's temporary restraining order absent that stipulation, and if successful Saypo would have proceeded to closing. (The contrary view would require the Court to believe that Saypo filed its complaint and requested the TRO without any intention of following through on the litigation but only for the purpose of intimidating RMF into allowing Saypo to close the Dyal sale.) The evidence indicates that Saypo would have gone forward with the third-party sale on January 5, 2011, even absent RMF's stipulations.[5] Furthermore, promissory estoppel is an equitable defense when asserted by Counter–Defendant Saypo under these circumstances. The doctrine of unclean hands applies in such a circumstance to negate Saypo's equitable defense. *See Kauffman–Harmon v. Kauffman,* 307 Mont. 45, 36 P.3d 408, 413 (2001) ("Parties must not expect relief in equity, unless they come into court with clean hands.") (*quoting In re Marriage of Burner,* 246 Mont. 394, 803 P.2d 1099, 1100 (1991)). *See also* Mont.Code Ann. § 1–3–208 ("A person may not take advantage of the person's own wrong."). Saypo is a party who comes to the Court having conducted itself unethically with respect to the subject matter-not only the manner in which Saypo obtained the release of the mortgage and the termination of the option, but also in the manner in which Saypo lay in wait until the eleventh hour to spring its litigation upon RMF—literally, to take RMF by surprise-and to give RMF only a few hours to secure unfamiliar out-of-state counsel by telephone in the thin hope of protecting its rights. Saypo's bid to benefit once again by this prior conduct—to enforce its interpretation of the stipulation against RMF under an equitable theory of promissory estoppel—will not be facilitated by this Court.

5 Had RMF refused to enter into the stipulation and thereby persuaded the state district court to block the Dyal sale, RMF could have ultimately been sued by Saypo and Dyal for interfering with the sale. Thus, Saypo maneuvered RMF into a difficult dilemma, *i.e.,* risking losing the SPEP, on the one hand, and risking being held responsible for blocking the Dyal sale, on the other.

As Counter–Defendant, Saypo challenges the equitable remedy requested by RMF's Fourth Counterclaim, to wit, rescission of RMF's termination of the Option. Assuming its success in defeating the Fourth Counterclaim, Saypo seeks a favorable judgment on the Fifth Counterclaim, as well, by arguing that there is no contract that could have been breached. In addition, Saypo asserts the equitable defense of impossibility. Again, however, the equitable doctrine of unclean hands—RMF's claim that defendant is acting unethically or in bad faith regarding the subject of the complaint—can be used offensively by the Counter–Plaintiff RMF to negate an equitable affirmative defense such as impossibility. So, not only factually does Saypo lose because it does still own the 40–acre parcel and has produced no evidence that Saypo cannot repurchase the Ranch from Dyal, but also, equitably, Saypo loses because it is its own wrongdoing that put it in its present predicament of not owning the Ranch that would permit it ***1285** to fulfill its obligation to RMF under the Option contract.

Significantly, RMF does not seek to press its rights to the detriment of a good faith purchaser for value. Perhaps only money damages may be available as to the 12,000 acre parcel. However, specific performance may be available as to the 40–acre parcel.

Plaintiff Saypo's Motion for Summary Judgment as to RMF's Fraud Counter–Claim.

Lastly, the Court examines Saypo's first summary judgment motion. (Doc. 31.) Saypo seeks partial summary judgment as to RMF's fraud claim. Saypo asserts that RMF cannot prove the nine elements of fraud under Montana law: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that it

should be relied upon, (6), the hearer's ignorance of falsity of the representation, (7) the hearer must rely on the representation, (8) the hearer's right to rely on the representation, (9) consequent and proximate injury caused by the reliance. *Pipinich v. Battershell,* 232 Mont. 507, 759 P.2d 148, 151 (1988). In particular, Saypo asserts that, on January 5, 2011, RMF was neither ignorant of Saypo's decision not to the pay the SPEP, nor entitled to rely on Saypo's prior "allegedly" deceitful statements to the contrary, because when RMF had discovered the truth of the matter on January 5, 2011, it entered into a stipulation permitting the title company to record the termination of the option. Therefore, Saypo believes, RMF cannot show ignorance or reliance on false statements.

However, RMF has successfully demonstrated numerous genuine issues of material fact—including RMF's claim that the fraud was completed by November 12, 2010, the claim that RMF did not release its rights under the Option simply by allowing a fraudulently procured termination to be recorded, or the fact that RMF was blind-sided in January 2011 as part of the ongoing fraud—all of which require that Saypo's summary judgment request as to the Third Counterclaim (Fraud) be denied. RMF does not seek summary judgment as to its Third Counterclaim, but instead seeks to submit it to a jury. Although the Court has evaluated RMF's fraud evidence carefully and given it significant weight as against Saypo's promissory estoppel and reliance arguments, this Court has not thereby adjudicated the Third Counterclaim. The Court merely notes RMF's contention that Saypo's fraud began in June 2010 with the drafting of the documents and continued through January 2011.

CONCLUSION AND ORDER

As to the question of usury, the Court finds that the evidence is so one-sided that Defendant must prevail as a matter of law. The Court finds that no genuine issue of material fact precludes summary judgment in favor of RMF on its Motion for Summary Judgment. RMF is therefore entitled to judgment as a matter of law on Saypo's usury claim as set forth in its Amended Complaint.

The Court finds further that genuine issues of material fact exist as to Counter–Plaintiff RMF's Third Counterclaim (Fraud) and as to RMF's damage claims.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Saypo's Motions for Partial Summary Judgment (Doc. 31, Doc. 53, Doc. 102) are DENIED.

IT IS FURTHER ORDERED that Defendant RMF's Motion for Summary Judgment (Doc. 77) is GRANTED, and the Amended Complaint is DISMISSED. The Court confirms the trial date of December ***1286** 10, 2012, for the trial of RMF's Counterclaims contained in its Amended Answer.

It appearing to this Court that the case is now ready for a court-supervised settlement conference,

IT IS FURTHER ORDERED that this matter is referred to United States Magistrate Judge Carolyn S. Ostby for the purpose of conducting a settlement conference, which will be set down by her by subsequent order. Those individuals having ultimate settlement authority shall be present personally at the conference.

The Clerk is directed forthwith to notify U.S. Magistrate Judge Ostby of the entry of this order.

All Citations

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Court of Appeals of Michigan.

Paolo SCALICI and Victoria Scalici,
Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo,
Defendants-Appellees.
Theodore FORMAN, Thomas Fowler,
Rodney McGrain, Juanita Mcgrain,
James A. Ropicky, Susan Scalici, Bradley
Wildberg, Kristan Wildberg, Bruce
Ollman, and Susan Ollman,
Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo,
Defendants-Appellees.
Terry PALAZZOLO, Jessee Bays, and
Gary Middleton, Plaintiffs-Appellants,
v.
BANK ONE, NA and Amy Okoroafo,
Defendants-Appellees.

No. 254632, 254633, 254634.
|
Sept. 20, 2005.

Before: SMOLENSKI, P.J., and MURPHY and DAVIS, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** In these consolidated appeals, plaintiffs appeal as of right the trial court's dismissal of their claims with prejudice for failure to state a claim on which relief could be granted. MCR 2.116(C)(8). We affirm.

