APPENDIX A

CLERK OF THE
NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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May 20, 2021

John P Raynor
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IN CASE OF: A-20-000299, Walker v. Probandt
TRIAL COURT/ID: Dawson County District Court
CI09-35

The following filing: Petition Appellant for Further Review
Filed on 04/28/21
Filed by appellant John Raynor

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

Petition of appellant for further review denied.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

APPENDIX B

29 Neb.App. 704
958 N.W.2d 459

Dennis WALKER et al., appellees,
v.
John PROBANDT, appellee,
and
John Raynor, appellant.

No. A-20-299.

Court of Appeals of Nebraska.

Filed March 30, 2021.

Patrick M. Heng, of Patrick M. Heng Law Office, P.C., L.L.O., for appellant.

Diana J. Vogt and James D. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., Omaha, for appellees.

Riedmann, Bishop, and Welch, Judges.

Riedmann, Judge.

[958 N.W.2d 461]

[29 Neb.App. 705]

INTRODUCTION

Upon remand, a debtor sought to have a judgment against him vacated on the basis that the district court lacked subject matter jurisdiction to adjudicate the case. The district court denied the motion to vacate on the basis that the relief sought fell outside the directions of the mandate. We determine that the district

court erred in determining that it lacked authority to address the issue, but affirm its decision denying the motion to vacate.

BACKGROUND

The relevant facts of this matter originated upon remand from this court to the district court for Dawson County. In *Walker v. Probandt*, 25 Neb. App. 30, 902 N.W.2d 468 (2017), John Raynor was found liable on a promissory note originally issued by First State Bank (FSB) and subsequently assigned to Skyline Acquisition, LLC (Skyline). An appeal was brought, and Raynor filed a cross-appeal. This court affirmed in part, and in part reversed and remanded to the district court with directions. Various other parties and issues were involved in the underlying action, but this present appeal is limited to the proceedings on mandate as they relate to Raynor's liability on the promissory note.

In our previous opinion, we provided specific directions on remand, stating:

[29 Neb.App. 706]

> We conclude that the district court abused its discretion in declining to enter default judgment against [John] 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.

Id. at 52, 902 N.W.2d at 484.

Upon remand, the district court entered an order on August 8, 2018, spreading the mandate, entering judgment against Probandt in the amount of $2,184,530, and setting an evidentiary hearing to determine the credit to be applied to the judgment against Raynor. Thereafter, on November 21, Raynor sought an order vacating the judgment for want of subject matter jurisdiction. He claimed that the district court lacked subject matter jurisdiction to decide liability on the FSB promissory note because FSB assigned the note to Skyline in June 2011, but Skyline was not made a party to the litigation until trial (and after the statute of limitations had run); therefore, Raynor claimed that all pleadings filed by FSB during the interim that sought recovery on the note were a nullity. The evidentiary hearing to determine the credit to be applied to the judgment was held on July 30, 2019.

In a subsequent written order, the court ruled that on mandate, it did not have jurisdiction to vacate the judgment as requested by Raynor; rather, it was confined

[958 N.W.2d 462]

to do only what the appellate court mandated be done. It therefore denied the motion to vacate. It then

determined that a $450,000 credit was to be applied to the judgment against Raynor and entered an order accordingly.

Raynor filed a motion for new trial, and after a hearing, the court determined that it incorrectly calculated the amount of credit. It entered a new order—awarding

[29 Neb.App. 707]

$1,600,000 in credit and adjusting the interest—and issued judgment in the amount of $735,932.34. Raynor appeals.

ASSIGNMENTS OF ERROR

Raynor assigns, restated and renumbered, that the district court erred in failing to (1) grant his motion to dismiss for lack of subject matter jurisdiction, (2) find that Raynor was an accommodation party under Neb. U.C.C. § 3-419(a) (Reissue 2020), and (3) find that a judgment against Raynor is unsupported and inconsistent with § 3-419.

STANDARD OF REVIEW

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the inferior court. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 248 Neb. 112, 532 N.W.2d 32 (1995).

ANALYSIS

On remand, Raynor sought to have the judgment entered against him vacated on the basis that the district court lacked subject matter jurisdiction over the case. The district court denied the motion, stating that it lacked jurisdiction to consider it, given the limited nature of the mandate. Raynor argues the court erred in denying his motion, because subject matter jurisdiction may be raised at any stage of the proceedings. We agree that the district court had jurisdiction to consider the motion.

Raynor asserts that the district court lacked subject matter jurisdiction for 3½ years because the action was originally commenced with FSB as a party but when FSB assigned the note to Skyline in June 2011, Skyline became an indispensable party. Because Skyline was not added as a party until January 7, 2015, Raynor reasons that the amended complaints filed during that time period which sought recovery from him on the promissory note were a nullity. He asserts, "It is indisputable that, as the assignee of [FSB], P-Skyline was an

[29 Neb.App. 708]

indispensable party under *Neb. Rev. Stat. § 25-323*. There is no subject matter jurisdiction without the assignee, P-Skyline, prosecuting the claim as is mandated by *Neb. Rev. Stat. § 25-301*." Brief for appellant at 16.

The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived. *Panhandle Collections v. Singh*, 28 Neb. App. 924, 949 N.W.2d 554 (2020). Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

Through his motion to dismiss, Raynor raised the issue of the court's subject matter jurisdiction. The district court concluded that because the matter was before it on remand, it was limited to the specific directions of the mandate. Its understanding of the constraints of a remand is supported in Nebraska case law. See, e.g., *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020) (stating we have consistently held that when lower court is given specific instructions on remand, it must comply

[958 N.W.2d 463]

with specific instructions and has no discretion to deviate from mandate). However, as stated above, lack of subject matter jurisdiction may be raised at any stage of a proceeding.

In *Bolan v. Boyle*, 222 Neb. 826, 387 N.W.2d 690 (1986), defendants raised the issue of the court's subject matter jurisdiction for the first time on remand through a motion for summary judgment. The district court granted the motion and dismissed the case. On appeal, the plaintiff argued that it was error for the district court to entertain a jurisdictional challenge on

remand. The Nebraska Supreme Court rejected the argument. Although it recognized that the first appeal "turned out to be an exercise in futility," it concluded:

> [T]his court cannot act to impose or grant subject matter jurisdiction on a court which otherwise does not have it. As we have reaffirmed recently, "parties cannot confer subject matter jurisdiction upon a judicial tribunal by
>
> [29 Neb.App. 709]
>
> either acquiescence or consent." *Riedy v. Riedy* [, 222 Neb.] 310, 312, 383 N.W.2d 742, 744 (1986). Subject matter jurisdiction may not be waived.

Bolan v. Boyle, 222 Neb. at 827, 387 N.W.2d at 691.

Bolan v. Boyle, supra, involved a general remand as opposed to a specific mandate. See *TransCanada Keystone Pipeline v. Tanderup, supra* (explaining general remand is reversal of judgment and remand of cause for further proceedings without specific direction as to what trial court should do, whereas specific mandate directs court as to what it must do on mandate). In cases of specific remand, Nebraska case law is clear that when a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate. *Id.* Insofar as tension arises between the court's inability to act beyond the scope of a specific mandate and its inability to address a matter over which it is claimed it has no jurisdiction, we determine it must address the issue of jurisdiction.

Addressing the same conflict, an Illinois appellate court explained:

> The mandate of this court directing the trial court to proceed to review the assessment was, of course, based on the assumption that the circuit court had jurisdiction of the subject matter. Accordingly, we hold that it was proper for the trial court to entertain the Department's objection to jurisdiction.

Fredman Bros. Furniture v. Ill. Dept. of Rev., 129 Ill. App. 3d 38, 40, 471 N.E.2d 1037, 1038, 84 Ill. Dec. 271, 272 (1984).

Our opinion in *Walker v. Probandt*, 25 Neb. App. 30, 902 N.W.2d 468 (2017), was also premised on the assumption that the district court had subject matter jurisdiction of the case. Raynor raised the issue on remand through a motion to vacate, and the court denied the motion not on the merits, but, rather, under the belief it was without jurisdiction to address the issue. Because lack of subject matter jurisdiction may be raised at any time, we determine the court erred in not addressing the issue.

[29 Neb.App. 710]

While an appellate court will not ordinarily decide an issue not passed upon by the trial court, see *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002), an appellate court has the duty to determine whether the trial court had subject matter jurisdiction to enter the final order sought to be reviewed, and to vacate an order of the trial court

entered without jurisdiction, see *Anderson v. A & R Ag Spraying & Trucking*, 306 Neb. 484, 946 N.W.2d 435 (2020). We therefore proceed to address whether the district court had subject matter jurisdiction over the underlying case

[958 N.W.2d 464]

during the time period after which FSB assigned the note to Skyline but before Skyline was added as a party. We conclude that it did. Neb. Rev. Stat. § 25-301 (Reissue 2016) states:

> Every action shall be prosecuted in the name of the real party in interest except as otherwise provided in section 25-304. An action shall not be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. *Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest.*

(Emphasis supplied.)

The last sentence of § 25-301 explicitly gives the court continuing jurisdiction when the real party in interest is substituted for another party. Therefore, when Skyline was substituted as plaintiff, the effect was as if it had commenced the action. Likewise, the failure to include Skyline as a party earlier in the case did not strip the district court of jurisdiction. See *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

In *Eli's, Inc. v. Lemen, supra*, Eli's, Inc., was an assignee of a printing company's creditors. After it filed suit against the debtor, Eli's assigned its rights to DCB, Inc. DCB was not substituted as a party plaintiff. Following a judgment in favor of Eli's, the debtor appealed. He argued that the district court lost jurisdiction when Eli's interests were assigned to

[29 Neb.App. 711]

DCB. The Supreme Court rejected the argument, holding that the issue was governed by Neb. Rev. Stat. § 25-322 (Reissue 1995). That statute then stated and continues to state in almost identical language:

> An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the court may allow the action to continue by or against his or her representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action.

§ 25-322 (Reissue 2016).

The *Eli's, Inc*. court stated that it had previously interpreted this section to mean that

> "the transfer of interest after the action is commenced does not prevent the action from being continued to final termination in the

> name of the original plaintiff." *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 54, 22 N.W.2d 403, 407 (1946), citing *Vogt v. Binder*, 76 Neb. 361, 107 N.W. 383 (1906). Further, this court has held that where promissory notes which were the subject of an action were transferred during its pendency, the action could continue in the name of the original holder of the notes. *Commercial Nat. Bank v. Faser*, 99 Neb. 105, 155 N.W. 601 (1915).

256 Neb. at 529-30, 591 N.W.2d at 553-54.

In the present case, FSB was the original plaintiff and remained the named plaintiff until Skyline was substituted in July 2015. *Eli's, Inc.* instructs that substitution was not required, but pursuant to § 25-322, it was permissible. And § 25-301 confirms that when the real party in interest is substituted, it has the same effect as if it had commenced the action. Therefore, the district court did not lose subject matter

[29 Neb.App. 712]

jurisdiction of the case and Raynor's motion to vacate on that basis was properly denied.

[958 N.W.2d 465]

Raynor argues that *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017), stands for the proposition that an assignee is an indispensable party and if not named as a party to a lawsuit, the court is without subject matter jurisdiction. We find this case distinguishable from the matter at issue. Significantly, the plaintiff in *Midwest*

Renewable Energy sought to quiet title to property upon which a judgment lien had been filed. It named as a defendant the original party who obtained the judgment and filed the lien; however, at the time the action was commenced, the judgment had been assigned to a third party who was not named in the lawsuit. The court held that the assignee of the judgment and judgment lien was an indispensable party.

In the present case, however, at the time the action was filed, FSB was the holder of the promissory note. It was not until during the litigation that the note was assigned to Skyline. We find that § 25-322 is applicable in this situation and that the principles of *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999), govern. See, also, *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997) (allowing substitution of plaintiff, real party in interest, after statute of limitations had run where no new cause of action is introduced and party substituted possesses interest in controversy sufficient to enable it to maintain proceeding). Therefore, we determine that the district court did not lose subject matter jurisdiction of the case during the time period between FSB's assignment of the note and Skyline's being named a party.

Raynor also assigns that the district court erred in failing to find that he was an accommodation party under § 3-419(a) of the Uniform Commercial Code and that a judgment against Raynor was unsupported and inconsistent with § 3-419. He argues on appeal that he raised both of these issues with the district court on remand; however, our record does not

[29 Neb.App. 713]

contain any such motion nor does the bill of exceptions from the hearing on remand contain reference to these issues.

A trial court cannot err in failing to decide an issue not raised, and an appellate court will not consider an issue for the first time on appeal that was not presented to or passed upon by the trial court. *Vande Guchte v. Kort*, 13 Neb. App. 875, 703 N.W.2d 611 (2005). We have stated that "to gain appellate review of an issue or theory, it must be presented to the trial court. In this way, litigants have some assurance that appellate review will be essentially limited to the case which was tried and presented in the lower court." *Id.* at 883, 703 N.W.2d at 620.

The transcript and the bill of exceptions do not support Raynor's assertion that he presented these issues to the district court. Furthermore, even if he had presented them to the district court, they clearly lie outside the specific directions of the mandate, and the district court had no authority to address them. See *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020). This assigned error fails.

CONCLUSION

We conclude that the district court erred in determining that it was without jurisdiction to address Raynor's assertion that the court lacked subject matter jurisdiction over the case. However, we find no merit in

Raynor's claim that subject matter jurisdiction was lacking. Because our record contains no indication that the accommodation party issue was raised in the district court on remand, and because those issues clearly fall outside the confines of the mandate, we find no error as to this issue. We

[958 N.W.2d 466]

therefore affirm the order denying Raynor's motion to vacate.

AFFIRMED.

APPENDIX C

**CLERK OF THE
NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS**
[SEAL] **2413 State Capitol, P.O. Box 98910
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May 8, 2018

Patrick M Heng
pheng@northplattelaw.com

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 D

25 Neb.App. 30
902 N.W.2d 468

Dennis WALKER et al., appellants and cross-appellees,
v.
John PROBANDT, appellee, and John Raynor, appellee and cross-appellant.

No. A- 16-844.

Court of Appeals of Nebraska.

Filed September 12, 2017.

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

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

Moore, Chief Judge, and Inbody and Riedmann, Judges. 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

[25 Neb.App. 34]

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

[25 Neb.App. 35]

district court denied the motion, finding that entering a default judgment as to

[902 N.W.2d 475]

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

[25 Neb.App. 36]

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

[902 N.W.2d 476]

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

[25 Neb.App. 37]

fraud/misappropriation claim. We therefore reverse the court's order denying the appellants' cause of action for fraud/ misappropriation against Probandt.

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,

[25 Neb.App. 38]

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/

[902 N.W.2d 477]

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.

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

[25 Neb.App. 39]

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

[25 Neb.App. 40]

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

[902 N.W.2d 478]

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

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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.

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).

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

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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

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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

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

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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.

The fact that Walker was an owner of the LLCs and received some benefit from

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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

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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.

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.

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,

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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.

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

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Raynor failed to meet his burden of proving that mutual mistakes of fact exist.

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.*

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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.

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(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.

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

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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.

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

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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).

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

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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.

Subject to an exception not relevant here, every action must be prosecuted in the name of the real party in interest.

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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).

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

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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

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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.

[902 N.W.2d 484]

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.

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

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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 IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

APPENDIX E

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. C109-35 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

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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.*

an accommodation party to other parties as 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 opmerica 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, IV
James E. Doyle, IV
District Judge

[Certificate Of Service Omitted]

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. C109-35 JUDGMENT (Filed Oct. 2, 2015)

Pursuant to the October 2nd, 2015 (filing date), memorandum opinion and order entered in this case, it is ordered adjudged and decreed:

1. The findings and conclusions in the memorandum opinion and order are so founded and decreed accordingly:

2. Judgment is entered in favor of Skyline Acquisition, LLC and against John Raynor in the amount of $2,306,244.76 together with interest accruing thereafter at the judgment rate on the plaintiffs' first cause of action;

3. Causes of actions two, three, four, five, and six in the October 9, 2013, fourth amended complaint are dismissed with prejudice.

4. All counterclaims asserted by John Raynor in his August 13, 2014, answer and counter claim and asserted in any other pleadings or filings made in the case by Raynor are dismissed with prejudice.

5. Each party shall their own costs and attorney's fees incurred in this action.

BY THE COURT:

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

[Certificate Of Service Omitted]

APPENDIX F

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 for the Estate of JOHN BRAZIER, and REX HANSEN, Defendants.	Case No. C109-35 ORDER SPREADING MANDATE, JUDGMENT, AND ORDER SETTING HEARING (Filed Aug. 8, 2018)

This case comes before the court upon its own motion. The Clerk of the District Court has received the mandate from the Nebraska Court of Appeals in the Court of Appeals Case No. A-16-000844. The mandate is spread on the records of this court.

Pursuant to and in accordance with such mandate, a single judgment for $2,184,530 is herewith entered against John Probandt and in favor of Dennis Walker, A&G Precision Parts, LLC, A&G Precision Parts Finance, LLC and Skyline Acquisitions, LLC.

The case shall come on for a scheduling hearing on September 13, 2018 at 1:30 p.m., which hearing shall be conducted by telephone conference call arranged by counsel for the plaintiff with the call to the court placed to telephone number 308-324-9884. The scheduling hearing shall be for the purpose of scheduling a hearing to adduce the evidence required for the court to determine the credit to be applied to the judgment against John Raynor for the amounts received in settlement from other defendants and to recalculate the judgment against John Raynor.

So ordered, adjudged and decreed.

BY THE COURT:

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

APPENDIX G

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, L.L.C., an Oregon Limited Liability Co.; and A & G PRECISION PARTS FINANCE, L.L.C. a South Dakota Limited Liability Company, Plaintiff, vs. JOHN PROBANDT, MARK HERZ, JOHN RAYNOR, STEPHEN MICHAEL BRAZIER, as Personal Representative of the Estate of JOHN BRAZIER, and REX HAN SEN, Defendants.	Case No. CI 09-35 AMENDED JUDGMENT (Filed Mar. 12, 2020) [Bar Code] 001464390D18

On October 22, 2019, a hearing was held on the defendant, John P. Raynor's October 15, 2019 motion for new trial. Dennis Walker, individually, Skyline Acquisitions, L.L.C., assignee of First State Bank, a Nebraska, Banking Corporation and Dennis Walker,

on behalf of A & G Precision Parts, L.L.C., an Oregon Limited Liability Co.; and A & G Precision Parts Finance, L.L.C., a South Dakota Limited Liability Company were represented by Diana Vogt. The defendant John P. Raynor was represented by Pat Heng. Arguments and statements were made, and the matters were submitted.

Now on this 10th day of February 2020, the above motion came for decision.

Applicable principles

Under Neb. Rev. Stat §25-1142 (Reissue 2016), a new trial is a " . . . reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court." Pursuant to such statute, the court reexamined the evidence and considered the mandate from the Court of Appeals and the evidence adduced by the parties concerning the determination of the judgment amount.

Analyses, findings, and conclusions

Upon reexamination of the evidence, the court finds the October 4, 2019 judgement pursuant to the May 30, 2018 mandate from the Nebraska Court of Appeals is incorrect because it contains an erroneous determination of the credits due. The October 4, 2019 judgment is vacated, annulled and set aside.

After reexamination of the evidence, the court finds Exhibit 256, received at the July 31, 2019

hearing, accurately sets forth the original amount of the judgment, the accrual of interest, and all credits to be applied to the judgment as required by the mandate of the Nebraska Court of Appeals. Attached to Exhibit 256 was a calculation in the form of a spreadsheet, showing the accrual of interest and the application of credits. Such spreadsheet is attached hereto, marked at Appendix A and is incorporated herein by this reference. All the credits paid by any defendant at any stage in these proceedings are accurately described on Appendix A to Exhibit 256.

There was no evidence any other defendant paid any money; that any defendant paid any additional money; nor was there evidence of any other valuable consideration paid or given to any of the plaintiffs or their assignees that could be applied as a credit against the judgment. The court adopts the calculation in Appendix A and incorporates it herein by this reference.

IT IS THEREFORE ORDERED, ADJUGED, AND DECREED:

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

2. Credits equal to $1,600,000 shall be applied to the amounts due on the promissory note;

3. Interest has accrued as shown on Appendix A at the rate of 8.75% per annum;

4. After the application of all credits and after including the accrual of interest, as of October

2, 2015, the amount of the judgment is $407,257.36; and,

5. The Clerk of the District Court shall make such adjustments to the records of the court as necessary to apply the credits and the accrual of interest as above described and to show the total final judgment amount of $407,257.36 as of October 2, 2015.

BY THE COURT:

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

Prepared and submitted by:

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APPENDIX H

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-TJ M 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.

APPENDIX I

[SUPREME COURT OF THE
UNITED STATES OF AMERICA]

No. 18-166

Title:	**John M. Probandt, et al., Petitioners v. Dennis P. Walker**
Docketed:	August 8, 2018
Lower Ct:	Court of Appeals of Nebraska
Case Numbers:	(A-16-844)
Decision Date:	September 12, 2017
Rehearing Denied:	January 29, 2018
Discretionary Court Decision Date:	May 8, 2018

DATE	PROCEEDINGS AND ORDERS
***	
Oct 09 2018	Petition DENIED.
***	

APPENDIX J

IN THE SUPREME COURT OF NEBRASKA

Dennis Walker *et al.*, Appellees v. John Raynor, Appellant,	)	Case No. A – 20 – 0299 **APPELLANT'S PETITION FOR FURTHER REVIEW AND SUPPORTING BRIEF** (Filed Apr. 28, 2021)

COMES NOW the Appellant, under *Neb. Ct. R. App. P.* §2-102F, and respectfully petitions the Nebraska Supreme Court for further review of the March 30, 2021 decision of the Nebraska Court of Appeals, 29 Neb. App. 704 (2021).

ASSIGNMENTS OF ERROR BY THE COURT OF APPEALS

1. The Court of Appeals erred in finding that the addition of the real party in interest ("Real Party") and indispensable party retroactively cure a 3½ year subject matter jurisdiction ("SMJ") defect in the prosecution of a cause of action ("COA") which finding ignores the Mootness Doctrine and the Court of Appeals decision holds court actions taken without SMJ are voidable/curable and are not void.

2. The Court of Appeals erred in finding that, and then not reconsidering, whether common law preempts *Neb U.C.C.* § 3-419 in conflict legislative

intent expressed in the plain language *Neb U.C.C.* § 1-103.

3. The Court of Appeals erred in issuing an opinions containing with plain errors which invoke the need for the exercise of this Court's supervisory power.

PROCEDURAL HISTORY

This appeal emanates from Nebraska Court of Appeals ("APP CT") adjudications sitting in review of adjudications by the Honorable James E. Doyle, IV of Dawson County District Court. The first appeallete opinion is published as *Walker v. Probandt*, 25 Neb. App. 30 (the "1st APPEAL"). The Petition for Further Review of the 1st APPEAL was not accepted. The latest APP CT opinion is published as *Walker v. Probandt*, 29 Neb. App. 704 (2021) (the "2nd APPEAL").

REASONS FOR GRANTING THE PETITION

1st Assignment of Error: Relying upon *Eli's, Inc. v. Lemen*, 256 Neb. 515 (1999) (*Eli's Inc.*) and *Neb. Rev. Stat.* § 25-322, the APP CT excused a 3½ year gap in SMJ; thus, treating Court actions taken without SMJ as voidable and not as void. 2nd APPEAL at 710-712. Appellee Skyline Acquisition LLC ("Skyline"), the Real Party, became a party in 2015, at Trial, upon oral motion. *Id*. at 707.

Eli's Inc. precedent, as applied, conflicts with (i) *Midwest Renewable Energy LLC v. Am. Eng. Testing, Inc.*, 296 Neb. 73 (2017) ("*Midwest Renewable I*")

finding that an indispensable party must be a party to maintain SMJ; (ii) *Lombardo v. Sedlacek*, 299 Neb. 400, 411-12 (2018) requiring strict construction of jurisdictional statutes; (iii) the APP CT's precedent in *In re Forster*, 22 Neb. App. 478, 483 (2014) which mandates dismissal as moot when changed circumstances preclude relief; (iv) *Neb. Rev. Stat.* § 25-301 which mandates the Real Party must prosecute the COA; (v) *Neb. Rev. Stat.* § 25-323 which mandates 'when' an indispensable party must be a party to proceeding to maintain SMJ; (vi) *Neb. Ct. R. Pldg.* § 6-1112(h)(3) which mandates dismissal of a COA whenever SMJ becomes wanting; (vii) Black Letter law which holds void all court actions taken without SMJ; and (viii) *Neb. Rev. Stat.* § 25-501 requiring a complaint to be filed and served to establish a court's jurisdiction over a COA when the grace period provided by *Neb. Rev. Stat.* § 25-301 for relation back had expired.

2nd Assignment of Error: As stipulated, the Note was a negotiable instrument within the meaning of the Neb. U.C.C. 1st APPEAL at 40. The Trial Court had deferred the adjudication of the *Neb U.C.C.* § 3-419(e) issues because the Appellant had not yet paid any part of the Note. *Id*. at 43. The APP CT, in the 1st APPEAL, used Surety law to preempted the Neb U.C.C. *Id*. at 43-44. The APP CT vitiated the plain language of *Neb U.C.C.* §§ 1-103, 3-419.

The APP CT's departure from Neb. U.C.C. muddled the plain language of *Neb U.C.C.* § 3-419. It rested upon two findings: (i) to secure the Note, the Appellee needed no accommodation [1st APPEAL at 44]; and (ii)

although acknowledging Appellant's unique pecuniary relationship to the Note [*Id*. at 51], the APP CT erroneously found that Appellant and Appellee had the same pecuniary obligation to repay the Note [*Id*. at 44]. Relying upon those two findings, *Neb U.C.C.* § 3-419(e) was displaced with Surety law. *Id*. at 44. Also, the benefit received by another party was treated as the Appellant's benefit [*Id*. at 52] further conflating *Neb U.C.C.* § 3-419.

3rd Assignment of Error: The foregoing, addressing the 1st and 2nd Assignments of Error, is incorporated herein. In the 1st APPEAL, the APP CT failed to address the SMJ 3½ year gap. 1st APPEAL at 34. In an *ex parte* appeal [*Id*. at 34-35], the APP CT, in error, mandated the entry of a judgment against Mr. Probandt. *Id*. at 39. The mandated judgment transgressed upon the Internal Affairs Doctrine and the Doctrine of Standing. *Id*. at 36-41, 46. The 2009 COA challenged managing member's (Mr. Probandt's) expenditures and investments for an Oregon LLC which was dissolved in 2007 (Internal Affairs Doctrine). *Id*. at 36-41. With no authority of record, Appellee Walker prosecuted the COA, in the name of the dissolved Oregon LLC (Standing). *Id*. at 34.

Plain errors by the APP CT permeated the decisions in the 1st Appeal and the 2nd Appeal suggesting the need for this Court's *de novo* review. *In re Mainor T.*, 267 Neb. 232, 245-46 (2004) (the Court has both review and supervisory powers).

MEMORANDUM BRIEF IN SUPPORT OF PETITION

1st Assignment of Error: **– FACTS**: The COA involves the collection of a Bank Note. 1st APPEAL at 34. On February 5, 2009, the Bank sued the Appellant, Appellee Walker, and other defendants for collection of the Note. *Id*. On June 15, 2011, Appellee Walker settled with the Bank. According to the settlement, the Bank's Note was then assigned to Skyline. *Id*. After the settlement, an overt and public event ("Overt Event") occurred. On July 18, 2011, Appellee Walker file the second amended complaint in which Appellee Walker and two foreign LLCs (not Skyline) status were transmuted to plaintiffs from defendants, because of the settlement. *Id*. The Overt Event should have triggered an examination of SMJ by the Trial Court.

On August 22, 2011, Appellant moved to dismiss the Note COA in the Second Amended Complaint because the Bank was no longer the Real Party. T:66-85; Exhibit 3. Additionally, the Bank's counsel, in a brief, admitted the Bank was no longer the Real Party. T:107-111; Exhibit 5. The Trial Court denied the Appellant's Motion and denied Appellant's motions contesting the Note COA in the third amended complaint [T:131-155] and the fourth amended complaint [T:156-183].

More than 3½ years after the June 15, 2011 settlement, Skyline was admitted as a party to the proceeding upon Appellees' oral motion at Trial. 1st APPEAL at 34; 2nd APPEAL at 708.

Both the Trial Court and the APP CT found Skyline to be the Real Party in the 1st APPEAL by awarding Skyline a judgment against the Appellant on the Note. 1st APPEAL at 52. In the 1st APPEAL, the APP CT sustained Skyline's Judgment subject to adjustments to be determined by the Trial Court upon remand. *Id*. After *Midwest Renewable I*, Appellant unsuccessfully raised the 3½ year gap in SMJ before the Trial Court and then, in the 2nd APPEAL. T:4-11.

1st Assignment of Error: **APP CT HOLDING:** In the 2nd APPEAL, the APP CT held: "[t]he last sentence of § 25-301 explicitly gives the court continuing jurisdiction when the real party in interest is substituted for another party" [2nd APPEAL at 709]; and "substitution was not required, but pursuant to § 25-322, it was permissible . . . [t]herefore, the district court did not lose subject matter jurisdiction of the case . . . " [*Id*. at 711-712]. Effectively, the Trial Court proceedings during a 3½ year SMJ gap were treated as voidable and cured when Skyline was added as a Party.

1st Assignment of Error: **APPELLANT'S ARGUMENT:** Appellant supplements this assignment of error, REASONS FOR GRANTING THE PETITION with the following.

Jurisdiction involves several elements including standing, personal jurisdiction, and SMJ. Jurisdiction law is often misunderstood by Courts and practitioners alike.

Jurisdictional Statutes relevant to this case are *Neb. Rev. Stat.* §§ 25-301, 25-304, 25-322, 25-323 and 25-501.

Skyline is both an indispensable party and Real Party. *Midwest Renewable I*; *W. Ethanol Co., LLC v. Midwest Renewable Energy, LLC*, 305 Neb. 1 (2020) (finding that the indispensable party in *Midwest Renewable I* was the Real Party). Under this Court's precedent in *Midwest Renewable I* and these facts, the Note COA should have been dismissed in 2011. That precedent is consistent with SMJ law: (a) "court action taken without subject matter jurisdiction is void," *JS. v. Grand Island Pub. Schs*, 297 Neb. 347 (2017); (b) when SMJ is raised, *Neb. Ct. R. Pldg.* § 6-1112(h)(3) mandates an evidentiary hearing and the COA must be dismissed if SMJ is wanting per *Hawley v. Skradski*, 304 Neb. 488, 496 (2019); (c) *Cummins Mgmt., Ltd. P'ship v. Gilroy*, 266 Neb. 635 (2003) finding an appeal without SMJ must be dismissed not suspended; and (d) *Davis v. Moats*, 308 Neb. 757, 768 (2021) finding when SMJ is wanting an appellate court only has the power to determine whether it lacks jurisdiction over an appeal . . . ; to vacate a void order; and . . . to remand the cause with appropriate directions. The corresponding Federal Rule, *Fed. R. Civ. P.* (12)(h)(3), requires the dismissal of the case if SMJ is wanting. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86 (1998) (without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit). Court actions taken without SMJ are treated by the APP CT as voidable rather than void which is

inconsistent with this Court's distinction between void and voidable. *Sanders v. Frakes*, 295 Neb. 374, 381 (2016). Lastly, the Note COA was not before the Trial Court in 2015 because the Trial Court lacked the power under *Neb. Ct. R. