APPENDIX A

CLERK OF THE NEBRASKA SUPREME COURT
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May 8, 2018

Patrick M Heng
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IN CASE OF: A-16-000844, Walker v. Probandt

The following filing: Petition Appellee for Further Review
Filed on 02/27/18
Filed by appellee John Raynor

Has been reviewed by the court and the following order entered:

Petition for further review denied.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

APPENDIX B

CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
2413 State Capitol, P.O. Box 98910
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January 29, 2018

John P Raynor
jp.r@cox.net

IN CASE OF: A-16-000844, Walker v. Probandt

The following filing: Motion Appellee for Rehearing & Brief
Filed on 09/22/17
Filed by appellee John Raynor

Has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

APPENDIX C

Walker v. Probandt

Nebraska Court of Appeals

September 12, 2017, Filed

No. A-16-844.

Reporter

25 Neb. App. 30 *; 902 N.W.2d 468 **; 2017 Neb. App. LEXIS 180 ***; 93 U.C.C. Rep. Serv. 2d (Callaghan) 838

DENNIS WALKER ET AL., APPELLANTS AND CROSS-APPELLEES, v. JOHN PROBANDT, APPELLEE, AND JOHN RAYNOR, APPELLEE AND CROSS-APPELLANT.

Prior History: Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge.

Disposition: AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

Counsel: Diana J. Vogt and James D. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Patrick M. Heng, of Waite, McWha & Heng, for appellee John Raynor.

Judges: MOORE, Chief Judge, and INBODY and RIEDMANN, Judges.

Opinion by: RIEDMANN

Opinion

RIEDMANN, Judge.

I. INTRODUCTION

This case calls into question the ability of a co-obligor to settle a claim on a promissory note for less than the amount due, and in return obtain the authority to direct assignment of the note to a third party of his choosing for full enforcement against another co-obligor. Under the facts of this case, we find recovery must be limited to the amount outstanding on the note.

II. BACKGROUND

A & G Precision Parts, LLC (Parts LLC), was a limited liability company whose members at the time of organization were Dennis Walker, John Raynor, John Probandt, John Brazier, and Walter Glass. The five members of Parts LLC formed a second limited liability company, A&G Precision Parts Finance, LLC (Finance LLC).

In 2002, Finance LLC, Walker, Raynor, and Brazier obtained a loan from Five Points Bank of Grand Island, Nebraska, for approximately $2.1 million and delivered the proceeds of the loan to Parts LLC. Parts LLC and Finance LLC (collectively the LLCs) did not make the loan payments as required, and the bank made demand for full payment. In September 2004, Raynor filed personal bankruptcy, and his personal liability on the Five Points Bank loan was discharged in bankruptcy in 2005.

In March 2008, the parties negotiated with First State Bank (FSB) to refinance the Five Points Bank loan. In conjunction with the loan, Parts LLC, Finance LLC, Walker, Raynor, Brazier, and Mark Herz signed a promissory note for $1.5 million. Under the promissory note, Walker, Raynor, Brazier, and Herz were cosigners on the loan and assumed joint and several liability for the repayment of the loan. The LLCs defaulted on the loan, and FSB commenced this action to recover on the note in February 2009.

In June 2011, Parts LLC, Finance LLC, Walker, Walker's wife, FSB, and Five Points Bank entered into a settlement agreement and mutual release under which Walker agreed to pay FSB $1.05 million to settle the claims FSB asserted against him and the LLCs. In exchange, FSB assigned the FSB note and related agreements to an entity of Walker's choosing; he selected Skyline Acquisition, LLC (Skyline). As a result of the settlement and assignment, Walker and the LLCs became plaintiffs in this action. On the first day of trial, the plaintiffs orally moved to amend the pleadings to name Skyline as a plaintiff, and the district court granted the motion.

Walker and the LLCs filed a motion for default judgment against Probandt on December 15, 2011. They asserted that Probandt never filed an answer and asked that judgment be entered against him in the amount of $2,134,832.99. The district court denied the motion, finding that entering a default judgment as to one defendant prior to trial could result in inconsistent and

illogical judgments following determination on the merits as to the remaining defendants.

Due to various settlement agreements and dismissals, the parties remaining at trial were Walker, the LLCs, and Skyline as plaintiffs, and Raynor and Probandt as defendants. Probandt did not appear at trial. Trial was held on the fourth amended complaint, which included four operative causes of action—two against Raynor and two against Probandt. Raynor's operative answer asserted several affirmative defenses and two counterclaims.

After the conclusion of trial, the district court entered an order which found in favor of Skyline as to one claim against Raynor but denied the remaining causes of action and Raynor's counterclaims. Specifically, the court found that the evidence established Raynor's liability to Skyline for repayment of the FSB note, because the full amount of principal and interest is due and Raynor has made no payments on the note and is in default. The court noted that the president of FSB testified that the principal amount due on the note as of the first day of trial was $1,430,260. Adding in the accrued interest up to the time of the court's order, judgment was entered in favor of Skyline and against Raynor for $2,306,244.76. In its order, the court stated that default judgment had previously been entered against Probandt on the FSB note. Walker, the LLCs, and Skyline (hereinafter collectively the appellants) appeal, and Raynor cross-appeals.

III. ASSIGNMENTS OF ERROR

On appeal, the appellants assign that the district court erred in failing to enter an award of damages against Probandt for the full amount of the note and for the amount of money Probandt misappropriated from Parts LLC. On cross-appeal, Raynor assigns, restated and renumbered, that the district court erred in (1) failing to apply Nebraska's Uniform Commercial Code (U.C.C.); (2) failing to give effect to the order of the bankruptcy court; (3) failing to find that he was an accommodation party and Walker was an accommodated party; (4) failing to apply the rule based on *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998) (Mandolfo Rule); (5) denying judgment on his counterclaim for contribution; (6) failing to find that his obligation on the debt was discharged; (7) failing to find mutual mistakes of fact; (8) allowing judgment in favor of Skyline because of lack of consideration; (9) entering judgment in favor of Skyline because Skyline sustained no injury and received a windfall; (10) failing to treat Walker as the real party in interest; (11) allowing foreign corporations to prosecute the action without certificates of authority; (12) allowing Walker and the LLCs to take inconsistent positions with respect to the enforceability of the FSB note; and (13) ignoring the "sole basis" stipulation.

IV. STANDARD OF REVIEW

A suit for damages arising from breach of a contract, including breach of the terms of a promissory note,

presents an action at law. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.*

V. ANALYSIS

1. DEFAULT JUDGMENT AGAINST PROBANDT

On appeal, the appellants assign that the district court erred in failing to enter an award of damages against Probandt. The appellants argue that because Probandt failed to appear and enter a responsive pleading, and the evidence was sufficient to establish his liability and damages, the court should have entered a default judgment. We find that the district court did not abuse its discretion in failing to grant a default judgment on the unjust enrichment claim, but that it should have granted a default judgment against Probandt on the fraud/misappropriation claim. We therefore reverse the court's order denying the appellants' cause of action for fraud/misappropriation against Probandt.

[1,2] Whether default judgment should be entered because of a party's failure to timely respond to a petition rests within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify reversal on such a ground. *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). In denying the motion for default judgment before trial in the present case, the district court concluded that

entry of a default judgment prior to trial could result in inconsistent and illogical judgments following determination on the merits as to the remaining defendants. In reaching its decision, the district court relied upon *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999), in which the Nebraska Supreme Court held that under *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.

Here, the operative complaint at the time the motion for default judgment was filed was the second amended complaint; however, between the date the motion was argued and the date on which the court entered its order, the appellants filed a revised third amended complaint. It is upon this complaint that the court denied the motion. In the revised third amended complaint, the appellants included two causes of action against Probandt. The first was a claim for unjust enrichment against Brazier, Herz, and Probandt. Therein, the complaint alleged that Brazier, Herz, and Probandt used a portion of the funds from the FSB loan to satisfy the loan which was owed to Five Points Bank by the LLCs and guaranteed by Probandt and Glass. The complaint alleged that because Probandt was a guarantor of the Five Points Bank loan, he benefited from the use of the FSB loan to pay off the Five Points Bank loan, relieving him of his obligation to

Five Points Bank. It further alleged that despite demands to pay, Brazier, Herz, and Probandt failed to pay the amount due.

The second cause of action involving Probandt was for fraud. This claim alleged that Probandt misappropriated funds from the original financing of Parts LLC to finance other business ventures; Probandt took unauthorized payments from Parts LLC; Probandt took money from Parts LLC and signed a promissory note in the amount of $64,859 but never repaid the note; and Probandt used funds of Parts LLC to pay rent on an apartment and pay personal living expenses.

Although the appellants' motion for default judgment was broad, at the hearing on the motion, the appellants' counsel limited the scope of her motion. Responding to an objection to an offered exhibit, she stated, "[T]hese number[s] go to just amounts that . . . Probandt took for his personal uses. There's a separate cause of action against . . . Probandt for misappropriation of funds; and this default judgment only goes to that cause of action."

Our review of the revised third amended complaint reveals that the cause of action to which counsel referred was the fraud/misappropriation claim. Under this cause of action, appellants sought recovery from only Probandt for actions he performed individually. It does not involve the other defendants and therefore a judgment against Probandt on this cause of action could not produce conflicting results. We determine that the

court's analysis under *State of Florida v. Countrywide Truck Ins. Agency, supra*, is therefore inapplicable.

[3] In the case of an original action filed in the district court, the failure of a defendant to file a responsive pleading entitles the plaintiff to a default judgment, without evidence in support of the allegations of the petition, except as to allegations of value or damages. *Chapman v. Department of Motor Vehicles*, 8 Neb. App. 386, 594 N.W.2d 655 (1999). Because Probandt failed to file a responsive pleading, the appellants were entitled to a default judgment on their fraud/misappropriation cause of action. It was then incumbent upon the appellants to prove damages.

The appellants argue on appeal that they sufficiently proved damages at trial via deposition testimony of Rex Hansen, a certified public accountant, and Herz. We agree that Hansen's testimony and the corresponding ledger offered at the close of appellant's case in chief establishes damages in the amount of $2,184,530.

Hansen testified that he classified expenditures by Probandt into two categories: "Bad" and "Sketch." According to Hansen, the "Bad" were expenditures "clearly used for something other than the daily operations of A&G" and the "Sketch" expenditures were composed of items that he "didn't understand what they were. There were some loan guarantees, financing costs, et cetera." The "Bad" totaled $2,184,530, and the "Sketch" totaled $477,661. We determine that the evidence sufficiently proved that Probandt misappropriated $2,184,530 from the LLCs; however, the evidence

that the "Sketch" items represented additional misappropriations was insufficient due to Hansen's own admission that he did not understand what they were. Accordingly, the court should have entered a default judgment against Probandt in the amount of $2,184,530.

Because counsel limited the scope of her pretrial motion for default judgment to the claim for misappropriation of funds, the court did not err in failing to grant a default judgment against Probandt on the unjust enrichment claim. We further observe that the appellants did not move for default either at trial or after trial. See, e.g., *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986) (referencing plaintiff's motion for default judgment made after trial).

We note that in its memorandum order entered after trial, the court stated, "During the early stages of the case, the court entered a default judgment against . . . Probandt on the plaintiffs' claims under the First State Bank note." The appellants argue that the court's statement was in error, and Raynor takes no position on the assigned error. We agree that no order is contained in our record granting default judgment against Probandt. However, we interpret the court's misstatement to relate to a claim other than the two claims contained in the operative complaint because the district court's order specifically rejected these two claims, citing a lack of proof. Therefore, this misstatement does not constitute reversible error.

2. U.C.C.

On cross-appeal, Raynor posits several arguments with respect to the U.C.C. He argues that the district court failed to apply the U.C.C., failed to give effect to the order of the bankruptcy court, failed to find that he was an accommodation party and Walker was an accommodated party as defined by the U.C.C., failed to apply the Mandolfo Rule, erred in denying judgment on his contribution counterclaim against Walker, and failed to find that his obligation on the debt was discharged under the U.C.C.

(a) Failure to Apply U.C.C.

Raynor first claims that the district court erred in failing to apply the U.C.C. in entering judgment against him on the FSB note. He does not specify, however, in what way the court "ignor[ed]" the U.C.C. Brief for appellee on cross-appeal at 30. The parties stipulated that the FSB note is a negotiable instrument within the meaning of the U.C.C. When the district court addressed Raynor's arguments regarding accommodation and accommodated parties in its order, the court cited to the U.C.C. Although it disagreed with Raynor's position, the court considered certain sections of the U.C.C. in reaching its decision. We therefore disagree with Raynor's assertion that the district court did not address the U.C.C.

(b) Accommodation Party and Accommodated Party

Raynor next argues that the district court failed to give effect to the bankruptcy court order to find that he was an accommodation party and failed to find that Walker was an accommodated party. He asserts that because, at the time he signed the FSB note, he had no ownership in the LLCs and was not personally liable for the Five Points Bank loan, he qualifies as an accommodation party under the U.C.C. He further claims that Walker is an accommodated party and that under the U.C.C., an accommodated party is prohibited from seeking contribution from an accommodation party. Therefore, he argues that the judgment entered against him is erroneous.

[4] If an instrument is issued for value given for the benefit of a party to the instrument (accommodated party) and another party to the instrument (accommodation party) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "'for accommodation.'" Neb. U.C.C. § 3-419(a) (Reissue 2001).

[5] An accommodation party is one who signs the instrument for the purpose of lending his credit to some other person or party. See *Bachman v. Junkin*, 129 Neb. 165, 260 N.W. 813 (1935). See, also, 10 C.J.S. *Bills and Notes* § 26 (2008) (party accommodated is one to whom name of accommodation party is loaned).

The claim upon which judgment was entered against Raynor was based on his liability to FSB for nonpayment of the loan. Specifically, the operative complaint alleges that Raynor was a maker and guarantor of the promissory note to FSB in the amount of $1.5 million and that Raynor failed to pay amounts due on the loan; therefore, FSB, later amended to Skyline as assignee, is entitled to judgment against Raynor for the outstanding balance plus interest. The district court agreed, finding that Raynor signed the note but failed to repay the loan and was therefore liable. In its order, the district court stated that for "the sake of resolving the claims, the court assumed Raynor was an accommodation maker." The court observed that as an accommodation party, Raynor remained liable to FSB, and subsequently to Skyline. His status of an accommodation party would only be relevant in an action for contribution by the accommodated party. However, because this was not a cause of action for contribution raised by Walker individually, the issue of contribution between an accommodated party and an accommodation party was immaterial.

We find no error in the district court's analysis. As stated above, the claim on the FSB note was prosecuted in the name of Skyline, the assignee of the note. The court's judgment was in favor of Skyline, not Walker. As such, the status of Raynor and Walker under the U.C.C., and whether Walker is barred from seeking contribution from Raynor, have no effect on whether Skyline can recover on the note from Raynor. This argument therefore lacks merit.

(c) Mandolfo Rule

[6] Raynor next argues that the district court erred in failing to apply the Mandolfo Rule, which he claims prohibits enhancing recovery by reason of the assignment of a promissory note after default. See *Mandolfo v. Chudy*, 253 Neb. 927, 573 N.W.2d 135 (1998). See, also, *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). In the cases Raynor cites, the Supreme Court held that the assignment of a promissory note and its guaranties to a guarantor does not enhance the guarantor's right of recovery against a coguarantor; rather, recovery against a coguarantor remains limited to the coguarantor's proportionate share. See, *Mandolfo v. Chudy, supra; Rodehorst v. Gartner, supra.*

In the present case, however, the assignment of the note was not made to a coguarantor of the note, but, instead, to Skyline. Raynor argues that Skyline is a mere alter ego of Walker and that the assignment of the note to Skyline was a "[s]ham [t]ransaction" because it was done for the sole purpose of enhancing Walker's recovery. Brief for appellee on cross-appeal at 34. We find no evidence in the record to support this argument, however, and Raynor cites to none in his brief. To the contrary, the only evidence regarding Skyline is that it is owned by Walker and his wife. None of the factors necessary to evaluate the existence of an alter ego were presented. As such, we find the holdings of *Mandolfo* and *Rodehorst* are inapplicable to the present case and do not prohibit Skyline's recovery on the FSB note from Raynor.

(d) Counterclaim for Contribution

Raynor argues that the district court erred in denying his counterclaim for contribution from Walker, asserting that under § 3-419, Walker is the party primarily responsible for the debt because of his status as an accommodated party. As such, Raynor argues that his contribution claim should have been granted. We disagree.

The district court denied Raynor's contribution claim because there was no evidence that Raynor had paid any portion of the FSB debt. Raynor claims this "result ignores the duty of the Trial Court to fully dispose of all contribution issues of parties to the controversy regarding the personal liability for unpaid negotiable instruments according to each party's pecuniary obligation pursuant to Nebr. U.C.C., Article 3, Part 4." Brief for appellee on cross-appeal at 39.

Assuming without deciding that Raynor was an accommodation party, the evidence does not establish that Raynor signed the note in order to accommodate or benefit Walker; he stipulated that he signed it to assist Herz who was managing the business of the LLCs. In essence, Raynor signed it to assist the LLCs in obtaining the loan. With respect to the instrument, Walker held the same position Raynor did—that of cosigner who lent his credit in order to benefit the LLCs.

[7] The fact that Walker was an owner of the LLCs and received some benefit from the FSB note does not conclusively establish his status as an accommodated party. See *Empson v. Richter*, 113 Neb. 706, 204 N.W.

518 (1925) (mere fact that party may have received some benefit out of transaction does not necessarily determine that he was an accommodated party). Rather, in determining the identity of the party accommodated, the intention of the parties is determinative. See 10 C.J.S. *Bills and Notes* § 26 (2008). There is no evidence that Raynor intended to assist Walker in obtaining a loan. Walker needed no accommodation to secure financing, because the undisputed evidence establishes that FSB offered financing to the LLCs based exclusively on Walker's financial strength and willingness to cosign. Thus, Raynor and Walker each cosigned the note in order to assist the LLCs, and therefore, Walker had no greater liability on the note than did Raynor.

[8] Co-obligors to a debt are each liable for a proportionate share of the debt as a whole, and an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt as a whole. See *Cepel v. Smallcomb*, 261 Neb. 934, 628 N.W.2d 654 (2001). Accordingly, until Raynor has paid more than his proportionate share of the debt as a whole, he has no basis for contribution from Walker or any other co-obligors. As a result, the district court did not err in denying Raynor's counterclaim for contribution from Walker.

(e) Discharge of Raynor's Obligation

Raynor asserts that because FSB failed to properly secure Walker's collateral, his liability on the note is

discharged under Neb. U.C.C. § 3-605 (Reissue 2001). We conclude that this defense has been waived.

[9-11] If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. § 3-605(f). Impairing value of an interest in collateral includes failure to obtain or maintain perfection or recordation of the interest in collateral. See § 3-605(g). Rights of the surety to discharge are commonly referred to as "suretyship defenses." § 3-605, comment 1.

[12] Here, however, Raynor waived his right to assert this defense. According to the promissory note Raynor signed in conjunction with the FSB loan, Raynor agreed to "waive any defenses . . . based on suretyship or impairment of collateral." The defense that a guarantor is discharged by a creditor's impairment of collateral can be waived by an express provision in the guaranty agreement. See *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). Accordingly, we find that Raynor has waived his right to assert this defense.

3. MUTUAL MISTAKES OF FACT

Raynor argues that he is not liable for the debt to FSB because of mutual mistakes of fact among the parties. He argues that the evidence was clear that, at the time the FSB note was executed, all of the parties to the note mistakenly believed he retained an ownership interest in the LLCs and remained personally liable for the Five Points Bank note. He claims that but for the mistakes of fact, he would not have executed the FSB note. We find that Raynor failed to meet his burden of proving that mutual mistakes of fact exist.

[13-15] A mutual mistake is a belief shared by the parties, which is not in accord with the facts. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument. *Id.* A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Id.*

[16, 17] To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should not be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence. See *id.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Id.*

Raynor cites to no evidence in the record to support a conclusion that the promissory note does not express what was really intended by the parties. To the contrary, the parties intended that FSB would extend the loan in exchange for the cosigners' signatures. The promissory note reflects that intent. The fact that Raynor was no longer liable on the Five Points Bank debt nor a member of the LLCs is of no effect. As in *R & B Farms v. Cedar Valley Acres, supra*, there is no clear and convincing evidence that the parties mistakenly believed the contract to mean one thing when in reality it did not.

The burden was on Raynor to present clear and convincing evidence to overcome the presumption that the agreement correctly expresses the parties' intent. Because he failed to do so, the district court correctly rejected his argument.

4. Skyline's Status and Real Party in Interest

Raynor asserts several arguments with respect to the ability of Skyline and the LLCs to prosecute a case against him. Specifically, he argues that the district court erred in allowing a judgment in favor of Skyline, entering a judgment in contravention of the Nebraska Constitution, failing to treat Walker as a substantive owner of the FSB note and instead treating Skyline as the real party in interest, allowing foreign limited liability companies to prosecute the action without certificates of authority, and allowing Walker and the LLCs

to take inconsistent positions on the enforceability of the FSB note.

(a) Lack of Consideration From Skyline

Raynor argues that Skyline does not qualify as a holder in due course of the FSB note and that therefore, Skyline's enforcement of the note against him is subject to the personal defenses that existed between the original parties to the instrument.

[18] Neb. U.C.C. § 3-302 (Reissue 2001) provides that a holder in due course means the holder takes an instrument (1) for value, (2) in good faith, (3) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (4) without notice that the instrument contains an unauthorized signature or has been altered, (5) without notice of any claim to the instrument described in Neb. U.C.C. § 3-306 (Reissue 2001), and (6) without notice that any party has a defense or claim in recoupment described in Neb. U.C.C. § 3-305(a) (Reissue 2001).

Here, Skyline does not meet all of the requirements to qualify as a holder in due course. Despite the language of the assignment, it does not appear that Skyline paid value for the note; rather, as evidenced by the language of the settlement agreement, the consideration was paid by Walker, and upon such payment, FSB agreed to assign the note to Skyline. In addition, in taking the note, Skyline had notice that the instrument was

overdue, because Walker and his wife are the only members of Skyline and they both signed the release which recognized the default of the note. Therefore, although Skyline is the present holder of the note, it is not a holder in due course.

[19] Raynor argues that because Skyline does not qualify as a holder in due course, it is subject to any defenses he could have asserted against FSB, and we agree. Unless one has the rights of a holder in due course, he is subject to all the defenses of any party which would be available in an action on a simple contract. See *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983). See, also, § 3-305. This would include the defense of set-off. See *Davis v. Neligh*, 7 Neb. 78 (1878) (stating that holder not in due course takes note subject to any right of set-off which maker had against any prior holder). See, also, Neb. U.C.C. § 3-601 (Reissue 2001) (limiting effectiveness of discharge of obligation of party to holder in due course of instrument without notice of discharge); § 3-605, comment 3 (using hypothetical stating partial payment by one borrower reduces obligation of coborrower).

[20-23] Furthermore, in a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position he would have occupied if the contract had been performed, that is, to make the injured party whole. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). As a general rule, a party may not have double recovery for a single injury, or be made "'more than whole'" by

compensation which exceeds the actual damages sustained. *Id.* at 516, 576 N.W.2d at 825. Where several claims are asserted against several parties for redress of the same injury, only one satisfaction can be had. *Id.* Thus, where the plaintiff has received satisfaction from a settlement with one defendant for injury and damages alleged in the action, any damages for which a remaining defendant would be potentially liable must be reduced pro tanto. See *id.*

Accordingly, in the present case, because Skyline is not a holder in due course, it is subject to any defense Raynor could assert against FSB in a simple contract case. In such a case, Raynor would have a defense against FSB that any amount for which he is liable on the note must be reduced pro tanto by the amounts FSB already received in settling the claims for nonpayment of the note from Walker, Brazier, Herz, and/ or Hansen. FSB is not allowed double recovery from multiple defendants for the same claim as to the note, and therefore, Raynor is liable only for the amount remaining on the note after subtraction of the amounts FSB received from the settling defendants. Therefore, we reverse the award of damages entered in favor of Skyline against Raynor and remand the cause for recalculation of the remaining balance due on the note.

(b) Skyline Sustained No Injury

Raynor contends that the judgment entered against him was unconstitutional, because Skyline sustained no legally cognizable injury. In other words, he claims

that Skyline was not the real party in interest. We do not agree.

[24,25] Subject to an exception not relevant here, every action must be prosecuted in the name of the real party in interest. Neb. Rev. Stat. § 25-301 (Reissue 2016). To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[26-28] As a general rule, an assignment is a transfer vesting in the assignee all of the assignor's rights in property which is the subject of the assignment. *Id.* The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor. Neb. Rev. Stat. § 25-302 (Reissue 2016). An assignee may recover the full value of an assigned claim regardless of the consideration paid for the assignment. *Eli's, Inc. v. Lemen, supra.*

In the instant case, FSB assigned to Skyline all of its rights conferred by the terms of the promissory note and term loan agreement which are the subject of this action. The cause of action upon which judgment was entered against Raynor, FSB, or Skyline alleged that Raynor signed the FSB note, the note was in default, and Raynor failed to satisfy the debt. As the assignee of FSB's right to collect on the loan, Skyline was permitted to maintain an action against Raynor and pursue any rights that FSB had to recover on the note.

Although lack of consideration is a factor in Skyline's becoming a holder in due course, it does not void the assignment. As a result, we find no merit to this argument.

(c) Unconstitutional Windfall in Favor of Skyline

Raynor also argues that the award in favor of Skyline was an unconstitutional windfall for Skyline because the district court refused to consider the settlements of Walker, Brazier, Hansen, and Herz. We agree. As set forth above, Skyline was not a holder in due course. It was therefore allowed to collect only the remaining balance on the note. The district court should have taken into consideration the settlement amounts paid by Walker, Brazier, Hansen, and Herz. As stated above, we remand the cause for recalculation of the unpaid balance.

(d) Certificates of Authority

Raynor argues that the LLCs were dissolved before this action was commenced and never had certificates of authority to do business in Nebraska. Thus, he claims, they have no standing as plaintiffs in Nebraska courts under Neb. Rev. Stat. § 21-162(a) (Reissue 2012).

The cause of action upon which judgment was entered against Raynor was the claim of FSB, later assigned to Skyline. The LLCs are not the plaintiffs with respect to the claim at issue in Raynor's argument. In ruling

on this claim, the district court found that judgment should be entered on the FSB note in favor of Skyline. Therefore, whether the LLCs having standing as plaintiffs in a Nebraska court has no bearing on Raynor's liability to Skyline.

(e) Inconsistent Positions on Enforceability of FSB Note

Raynor claims that initially Walker and the LLCs argued that the FSB note was unenforceable for various reasons, but once they settled and became plaintiffs, they took an opposite position. He argues that the assertions Walker and the LLCs made in their early pleadings constitute judicial admissions and that they should be estopped from asserting an inconsistent position now.

[29] As discussed above, neither Walker nor the LLCs are the plaintiffs in the relevant cause of action against Raynor. It is FSB by way of Skyline that is asserting the enforceability of the note. Thus, Walker's and the LLCs' positions with respect to the note are irrelevant to our analysis as to whether judgment was erroneously entered against Raynor. Furthermore, admissions made in superseded pleadings are no longer judicial admissions, but, rather, simple admissions. *Cook v. Beermann*, 202 Neb. 447, 276 N.W.2d 84 (1979). We therefore reject this argument.

5. SOLE BASIS STIPULATION

Raynor argues that the district court's judgment was contrary to the parties' stipulation that the sole basis for seeking recovery against him was his expressed intent to assist Herz. We understand this stipulation to be the parties' recognition that Raynor was not an owner or member of the LLCs at the time the FSB note was signed nor was he personally liable on the Five Points Bank note. The dispute appears to arise out of whether Raynor's intended assistance to Herz is sufficient consideration to support the FSB note.

[30-32] Generally, there is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000). What that benefit and detriment must be or how valuable it must be varies from case to case. It is clear, however, that even "'a peppercorn'" may be sufficient. *Id.* at 439, 618 N.W.2d at 436. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. *Id.* For the purpose of determining consideration for a promise, the benefit need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Id.*

In the present case, a detriment to the promisee is present: FSB issued a loan to the LLCs, a legal act which it was not bound to do. Raynor argues that he, as the promisor, did not receive a benefit from the loan because he was not an owner of the LLCs at the time of the loan and was not personally liable on the Five Points Bank loan. There is no requirement, for purposes of consideration, that Raynor personally received a benefit; his stated intention to assist Herz is sufficient consideration, because Herz received a personal benefit via the loan proceeds. Accordingly, this argument lacks merit.

VI. CONCLUSION

We conclude that the district court abused its discretion in declining to enter default judgment against Probandt on the fraud/misappropriation cause of action, and we remand the cause to the district court with directions to enter a default judgment against Probandt in the amount of $2,184,530.

We find no error in the decision to enter judgment in favor of Skyline against Raynor. However, the district court erred in failing to award a credit against the judgment for the amounts received in settlement, and we remand the cause for recalculation of this amount.

AFFIRMED INPART, AND INPART REVERSED AND REMANDED WITH DIRECTIONS.

APPENDIX D

IN THE DISTRICT COURT OF
DAWSON COUNTY, NEBRASKA

FIRST STATE BANK, a Nebraska Banking Corporation and DENNIS WALKER, individually and on behalf of A&G PRECISION PARTS, LLC, an Oregon Limited Liability Co.; and A&G PRECISION PARTS FINANCE, LLC, a South Dakota Limited Liability Company Plaintiff, vs. JOHN PROBANDT and JOHN RAYNOR Defendant.	Case No. CI09-35 MEMORANDUM OPINION AND ORDER (Filed Oct. 2, 2015)

On December 3, 2014, January 7, 2015, and March 24, 2015, a trial to the court was conducted on the plaintiffs' October 9, 2013, fourth amended complaint and on the defendant John Raynor's August 13, 2014, answer to the fourth amended complaint and his counterclaims. Dennis Walker (Walker), one of the plaintiffs' was present and represented by his attorney, Diana Vogt. John Raynor (Raynor) was present and represented himself. Raynor also had the assistance of Lindsay Pedersen, who entered a limited appearance on behalf of Raynor. Evidence was adduced, statements

were made, and the court took under advisement an offer of proof made by John Raynor.

On June 10, 2015, the court entered its order ruling on the offer of proof. Said order denied the offer of proof, sustained the objections thereto and closed the evidentiary record. The parties were permitted time to file briefs. The case was submitted and taken under advisement.

Now on this 2nd day of October, 2015, the matter comes on for decision after courts' consideration of the evidence and the briefs of counsel. After such consideration, the court finds and orders as follows:

Factual background and findings

The court finds the following facts were established either by the preponderance of the evidence, the admissions by the parties in their pleadings, or by the parties' declarations in the December 1, 2014 (filing date) joint pretrial conference memorandum in which the parties agreed upon certain undisputed facts.

In August of 1998, A&G Precision Parts, LLC (A&G Parts), was owned equally by John Probandt, Dennis Walker, John Raynor, Walter Glass, and John Brazier. A&G Parts was a member managed limited liability company.

A&G Precision Parts Finance, LLC (A&G Finance), was formed in August 2002, and then was then owned equally by John Probandt, Dennis Walker, John Raynor, Walter Glass, and John Brazier.

A&G Parts was an Oregon limited liability company and A&G Finance was a South Dakota limited liability company. Both companies were dissolved, A&G Finance in 2010, and A&G Parts in 2006 by virtue of a failure to file an annual report. A&G Finance never operated a business, and existed only in relation to the financing of A&G Parts' business.

In October of 2002, A&G Finance, Dennis Walker, John Brazier, and John Raynor borrowed $2,100,010.00 from Five Points Bank in Grand Island, Nebraska. Thereafter, the business operated by A&G Parts struggled, the Five Points Bank note could not be paid as agreed, and the bank made demand for full payment.

In September of 2004, after the loan from Five Points Bank, John Raynor filed personal bankruptcy. In 2005, John Raynor's personal liability to the Five Points Bank was discharged in his bankruptcy.

In 2008 the parties decided to refinance the Five Points Bank debt which lead them to First State Bank of Gothenburg. On March 31, 2008, John Raynor, Dennis Walker, John Brazier, and Mark Herz signed a promissory note for $1,500,000.00 promising to pay said sum to First State Bank under the terms of such note and a March 30, 2008, term loan agreement.

The proceeds from the First State Bank note were paid out pursuant to the agreement reached between the bank and the parties, although there was some dispute concerning whether a portion of the proceeds was paid as a "finder's fee" for the placement of the loan at First State Bank.

The term loan agreement was revised by an agreement signed on various dates in April and May of 2008 by John Raynor, Dennis Walker, and Mark Herz. The execution of the revised term loan agreement occurred after the loan proceeds were disbursed by the First State Bank.

In July of 2008, John Raynor and John Probandt signed an agreement by which their interest in A&G Parts and A&G Finance would be transferred and assigned to Dennis Walker, unless certain terms and conditions were met. Between March 31, 2008, and late October 2008, Dennis Walker provided additional funds to A&G Parts, the first installment of which was $150,000.00. Raynor and Probandt did not fulfill the terms and conditions of the July 2008 agreement. By November 2008, A&G Parts was struggling and on November 4, 2008, A&G parts was unable to meet its daily expenses and ceased all business operations. Payments to First State Bank on the March 2008 note stopped.

On February 5, 2009, First State Bank brought suit against A&G Parts, A&G Financing, Walker, Raynor, John Brazier, Mark David Herz, and Wells Fargo Bank to collect on the note. Various court proceedings took place thereafter including the issuance of a series of scheduling orders directing the parties' conduct of discovery and other actions necessary to prepare the case for trial.

During the early stages of the case, the court entered a default judgment against John Probandt on the plaintiffs' claims under the First State Bank note.

On June 15, 2011, A&G Parts, A&G Finance, Dennis Walker, Diana Walker, First State Bank, and Five Points Bank entered into a settlement agreement and mutual release to settle the claims brought by First State Bank against the named parties. Under the terms of the settlement agreement, Dennis Walker agreed to pay First State Bank $1,050,000.00 Under the agreement, A&G Parts, A&G Financing, Dennis Walker, and Diana Walker released First State Bank and Five Points Bank from any liability by virtue of the prior business dealings between the parties. Pursuant to the June 15, 2011, settlement agreement, First State Bank assigned the First State Bank note and related agreements to Skyline Acquisition, LLC, an entity designated by Walker.

Further procedural activity took place in the case, ultimately resulting in the filing of the fourth amended complaint by the plaintiffs' on October 9, 2013, and the filing by Raynor of an answer and counterclaim on August 13, 2014. Mark Herz, John Brazier, and Rex Hanson entered into settlement agreements with the plaintiffs and were dismissed from the case.

During the trial, the plaintiffs moved to amend the pleadings to name Skyline Acquisition LLC as a party to the suit by reason of First State Bank's assignment of the note to Skyline Acquisition LLC. The court

granted the request and Skyline Acquisition LLC was added as a plaintiff in the case.

Claims asserted

In the October 9, 2013, fourth amended complaint, the plaintiffs set forth six causes of action. Of the six causes of action, the first and sixth cause of action were the only ones asserted against Raynor. The second and fourth causes of action were asserted against John Probandt. The third and fifth causes of action were asserted against parties who were dismissed from the case. In the first cause of action, the plaintiffs alleged Raynor was liable to the plaintiffs for $1,430,171.09, the principal and interest owed on the First State Bank note. The plaintiffs alleged Raynor failed and refused to pay the amounts due on the note, and the plaintiffs were entitled to judgment against Raynor for the full amount of the note.

In the sixth cause of action, the only other cause of action asserted against Raynor, the plaintiffs alleged Raynor engaged in a civil conspiracy to divest Walker of his ownership interest in A&G Parts and to cause Walker to put additional money into A&G Parts to benefit parties other than A&G Parts. Walker claimed he lost his interest in the A&G Parts equipment, "he had paid for and in the ongoing business, and caused the business to be transferred to another party despite the fact that Walker was a signatory on a promissory note for approximately 1.5 million dollars that had been used for the benefit of the business." The plaintiffs

asked for a judgment in favor of Walker for $241,000 by reason of the conspiracy and asked that a constructive trust be placed on all equipment and assets of business now operating as Herz Precision Parts, LLC in favor of A&G Parts.

In their second cause of action the plaintiffs alleged John Probandt was unjustly enriched by reason of the payoff of the Five Points Bank loan via the First State Bank loan, which resulted in Probandt being relieved from liability as maker and guarantor of the Five Points Bank debt without a corresponding liability under the First State Bank note.

In the fourth cause of action, the plaintiffs alleged John Probandt committed fraud by the misappropriation of funds from A&G Parts and A&G Finance in the amount of $2,054,833.06, by reason of unauthorized payments he took from the companies and his use of such funds for personal expenses and by reason of his failure to repay indebtedness he owed to the limited liability companies. In the fourth cause of action, the plaintiffs prayed for judgments against Probandt for at least $1,914,974.06 and $64,859.00.

In his answer, John Raynor admitted he executed the note to First State Bank and the term loan agreements. But Raynor alleged that when he signed the note and agreements, there existed a mutual mistake of fact concerning his membership in A&G Parts and A&G Finance. Raynor denied all other material allegations made in the fourth amended complaint. In his answer, Raynor further alleged: (1) his obligation to pay

the note owed to First State Bank was not enforceable against him due to his bankruptcy; (2) Walker was barred by the equitable doctrine of unclean hands from any and all equitable relief sought due to Walker's misrepresentation and fraudulent inducement and Walker's interference with the business of A&G parts; (3) that the action brought by the plaintiff was time barred and barred by the applicable statute of limitations; (4) that his liability was discharged under the Uniform Commercial Code and that he has no liability on the loan because of the equitable doctrine of reliance; (5) that the defense of equitable estoppel applied because the First State Bank note was not signed by Probandt and Raynor would not have signed the note but for the fact that Probandt's signature was required in advance of funding; (6) that the plaintiffs were barred from collecting any money from Raynor because they made an election of remedies by reason of Walker's acquisition of sole ownership of A&G Parts and A&G Finance; and, (7) under the equitable principles of contribution and unjust enrichment, Raynor is entitled to an offset against all indebtedness he is determined to owe Walker under any of the causes of actions asserted against Raynor.

Raynor asserted two counterclaims against Walker. The first claim was a claim of contribution. In that claim, Raynor claimed that equitable principles applied to the claim of liability for the First State Bank note such that the entire indebtedness must be apportioned solely to Dennis Walker. Such defense was pled as an alternative to Raynor's defense of mutual

mistake. In his second counterclaim, Raynor pled, again as an alternative to Raynor's defense of mutual mistake, that there was an implied covenant between Walker and the other parties to the various agreements that Walker would continue to fund A&G Parts and A&G Finance as needed to meet its obligations. Raynor contended that Walker breached this implied covenant and that such breach was the proximate cause of the plaintiffs' damages. As a result, Raynor claimed Walker should be held responsible for the damages flowing from his breach of the implied covenant.

Analysis, findings, and conclusions

A. First cause of action on the First State Bank promissory note.

1. The plaintiffs sustained their burden of proof.

The court finds the plaintiffs' evidence proved all the necessary elements to establish Raynor's liability for repayment of the First State Bank note. The full amount of the principal and accrued interest is due under the note. Raynor has made no payments on the note and is in default.

2. Raynor's accommodation claim

Raynor claimed because he was an accommodation party, he is not liable on the note for various reasons asserted both in his answer and his brief. Raynor also relied on the fact that the plaintiffs' and Raynor

"agreed" that the sole basis for recovery against Raynor for the full liability under the First State Bank note rests on Raynor's "expressed intent to assist Mark Herzs'." (sic).[1] However, neither the reasons asserted by Raynor, nor the agreed upon facts, preclude the imposition of liability against Raynor on the note.

For the sake of resolving the claims, the court assumed Raynor was an accommodation maker, which the court understands to mean a person who signs an instrument for the " . . . purpose of incurring liability on the instrument without being a direct beneficiary of value given for the instrument."[2] But such status does not alone preclude the imposition of liability on Raynor.

An accommodation party is obligated to pay the instrument and is entitled to reimbursement from the accommodated party.[3] Thus, being an accommodation party does not negate or absolve Raynor from liability on the instrument, it only entitles Raynor to reimbursement from the accommodated party.[4] The evidence established that Raynor was not accommodating Walker by incurring the obligation to pay the First State Bank note. Therefore, whether Raynor stands as an accommodation party to other parties as

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[1] December 1, 2014, joint pretrial conference memorandum signed by the plaintiffs and John Raynor. (Hereinafter joint pretrial conference memorandum.)

[2] Neb. U.C.C. §3-419(a).

[3] *Rodehorst v. Gartner,* 266 Neb. 842 (2003).

[4] *Id.*

immaterial and does not affect whether Raynor is liable to the present holder of the First State Bank note, i.e., Skyline Acquisition, LLC.

3. Raynor's claims of mistake

Raynor also asserted he is not liable on the First State Bank note because of a mutual mistake of law or fact. This defense is unavailable to Raynor because of the lack of evidence to establish a mutual mistake and because of the lack of proof of the equitable basis required for such a defense. Relief due to mistakes of law or fact are founded on principles of equity and "[a] court will not grant relief from the consequences thereof, in the absence of fraud or undue influence. . . ."[5] Under Nebraska law, mistake of law or fact that warrants rescission of an instrument is that which is so fundamental in nature as to a negate a finding that there was a meeting of in the minds as to an essential element of the transaction.[6]

In addition, the Nebraska Supreme Court has held that the " . . . a mistake of one party does not relieve that party from its obligation under a contract absent a showing of fraud, misrepresentation, or other inequitable conduct."[7]

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[5] 30A C.J.S. *Equity,* section 45.

[6] *Stitch Ranch, LLC v Double BJ Farms Inc.,* 21 Neb. App. 328 (2013).

[7] *Bachman v Easy Parking of America Inc.,* 252 Neb. 325 (1997).

Raynor claimed two bases for his mistake claims. First, he claimed he did not realize he was not required to sign the First State Bank note after his liability to Five Points Bank had been discharged in bankruptcy. But, the First State Bank note was bargained for and executed by Raynor after his bankruptcy discharge. Raynor's status as a lawyer and CPA belies his contention he was mistaken as to the law and facts surrounding the procurement of the loan and the execution of the note. If Raynor was in fact uncertain of his obligation or the wisdom of executing the First State Bank note, based upon his education, business experiences, including his experience in bankruptcy, it is a reasonable inference that a person similarly situated to Raynor would have sought legal counsel or conducted a due diligence evaluation before signing a one and a half million dollar promissory note.

Raynor's second claim of mistake was based on a "mistake of fact concerning his membership in A&G Parts and A&G Finance." But Raynor's proof of mistake under such theory was deficient. He failed to prove any of the elements necessary to establish any inequitable conduct on the part of Walker or any other party relating to Raynor's interest or lack of interest in either of the LLC's. That is, there was no proof by Raynor of fraud, undue influence, or misrepresentation.

Raynor's attempts to build a chain of reasoning to support his claims were without support in the evidence and without support in the law. The court finds that the defense of mistake was not proven and such

defense was not available to Raynor under the evidence presented.

4. Raynor's contribution claims

In his answer and his first counterclaim, Raynor alleged that if he was " . . . found liable for the FSB note, he is entitle (sic) to seek contribution from Mr. [Dennis] Walker under equitable principles." Raynor alleged that "equitable principles applied to the underlying facts clearly support that the liability for the FSB note should be apportioned solely to Mr. [Dennis] Walker."

Under the Nebraska law, a joint and several debtor who has been compelled to pay more than his share of a common debt has a right of contribution from each of the co-debtors.[8] The party seeking contribution must establish that such party and the party from whom such party seeks contribution share a common liability and that the party seeking contribution has been "compelled to pay more than his share of the common debt . . . "[9] There is no evidence of any kind that Raynor paid any part of the debt owed to First State Bank. As a result, Raynor's claim for contribution is without merit.

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[8] *Giles v. Sheridan,* 179 Neb. 257 (1965), citing, *Exchange Elevator Co. v. Marshall,* 147 Neb. 48 (1946).

[9] *Id.* at 264.

5. Conclusion

The court finds that a judgment shall be entered in favor of Skyline Acquisitions, LLC., and against Raynor for the amount of indebtedness owed under the First State Bank note which, as of the date of the filing of this memorandum and opinion, was $2,306,244.76.[10]

C. Other claims, affirmative defenses and counterclaims

The court finds neither the plaintiffs nor Raynor can recover on any of their other causes of actions or counterclaims, nor does the evidence support any of the other defenses claimed by Raynor. The evidence offered by the plaintiffs and by Raynor on causes of action, two through six, the counterclaims, and defenses failed to establish the necessary elements required to entitle any party to relief. The testimony of both Walker and Raynor on the other causes of actions, counterclaims, and defenses, was entirely unconvincing, often contradictory, and at times was so circular as to be without reason and nearly unintelligible. The court finds the testimony elicited from Walker on the causes of action two through six and from Raynor on

[10] The president of First State Bank testified the principal amount due on the First State Bank note as of December 3, 2014 was $1,430,260 and the accrued interest was $772,095. Interest accrued at the rate of 8.75% per annum under the note which yields a per diem interest amount of $342.8705. 303 days elapsed after December 3, 2014 until October 2, 2015 which yields an additional $103,899.76 in accrued interest.

his counterclaims and defenses was neither creditable nor credible.

In reaching the conclusion that the plaintiffs failed to prove causes of action two through six and that Raynor failed to prove his defenses and his counterclaims, the court gave weight to the demeanor evidence. Such demeanor evidence included the inconsistency in the testimony of the witnesses and the documents produced by each of the parties. The court also considered the manner in which each witness composed answers to questions, the time each witness took to respond to the questions, including the hesitation or readiness with which answers were given, the directness of the answers, the tone of voice used, the emphasis placed on words, the earnestness and zeal displayed, facial expressions, each witnesses' air of candor or seeming levity, voice quality and the bearing of each of the witnesses. The court also considered the eye movements of the witnesses, furtive or meaningful glances, and the apparent embarrassment witnesses displayed while testifying.

The plaintiffs failed to sustain their burden of proof on the second, third, fourth, fifth, and six causes of action stated in their fourth amended complaint. Causes of actions two through six of the fourth amended complaint and all counterclaims made by Raynor in his August 13, 2014, answer and counterclaim and in all other pleadings filed by Raynor are denied, the plaintiffs shall have no recovery on such actions and the same are dismissed with prejudice.

Raynor shall have no recovery on his counterclaims and the same are dismissed with prejudice.

D. Attorneys fees

Both parties requested the payment of attorneys fees. After consideration of such requests and the nature of the action, the services performed, the results obtained, earning capacity of the parties, the time required for preparation and presentation of such a case, customary charges of the bar and the general equities of the case, the court finds that neither party shall pay the attorney fees of the other, and each party shall pay their own attorney's fees and costs.

It is therefore ordered, adjudged, and decreed:

a. The above and foregoing findings so founded and ordered accordingly.

b. Skyline Acquisitions, LLC shall have a judgment against Raynor in the amount of $2,306,244.76 on the first cause of action in the fourth amended complaint.

c. Causes of actions two through six set forth in the fourth amended complaint are dismissed with prejudice.

d. All counterclaims asserted by John Raynor in his August 13, 2014, answer and counterclaim and in all other pleadings filed by Raynor are dismissed with prejudice.

e. A judgment so providing shall be entered by separate document contemporaneously with the filing of this memorandum opinion and order.

BY THE COURT:

/s/ James E. Doyle
James E. Doyle, IV
District Judge

[Certificate Of Service Omitted]

APPENDIX E

IN THE NEBRASKA SUPREME COURT

DENNIS WALKER et al., Appellants and Cross-Appellees, v. JOHN PROBANDT, Appellee, and JOHN RAYNOR, Appellee and Cross-Appellant.	CASE NO. A-16-000844 **PETITION FOR FURTHER REVIEW AND MEMORANDUM BRIEF IN SUPPORT** (Filed Feb. 27, 2018)

The Appellee, JOHN RAYNOR, pursuant to Neb. Rev. Stat. §24-1107 (Reissue 2008) and Neb.Ct.R.Prac. 2-102F, respectfully petitions the Nebraska Supreme Court for further review by the Nebraska Supreme Court of the decision of the Nebraska Court of Appeals filed on September 12, 2017 and Reported at *Walker et al. v Probandt et al.*, 25 Neb. App. 30 (2017), and the denial of the Appellee's timely filed Petition for Rehearing on January 29, 2018. The docket fee of $50.00 is paid to the Clerk with this Petition for Further Review.

ASSINGMENTS [sic] OF ERROR

The Court of Appeals erred:

1. By displacing the statutory test, the "Direct Benefits [sic] Test," of Neb. U.C.C. § 3-419(a), the applicable primary law (the Neb. U.C.C. is referenced by the use of "U.C.C.");

2. By depriving the Appellee of the statutory protection afford [sic] an "accommodation party" by the plain language of U.C.C. § 3-419(e), the applicable primary law;

3. By not applying this Court's binding precedent – the "Mandolfo Rule";

4. By mandating the entry of a void judgment against Defendant, John Probandt; and

5. By violating the equal protection clause of Amend. XIV to the U. S. Constitution.

STATEMENT OF THE CASE/ THE RELEVANT PROCEDURAL HISTORY

Appellee and the Plaintiffs filed a Joint Pretrial Conference Memorandum ("JPTM"). At trial, the parties stipulated to the undisputed facts ("STIP") – JPTM paragraphs 73 through 161. (2nd Supp.T V2:366-376 ¶73-161).

On February 5, 2009, First State Bank ("FSB") sued five parties on an 'Instrument:" Appellee Raynor; Appellant Dennis Walker ("Walker"); A&G Precision Parts, L.L.C. ("Parts LLC"), an Oregon limited liability company; Mr. Brazier; and Mr. Herz. Wells Fargo Bank, N.A. ("WFBank") was a defendant to a *cause of action* ("COA") for replevin. (2nd Supp.T V2: 375 ¶159-161). On **March 31, 2009**, Mr. Walker filed an answer and counterclaim against FSB and the Defendants. Additionally, Mr. Walker added, as third party defendants, Mr. Probandt and Mr. Hansen. In every filing, Mr.

Walker purports to act on behalf of Parts LLC. As a then resident of China (2nd Supp.T V2:366 ¶77), Mr. Probandt never made an appearance in the litigation asserting the lack of service. On 6/15/2011, Mr. Walker settled with FSB by agreeing to pay FSB $1,050,000 (the "2011Walker Settlement"). (2nd Supp.T V2:373 ¶¶137, 139, 142). The 2011Walker Settlement empowered Mr. Walker to direct FSB to assign the Instrument to Skyline Acquisition LLC ("Skyline"). (2nd Supp.T V2:373 ¶¶141, 142). Skyline, a gratuitous assignee of the Instrument, was not a party to the 2011 Walker Settlement. (2nd Supp.T V2:373 ¶¶138, 144). The 4th Amended Complaint was filed October 9, 2013. The 1st COA was the only relevant COA against Appellee Raynor where the Appellee, Mr. Herz, and Mr. Brazier were sued by Skyline, as FSB's assignee, for a money judgment on the Instrument. Mr. Brazier was also sued in the 5th COA for funds that Mr. Brazier personally received from Parts LLC, all of which, were paid before **3/31/2005**. The 5th COA was dismissed, *with prejudice*, by Order dated February 13, 2013 as timed-barred [sic] pursuant to the Oregon limitation statute ("SL Holding"). All Defendants other than Appellee and Mr. Probandt (who never made an appearance) settled with Appellants before trial. On October 2, 2015, a judgment on the Instrument of $2,306,244.76 was entered against the Appellee in favor of Skyline. (T. Vol. 2:620-622). Appellant timely appealed because no judgment was entered against Mr. Probandt on the 4th COA which mirrors the 5th COA against Mr. Brazier. Appellee timely appealed.

On September 12, 2017, the Appeals Court modified Skyline's judgment by mandating that the amount due on the Instrument be reduced by the sums collected by Skyline and/or FSB from the settlements with all other defendants. The Appeals Court also held: that the Appellee could not seek recovery from Mr. Walker until the Appellee's contribution exceeded Mr. Walker's contribution; and on the 4th COA, mandated the entry of a judgment against Mr. Probandt.

Appellee timely filed a Motion for Rehearing. In addition to Appellee's issues, as an officer of the Court, with respect to Mr. Probandt, the Appellee raised both the Internal Affairs Doctrine and the Law of the Case Doctrine. On January 29, 2018, the Appellee's Motion for Rehearing was denied without further opinion. Appellee timely filed this Petition for Further Review.

RELEVANT STATEMENT OF FACTS

Appellee's assignment of error relies upon the STIP which establish:

"**1st Fact**" – The STIP established that Parts LLC has no legal existence since 2007; thus, it had no legal existence at the time the 2008 Instrument was executed. Mr. Walker intentionally failed to reinstate Parts LLC. (2nd Supp.T V2:367-369 ¶¶ 88:92 & 103).

"**2nd Fact**" – Appellee executed the Instrument. (2nd Supp.T V2:369 ¶103). Appellee is an 'accommodation party' because the Appellee **was not** a "direct beneficiary of the value given" for the Instrument within

the meaning of U.C.C. § 3-419(a) ("Direct Benefits [sic] Test"), to wit: "Plaintiffs' [sic] agree that the sole basis for asserting recovery against John Raynor [Appellee] for the FSB Note rests upon John Raynor's expressed intent to assist Mark Herz [sic]." (2nd Supp.T V2:375 ¶156). *Also*, 2nd Supp.T V2:374 ¶¶154:155 and 2nd Supp. T Vol. 2:370 ¶111.

"**3rd Fact**" – Mr. Walker executed the Instrument. (2nd Supp.T V2:369-370 ¶¶103). The STIP established Mr. Walker was an 'accommodated party' because Appellee was a "direct beneficiary of the value given" ("Direct Benefits [sic] Test"). (2nd Supp.T V2:368 ¶100; 2nd Supp.T V2:369 ¶105 and ¶109). Mr. Walker was required to **personally collateralize the Instrument**: hence, WFBank's involvement. (2nd Supp.T V2:375 ¶159-161). As described in the 1st Fact herein, Parts LLC, dissolved in 2007 and did not exist when the Instrument was executed in 2008.

"**4th Fact**" – The Instrument was a negotiable instrument within the meaning of the U.C.C. (2nd Supp.T V2:369 ¶104). No 'guaranty agreements' were involved. (2nd Supp.T V2:369 ¶103).

"**5th Fact**" –Skyline had no interest in Parts LLC and was not maker or guarantor of the 2008 Instrument or the refinanced instrument. (2nd Supp.T V2:367 ¶82; 2nd Supp.T V2:368 ¶95; 2nd Supp.T V2:369-370 ¶¶103, 105, 108-111). Skyline was the gratuitous transferee of the Instrument by reason of the 2011 Walker Settlement. (2nd Supp. T Vol. 2:373-374 ¶¶137:148).

"**6th Fact**" – Mr. Probandt [sic] issues presented to the District Court include: alleged misappropriation from Parts LLC (2nd Supp.T V2:359-379 ¶23); and the Internal Affairs Doctrine (2nd Supp.T V2:359-379 ¶38). Parts LLC is an Oregon LLC. (2nd Supp.T V2:366 ¶80-81). During Parts LLC [sic] lawful existence, Mr. Probandt was the managing member. (2nd Supp.T V2:367 ¶84; 2nd Supp. T Vol. 2:370-371 ¶117). Mr. Walker sought a judgment against Mr. Probandt because of fraud by alleged misappropriation from an Oregon LLC by the managing member. (2nd Supp.T V2:359-379 ¶23).

ARGUMENT

I. U.C.C.'s Preemption: U.C.C. § 1-103(b) states: "Unless **displaced** by the particular provisions of the Uniform Commercial Code, the principles of law and equity . . . **supplement** its [U.C.C.] provisions." (Emphasis added). U.C.C. § 1-103, Cmt. 2, states: " . . . the Uniform Commercial Code is the **primary source of commercial law rules in areas that it governs**, and its rules represent choices made by . . . the enacting legislatures about the appropriate policies to be furthered in the transactions it covers." (Emphasis added). U.C.C. § 1-103, Cmt. 2, states: "[t]he language of subsection (b) is intended to reflect **both** the concept of **supplementation** and the concept of **preemption**." (Emphasis added). A U.C.C. action is one at law and not equity. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 39 (1981). The litigation was solely between parties (makers) to the Instrument and there were no guaranty agreements.

The U.C.C. is dispositive. With no guaranty agreements, the U.C.C. is the primary source of law which preempts all other law. It is error to circumvent U.C.C. § 3-419.

II. Displacement of U.C.C. § 3-419(a): The statutory test to distinguish an 'accommodated party' from an 'accommodation party' is the "Direct Benefits [sic] Test;" which examines whether the "instrument is issued for value given for the benefit of a party to the instrument." An 'accommodation party' is not "a direct beneficiary of the value given for the instrument." U.C.C. § 3-419(a).

The Appellee is an 'accommodation party' [2nd Fact]. Mr. Walker is an 'accommodated party' because Mr. Walker is direct beneficiary of the Instrument [3rd Fact]. Parts LLC is wholly irrelevant to the Instrument and to this analysis. [1st Fact].

The Appeals Court held: "*Walker needed no accommodation to secure financing, because the undisputed evidence establishes that FSB offered financing to the LLCs based* ***exclusively on*** *Walker's financial strength and willingness to cosign.*" 25 Neb. App. 30 at 44 (Emphasis added). That finding was used by the Appeals Court to displace U.C.C. § 3-419(a).

The Appeals Court displaced the statutory test and substituted its new, judicially crafted test. Under the Direct Benefit Test, a party's status turns exclusively upon the receipt or not of a direct benefit from the Instrument, *i.e.*, directly benefited from the note proceeds. Under the Appeals Court's test, a party's

status exclusively turns upon their relationship to each other and a direct benefit from the Instrument is of no relevance. According to the Appeals Court's reasoning, no person can be an 'accommodation party' to any Instrument executed by Mr. Walker unless Mr. Walker needs their signature to secure the Instrument. U.C.C. § 1-103(b) mandates that Direct Benefits [sic] Test of U.C.C. § 3-419(a) governs; thus, the departure from U.C.C. § 3-419(a), the primary law, is unsupportable and is in error. Such departure conflicts with this Court's precedent which requires the appellate court "to give effect to the entire language of a statute." *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857 (2014)

III. Deprivation of U.C.C. § 3-419(e): U.C.C. § 3-419(e) explicitly provides "accommodation party who pays the instrument is entitled to reimbursement from the accommodated party" and "an accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party."

The Appeals Court gave no credence to U.C.C. § 3-419(e) by holding:

> *"Thus, Raynor and Walker each cosigned the note in order to assist the LLCs, and therefore, Walker had no greater liability on the note than did Raynor. Co-obligors to a debt are each liable for a proportionate share of the debt as a whole, and an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt*

> *as a whole. Accordingly, until Raynor has paid more than his proportionate share of the debt as a whole, he has no basis for contribution from Walker or any other co-obligors. As a result, the district court did not err in denying Raynor's counterclaim for contribution from Walker.*"

See 25 Neb. App. 30 at 44.

As to Appellee's claim for contribution, the District Court held: "There is no evidence of any kind that Raynor [Appellee] paid any part of the debt owed to First State Bank. As a result, Raynor's claim for contribution is without merit." (T. Vol. 2:620-622 at p. 11). The District Court's decision is akin to finding a contribution claim was not yet ripe for consideration. The Appeals Court decided, effectively, that the Appellee had no recourse against Mr. Walker.

In the case of multiple makers, the U.C.C. distinguishes between a maker's liability to the Bank ("Primary Liability") and the allocation of liability among the various co-makers which Appellee after the Instrument is satisfied ("Ultimate Liability"). Primary Liability is joint and several among co-makers; co-makers are co-obligors. U.C.C. § 3-116(a). In determining Ultimate Liability, distinguishing between 'accommodation parties' and 'accommodated parties' becomes relevant because, by statute, they do not share 'the same pecuniary obligation' for the *Ultimate Liability* resulting from the payment of the Instrument. U.C.C. §§ 3-116(b), 3-419(e). Appellee is an 'accommodation party' [2nd Fact] and thus, as long as there is an

accommodated party with means, Ultimate Liability lies with the 'accommodated party' or the 'accommodated parties.' Neb. U.C.C. 3-419(e). Taken as a whole, the Stipulation established that Mr. Walker is an 'accommodated party' [3rd Fact]. If Parts LLC was a legally cognizable entity, this issue might entail closer examination; however, Parts LLC was not a legally cognizable entity [1st Fact]. Even if Parts LLC had legal existence, Mr. Walker is nevertheless an accommodated party because the testimony established that the refinancing took place under the threat of litigation and Mr. Walker's personal liability to Five Points Bank Note was discharged with proceeds from the Instrument [2nd Supp.T V2: 369 ¶ 105]. The Appeals Court relied upon an irrelevant fact (Appellee and Mr. Walker are co-obligors) as the premise for the denial of the benefit of U.C.C. § 3-419(e). The Appeals Court has treated the whole of Neb. U.C.C. § 3-419(e) as mere surplusage rather than the primary law which is preemptive. Also, the adjudication violates precedent which holds that "[t]he legislative intent is the **cardinal rule** in the construction of statutes." *Foote Clinic v. City of Hastings*, 254 Neb. 792, 796, 580 N.W.2d 81, 84 (1998) (Emphasis added). *See also*, *Huntington v. Pedersen*, 294 Neb. 294, 304 (2016) (A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.)

IV. Skyline should be irrelevant: Both lower Courts gave force and effect to the assignment to Skyline which had no interest in the underlying business

nor the Instrument until the gratuitous assignment of the Instrument by reason of the 2011 Walker Settlement.

This Court has held: "a right of contribution exists between cosureties regardless of whether they are designated as guarantors, accommodation makers, or otherwise, provided that they share the same pecuniary obligation with respect to the same debt." *Rodehorst v. Gartner*, 266 Neb. 842, 852 (2003). Then citing *Mandolfo v. Chudy*, 253 Neb. 927 (1998) this Court further held: "The assignment of promissory note . . . neither enhances nor diminishes this right." *Id.* 266 Neb. at 853. Since *Rodehorst* was found to be an 'accommodation party,' this Court has extended the Mandolfo Rule to the U.C.C. and further, the extension of the Mandolfo Rule is consistent with U.C.C. § 1-103(a). Under U.C.C. § 3-419(e) and thus, as a *matter of law*, Mr. Walker bears the Ultimate Liability. Pursuant to both lower Courts, Skyline has enhanced Mr. Walker's recovery. The effect of the Appeals Court ruling is that Skyline can enforce the Instrument against Appellee and Appellee cannot seek recourse (contribution) against Mr. Walker. The Legislature's Intent, as express in the plain language of U.C.C. § 3-419(e), has been ignored; therefore, the adjudication violates the express rules of interpretation set forth in U.C.C. § 103(a). Both Courts' holdings narrowly construed the U.C.C. and undermine the U.C.C.'s underlying purposes and policies by finding a pathway for all with means to circumvent U.C.C. § 3-419(e).

V. The Internal Affairs Doctrine: The Appeals Court ordered the District Court to enter a judgment which violates the Internal Affairs Doctrine. Any dispute that the Appeals Court violates the Internal Affairs Doctrine was settled in 2017, to wit: "As to limited liability companies, **the internal affairs doctrine is codified** under Neb. Rev. Stat. § 21-155 (Reissue 2012)." *Midwest Renewable Energy, LLC v. American Engineering Testing, Inc.*, 296 Neb. 73, 83 (Neb. 2017) (Emphasis added). This precedent was presented to the Appeals Court in the Rehearing Motion. Nevertheless, the mandate to enter a void judgment [*Travelers Indem. Co. v. Wamsley*, 295 Neb. 301, 307 (2016) (saying: "a court action taken without subject matter jurisdiction is void")] still stands.

VI. 14th Amendment: The 14th Amendment to the U.S. Constitution, provides "No state shall . . . to any person within its jurisdiction the equal protection of the laws." Sec. 1. Sec. 5 states the "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." The lower Courts deny the Appellee equal protect [sic] of the law by denying the Appellee the benefit and protection afforded by U.C.C. § 3-419. 18 U.S.C. § 242. The Instrument is: a negotiable instrument; the U.C.C. is the primary source of law [U.C.C. § 1-103(a)]; and guaranty agreements are not involved. The Court of Appeals, in error, has circumvented U.C.C. § 3-419. The holding violates the equal protect [sic] clause of [sic] U.S. Constitution.

VII. Precedent & Published Decision: "[C]onsiderations of *stare decisis* weigh heavily in the

area of statutory construction. . . ." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). *Stare decisis* makes the reasoning, not just the holding, binding, to wit: "under the doctrine of *stare decisis*, this reasoning – to the extent that it is necessary to the holding – will be binding in all future cases." *City of L.A. v. Patel*, 135 S. Ct. 2443, 2457-58 (2015). The Appeals Court disregarded precedent, particularly precedent involving statutory construction.

CONCLUSION

Neb. Rev. Stat. § 24-1106 sets forth considerations to bypass the Appeals Court. Considerations allowing bypass should weigh heavily in granting this petition, to wit: whether the Mandolfo Rule has been extended to the U.C.C. presents a unsettled and novel legal issue [§ 24-1106(2)(a)]; U.C.C. § 3-419(e) was invalidated for this case and for many future cases in which there's one financially strong maker of the Instrument [§ 24-1106(1) & § 24-1106(2)(c)]; the invalidity of U.C.C. § 3-419(e) raises equal protection considerations [§ 24-1106(2)(b)]; the result is inconsistent with previous decisions applying the Direct Benefits [sic] Test – *Sack Lumber Co. v. Goosic*, 15 Neb. App. 529 (2007) and *Rodehorst v. Gartner*, *supra*, [§ 24-1106(2)(d)]; and there is significant public interest [§ 24-1106(2)(e)] when uniformity and construction to promote the U.C.C. underlying purposes is explicitly mandated in U.C.C. § 1-103 and by the precedent including *Lindsay v. First Nat'l Bank*, 211 Neb. 285, 290 (1982). Also, mandating the entry of a void judgment implicates this

Court [sic] supervisory authority. Lastly, this is a published adjudication which heightens the public interest in this Court's further review.

February 27, 2018. Appellee John Raynor,

BY: */s/ Patrick M. Heng*

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APPENDIX F

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

FIRST STATE BANK, a Nebraska Bank Corporation, DENNIS WALKER, et al., **Appellants/Plaintiffs,** **v.** **JOHN RAYNOR, et al.,** **Appellee/Defendant.**	**Case No. A-16-000844** **Opinion:** 25 Neb. App. 30 **Issued:** September 12, 2017

APPELLEE'S MOTION FOR REHEARING

(Filed Sep. 22, 2017)

****

COMES NOW, John P. Raynor, the Appellee, by and through the undersigned counsel, and hereby moves this Court for Rehearing pursuant to §2-113 on the following premises which are the Appellee's assignments of error:

1. **Void Judgment:** Without subject matter jurisdiction, this Court mandates that the District Court entered a Judgment against Mr. Probandt for which the District Court also lacks subject matter jurisdiction. Subject matter jurisdiction is wanting. The Internal Affairs Doctrine rests upon U.S. Supreme Court precedent, Nebraska Supreme Court precedent as applied to limited liability companies, and Nebraska

Statutes. The Internal Affairs Doctrine limits Nebraska Courts extra-territorial subject-matter jurisdiction.

2. **The Court of Appeals Opinion is Antithetical to the Code:** The 'Direct Benefit Test' of Neb. U.C.C. ("Code") § 3-419(a) and Code § 3-419, in total, were effectively struck from the Code in this case. Such violates elemental rules of statutory construction supported by extensive precedent that a *court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.* Instead, without finding an ambiguity in the Code, this Court applied a singular test, *i.e.*, intent, to establish law not reflected in the statutes. The Opinion holds that co-obligors on a negotiable instrument are entitled to the benefit of Code § 3-419 **only if, *as to each other,*** *one is an accommodated party and another is an accommodation party* (the "Co-Obligor Net Worth Test" or the "Co-Obligor N.W. Test). The Co-Obligor N.W. Test is, in essence, "Judge Made Law". Pursuant to the Co-Obligor N.W. Test, the Appellee could never be an 'accommodation party' as to Mr. Walker because he was capable of securing the loan without Appellee's signature. In essence, the Opinion finds wealthy individuals do not have co-obligors which are an 'accommodation party.' The result is that the Appellee is an 'accommodation party' to Mr. Herz but not so as to Mr. Walker, This result is not supported by the statute or law. It is indisputable that the Direct Benefit Test is derived from the plain language of the Code, to wit: accommodation

party "signs the instrument . . . without being a direct beneficiary of the value given for the instrument. . . ." The Direct Benefit Test exclusively examines whether a direct economic benefit accrued directly to the party signing the note and does not examine the wealth of the co-obligors. This Opinion is incongruent with 1991 amendments to Code § 3-419 adopting the Direct Benefit Test; incongruent with the precedent emanating from this Court's decision in *Sack Lumber Co. v. Goosic*, 15 Neb.App. 529, 532-533 (2007) rejecting old legal precedent as not controlling; and incongruent with the law of various other jurisdictions.

3. **The Opinion Is Antithetical Amendment XIV to the United States Constitution:** This Court deprived the Appellee of his codified right of recourse/contribution against/from Mr. Walker which is explicitly set forth in Code § 419(e). The Court of Appeals Opinion substituted the Co-Obligor N.W. Test for the whole of Code § 3-419 when, in fact, the controversy is clearly solvable within the confines of the Code through the application of Code § 3-419. The inference from Court's Opinion is that, under the Direct Benefit Test, Mr. Walker is an 'accommodated party.' This Opinion is a first-time holding (the District Court deferred consideration of Code § 3-419; this Court effectively removed Code § 3-419 from any application to the controversy) and is now the Law of the Case; thus, the holding permanently denies the Appellee benefit of Code § 419. The Appellee has been denied **equal protection** of Nebraska law under the color of this Court's authority which is prohibited by Federal Public Policy

emanating from 18 U.S.C. § 242 adopted pursuant to the XIV Amendment of the U.S. Constitution.

4. **The Court Lacks Authority to Substitute Its New Remedy, for Express Provisions of the Code:** The Court denied Appellee the remedy explicitly set forth in the express provisions of the Code § 3-419 which is expressly prohibited by Code § 1-103(b), *i.e.*, "the Code preempts principles of common law and equity" pursuant to *cmt.* 2; the holding frustrates the express policy Code § 1-103(a)(3) *to make uniform the law among the various jurisdictions*; and the holding contravenes rules of interpretation which prevents the Court from fashioning remedies not sanctioned by the Code. The Court negates age-old rules of statutory construction. The implementation of the Co-Obligor N.W. Test relies upon case law preempted in 1991 by the adoption of Code § 3-419. Judicial precedents and Nebraska Public Policy have been vitiated to accomplish this unsupportable departure.

5. **The Court Improperly Gives Effect to an Assignment of the Note at the Direction of the Accommodated Party:** Contrary to basic and fundamental cannons [sic] of statutory construction and the express provisions of Code § 1-103 controlling interpretation of the Code, this Court approves an assignment of a negotiable instrument to circumvent the statutory bar of Code § 3-419(e). Thereby, this Court prevents 'accommodation parties' from seeking recourse or contribution from 'accommodated parties.' Pursuant to a settlement agreement with the bank, Mr. Walker directed the bank to assign the negotiable

instrument to Skyline Acquisition LLC; an entity which had no previous relationship to the controversy, paid no consideration for the assignment, and only received the assignment of the negotiable instrument because of Mr. Walker's payment of consideration to the bank. The Court ignored Mr. Walker's incidents of ownership over the negotiable instrument and the law of agency in order to treat the Bank as the assignor. The Court ignored that Mr. Walker possessed the sole authority to designate the assignee. The Court has opened a gaping hole in the Code which allows those with financial means to vitiate Code § 3-419. This gaping hole vitiates the express provision of Code § 1-103 that the Code must be liberally construed and applied to promote its underlying purposes and policies. Code § 3-419 is Nebraska Public Policy vitiated by the Court's holding.

6. **Law of the Case Doctrine:** The District Court entered a judgment for another member of the Oregon Limited Liability Company [Mr. Brazier] that received payments from the operations [from the LLC] that were disagreeable to Mr. Walker. Mr. Probandt stands in the same shoes [in privity with] as the party that benefited from the ruling (only different payments are involved). Mr. Probandt is entitled to evenhanded application of the law. All the subject payments are time barred.

WHEREFORE, Appellee, John Raynor, respectfully requests a rehearing.

Dated: September 22, 2017.

JOHN RAYNOR, Appellee,

BY: */s/ Patrick M. Heng*

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APPENDIX G

IN THE DISTRICT COURT FOR
DAWSON COUNTY, NEBRASKA

FIRST STATE BANK, a Nebraska Banking Corporation, SKYLINE ACQUISITION, LLC its assignee and DENNIS WALKER, individually and on behalf of A & G PRECISION PARTS, LLC, an Oregon Limited Liability Co.; and A & G PRECISION PARTS FINANCE, LLC, a South Dakota Limited Liability Company, Plaintiffs, vs. JOHN PROBANDT, MARK HERZ, JOHN RAYNOR, STEPHEN MICHAEL BRAZIER, as Personal Representative of the estate of JOHN BRAZIER, and REX HANSEN, Defendants.	Case No. CI 09-35 JOINT PRETRIAL CONFERENCE MEMORANDUM (Filed Dec. 1, 2014)

COME NOW the parties, and in conformance with this Court's Order dated April 17, 2014, present the following Joint Pretrial Conference Memorandum. Simultaneously with submission of this Memorandum,

each party has submitted its proposed jury instructions to the Court.

Counsel preparing this Joint Memorandum were as follows:

GENUINELY CONTROVERTED FACTS IN DISPUTE

1. What representations were made and by whom to induce Dennis Walker to sign the First State Bank "FSB") Note and the FSB term loan agreement.

2. What representations were made and by whom to induce John Raynor to sign the FSB Note and the FSB term loan agreement.

3. What representations were made and by whom to induce Mark Herz to sign the FSB Note and the FSB term loan agreement.

4. Whether John Raynor signed the Note under a material mistake of fact, *i.e.*, (i) he had no ownership interest in A&G Parts; and/or (ii) had no personal liability for the Five Points Bank Loan?

5. If there was a material mistake of fact, was it mutual or unilateral?

6. Are either of the FSB Notes enforceable at all?

7. If a Note is enforceable, which Note is the effective note?

8. Which term loan agreement is the effective loan agreement?

9. Who prepared each of the term loan agreements?

10. Are there substantive differences between the term loan agreements and what are those differences? If so, why was the April Term Loan Agreement changed?

11. Who currently owns the Note issued by FSB?

12. What is the amount currently owed under the Note issued by FSB?

13. Whether John Raynor signed the Note to help Mark Herz.

14. If John Raynor did sign the Note to help Mark Herz, what was the nature of the intended help?

15. Whether John Raynor reviewed and edited the term loan agreement. If so, what changes John Raynor made to the March Term Loan Agreement?

16. Whether Dennis Walker understood A&G Parts financial condition before signing the March Term Loan Agreement on March 30, 2008.

17. Who owned the business of A&G Parts before the FSB Note and related documents including the March Term Loan Agreement were signed and proceeds were disbursed?

18. Who owned the business of A&G Parts after the FSB Note and related documents including the March Term Loan Agreement were signed and proceeds were disbursed?

19. Whether Dennis Walker believed that he was only liable for 20% of the note amount prior to the suit initiated by FSB.

20. Whether Dennis Walker understood that he was liable for totality of the FSB Note.

21. Whether Dennis Walker understood the undertaking set forth in paragraph 5 of the March Term Loan Agreement.

22. Is John Raynor solvent?

23. Whether funds were misappropriated by John Probandt from A&G Parts.

24. When did Dennis Walker discover John Probandt's alleged inappropriate expenditures?

25. If any, the amount of damages owed by John Probandt on matters other than the Note.

26. Whether Dennis Walker believed he had acquired John Raynor's interest in A&G Parts and A&G Finance by reason of the Bridge Agreement.

27. Whether Dennis Walker believed he had acquired John Probandt's interest in A&G Parts and A&G Finance by reason of the Bridge Agreement.

28. Whether Dennis Walker believed he had acquired John Probandt's interest in A&G Parts and A&G Finance by reason of John Probandt's failure to execute the March 30, 2008 Term Loan Agreement.

29. How much money did Dennis Walker personally contribute to A&G Parts between March 31, 2008 and late October, 2008?

30. Whether A&G Parts continued activities after July 27, 2007 other than those activities necessary and appropriate to wind up and liquidate A&G Parts' business?

31. What amount of money, if any, does John Raynor owe to Dennis Walker or Skyline Acquisition LLC as a result of the FSB Note?

GENUINELY CONTROVERTED ISSUES OF LAW

32. Is the FSB refinancing of March 30, 2008 a lawful obligation of A&G Parts although A&G Parts was administratively dissolved and is now administratively dissolved?

33. Can A&G Parts be sued or sue regarding an indebtedness incurred although A&G Parts was administratively dissolved when the indebtedness at issue was not secured *to wind up and liquidate the* business activities of A&G Parts?

34. Can A&G Parts sue in Nebraska Courts regarding an indebtedness incurred although A&G Parts had no Certificate of Authority to do business in Nebraska?

35. Can A&G Finance sue after A&G Finance was administratively dissolved regarding a indebtedness incurred by A&G Parts (*and not A&G Finance*) and which indebtedness was not secured in connection with business activities to wind up A&G Finance business Operations?

36. Can A&G Finance sue in Nebraska Courts regarding an indebtedness incurred although A&G Finance had no Certificate of Authority to do business in Nebraska?

37. Is there any lawful process where Dennis Walker can become the Managing Member of A&G Parts after 2007?

38. Whether this Court can adjudicate John Probandt's liability for the alleged defalcation of A&G Parts or does the matter involve the internal affairs of A&G Parts?

39. Which set of loan documents memorializing the loan from FSB establishes the terms and conditions of the loan agreement?

40. Whether Dennis Walker is equitably estopped from asserting that the March Term Loan Agreement is enforceable?

41. Is the April Term Loan Agreement enforceable?

42. Whether Dennis Walker is equitably estopped from asserting that the April Term Loan Agreement is enforceable?

43. Is the FSB Note unenforceable by reason of the failure to obtain the signatures of all parties to said Note?

44. Whether Dennis Walker is equitably estopped from asserting that the FSB Note is enforceable since all parties did not sign the Note?

45. Who owns A&G Finance after the FSB Note and related documents including the March Term Loan Agreement were signed and proceeds were disbursed?

46. Does Dennis Walker have authority to act as representative of A&G Parts and/or A&G Finance?

47. Is the FSB Note enforceable against John Raynor under the Nebraska Uniform Commercial Code given FSB's failure to perfect their security interest in Dennis Walker's Investment Account No. ****6900 held by Wells Fargo Bank, N.A.?

48. Was there a mutual mistake of fact material regarding John Raynor's ownership of A&G Parts and A&G Finance?

49. Was there a mutual mistake of material fact regarding John Raynor's personal liability for the Five Points Bank Loan?

50. Whether, if John Raynor did sign the term loan agreement and Note under a material mistake of fact, is the mistake sufficient to make his obligation under the Note and term loan agreement void or voidable.

51. Whether John Raynor received sufficient consideration for his signature on the Note to FSB to make him liable as a maker of the FSB Note.

52. Whether the provisions of the March Term Loan Agreement would have provided FSB with a security interest in Dennis Walker's assets sufficient to allow FSB to immediately seize assets as collateral upon Mr. Walker's refusal to voluntarily pay the entire loan amount.

53. Whether the provisions of the April Term Loan Agreement impaired FSB's interest in collateral as described in the March Term Loan Agreement.

54. Whether John Raynor is estopped from asserting impairment of collateral if he assisted in drafting the term loan agreement which he asserts impaired the bank's collateral.

55. Whether John Raynor was an accommodation party.

56. Was Dennis Walker an accommodated party?

57. Did Dennis Walker reasonably rely on any representations made to him by John Raynor in deciding to sign the Note?

58. Did Dennis Walker reasonably rely on any representations made to him by Rex Hansen in deciding to sign the Note? And if so, in what capacity was Rex Hansen acting to the extent any representations were made?

59. Whether John Probandt is liable under the Note even though he did not sign.

60. Was the release of Probandt from his guarantee of the Five Points Bank debt sufficient consideration to make him liable for the Note under the equitable theory of unjust enrichment?

61. Is Probandt equitably estopped from asserting he is not liable for the Note issued by FSB?

62. Is John Raynor equitably estopped from asserting he is not liable for the Note issued by FSB?

63. If Dennis Walker acquired ownership of John Probandt's ownership interest in A&G Parts and A&G Finance with knowledge of A&G Parts' financial condition, was that an Election of Remedies foreclosing pursuit of alternative remedies?

64. If Dennis Walker acquired ownership of John Raynor's ownership interest in A&G Parts and A&G Finance with knowledge of A&G Parts' financial condition, was that an Election of Remedies foreclosing pursuit of alternative remedies?

65. Are the Plaintiffs' equitable claims estopped by reason of the equitable Doctrine of Laches?

66. Are Herz, Raynor, and Probandt jointly and severally liable for the full amount of the original Note plus interest?

67. If they are not jointly and severally liable on the Note, is the liability of each limited to recovery under the theory of equitable contribution?

68. If the individuals are not jointly and severally liable and John Raynor is insolvent, does that increase the amount of contribution available from each of the loan's co-makers.

69. Whether John Probandt was the Managing Member of A&G Parts until the March Term Loan Agreement on March 30, 2008.

70. Whether Dennis Walker was the Managing Member of A&G Parts by reason of the March Term Loan Agreement.

71. Whether the language of the Note waives the assertion of any defense arising from alleged impairment of collateral.

72. Is Walter Glass a necessary party to this litigation?

ALL UNDISPUTED MATTERS SUITABLE FOR STIPULATION

73. First State Bank ("FSB") is and at all times pertinent hereto has been a Nebraska banking corporation with its principal place of business in the City of Gothenburg, Dawson County, Nebraska.

74. Dennis Walker is an individual residing in the State of Nebraska.

75. Mark Herz resides in the State of Oregon. Mark Herz was formerly employed by A & G. Herz is now 50% owner of Herz Precision Parts, LLC (hereinafter "HPP").

76. Rex Hansen is an individual residing in Oregon and doing business in Nebraska. Hansen is also a minority shareholder in the holding company that owns FSB and is a 50% owner in Herz Precision Parts LLC.

77. John Probandt is an individual residing primarily in the People's Republic of China since 2003.

78. Herz Precision Parts LLC ("HPP") is a limited liability company organized and doing business in Oregon, owned by Herz and Hansen. HPP was established on December 17, 2008.

79. John Raynor is an individual residing in Nebraska.

A&G PRECISION PARTS, LLC

80. On May 27, 1998 "The John Probandt Company" was formed as an Oregon Limited Liability Company to acquire the business, A&G Precision Parts, LLC.

81. On August 20, 1998, after acquiring the business and the right to use its name, The John Probandt Company changed its name to A&G Precision Parts, LLC ("A&G Parts").

82. A&G Parts was then owned equally by John Probandt, Dennis Walker, John Raynor, Walter Glass and John Brazier.

83. A&G Parts was a member managed limited liability company.

84. John Probandt was named the Managing Member of A&G Parts in 1998.

85. In September of 1998, Mark Herz became employed by A & G. Mark Herz was hired to assist and later manage the daily affairs of the company pursuant to direction from the members of A & G Precision Parts, LLC. Mark Herz was hired for his expertise in A&G Parts' business.

86. A & G was in the business of manufacturing machine parts for machines that polish the wafers that are used in computer chips.

87. A & G had contracts primarily with Intel and Novellus Systems (hereinafter "Novellus").

88. A&G Parts was legally dissolved in the calendar year2007 for failure to file Annual Report. The last Annual Report for A&G Parts was filed on June 16, 2006.

89. Dennis Walker made an attempt on February 11, 2009 to reinstate A&G Parts ("Restatement Amended"); however, the past due Annual Reports were not filed.

90. The February 11, 2009 letter from the office of the Oregon Secretary of State stated that the division could not process A&G Parts' Restatement Amended because a past due Annual Report was required.

91. Dennis Walker did not file the past due report cited in the February 11, 2009 letter from the office of the Oregon Secretary of State.

92. Another notice of administrative dissolution of A&G Parts was entered by the Oregon Secretary of State on July 27, 2009 because the required Annual Report was not filed.

93. A&G Parts does not have and never has had a Certificate of Authority to transact business in the State of Nebraska.

A&G PRECISION PARTS FINANCE, LLC

94. A&G Precision Parts Finance, LLC ("A&G Finance"), a limited liability company organized under the laws of the State of South Dakota, was formed in August 27, 2002, for purposes of borrowing from Five Points Bank to refinance the indebtedness related to the acquisition of A&G Parts business by The John Probandt Company.

95. A&G Finance was then owned equally by John Probandt, Dennis Walker, John Raynor, Walter Glass and John Brazier.

96. A&G Finance has never operated a business and existed only in relationship to financing the business of A&G Parts.

97. A&G Finance was legally dissolved in calendar year2010.

98. A&G Finance does not have and never has had a Certificate of Authority to transact business in the State of Nebraska.

FIVE POINTS BANK NOTE

99. The Five Points Bank Note was executed on October 18, 2002 in the principal amount of $2,100,010.00 to refinance the acquisition indebtedness of A&G Parts.

100. The Five Points Bank Note was executed by A&G Finance, Dennis Walker, John Brazier and John Raynor.

101. John Probandt and Walter Glass jointly and severally guaranteed the Note.

102. In 2006 A&G Finance, John Raynor, Dennis Walker and John Probandt executed a Forbearance Agreement abating the payment of principal during the Forbearance Period on the Five Points Bank Loan for a six month period which ended June 30, 2006.

FIRST STATE BANK MARCH 31, 2008 NOTE

103. The FSB Note was for the principal sum of $1,500,000 and was dated March 31, 2008. The FSB Note was executed by John Raynor, Dennis Walker, John Brazier, Mark Herz and Karl Randecker, the President of First State Bank.

104. The FSB Note is a negotiable instrument within the meaning the Nebraska Uniform Commercial Code.

105. The proceeds from the FSB Note were used to pay off the Note held by Five Points Bank, releasing the debt owed to Five Points by Dennis Walker, John Brazier, and John Probandt and to allow additional infusion of capital into A&G.

106. The proceeds from the FSB Note were disbursed or paid out pursuant to FSB Note Disbursement Agreement executed at the time of the FSB Note execution. The FSB Note Disbursement Agreement was executed by John Raynor, Dennis Walker, John Brazier, Mark Herz and Karl Randecker, the President of First State Bank.

107. John Probandt and Walter Glass did not execute the FSB Note or the FSB Note Disbursement Agreement.

108. FSB did pay out the sum of $1,500,000.00 as a result of the Note signed by Dennis Walker, John Raynor, Mark Herz, and John Brazier.

109. $1,361,436.00 of the FSB Note proceeds were disbursed to Five Points Bank in full payment of Five Points Bank Note.

110. Expenses of closing the FSB Note included $45,000 in fees paid to FSB, $1,000 in legal fees incurred by FSB, and $30.00 in recording fees of the $45,000 in fees paid to FSB, $30,000 was paid to Maxwell Morgan, LLC.

111. The balance of the FSB Note proceeds, totaling $92,943.06, was deposited in A&G Parts operating account at FSB. None of the members or makers of the FSB Note personally received any of the FSB Note proceeds.

112. The FSB Note had a maturity date of March 15, 2015.

MARCH 30, 2008
MARCH TERM LOAN AGREEMENT

113. On March 30, 2008, the Term Loan Agreement (the "March Term Loan Agreement"), signed in conjunction with the FSB Note, provided Dennis Walker, John Raynor and Mark Herz were named Managing Members of both A&G Parts and A&G Finance. The March Term Loan Agreement was executed by John Raynor and Dennis Walker on March 30, 2008, by Mark Herz on April 1, 2008 and on April 4, 2008 by Karl Randecker, the President of First State Bank.

114. The March Term Loan Agreement provided in paragraph 5, subparagraph b, that:

> a. Each Member had to refinance their proportionate interest in the FSB Note – identifying said interest as $300,000 – by December 31, 2008, approximately nine months after the FSB Note; and
>
> b. Each Member that did not sign the agreement and did not refinance their interest in the FSB Note, through operation of

the March Term Loan Agreement effectively transferred their interest in A&G Parts and A&G Finance to Dennis Walker.

115. John Probandt and Walter Glass did not sign the March Term Loan Agreement.

116. The March Term Loan Agreement contemplated replacing Walter Glass as a Member of both A&G Parts and A&G Finance with Mark Herz.

117. The Members of A&G Parts did not have a meeting from 1998 through and until the March 30, 2008 Term Loan Agreement. The only Members who signed the March 30, 2008 Term Loan Agreement were Dennis Walker, John Raynor and John Brazier.

118. The March Term Loan Agreement named Mark Herz the Administrative Manager of A&G Parts and A&G Finance.

APRIL LOAN AGREEMENT

119. A revised Term Loan Agreement (the "April Loan Agreement") was executed on April 25, 2008 by John Raynor; on May 7, 2008 by Dennis Walker, on May 13, 2008 by Mark Herz; and May 16, 2008 by Karl Randecker, the President of First State Bank. All the dates are after the funds were disbursed by FSB.

120. The April Term Loan Agreement did not address ownership issues or the Management issues.

BRIDGE AGREEMENT IN JULY 2008

121. In July of 2008 John Raynor and John Probandt signed an agreement (titled as the "Bridge Agreement") under which their interests in A&G Parts and A&G Finance would be transferred and assigned to Dennis Walker by August 10, 2008, through operation of the agreement.

122. The Bridge Loan Agreement executed in July of 2008 provided for transferring the interest of John Raynor and John Probandt in both A&G Parts and A&G Finance to Dennis Walker if they did not buy-out Dennis Walker's interest in both A&G Parts and A&G Finance.

123. Dennis Walker agreed to provide A&G Parts with funding of $150,000.00 provided John Raynor, John Probandt and John Brazier executed the Bridge Agreement.

124. Dennis Walker provided A&G Parts the funding even though John Brazier did not sign the Bridge Agreement.

125. Walter Glass was not a party to the Bridge Agreement.

OTHER

126. Herz never received a 20% ownership interest in both A&G Parts and A&G Finance

127. In October of 2008, Walker and Herz met with representatives of Novellus in San Jose, California.

128. Later in October 2008, Herz signed a new lease agreement with the landlord of the space in which A&G Parts operated which extended the lease for an additional two years.

129. Between March 31, 2008 and late October 2008, Dennis Walker provided additional funds to A&G Parts at the request of Mark Herz and Rex Hansen commencing with the first payment of $150,000 contributed upon the execution of the Bridge Agreement.

130. Dennis Walker ceased providing additional funds to A&G Parts after late October of 2008.

131. On or before November 4, 2008, A & G was unable to meet its daily expenses and ceased all business operations.

FORECLOSURE OF A&G PARTS

132. On or about March 31, 2009, Dennis P. Walker received the "Notice of Foreclosure Sale of Personal Property" from the attorney for the landlord who owned the space A&G Parts was renting for nonpayment of rent, late fees and a construction lien.

133. The landlord foreclosed on all the equipment owned by A&G Precision Parts LLC located in the leased space on May 8, 2009 pursuant to Oregon law.

134. Dennis Walker did not attend the foreclosure sale.

135. Dennis Walker, Member of A&G Precision Parts, LLC was mailed a Statement of Account of Foreclosure Sale by landlord's attorney.

136. HPP purchased some of the equipment previously owned by A&G Parts for a sum of $30,000 from the landlord approximately 3 weeks after the foreclosure sale.

ASSIGNMENT OF FSB NOTE TO SKYLINE

137. On June 15, 2011A&G Parts, A&G Finance, Dennis Walker, Diana Walker, First State Bank, and Five Points Bank entered into a "Settlement Agreement and Mutual Release" ("Settlement Agreement") to settle this claims brought by First State Bank.

138. No representative of Skyline Acquisition LLC was a signator on the Settlement Agreement.

139. Pursuant to the terms of the Settlement Agreement, Dennis Walker agreed to pay First State Bank $1,050,000.00.

140. Pursuant to the terms of the Settlement Agreement, A&G Parts, A&G Finance, Dennis Walker,

and Diana Walker released First State Bank and Five Points Bank.

141. Pursuant to the terms of the Settlement Agreement, First State Bank and Five Points Bank released A&G Parts, A&G Finance, Dennis Walker, and Diana Walker.

142. Pursuant to the terms of the Settlement Agreement, First State Bank agreed that it would assign the FSB Note and related agreements to any entity designated by Dennis Walker.

143. First State Bank and Five Points Bank assigned the FSB to Skyline Acquisition LLC as the entity designated by Dennis Walker.

144. Skyline Acquisition LLC provided no consideration for the assignment of the FSB Note.

145. On July 18, 2011, Dennis Walker caused the filing of the Second Amended Amended [sic] Complaint.

146. The Second Amended Complaint rearranged the status of parties to the lawsuit pursuant to the Settlement Agreement.

147. The Settlement Agreement resulted in the transmutation of Dennis Walker, A&G Finance and A&G Parts from Defendants in the lawsuit to Plaintiffs in the lawsuit.

148. No claims were brought by Dennis Walker, A&G Finance, and A&G Parts against First State Bank or Five Points Bank in the Second Amended Complaint.

BANKRUPTCY

149. Before the March 30, 2008 refinancing, Walter Glass filed personal bankruptcy and was discharged from the Five Points Bank liability.

150. John Raynor filed personal bankruptcy in September of 2004.

151. John Raynor's personal liability to Five Points Bank had been discharged in bankruptcy in 2005, prior to the date Raynor signed the note to FSB.

152. John Raynor executed the Forbearance Agreement with Five Points Bank in December of 2005. John Probandt and Dennis Walker also signed the Forbearance Agreement with Five Points Bank.

153. At the time he signed the note to FSB John Raynor's ownership interest in A & G was the property of the bankruptcy trustee.

154. On April 17, 2012, the Nebraska Bankruptcy Court determined that John Raynor did not have an ownership interest in A&G Parts and A&G Finance and further, that the Trustee of the Estate of John Raynor had owned John Raynor's interest in A&G Parts and A&G Finance since his bankruptcy filing in September of 2004.

155. On April 17, 2012, the Nebraska Bankruptcy Court determined that John Raynor did not have personal liability on the loan from Five Points Bank.

156. Plaintiffs' [sic] agree that the sole basis for asserting recovery against John Raynor for the FSB Note rests upon John Raynor's expressed intent to assist Mark Herz's [sic].

157. John Raynor never had a financial interest or ownership interest in Herz Precision Parts, LLC.

158. John Raynor never was promised a financial interest or ownership interest in Herz Precision Parts, LLC.

THE REPLEVIN ACTION

159. On February 6, 2009, FSB obtained a temporary order of replevin ordering Wells Fargo Bank to hold all funds in an investment account owned by Dennis Walker (Account No. ****6900) pending a hearing on replevin.

160. Hearing was held on the 19th day of February, 2009.

161. On March 4, 2009, the [sic] entered an order setting aside the temporary order of replevin and denying replevin on the grounds that the money in Mr. Walker's investment account was not sufficiently identified, marked, or physically set aside as security to be the subject of an action in replevin.

OBJECTIONS TO EXHIBITS

Objections are noted on the joint exhibit list.

NAMES AND ADDRESSES OF WITNESSES TO BE CALLED

All witnesses, expected to be called, except those who may be called for impeachment purposes as defined in NECivR 16.2(c) only and rebuttal witnesses, are:

Plaintiffs will call:

Dennis Walker
1223 N. 126th Street
Omaha, NE 68154

Diana Walker
1223 N. 126th Street
Omaha, NE 68154

Karl Randecker
First State Bank
Gothenburg, NE

Rex Hansen
10645 S.W. Meier Drive
Tualatin, OR 97062

Mark Herz
Herz Precision Parts
2233 NE 244th, C-1
Wood Village, Oregon 97060

John Raynor

Steve Vinton
416 10th St
Gothenburg, NE 69138

All witnesses listed by all Defendants

Plaintiffs may call:

Leroy Kibby
4816 S. 154th Plaza
Omaha, NE 68137

Joanne Maseman (only for foundation for document)
821 N. 75th Street
Omaha, NE 68114-3125

Defendant Rex Hansen will call:

All Plaintiffs' witnesses
All witnesses listed by other Defendants

Defendant Rex Hansen may call:

Walter Glass
4816 S. 154th Plaza
Omaha, Nebraska 68137

LeRoy Kibby
Suite 480
Portland, OR 97201

Greg Hendrix
Hendrix, Brinich & Bertalan, LLP
716 N.W. Harrison Street
Bend, OR 97701

Matt Yoes
2233 NE 244th, C-1
Wood Village, Oregon 97060

Dave Kinville
Christensen Electric
111 SW Columbia

William W. Marshall, III
c/o Five Points Bank

Defendant Mark Herz will call:

All Plaintiffs' witnesses
All witnesses listed by other Defendants

Defendant John Raynor will call:

All Plaintiffs' witnesses
All witnesses listed by other Defendants

NECESSARY AMENDMENTS TO PLEADINGS

162. None.

PENDING MOTIONS

163. Motions currently under consideration and any Motions of Limine filed before or during Trial.

DESIGNATION OF DEPOSITION TESTIMONY

Plaintiffs Designate the Following Testimony:

Deposition of Rex Hansen February 1, 2010 (Volume I)

Exhibit No. 10
17:19-18:4
34:5-8
83:3-9
90:9-92:7

Deposition of Mark Herz February 2, 2010
Exhibit No. 55
17:10-18:3
20:7-10
42:25-43:4
65:1-6

Deposition of Rex Hansen February 4, 2014
Exhibit 58
9:22-10:1

Deposition of Mark Herz December 14, 2012
Exhibit 63
8:22-9:1
49:15-18
53:17-21

Trial depositions taken March 24, 2014.

In addition, Plaintiffs may cite to portions of the depositions which were designated by the other parties.

Defendants Designate the Following Testimony:

Deposition of Robert Thilgen taken on September 2, 2010
26:15-28:1

In addition, Defendants may cite to portions of the depositions which were designated by the other parties.

DATED this 26th day of November, 2014.

DENNIS P. WALKER, A & G PRECISION PARTS LLC and A & G PRECISION PARTS FINANCE LLC, Plaintiffs,

By: /s/ Diana J. Vogt

James D. Sherrets, No. 15756
Diana J. Vogt, No. 19387
SHERRETS & BOECKER LLC
260 Regency Parkway Drive,
Suite 200
Omaha, NE 68114
Tele: (402) 390-1112
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/s/ John Raynor

John Raynor, *Pro se*
NSBA #15151
5062 So. 108th St., # 115
Omaha, Nebraska 68137
Tel. No.: (402) 939-8937
Tel. No.: (402) 350-3000
Fax No.: (509) 479-2443
Email: jp.r@cox.net

APPENDIX H

IN THE DISTRICT COURT FOR
DAWSON COUNTY, NEBRASKA

FIRST STATE BANK, a Nebraska Banking Corporation, Plaintiff, Counterdefendant, vs. A & G PRECISION PARTS, LLC, an Oregon Limited Liability Co.; DENNIS WALKER JOHN RAYNOR, JOHN BRAZIER, MARK DAVID HERZ, and WELLS FARGO BANK, N.A., Defendants, Counterclaimants, and A & G PRECISION PARTS FINANCE, LLC, a South Dakota Limited Liability Co. and A & G PRECISION PARTS, LLC, an Oregon Limited Liability Co., Counterclaimants, Crossclaimants, and Third Party Plaintiffs, vs. JOHN RAYNOR, JOHN BRAZIER, and MARK DAVID HERZ, Crossdefendants, and	Case No. CI 09-35 ORDER (Filed Apr. 30, 2010)

JOHN PROBANDT and)
REX HANSON,)
)
Third Party Defendants.)
)

THIS MATTER having come before this Court on the 29th day of April, 2010 for telephonic hearing upon the following motions:

1. Joint motion of A&G Precision Parts, A&G Precision Parts Finance and Dennis Walker to Strike John Raynor's Affirmative Defense alleging discharge in bankruptcy of the underlying debt;

2. Joint motion of A&G Precision Parts, A&G Precision Parts Finance and Dennis Walker for an order of default against John Probandt or an order allowing alternative service;

3. Motion of John M. Probandt to dismiss for failure off service.

The parties appeared as follows: Steve Vinton for Plaintiff, First State Bank; Diana Vogt for A&G Precision Parts LLC, A&G Precision Parts Finance LLC, and Dennis Walker; John Raynor for John Probandt; John Raynor *pro se;* Marsha Fangmeyer for Mark Herz; and Terry Waite for Rex Hansen.

The Court heard argument and accepted evidence and, being fully advised in the premises, finds as follows:

IT IS HEREBY ORDERED that the Motion to Strike Affirmative Defense is GRANTED and John Raynor is granted leave to file an amended answer and affirmative defenses. The amended answer is to be filed no later than May 19, 2010 (20 days from the date of this hearing).

IT IS FURTHER ORDERED that the Motion to Dismiss is DENIED;

IT IS FURTHER ORDERED that the Motion for Default or Alternative Service is DENIED and that John Probandt is granted leave to file an Answer in this matter no later than May 19, 2010 (20 days from the date of this hearing).

DONE AND DATED this 29 day of April, 2010.

/s/ James E. Doyle
James E. Doyle, IV
District Judge

APPENDIX I

IN THE DISTRICT COURT OF
DAWSON COUNTY, NEBRASKA

FIRST STATE BANK, a Nebraska Banking, Corporation and DENNIS WALKER, individually and on behalf of A & G PRECISION PARTS, LLC, an Oregon Limited Liability Co.; and A & G PRECISION PARTS FINANCE, LLC, a South Dakota Limited Liability Company, Plaintiffs, vs. JOHN PROBANDT, MARK HERZ, JOHN RAYNOR, STEPHEN MICHAEL BRAZIER, as Personal Representative of the estate of JOHN BRAZIER, AND REX HANSEN, Defendants.	Case No. CI09-35 ORDER DENYING MOTION FOR DEFAULT JUDGMENT (Filed Mar. 9, 2012)

As of the date filed stamped on this order, the court had under advisement the December 15, 2011 motion for default judgment against John Probandt, filed by the plaintiffs Dennis Walker, individually, and as a member of A & G Precision Parts, LLC, and A & G Precision Parts Finance, LLC. A hearing was held on such

motion on December 22, 2011 at which time the plaintiffs were represented by Diane Vogt, the defendant Rex Hansen by Pat Heng and the defendant John Raynor appeared pro se. Evidence was adduced and the parties were granted time to submit briefs which time was subsequently extended per the parties' stipulation.

On February 3, 2012 and February 13, 2012 the parties filed motions by which they extended the time to submit materials relating to the motion for default judgment against John Probandt. In each motion the parties asked the court to reserve ruling on the motion until dates specified in the motion. The last such date was March 9, 2012.

On March 9, 2012 the motion came on for decision. At the December 22, 2011 hearing the court reserved ruling on Exhibit 42. After consideration of objections to Exhibit 42 the court overrules such objections and Exhibit 42 is admitted in evidence for the sole purpose of ruling on the motion for default judgment against John Probandt. After consideration of the evidence and applicable law, the court finds the motion for default judgment against John Probrandt should be overruled and denied for the reasons hereinafter stated.

The plaintiffs First State Bank, A & G Precision Parts, LLC, A & G Precision Parts Finance, LLC, and Dennis Walker filed a revised third amended complaint on February 13, 2011. In such third amended complaint, the plaintiffs alleged six separately stated but factually related causes of action. Of the six causes

of action, the second cause of action makes claims against John Probandt and some but not all of the other defendants and the fourth cause of action makes a claim against John Probandt only.

In *Florida ex rel. Dep't. of Ins. v. Countrywide Truck Ins. Agency, Inc.,* 258 Neb. 113 (1999), the Supreme Court stated two rules which have direct application to the plaintiffs' motion for default judgment. The first is that the amount of damages alleged is not proven by default. Instead, where a defendant is in default, " . . . the allegations of the petition are to be taken as true against him except allegations of value and amount of damage." *Id.* at 124. In addition, the Supreme Court also interpreted and adopted the rule first announced in *Frow v. De La Vega,* 82 U.S. (15 Wall) 52, 21 L. Ed. 60 (1872), and held that " . . . a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default." 258 Neb. at 122-123.

After considering the motion, the pleadings in the case, and the evidence adduced in support of the motion, the court finds the *Frow* rule adopted by the Nebraska Supreme Court has application to this case and as a result the court finds there is a strong possibility the entry of a default judgment in this case could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default. For such reason the plaintiff's December 15,

2011motion for default judgment against John Probrandt should be and hereby is overruled and denied.

SO ORDERED.

BY THE COURT:

/s/ James E. Doyle
James E. Doyle, IV
District Judge

[Certificate Of Service Omitted]

APPENDIX J

IN THE DISTRICT COURT OF
DAWSON COUNTY, NEBRASKA

FIRST STATE BANK, a Nebraska Banking Corporation and DENNIS WALKER, individually and on behalf of A & G PRECISION PARTS, LLC, an Oregon Limited Liability Co.; and A & G PRECISION PARTS FINANCE, LLC a South Dakota Limited Liability Company,	Case No. CI09-35
Plaintiffs,	ORDER
vs.	(Filed Feb. 13, 2013)
JOHN PROBANDT, MARK HERZ, JOHN RAYNOR, STEPHEN MICHAEL BRAZIER, as Personal Representative of the estate of JOHN BRAZIER, and REX HANSEN,	
Defendants.	

On November 8, 2012, a hearing was had on the Estate of John Brazier's §6-1112(b) motion to dismiss. The plaintiffs were represented by their attorney, Diana Vogt. The Estate of John Brazier was represented by its attorneys, Brian Davis and C. Chip Goss. Evidence was adduced, the matter was argued, the parties

were given time to submit briefs, and the matter was submitted and taken under advisement.

The Estate of John Brazier's motion was filed under Neb. Ct. R. §6-1112(b). However, in opposition to the motion, the plaintiffs offered evidence of matters outside the pleadings, which evidence was received by the court. As required under Rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§25-1330 to 25-1336 (Reissue 2008).

Governing principles applicable to motions for summary judgment

Under Neb. Rev. Stat. §25-1332 (Reissue 2008), a judgment sought via a motion for summary judgment shall be " . . . rendered forthwith if the pleadings and the evidence submitted at the hearing show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations and affidavits. As to all the evidence, the court views the evidence in the light most favorable to the nonmoving party on each motion and gives such party the benefit of all reasonable inferences deducible from the evidence.[1] In considering the motion for summary judgment, the court does not determine how factual issues should be decided; instead, the court examines the evidence to

[1] *Geddes v. York County*, 273 Neb. 271 (2007).

determine whether any real issue of material fact exists.[2] The court reviews the evidence to determine whether the party moving for summary judgment had made a prima facie case by producing enough evidence to demonstrate that the moving party was entitled to judgment if the evidence were uncontroverted at trial.[3] If the party moving for summary judgment made a prima facie case, the court examines the evidence to determine whether the opposing party met its burden to show the existence of a material issue of fact that prevents judgment as a matter of law.[4]

The moving party must produce evidence regarding the material factual allegations set forth in a defending party's purported affirmative defenses, otherwise it fails to meet its initial burden as the party moving for summary judgment to produce evidence which, if uncontroverted, would entitle it to judgment as a matter of law.[5] If the moving party fails to produce enough evidence to demonstrate its entitlement to a judgment, the burden does not shift to the non-moving party to produce contrary evidence.[6]

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[2] *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263 (2001).

[3] *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634 (2000).

[4] *Id.*

[5] *City State Bank v. Holstine*, 260 Neb. 578, 585 (2000); see, also, *Nebraska Popcorn v. Wing*, 258 Neb. 60 (1999); *Cass Constr. Co. v. Brennan*, 222 Neb. 69 (1986).

[6] *City State Bank v. Holstine, supra; Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 794 (1985).

Analyses, findings, and conclusions

The court finds there are no genuine material issues of fact and the Estate of John Brazier is entitled to judgments as a matter of the law on the plaintiffs' fifth cause of action. In the fifth cause of action in its March 2, 2012 revised third amended complaint, labeled the cause of action as a claim for fraud. However, there are no allegations in the fifth cause of action which directly alleged the required elements of a fraud claim. Nevertheless, consistent with the rule that the court is to consider the evidence in the light most favorable to the plaintiffs and is required to give the plaintiffs the benefit of all reasonable inferences deducible from the evidence, the court treats the cause of action as one for fraud. Even with application of such rule is, however, there is no evidence to support findings that a representation was made by John Brazier, that such representation was false, that Brazier knew the representation to be false, or was made without knowledge of its truth, that it was made as a positive assertion, and that the representation was made with the intention that Walker or one of the other plaintiffs rely upon its representation.[7] The only basis the plaintiffs can rely for their statement of a cause of action for fraud is the reasonable inferences that can be pulled from the allegations in the revised third amended complaint.

Assuming the claim asserted is a viable claim for fraud, the court finds the claim of fraud is barred by

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[7] See, *Abboud v. Michals,* 241 Neb. 747, 756 (1992).

the four-year statute of limitations.[8] Examination of the pleadings and the evidence shows that the facts which could support a claim for fraud occurred no later than August of 1998. Thus, the four-year statute of limitations would have run on August of 2002.

The discovery rule in §25-207(4) provides that a cause of action for fraud shall not be deemed to have accrued until discovery of the fraud. The Nebraska Supreme Court has described the time of accrual of a cause of action under the discovery rule to be when there has been " . . . a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery."[9]

According to the revised third amended complaint, the transaction which gave rise to the plaintiffs' claims arose out of a series of events which began in May of 1998. At that time, the plaintiff, Dennis Walker, and the defendants, John Raynor, John Probandt, and John Brazier, formed an Oregon company known as John M. Probandt, LLC. John M. Probandt, LLC purchased A & G Precision Parts and after the purchase was completed John M. Probandt, LLC changed its name to A & G Precision Parts, LLC. In August of 1998, John M. Probandt, LLC obtained a $4.12 million loan from Capital Consultants, Inc. to purchase the business of A & G Precision Parts. At the time of the loan, Dennis

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[8] Neb. Rev. Stat. §25-207(4) (Reissue2008) (Actions for fraud can only be brought within four years).

[9] *Bowling Assocs. Ltd. v. Kerrey,* 252 Neb. 458, 461 (1997).

Walker was a member of the limited liability company known as John M. Probandt, LLC.

The plaintiffs contend that John Brazier, unbeknownst to the plaintiffs, obtained $125,000 from the $4.12 million loan proceeds. In the fifth cause of action the plaintiffs contend the $125,000 was obtained via fraud.

With respect to the plaintiff, A & G Precision Parts, LLC, the plaintiff cannot invoke the discovery rule because such company was aware of the transaction it conducted and documented in its corporate records. The plaintiff, A & G Precision Parts Finance, LLC, was not formed until August 27, 2002, by the members of A & G Precision Parts, LLC and thus cannot claim fraud based on an act which occurred prior to its formation. The same is true with respect to First State Bank, which at this point is only a nominal plaintiff, and secondly had no role or involvement in the transaction which occurred nearly ten years before its loan to the parties.

Dennis Walker is the only possible plaintiff who could have any basis to make a claim under the discovery rule to toll the running of the statute of limitations past its four-year term. At all relevant times, Dennis Walker was a member of A & G Precision Parts, LLC and had a right to access all the records of the LLC under Oregon law.[10]

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[10] ORS §63.771

Because Walker was involved in the formation of A & G Precision Parts, LLC, and was involved in the activities which gave rise to the transaction resulting in the purchase of the business known as A & G Precision Parts and because, as a member of the LLC, he had access to all the records of the LLC including those which evidenced the 1998 $4.12 million loan, including closing statements and the like, such facts would have put Dennis Walker, as a person of ordinary intelligence and prudence, on inquiry as to the facts surrounding the use of the loan proceeds. Such inquiry would have, through a simple examination, permitted the discovery of the alleged $125,000 payment to John Brazier. As a result, the court finds the discovery provision of Neb. Rev. Stat. §25-207(4) does not apply and that the four-year statute of limitations applicable to the claim of fraud expired before the commencement of the plaintiffs action based on fraud against John Brazier.

The court finds there are no material issues of genuine fact as to the expiration of the statute of frauds and the defendant, Stephen Michael Brazier as personal representative of the estate of John Brazier, is entitled to judgment as a matter of law.

It is therefore ordered, adjudged, and decreed:

1. The above and foregoing findings are so found and ordered accordingly.

2. Stephen Michael Brazier's, as personal representative of the estate of John Brazier, August 10, 2012 motion to dismiss the fifth cause of action in the revised third amended complaint is sustained.

3. The fifth cause of action in the March 2, 2012 revised third amended complaint is dismissed.

BY THE COURT:

/s/ James E. Doyle
James E. Doyle, IV
District Judge

[Certificate Omitted]

APPENDIX K

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: JOHN PATRICK RAYNOR, Debtor(s).	CASE NO. BK04-83112-TJM A09-8015-TJM CH. 7
DENNIS WALKER, An individual and on behalf of A & G Precision Parts, L.L.C. and A & G Precision Parts Finance, L.L.C. et al., Plaintiffs, vs. JOHN PATRICK RAYNOR, an individual and as managing member of A & G Precision Parts, L.L.C. and A & G Precision Parts Finance, L.L.C., Defendant.	

ORDER

(Filed Apr. 17, 2012)

This matter comes before the Court regarding Fil. #53, Motion for Interpretation and/or Clarification of This Court's Orders, filed by Defendant, and Fil. #55, Resistance to Motion for Clarification of Prior Orders, filed by Plaintiffs. Plaintiffs are represented by Diana

J. Vogt and James D. Sherrets, and Defendant John Patrick Raynor is pro se.

At Fil. #53, the Defendant, John P. Raynor ("Raynor"), moves the court to interpret and/or clarify three orders entered in the bankruptcy case and two different adversary proceedings. Plaintiff Dennis L. Walker resists such motion.

After reviewing the motion, the attachments thereto, the resistance, and the response, I will grant the motion in part.

There is ongoing litigation between Plaintiff Walker and Defendant Raynor in the state court concerning refinancing a debt of A & G Precision Parts, L.L.C., and A & G Precision Parts Finance, L.L.C. ("A & G"). When the original note was entered into with Five Points Bank in 2002, the debtor, as a member of the L.L.C. and perhaps individually, and Mr. Walker and others signed the debt instrument either as a co-maker or as a guarantor.

Raynor filed a Chapter 11 bankruptcy in 2004 and that case was converted to a Chapter 7 bankruptcy in 2005. He received a discharge of his obligation on the Five Points Bank debt, as well as other obligations.

In 2006, Raynor and others refinanced the Five Points Bank debt with a new debt instrument to Five Points Bank and personal guarantees.

In 2008, the debtor, in his capacity as a member of the L.L.C. and as managing member, executed, along with Walker and others, a new promissory note made

payable to First State Bank which paid off the Five Points Bank note.

In February of 2009, First State Bank sued Walker, Raynor and others on the note in state court..

This adversary proceeding, in which this order is being entered, was opened as a result of the filing of March 9, 2009, complaint by Walker and Walker acting through A & G to set aside Raynor's discharge. The court dismissed this adversary proceeding on July 1, 2009. The adversary proceeding was recently reopened at Raynor's request to deal with a motion for contempt for violating Raynor's bankruptcy discharge concerning actions by Walker and his counsel which arose in the state court proceeding.

Raynor filed an adversary proceeding against First State Bank on October 19, 2009, which the court dismissed on January 11, 2010, finding that the bankruptcy discharge injunction did not apply to the First State Bank litigation because the First State Bank debt was incurred after the discharge injunction was entered.

Walker is now the owner of the First State Bank note.

After he became the owner of the First State Bank note, Walker filed a second amended complaint in the state court and sued Raynor. According to Raynor, at paragraph 19 of this motion, Walker continues to assert his interpretation of the First State Bank dismissal order to foreclose Raynor's opportunity to raise the

October 2005 discharge, whether collaterally or directly in defense of the state court action.

Raynor requests the following relief:

> (a) a factual finding that Raynor was not an owner of A & G in 2005, 2006, 2007, 2008 and 2009, by reason of the operation of the bankruptcy law coupled with the trustee's asset claim;
>
> (b) that the July 1, 2009, Walker dismissal order and the January 11, 2010, First State Bank dismissal orders did not foreclose Raynor's opportunity to raise these facts in the state court action;
>
> (c) that the refinancing of a discharged obligation standing alone cannot, as a matter of law, constitute legal consideration that runs to the person of Raynor pursuant to 11 U.S.C. § 524(c); and
>
> (d) that the July 1, 2009, Walker dismissal order and the January 11, 2010, First State Bank dismissal order did not foreclose Raynor's opportunity to raise these facts in the state court action.

On the request for relief, I enter the following limited clarification:

> (a) Upon the filing of the bankruptcy petition in 2004, Raynor's interest in A & G became the property of the bankruptcy estate. Upon the appointment of a Chapter 7 trustee, Richard Myers, in 2005, Mr. Myers, as trustee, became the real party in interest with regard

to Raynor's A & G interests. Raynor was not an owner of A & G in 2005, 2006, 2007, 2008, or 2009, and is not now an owner of A & G because the trustee's interest has not been administered or abandoned.

(b) The July 1, 2009, dismissal order dealt only with whether Walker had timely notice of Raynor's bankruptcy case and whether, if he did not, the discharge order should be set aside as to him. The 2010 First State Bank dismissal order dealt only with whether the obligation Raynor incurred by executing the First State Bank loan documents, was a post-petition, post-discharge obligation not affected by the discharge. In neither situation was there raised any issue concerning mistake of law or mistake of fact. Respecting the state court judge's ability to determine whether, and which, if any, affirmative defenses should be allowed in the state court collection action, I decline to comment further on that issue.

(c) Assuming that this portion of the request for relief deals with the refinanced Five Points Bank debt, the refinanced obligation of Five Points Bank was unenforceable against Raynor because the reaffirmation process was not followed.

(d) I refer the reader to paragraph (b) above.

IT IS ORDERED that Fil. #53, Defendant's Motion for Interpretation and/or Clarification of This Court's Orders, is granted in part as set forth above.

DATED: April 17, 2012

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
Diana J. Vogt
James D. Sherrets
*John Patrick Raynor
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.

EXHIBIT 169

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: JOHN PATRICK RAYNOR, Debtor(s)	)	CASE NO. BK04-83112-TJM A09-8015-TJM CH. 7
DENNIS WALKER, An individual and on behalf of A & G Precision Parts, L.L.C. and A & G Precision Parts Finance, L.L.C. et al., Plaintiffs, vs. JOHN PATRICK RAYNOR, an individual and as managing member of A & G Precision Parts, L.L.C. and A & G Precision Parts Finance, L.L.C., Defendant.	)	

ORDER

(Filed Apr. 17, 2012)

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Raynor requests the following relief:

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(d) refer the reader to paragraph (b) above.

IT IS ORDERED that Fil. #53, Defendant's Motion for Interpretation and/or Clarification of This Court's Orders, is granted in part as set forth above.

DATED: April 17, 2012

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
Diana J. Vogt
James D. Sherrets
*John Patrick Raynor
U.S. Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.