I. Facts and Procedural History

Plaintiffs' claims against defendants arose out of their participation in an investment scheme with Daniel Broucek, who was doing business under the name of Pupler Distributing Company (Pupler). Pursuant to the investment scheme, plaintiffs would lend money to Pupler in exchange for a promissory note and a post-dated check. Under the terms of the promissory note, plaintiffs would receive the principal amount of the loan along with a "financing fee" on the maturity date of the loan. The checks issued with the promissory notes were written for the full amount of the principal plus the "financing fee" and were post-dated to the maturity date of the loan. The post-dated checks were drawn on Pupler's account with defendant Bank One, NA (Bank One). By November of 2002, Pupler's account with Bank One was frozen and, after Broucek entered involuntary bankruptcy, plaintiffs were left holding worthless promissory notes and checks.

In February of 2003, plaintiffs filed their respective suits against defendants. Plaintiffs claimed they would not have "invested" with Pupler had it not been for the misrepresentations of Bank One's employees, including primarily the representations of defendant Amy Okoroafo, who was the banking center manager for one of Bank One's branches. Based on the alleged misrepresentations and other theories, plaintiffs argued defendants should be liable for the losses plaintiffs sustained as a result of investing in Pupler. In each case, Bank One responded by filing a motion for a more definite statement wherein it asked the court to require plaintiffs to attach copies of the notes and checks upon which plaintiffs based their claims, as required by MCR 2.113(F)(1). After plaintiffs filed amended complaints with copies of the promissory notes and, in some cases, copies of the checks attached, Bank One filed a motion for summary disposition under MCR 2.116(C)(8).[1] In these motions, Bank One argued plaintiffs' claims were based on losses sustained after their criminally usurious loans became uncollectible and, therefore, the claims were unenforceable under Michigan's wrongful conduct rule. On July 10, 2003, the trial court held a joint hearing on this issue.[2] The trial court agreed that plaintiffs' claims were barred by the wrongful conduct rule and granted summary disposition in favor of defendants under MCR 2.116(C)(8). Plaintiffs

then appealed as of right.

[1] In each case, Okoroafo filed a motion under MCR 2.116(C)(8), which relied upon Bank One's law and arguments.

[2] While the three cases were not consolidated until this appeal, see *Scalici v. Bank One,* unpublished order of the Court of Appeals, entered May 10, 2004 (Docket No 254632), all three were assigned to the same trial court and were handled jointly for judicial efficiency.

II. Standards of Review

This Court reviews de novo the resolution of a summary disposition motion. *Corley v. Detroit Bd of Ed,* 470 Mich. 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Id.;* MCR 2.116(G)(5). All well-pleaded factual allegations in support of the claim are accepted as true and construed in the light most favorable to the nonmoving party. *Adair v. Michigan,* 470 Mich. 105, 119; 680 NW2d 386 (2004). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." ' *Maiden v. Rozwood,* 461 Mich. 109, 119; 597 NW2d 817 (1999), quoting *Wade v. Dep't of Corrections,* 439 Mich. 158, 162; 483 NW2d 26 (1992).

***2** This Court also reviews de novo the proper interpretation of a statute. *Macomb Co Prosecutor v. Murphy,* 464 Mich. 149, 157; 627 NW2d 247 (2001). This Court begins the interpretation of a statute by examining the language of the statute itself. *Id.* at 158. If the language is not ambiguous, the court shall not construe it, but rather will enforce it as written. *Id.* Where ambiguity exists, "this Court seeks to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished." *Id.* Furthermore, an act must be construed as a "whole to harmonize provisions and carry out the purpose of the Legislature." *Id.*

III. Analysis

As a preliminary matter, we note that the wrongful conduct rule does not attack plaintiffs' prima facie cases, but rather seeks to foreclose plaintiffs from proceeding for reasons unrelated to their prima facie cases. For this reason, the wrongful conduct rule is properly understood to be an affirmative defense. *Campbell v. St John Hosp,* 434 Mich. 608, 615-616; 455 NW2d 695 (1990). Normally, the defendant has the burden of establishing the existence of an affirmative defense. *Nationwide Mut Ins Co v. Quality Builders, Inc,* 192 Mich.App 643, 646; 482 NW2d 474 (1992). However, where a complaint shows on its face that relief is barred by an affirmative defense, the trial court may dismiss the complaint for failing to state a claim on which relief can be granted. See *Rauch v. Day and Night Mfg Corp,* 576 F.2d 697, 702 (CA 6, 1978); see also, e.g., *Glazier v. Lee,* 171 Mich.App 216; 429 NW2d 857 (1988) (granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule). In the present case, the promissory notes, which are the basis of plaintiffs' losses, were attached to their respective amended complaints and became part of the pleadings. See MCR 2.113(F)(2). Consequently, the trial court could properly consider whether the wrongful conduct rule barred plaintiffs' claims when ruling on defendants' motions for summary disposition under MCR 2.116(C)(8). However, the relevant inquiry remains whether any factual development under the facts pleaded by plaintiffs could possibly justify recovery. *Maiden, supra* at 119.

A. The Wrongful Conduct Rule

Under Michigan's wrongful conduct rule, a plaintiff's claim will be barred if it is based, in whole or in part, on the plaintiff's own illegal conduct. *Orzel v. Scott Drug Co,* 449 Mich. 550, 558; 537 NW2d 208 (1995). This is true even where the defendant has participated equally in the illegal activity. *Id.* at 559. In *Manning v. Bishop of Marquette,* 345 Mich. 130, 133; 76 NW2d 75 (1956), our Supreme Court succinctly stated the rule: "Our doors are open to both the virtuous and the villainous. We do not, however, lend our aid to the furtherance of an unlawful project, nor do we decide, as between 2 scoundrels, who cheated whom the more." The Court in *Orzel* noted that the rationale behind the wrongful conduct rule is rooted in public policy considerations. *Orzel, supra* at 559. The Court explained,

***3** If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a

result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

However, the Court in *Orzel* also noted that the wrongful conduct rule is a general rule and that there are limitations and exceptions to its application. *Id.* at 561.

There are two limitations on the application of the wrongful conduct rule. First, the plaintiff's conduct must be mostly or entirely prohibited by a penal or criminal statute and must constitute sufficiently serious misconduct to warrant application of the wrongful conduct rule. *Id.* at 561. Where the plaintiff's conduct amounts to a violation of a safety statute, that violation will not be sufficient to bar his or her claim. *Id.* Second, "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 564.

In addition to these limitations, there are two exceptions that will preclude application of the wrongful conduct rule to bar a plaintiff's claims: the differing degrees of culpability exception and the statutory basis for recovery exception. Under the first exception, where the "plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries...." *Id.* at 569. The second exception applies where the plaintiff alleges the defendant violated a statute, which, either explicitly or implicitly, allows the plaintiff to recover for injuries suffered as a result of the violation. *Id.* at 570.

B. The Application of the Wrongful Conduct Rule

Plaintiffs first argue that the trial court erred by granting summary disposition under MCR 2.116(C)(8) based on the wrongful conduct rule where facts could be developed that would demonstrate that the criminal usury statute, MCL 438.41, did not prohibit their conduct. Specifically, plaintiffs state, because the promissory notes did not mention an interest rate, but rather referred to a "financing fee" and because they thought they were dealing with a corporation, they could not be found to have knowingly charged simple interest in excess of 25% per year without being authorized or permitted by law to do so. Consequently, plaintiffs contend, the first requirement for application of the wrongful conduct rule could not be met. We disagree.

***4** Under MCL 438.41,

> [a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

Hence, according to its plain language, a person is guilty of violating MCL 438.41 when they charge, take or receive money or other property as interest on a loan, while knowing that the interest charged, taken or received exceeded a simple interest rate of 25% per year.

In the present case, plaintiffs claim they were unaware that the "financing fee" referenced in the promissory notes attached to their amended complaints, constituted interest and, therefore, did not knowingly charge, take or receive simple interest in excess of 25% per year. We find this argument to be disingenuous. According to plain usage, a "fee" is "a sum charged or paid, as for professional services or for a privilege." *Random House Webster's College Dictionary* (1992). Likewise, "financing" is the "act of obtaining or furnishing funds for a purchase or enterprise." *Id.* Hence, in the context of these promissory notes, which clearly involve the lending of money,[3] the "financing fee" is a sum charged by the lender (i.e.plaintiffs) for the furnishing of funds to the borrower (i.e.Pupler). This is synonymous with the charging of interest on a loan. See *id.* (defining the word "interest" as "a sum paid or charged for the use of money or for borrowing money."). Furthermore, many of the promissory notes have a notation at the bottom that clearly identifies the portion of the payment that constitutes the repayment of principal and the portion that constitutes the payment of interest. Finally, while the notes do not directly state the applicable annual percentage rate, the fact that the rate of return invariably exceeded an annual rate of 25% was self-evident from the amounts listed on the notes.[4] Consequently, the promissory notes attached to the pleadings clearly indicate that plaintiffs knowingly charged, took or received interest on a loan at a rate exceeding 25% at simple interest per annum contrary to MCL 438.41.

[3] While plaintiffs repeatedly refer to these transactions as "investments", the promissory notes clearly state that Pupler will be in default if it fails to pay the principal and "financing fee" upon the maturity of the note. The

use of the word principal contemplates the repayment of a loan.

[4] By way of example, in a note executed on October 28, 2002, Pupler promised to pay plaintiff Susan Scalici $880,000 on November 14, 2002. The note identified $80,000 of the payment as the "financing fee." Hence, on its face the note purports to pay a 10% return on the principal amount over a loan period of 17 days. No reasonable person could be unaware that a 10% return over a period of 17 days amounted to an annual rate of return in excess of 25%.

Plaintiffs also state that they were unaware that Pupler was not a valid corporate entity when the notes were executed. Plaintiffs argue that, because they believed Pupler was a corporate entity and corporations are permitted by MCL 450.1275 to agree in writing to rates of interest in excess of the legal rate, the notes did not violate MCL 438.41. We disagree.

MCL 450.1275, which is part of the Business Corporation Act, MCL 450.1101 *et seq,* states:

A domestic or foreign corporation, whether or not formed at the request of a lender or in furtherance of a business enterprise, may by agreement in writing, and not otherwise, agree to pay a rate of interest in excess of the legal rate and the defense of usury shall be prohibited.

***5** Under the plain meaning of this statute, one of the powers possessed by corporations is the power to agree to pay a rate of interest in excess of the legal rate. However, while the statute permits corporations to agree to pay potentially usurious interest, nothing within this language necessarily absolves the corporation's lenders of criminal liability under MCL 438.41. Furthermore, this grant of power is consistent with MCL 438.61, which creates exceptions to the usury statutes for loans made to a business entities. Under MCL 438.61(2), a limited class of lenders, such as banks, may lawfully charge a business entity any rate of interest, notwithstanding both the civil and criminal usury statutes.[5] Conversely, while MCL 438.61(3) does allow persons other than those identified in MCL 438.61(2) to charge a business entity an interest rate in excess of the civil usury statutes, it also provides that the interest rate charged may not exceed the criminal usury limits. Thus, while corporations do have the power to agree to pay a rate in excess of the legal rate, only certain classes of lenders may actually charge a rate in excess of the rate provided by MCL 438.41 without incurring criminal liability. The provision for continued criminal liability under MCL 438.61(3) for persons who charge business entities an interest rate in violation of MCL 438.41 directly contradicts plaintiffs' contention that MCL 450.1275 removes plaintiffs' loans from operation of the criminal usury laws. Consequently, the trial court properly determined that plaintiffs violated MCL 438.41 and that this violation warranted application of the wrongful conduct rule.

[5] The civil usury statutes are MCL 438.31 and MCL 438.32. The criminal usury statutes are MCL 438.41 and MCL 438.42.

Plaintiffs next argue there was an insufficient causal nexus between the charging of interest in excess of 25% and their losses to warrant application of the wrongful conduct rule. Specifically, plaintiffs contend that their losses were incurred because Pupler was a bad investment and not because of the rate of interest charged. We disagree.

In order to bar a plaintiff from recovery under the wrongful conduct rule, the injury suffered " 'must be traceable to his own breach of the law and the breach must be an integral and essential part of his case." ' *Manning, supra* at 136, quoting *Meador v. Hotel Grover,* 193 Miss 392, 405, 406; 9 So2d 782 (1942). In the present case, plaintiffs' losses directly resulted from their inability to collect the sums due on the promissory notes received from Pupler. While plaintiffs claim the notes are merely evidence of their "investment" in Pupler and that the actual losses were sustained because Pupler was not a sound investment, the reality is plaintiffs' entire case arises out of their decision to lend Pupler money, which loans Pupler was unable to repay. Indeed, plaintiffs cannot even establish their losses without the notes. In addition, plaintiffs' attempt to minimize the role the usurious interest rate played in the investment scheme by emphasizing the role of Bank One's employees in convincing plaintiffs to loan the money to Pupler is unconvincing. Even accepting that Bank One's employees influenced plaintiffs' decisions to loan money to Pupler, a significant factor in any decision to loan money will be the rate of return. Given the staggeringly high rate of return for most of the notes, one can reasonably conclude that the rate of return was a significant motivational factor for plaintiffs. As the trial court aptly noted, "-a lot of money can be made if you're willing to trip over a few penal statutes along the way." Hence, we conclude that plaintiffs' claims are directly and causally related to their decision to engage in usurious lending. Therefore, there is a sufficient causal nexus between plaintiffs' illegal conduct and the losses suffered to warrant application of the wrongful conduct rule.

***6** Because it is clear from plaintiffs' pleadings that their losses are causally linked to their engagement in serious misconduct prohibited by a penal or criminal statute, the trial court properly concluded that the wrongful conduct rule applied to their claims.

C. The Exceptions to the Wrongful Conduct Rule

Plaintiffs next argue that, even if a penal or criminal statute prohibited their conduct and there were a causal connection between that conduct and their losses, their claims should not be barred because both exceptions to the wrongful conduct rule apply. Specifically, plaintiffs claim defendants' conduct is more culpable than their own and recovery is explicitly or implicitly permitted by statute. We disagree.

In discussing the nature of the culpability exception to the application of the wrongful conduct rule, the Court in *Orzel* noted that a plaintiff might still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries. *Orzel, supra* at 569. However, the Court explained that such cases arise when the plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age. *Id.* In interpreting this language, the Court in *Stopera v. DiMarco,* 218 Mich.App 565, 571-572 n 5; 554 NW2d 379 (1996) stated,

As we stressed in the preceding paragraph, this case involves a defendant who was significantly more culpable than the plaintiff. We consider this necessary for application of the culpability exception. In its discussion of the applicability of the exception, the *Orzel* Court listed only situations where a defendant was egregiously more at fault than a plaintiff, *Orzel, supra* at 569, without suggesting that a slight difference in the degree of culpability would be sufficient for its application. Further, to apply the culpability exception in cases where a defendant is only slightly more blameworthy would likely eviscerate the wrongful conduct rule entirely; presumably, a plaintiff will almost always be able to argue that, if the allegations of a complaint are proved, a defendant's misconduct will be shown to be at least somewhat greater than the plaintiff's....

Hence, in order for plaintiffs to assert this exception, defendants must be significantly more culpable than plaintiffs for the losses suffered by plaintiffs.

In the present case, plaintiffs cannot demonstrate that defendants' actions make them more culpable than plaintiffs, let alone significantly more culpable. First, as the trial court noted, plaintiffs pleaded that defendants' conduct was tortious whereas plaintiffs' conduct was clearly felonious. In addition, defendants' culpability is limited to their role in convincing defendants to participate in the Pupler investment scheme. However, the final decisions to enter into usurious loan agreements with Pupler and continue to reinvest with Pupler, were made by the individual plaintiffs. Therefore, while plaintiffs might be able to develop facts that demonstrate defendants' culpability, and may even be able to demonstrate that defendants were equally culpable, we conclude that there are no factual developments which could lead to the conclusion that defendants were significantly more culpable than plaintiffs. Therefore, the trial court properly rejected this exception to the application of the wrongful conduct rule.

***7** Plaintiffs next argue that there is a statutory basis for recovery from defendants. Plaintiffs contend that, because MCL 438.32 prevents a usurious lender from recovering usurious interest charges, it must necessarily permit the recovery of the principal. Hence, MCL 438.32 implicitly permits recovery against defendants. We disagree.

In order for the statutory basis exception to apply, plaintiffs must allege defendants violated a statute, which, either explicitly or implicitly, allows them to recover for injuries suffered as a result of defendants' violation. *Orzel, supra* at 570. Yet plaintiffs have not pleaded that defendants violated a statute, which either explicitly or implicitly, permits them to recover their loan losses from defendants. Indeed, plaintiffs' argument relies solely on their own violations of the usury statutes to implicitly find authority for recovery of their losses. Even if reliance on their own violation of a statute were sufficient, because MCL 438.32 seeks to punish lenders who violate the civil usury law, we cannot conclude that the statutory purpose of MCL 438.32 was to protect the usurious lender's principal. See *Orzel, supra* at 571. Therefore, the statutory basis exception does not apply to plaintiffs' claims.

D. Motion to Amend

Finally, plaintiffs argue that the trial court should have given them leave to amend their respective complaints to plead facts, which would establish the existence of greater culpability on the part of defendants. We decline to address this issue because it was not raised in the statement of the questions presented, *People v. Miller,* 238 Mich.App 168, 172; 604 NW2d 781 (1999), and was

inadequately briefed and, therefore, abandoned on appeal, *People v. Van Tubbergen,* 249 Mich.App 354, 365; 642 NW2d 368 (2002). Furthermore, as noted above, we have determined that no factual development could establish that defendants were significantly more culpable for plaintiffs' losses than plaintiffs. Therefore, leave to amend would have been futile and was properly denied. *Hakari v. Ski Brule, Inc,* 230 Mich.App 352, 355; 584 NW2d 345 (1998).

IV. Conclusion

The trial court properly determined plaintiffs' claims against defendants, as pleaded, were based on losses proximately caused by plaintiffs' own criminal conduct and, therefore, were subject to the wrongful conduct rule. In addition, the trial court correctly determined that neither exception to the wrongful conduct rule applied to plaintiffs' claims. Consequently, the trial court did not err when it dismissed plaintiffs' claims for failing to state a claim on which relief can be granted.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 2291732

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204 A.D.2d 182
Supreme Court, Appellate Division, First Department, New York.

The SIMSBURY FUND, INC., Plaintiff–Appellant,
v.
The NEW ST. LOUIS ASSOCIATES, et al., Defendants–Respondents.

May 19, 1994.

Synopsis
Action was brought to collect on agreements that permitted plaintiff to demand interest not only on money it advanced to defendant but also on escrowed funds to which defendant had no access. The Supreme Court, New York County, Tolub, J., upon decision of Nardelli, J., dismissed complaint. Plaintiff appealed. The Supreme Court, Appellate Division, held that agreements were usurious.

Affirmed.

****557** Before CARRO, J.P., and ROSENBERGER, WALLACH, KUPFERMAN and TOM, JJ.

Opinion

MEMORANDUM DECISION.

***182** Resettled judgment, Supreme Court, New York County (Walter Tolub, J.; upon decision ****558** of Eugene Nardelli, J.), entered October 5, 1993, and order, same court and Justice, entered on or about October 25, 1993, which dismissed plaintiff's complaint after trial on the ground that the agreements sued upon were usurious and void, and denied plaintiff's motion pursuant to CPLR 4404 to set aside Justice Nardelli's decision, respectively, unanimously affirmed, with costs.

The provision in the subject agreements permitting plaintiff to demand, as it did, interest not only on the money it advanced to defendant but also on the escrowed funds to which defendant had no access made the agreements usurious since, as the IAS court found, it effectively required defendant to make combined interest payments at an annual rate of approximately 80% (Penal Law § 190.40; *see, East Riv. Bank v. Hoyt,* 32 N.Y. 119). We also agree with the IAS court that the possibility of a nonusurious rate of interest in the event of defendant's full performance under the agreements, and language therein purporting to reduce the interest rate to the legal rate in the event of a finding of usury, do not make the subject agreements nonusurious (*see, Durst v. Abrash,* 22 A.D.2d 39, 42, 253 N.Y.S.2d 351, *affd* 17 N.Y.2d 445, 266 N.Y.S.2d 806, 213 N.E.2d 887).

All Citations

204 A.D.2d 182, 611 N.Y.S.2d 557

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330 N.C. 153
Supreme Court of North Carolina.

Gary W. SWINDELL and wife, Lillian R. Harris Swindell
v.
The FEDERAL NATIONAL MORTGAGE ASSOCIATION and Skyline Mortgage Corporation.

No. 70PA90.
|
Nov. 7, 1991.

Synopsis
Mortgagors brought suit against mortgagee and its servicing agent seeking to recover usury penalty for mortgagee's imposition of late payment charge in excess of statutory 4% ceiling. The Superior Court, Mecklenburg County, Frank W. Snepp, J., granted summary judgment in favor of defendants, and mortgagors appealed. The Court of Appeals, 97 N.C.App. 126, 387 S.E.2d 220, affirmed in part and reversed in part. On discretionary review, the Supreme Court, Exum, C.J., held that: (1) late payment charge constituted "interest" within meaning of usury statute, rendering usury penalty applicable to such charge; (2) usury penalty required mortgagee to forfeit all late payment charges to which it might otherwise have been entitled under terms of loan, but mortgagee was not required to forfeit interest due on the loan itself; and (3) usury savings clause of mortgage note did not shield mortgagee from liability for charging usurious rates.

Modified and affirmed.

****893 *154** On discretionary review pursuant to N.C.G.S. § 7A–31 of a unanimous opinion of the Court of Appeals, 97 N.C.App. 126, 387 S.E.2d 220 (1990), affirming summary judgment for defendants entered on 13 April 1989 by Snepp, J., in the Superior Court, Mecklenburg County. Heard in the Supreme Court 9 October 1990.

Attorneys and Law Firms

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Alexander and Brown by William G. Alexander, Concord, for defendants-appellees.

Margot Saunders, N.C. Legal Services Resources Center, Raleigh, and Mal Maynard, Legal Services of the Lower Cape Fear, Wilmington, for North Carolina Clients Council, amicus curiae.

Opinion

***155** EXUM, Chief Justice.

The question central to this appeal is how the penalty for usury under N.C.G.S. § 24–2 applies to a late payment charge that exceeds the maximum rate permitted under N.C.G.S. § 24–10(e). We hold the statutory penalty for usury requires defendant to forfeit all late payment charges to which it might otherwise have been entitled under the terms of the loan, but defendant is not required to forfeit the interest due on the loan itself.

On 22 March 1985, plaintiffs executed an adjustable rate note secured by a deed of trust on a home for $112,500.00. The note was executed on a multistate Federal National Mortgage Association (FNMA) Uniform Instrument form, which included a provision for late payment charges. A late payment charge rate of five percent of the overdue payment of principal and interest was typed in a blank provided on the form. The preceding paragraph, entitled "Loan Charges," stated:

> If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me.

The FNMA purchased the note from the lender, Epic Mortgage Inc., in March 1985. Skyline Mortgage Corporation succeeded Epic as servicer of the loan. On 14 October 1987, Skyline sent plaintiffs notice of uncollected late charges. When Skyline discovered that the late payment penalty rate on plaintiffs' note exceeded the legal maximum under North Carolina law, it offered to reduce the rate to four percent, pursuant to the "Loan Charges" paragraph in the note. Defendants never

collected a late payment penalty from plaintiffs.

Plaintiffs filed a complaint and an amended complaint for declaratory judgment, averring the five percent late charge was assessed on a payment not yet due, the charge was usurious under N.C.G.S. § 24–10.1, and reduction of that rate to four percent was fraudulent and a material alteration discharging plaintiffs from their obligations under the note. Plaintiffs ****894** sought a judgment declaring ***156** the loan usurious, requiring defendant to forfeit all interest due under the note to FNMA or Skyline, or both, or, alternatively, discharging plaintiffs from the note pursuant to N.C.G.S. § 25–3–407. Plaintiffs further sought the court's application of N.C.G.S. § 24–2.1 and an award of all interest paid by them to any holder of the note from and after 22 March 1985 to the date of the court's order. Defendants, answering, denied the allegation that the late charge was usurious, added that plaintiff had refused Skyline's offer to change the rate to four percent, and requested the court to dismiss plaintiffs' complaints. Both plaintiffs and defendants subsequently filed motions for summary judgment.

The trial court granted defendants' motion for summary judgment and denied that of plaintiffs. The Court of Appeals affirmed in part and reversed in part, holding that the late payment charge was excessive in violation of N.C.G.S. § 24–10(e), but that the penalties of the usury statute, N.C.G.S. § 24–2, did not apply, for "the legislature did not intend for late charges to be considered interest." 97 N.C.App. at 129, 387 S.E.2d at 221. Because "public policy demands that there be something to discourage wrongful or erroneous late charges," 97 N.C.App. at 129, 387 S.E.2d at 222, the Court of Appeals imposed a penalty it considered consistent with the purpose of the usury statutes: defendants forfeited their right to collect late charges on the loan, but did not forfeit their right to receive principal and interest.

We agree with the holding of the Court of Appeals, but find authority for it in the statutes, as we must: "The entire subject of the rate of interest and penalties for usury rests in legislative discretion, and the courts have no power other than to interpret and execute the legislative will." *Smith v. Building and Loan Assn.,* 119 N.C. 249, 256, 26 S.E. 41, 42 (1896).

Chapter 24 of the General Statutes, entitled "Interest," governs a number of lending transactions for which it either states maximum interest rates or excepts the transaction from such statutory constraints. *See generally* N.C.G.S. §§ 24–1 through 24–16 (1986). Among the "transactions" governed by this chapter is a lender's charge for a borrower's late payment, for which the statute states a maximum rate:

> (a) Subject to the limitations contained in subsection (b) of this section, any lender may charge a party to a loan or extension of credit governed by the provisions of G.S. 24–1.1, 24–1.2, ***157** or 24–1.1A a late payment charge as agreed upon by the parties in the loan contract.
>
> (b) No lender may charge a late payment charge:
>
> (1) In excess of four percent (4%) of the amount of the payment past due.

N.C.G.S. § 24–10.1 (1986). The predecessor statute, N.C.G.S. § 24–10(e), in effect at the time plaintiffs signed their note, was essentially identical.[1] The single statute in chapter 24 stating penalties for charges exceeding the maximum rates stipulated in its provisions provides, in pertinent part:

> The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon.

N.C.G.S. § 24–2 (1986).

Plaintiffs argue that charging a five percent late penalty fee is usurious under N.C.G.S. § 24–2 and that defendants must accordingly forfeit all interest due under ****895** the note. Defendants counter that a late payment fee is not interest and that violation of N.C.G.S. § 24–10.1 consequently carries no penalty.

The forfeiture provisions of N.C.G.S. § 24–2 are "in the nature of a penalty intended to induce an observance of the statute, and it is the duty of the courts so to expound and apply the law as to carry out the legislative intent." *Moore v. Woodward,* 83 N.C. 531, 533 (1880). We are

[1] "Any lender may charge a party to a loan made under G.S. 24–1.1A, a late payment charge on any installment of principal, interest, or both in an amount not to exceed four percent (4%) of such installment. The charges authorized by this subsection may not be charged by a lender unless an installment is more than 15 days past due; provided, however, for the purposes of this subsection, a late payment charge may not be charged until an installment is more than 30 days past due where interest on such installment is paid in advance." N.C.G.S. § 24–10(e) (1983 Cum.Supp.) (repealed and replaced with N.C.G.S. § 24–10.1 by 1985 N.C.Sess.Laws ch. 755, § 2.)

convinced that the General Assembly, which specified a maximum legal rate for late payment fees in N.C.G.S. § 24–10.1, considered such fees "interest" and intended to induce ***158** observance of that law through the penalty provisions of N.C.G.S. § 24–2.

Interest is the cost of "the hire of money." *Bank v. Hanner,* 268 N.C. 668, 673, 151 S.E.2d 579, 581 (1966). More generally, "interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Black's Law Dictionary 729 (5th rev. ed. 1979). " 'Forbearance' means the contractual obligation of a lender or creditor to refrain for a given period of time from requiring the borrower or debtor to repay the loan or debt which is then due and payable." *Auto Supply v. Vick,* 303 N.C. 30, 39, 277 S.E.2d 360, 367 (1981). Just as a charge for a creditor's forbearance in the collection of a debt is interest, so a charge for a lender's forbearance in collecting a payment due is interest.

The note executed by plaintiffs in actuality contemplated interest for two separable monetary transactions. The more obvious transaction was the contract for a home loan exceeding $10,000, for which the parties were free to agree on any rate of interest. *See* N.C.G.S. § 24–1.1A(a) (1986). The second transaction contemplated was the cost of money retained—the delayed loan payment. A late payment fee has two purposes: to encourage the borrower to pay on time and to compensate the lender for the loss of use of the payment held for the period of the delay. In the latter use the late payment charge is interest, for it is compensation fixed by the parties for the detention of money or for the lender's forbearance in collecting the late payment.

"[A]ny charges made against [a borrower] in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious." *Hollowell v. B. & L. Association,* 120 N.C. 286, 287, 26 S.E. 781, 781 (1897). In *Supply, Inc., v. Allen,* 30 N.C.App. 272, 227 S.E.2d 120 (1976), a charge on a payment past due similar to that charged plaintiff here was deemed interest. In that case the Court of Appeals examined a "service charge" imposed upon an account resulting from the purchase of plumbing equipment. It concluded that the charge was "for plaintiff's forbearance in the collection of the debt at the end of the payment period; as such, the ... service charge is interest." 30 N.C.App. at 280, 227 S.E.2d at 126. Because the service charge rate exceeded that permitted under N.C.G.S. § 24–11(a), limiting "interest, finance charges, or other fees" on the extension of credit ***159** under an open-end or similar plan to one and one-half percent, the two percent "service charge" was held usurious. *See also Fisher v. Westinghouse Credit Corp.,* 760 S.W.2d 802, 807 (Tex.Ct.App.1988) (assessing whether late payment usurious by calculating highest legal rate times monthly payment times number of days payment past due and terming overdue payment a "loan").

The elements of usury are a loan or forbearance of the collection of money, an understanding that the money owed will be paid, payment or an agreement to pay interest at a rate greater than allowed by law, and the lender's corrupt intent to receive more in interest than the legal rate permits for use of the money loaned. *Auto Supply v. Vick,* 303 N.C. at 37, 277 S.E.2d at 366; *Henderson v. Finance Company,* 273 N.C. 253, 263, 160 S.E.2d 39, 46 (1968).

> The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the ****896** instrument, a corrupt intent to violate the usury law on the part of the lender is shown.

Kessing v. Mortgage Corp., 278 N.C. 523, 530, 180 S.E.2d 823, 827 (1971) (citations omitted).

These four elements are all present with regard to the late payment penalty provision in plaintiffs' note. First, there was a "loan" consisting in this context of the amount of principal and interest thereon due in the allegedly overdue payment. The note's scheduled repayment of principal and interest thereon indicated the parties' expectation that each payment would eventually be made. The note provided that a payment delayed more than fifteen days would be assessed late charges at five percent of the payment amount, a rate that exceeded the legally permissible rate. Corrupt intent was shown simply in imposing the usurious rate. "A profit, greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, ... is a violation of the usury laws, it matters not what form or disguise it may assume." *Henderson v. Finance Co.,* 273 N.C. at 263, 160 S.E.2d at 46 (quoting *Doster v. English,* 152 N.C. 339, 341, 67 S.E. 754, 755 (1910)).

The penalty for charging usurious interest, whether or not it is collected, is the "forfeiture of the entire interest which the ***160** ... evidence of debt carries with it." N.C.G.S. § 24–2 (1986). In the restricted context of a late charge on a delayed payment, "forfeiture of ... interest" in no way implicates the interest on the principal. When late charges are usurious, "the entire interest" can only signify any and all penalty fees for late payments. The penalty fee is "interest." It is compensation for the detention of money owed another, and all such compensation must be

forfeited when its rate is usurious, as defined by the laws of this state.

In addition, we hold that the "usury savings clause" stated in the note's "Loan Charges" paragraph cannot shield a lender from liability for charging usurious rates. The purpose of chapter 24 is to further "the paramount policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C.G.S. § 24–2.1 (1986). The usury statutes codify "the idea of protecting the borrower against the oppression of the lender." *Moore v. Woodward,* 83 N.C. 531, 533 (1880). The statute relieves the borrower of the necessity for expertise and vigilance regarding the legality of rates he must pay. That onus is placed instead on the lender, whose business it is to lend money for profit and who is thus in a better position than the borrower to know the law. A "usury savings clause," if valid, would shift the onus back onto the borrower, contravening statutory policy and depriving the borrower of the benefit of the statute's protection and penalties. "The nature and terms of the contract determine its character and purpose, and if usurious in itself it must be so understood to have been intended by the parties, and they cannot be heard to the contrary." *Burwell v. Burgwyn,* 100 N.C. 389, 392, 6 S.E. 409, 410 (1888). A lender cannot charge usurious rates with impunity by making that rate conditional upon its legality and relying upon the illegal rate's automatic rescission when discovered and challenged by the borrower.

Plaintiffs argue that reducing the late charge rate pursuant to the "Loan Charges" paragraph was a material and fraudulent alteration discharging them from the contract under N.C.G.S. § 25–3–407. Although the reduction in rate is unquestionably material insofar as "it changes the contract of any party thereto in any respect," N.C.G.S. § 25–3–407(1), it was not fraudulent. For purposes of this provision, "fraud requires a dishonest and deceitful purpose to acquire more than one was entitled to under the note as signed by the makers rather than only a misguided purpose." *Thomas v. Osborn,* 13 Wash.App. 371, 377, 536 P.2d 8, 13 (1975). Where, ***161** as here, the alteration is a reduction in rate intended to comply with the law and which in fact inures to the advantage of the other party, the alteration cannot be said to be fraudulent. "There is no discharge where ... a change is made with a ****897** benevolent motive such as a desire to give the obligor the benefit of a lower interest rate." N.C.G.S. § 25–3–407 (1986) (Official Comment). Defendants' motives to bring their late fee rate into accord with North Carolina law were no doubt less "benevolent" than expedient, but there is no evidence in the record that fraudulent intent motivated the reduction.

We conclude it was the intent of the General Assembly to enforce late charges violating N.C.G.S. § 24–10.1 by the penalty provisions of N.C.G.S. § 24–2, which, under the facts of this case, require the lender's forfeit of all late charges to which it would otherwise be entitled under the terms of the loan. We accordingly hold the decision of the Court of Appeals is

MODIFIED AND AFFIRMED.

All Citations

330 N.C. 153, 409 S.E.2d 892

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496 So.2d 883
District Court of Appeal of Florida,
Second District.

James A. SZENAY and Cindy R. Szenay,
Appellants/Cross-Appellees,
v.
John W. SCHAUB, III, and Valerie J. Davis,
Appellees/Cross-Appellants.

No. 86–393.
|
Oct. 15, 1986.

Synopsis

Wraparound mortgagees sought to foreclose after mortgagors failed to make payments on note. The Circuit Court, Sarasota County, Grissim H. Walker, J., entered final judgment of foreclosure and both parties appealed. The District Court of Appeal, Hall, J., held that: (1) finding that mortgagees did not intend to charge mortgagors usurious rate of interest was not abuse of discretion; (2) mortgagees were only entitled to interest on their judgment at 12 percent a year; and (3) mortgagees were not entitled to attorney fees.

Affirmed but remanded for correction.

Attorneys and Law Firms

***884** James E. Aker of Icard, Merrill, Cullis, Timm and Furen, P.A., Sarasota, for appellants/cross-appellees.

Scott E. Gordon of Scott E. Gordon, P.A., Sarasota, for appellees/cross-appellants.

Opinion

HALL, Judge.

Appellants James and Cindy Szenay appeal a final judgment of foreclosure. By cross-appeal, appellees John Schaub and Valerie Davis seek attorney's fees.

In 1984, appellants executed a wraparound, third mortgage on their property in favor of appellees as security for a loan. The mortgage was in the amount of $18,269.79. It wrapped around a second mortgage in the amount of $12,769.79, resulting in an actual loan to appellants of $5,500. The terms of the loan required that appellants pay appellees $500 on the 26th day of each month, commencing February 26, 1984, and terminating December 26, 1984. On January 26, 1985, appellants were to pay the remaining principal plus all accrued and unpaid interest which, according to the note and mortgage, would be $15,097.86. Appellees were to be responsible for the quarterly payments on the interest-free second mortgage on appellants' property during the term of the wraparound mortgage.

On April 22, 1984, appellees failed to make a quarterly payment on the second mortgage, and it was placed in foreclosure. Appellees attempted to have the mortgage reinstated but were unsuccessful and decided to pay it off. They then advised appellants that the favorable terms of the second mortgage would continue as long as appellants were current in their payments on the wraparound mortgage.

On December 26, 1984, appellants failed to make the last monthly payment on the wraparound mortgage, and on January 26, 1985, they failed to tender the final payment. Appellees then instituted a suit in foreclosure. The trial court entered a final judgment of foreclosure for a principal amount of $13,975.62 plus interest and costs. The judgment made no provision for attorney's fees.

Appellants raise three points on appeal. In their first point, appellants argue that the loan documents and amortization schedule reflect a rate of forty-two percent interest on the loan from appellees. Because this is a usurious rate of interest, appellants assert that the final judgment should be reduced in accordance with the penalty provisions of the usury statute. § 687.03, Fla.Stat. (1985).

Appellees respond that they did not intend to charge appellants a usurious rate of interest. Rather, a genuine mistake was made in calculating the amount of the promissory note. Consequently, appellees maintain, the trial judge correctly adjusted the amount to be paid appellees in accordance with the remedy provided in the promissory note for overpayment of interest.

"[U]sury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than law permits, but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent." *Dixon v. Sharp,* 276

So.2d 817 (Fla.1973). This determination is the responsibility of the trier of fact.

The trial judge in the present case made no finding of usury in the final judgment. However, in determining the amount of principal appellants owe appellees, the judge implemented the following provision of the promissory note:

> Notwithstanding any provisions in this note to the contrary, no interest, charges, or other payments in excess of those permitted by law shall accrue or become payable hereunder and any excessive ***885** payments which may be made shall be applied to principal in reduction of the balance of this note.

It thus appears the trial judge found that even though the mortgage and note called for a usurious rate of interest, appellees had no intent to charge appellants such a rate. We agree. There is substantial, competent evidence to support this finding, and it thus represents no abuse of discretion on the part of the trial judge.

In their second point on appeal, appellants argue that they were damaged by the failure of appellees to keep the second mortgage current. We find no merit to this point as appellees had agreed that they would step into the shoes of the second mortgage holder and appellants would be allowed to continue the no-interest payments on the second mortgage until it was paid in full as long as they kept the payments current on the wraparound mortgage. Any damages that they might have incurred were caused by their default on the wraparound mortgage.

In their third point on appeal, with which appellees agree, appellants note that the final judgment states that it shall bear interest at the rate of eighteen percent a year. However, section 55.03, Florida Statutes (1985), provides that all judgments rendered after October 1, 1981, shall bear interest at twelve percent a year. Accordingly, we remand this case to the trial court for correction of the judgment to reflect a rate of twelve percent.

In their cross-appeal, appellees contend that the trial court erred in failing to award them attorneys fees as provided in the note and mortgage. We disagree. We believe that it would be inequitable to award appellees attorney's fees under the circumstances of this case,[1] especially in light of the fact that they allowed the second mortgage to be foreclosed.

[1] *See Feemster v. Schurkman,* 291 So.2d 622, 2630 (Fla. 3d DCA 1974) ("No indemnity for attorney's fees should be allowed ... for legal services rendered in attempting to enforce the usury, as distinguished from foreclosing the mortgage for the legally enforceable amount of the debt").

The final judgment is affirmed but remanded for correction in accordance with this opinion.

DANAHY, C.J., and GRIMES, J., concur.

All Citations

496 So.2d 883, 11 Fla. L. Weekly 2221

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2005 WL 2291741
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Scott WELLMAN, Plaintiff-Appellant,
v.
BANK ONE, NA, Defendant-Appellee,
and
FIRST BANK-LAKEVIEW, Defendant.

No. 253996.
|
Sept. 20, 2005.

Before: SMOLENSKI, P.J., and MURPHY and DAVIS, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals by right from the trial court's order granting defendant Bank One's motion for summary disposition for failure to state a claim on which relief can be granted. MCR 2.116(C)(8).[1] We affirm.

[1] Defendant First Bank-Lakeview was dismissed from this appeal by stipulation of the parties. See *Wellman v. First Bank-Lakeview,* unpublished order of the Court of Appeals, entered June 15, 2004 (Do. No. 253996). Therefore, we shall use defendant to refer solely to defendant Bank One.

Plaintiff's claims against defendant arise out of plaintiff's participation in an investment scheme with Daniel Broucek, who was doing business as Pupler Distributing Company. Under the scheme, plaintiff would loan money to Pupler in exchange for a promissory note and a post-dated check for the principal as well as a substantial "financing fee." The post-dated checks were drawn on Pupler's account with defendant. Ostensibly, the loan was to enable Pupler to purchase shipments of goods, which would then be resold for a profit. However, in reality, the loans were part of a Ponzi scheme whereby Pupler used the funds raised from some of its "investors" to pay the amounts due to other "investors." After an investigation, defendant froze Pupler's account and refused to honor two checks issued to plaintiff by Pupler.

After defendant refused to honor the checks, plaintiff commenced this suit alleging, under various theories, that defendant should be held liable for the losses he suffered when the notes and accompanying checks became uncollectible. Defendant responded by filing a motion for summary disposition under MCR 2.116(C)(8). Defendant contended that, as pleaded, plaintiff's suit was barred by the wrongful conduct rule. The trial court agreed and granted defendant's motion. The sole issue on appeal is whether the trial court erred when it granted defendant's motion under MCR 2.116(C)(8) based on the wrongful conduct rule.

This Court reviews de novo the grant or denial of summary disposition based upon a failure to state a claim. *Adair v. Michigan,* 470 Mich. 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Mable Cleary Trust v. Edward-Marlah Muzyl Trust,* 262 Mich.App 485, 491; 686 NW2d 770 (2004). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Adair, supra* at 119; *Alan Custom Homes, Inc v. Krol,* 256 Mich.App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra* at 119.

Plaintiff argues the trial court erred when it granted defendant's motion for summary disposition under MCR 2.116(C)(8). We disagree.

Because the wrongful conduct rule does not rebut plaintiff's prima facie case, but rather seeks to foreclose plaintiff from proceeding for reasons unrelated to his prima facie case, it is an affirmative defense. *Campbell v. St John Hosp,* 434 Mich. 608, 615-616; 455 NW2d 695

(1990). Normally, the defendant has the burden of establishing the existence of an affirmative defense. *Nationwide Mut Ins Co v. Quality Builders, Inc,* 192 Mich.App 643, 646; 482 NW2d 474 (1992). However, where a complaint shows on its face that relief is barred by an affirmative defense, the trial court may properly dismiss the complaint for failing to state a claim on which relief can be granted. See *Rauch v. Day and Night Mfg Corp,* 576 F.2d 697, 702 (CA 6, 1978); see also, e.g., *Glazier v. Lee,* 171 Mich.App 216; 429 NW2d 857 (1988). In the present case, the promissory notes, which are the basis of plaintiff's losses, were attached to plaintiff's amended complaint and became part of the pleadings. MCR 2.113(F)(2). Consequently, the trial court could properly consider whether the wrongful conduct rule barred plaintiff's claims when ruling on defendant's motion for summary disposition under MCR 2.116(C)(8).

***2** The wrongful conduct rule generally bars a plaintiff's claim when the claim is based, in whole or in part, on his own illegal conduct. *Orzel v. Scott Drug Company,* 449 Mich. 550, 558; 537 NW2d 208 (1995). In *Orzel,* the Court explained:

The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

In order for the wrongful conduct rule to apply, two requirements must be met: 1) the plaintiff's "conduct must be prohibited or almost entirely prohibited under a penal or criminal statute"; and 2) "a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages." *Id.* at 561, 564. However, where the plaintiff's illegal conduct "amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule ." *Id.* at 561.

Defendant argues plaintiff's conduct was completely prohibited by the criminal usury statutes, MCL 438.41 and MCL 438.42. Under MCL 438.41,

[a] person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both.

Under MCL 438.42, a person is "guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by this act." A person found guilty of possession of usurious loan records may be imprisoned for up to 1 year or fined up to $1,000, or both. *Id.* These statutes are distinguishable from the safety statutes identified by the Court in *Orzel, supra* at 561-562, as insufficient to support application of the wrongful conduct rule. In contrast to those statutes, MCL 438.41 and MCL 438.42 unambiguously criminalize usurious lending and provide significant penalties for such conduct. Therefore, we conclude that the conduct prohibited by these statutes is serious enough to warrant the application of the wrongful conduct rule.[2]

[2] We decline plaintiff's invitation to limit the application of the rule in the context of the criminal usury statutes to those cases involving "necessitous borrowers." The plain language of the statute bans all lending that charges, takes or receives interest of more than 25% and is not limited in application to "necessitous borrowers."

***3** Plaintiff made at least two loans to Pupler in return for promissory notes and accompanying post-dated checks that included a return of the principal along with large "financing fees." The principal and interest amounts for each loan are listed on the respective promissory notes. Under one note, plaintiff loaned Pupler $200,000, which was to be paid back along with $10,000 interest in seventeen days. Under a second note, plaintiff loaned Pupler $150,000, which was to be paid back along with $7,500 in interest seventeen days later. Hence, under both notes, plaintiff was to receive a 5% return on the principal amounts of the loans over a span of seventeen days. When calculated, the simple interest rate for both loans amounts to over 100% per year. Consequently, plaintiff had to have known that he was charging more than 25% interest

per year and, therefore, violated MCL 438.41. Furthermore, plaintiff attached the promissory notes to his first amended complaint, demonstrating that he knowingly possessed the written record of his usurious loans; therefore, plaintiff violated MCL 438.42 as well.

Under the second requirement, there must be a causal nexus between the plaintiff's illegal conduct and the damages sought. Plaintiff's losses occurred when the Pupler "investment" scheme failed and he was no longer able to collect the principal and interest called for in the promissory notes from Pupler. Indeed, plaintiff could not prove his damages without reference to the sums lent to Pupler, as evidenced by the illegal promissory notes and checks. Hence, plaintiff's claims arise from and depend on these usurious notes. Because plaintiff clearly violated the criminal usury statutes and there is a causal nexus between the usurious promissory notes and plaintiff's claims, the wrongful conduct rule applies.

Notwithstanding this, plaintiff contends his claims are excepted from the operation of the wrongful conduct rule. Plaintiff first argues that the usurious notes were not actionable because Pupler voluntarily paid the usurious amounts. In support of this contention, plaintiff cites *Osinski v. Yowell,* 135 Mich.App 279; 354 NW2d 318 (1984) and *Sienkiewicz v. Leonard Mortgage Co,* 59 Mich.App 154; 229 NW2d 352 (1975). However, these cases are inapplicable to the present situation. *Osinski* and *Sienkiewicz* dealt with the civil usury statutes, MCL 438.31 and MCL 438.32, as opposed to the criminal usury statutes involved here. In both cases, the Courts noted that, because MCL 438.32 only barred a plaintiff from recovering interest and fees based on a civilly usurious note, a defendant who has voluntarily paid amounts in excess of the principal would have no remedy. *Osinski, supra* at 287-288; *Sienkiewicz, supra* at 156-157. The Courts did not address whether voluntary payment would preclude the operation of the wrongful conduct rule. In any event, whether the victim of the usurious lender, which in this case is Pupler, has a remedy is irrelevant to determining whether plaintiff's conduct was illegal and, therefore, subject to the wrongful conduct rule.

***4** Plaintiff next argues that the statutory exception to the wrongful conduct rule applies. In *Orzel,* our Supreme Court noted that the wrongful conduct rule will not bar a plaintiff from recovering against a defendant where the statute the plaintiff alleges the defendant violated specifically authorizes the plaintiff's recovery. *Orzel, supra* at 570. Likewise, where the statute the defendant allegedly violated does not explicitly authorize plaintiff's recovery, the plaintiff may still recover if the statute impliedly permits recovery. *Id.* at 571. Plaintiff does not identify the statute defendant allegedly violated and does not state whether that statute explicitly or implicitly authorizes plaintiff's recovery. Consequently, plaintiff has failed to establish the presence of a statutory exception to the application of the wrongful conduct rule.

Finally, plaintiff contends that defendant's conduct was more culpable than plaintiff's conduct and, therefore, the culpability exception to the wrongful conduct rule applies. In *Orzel, supra* at 569, the Court noted that the wrongful conduct rule will not bar a plaintiff's recovery where the plaintiff and defendant have both engaged in illegal conduct, but where the defendant is more culpable than the plaintiff. Accepting all of plaintiff's allegations as true, defendant's conduct was at most tortious, whereas plaintiff's conduct was clearly felonious. Under these circumstances we cannot conclude that defendant was more culpable than plaintiff.

The trial court properly determined that, on its face, plaintiff's complaint failed to state a claim on which relief could be granted. Therefore, summary disposition under MCR 2.116(C)(8) was appropriate.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 2291741

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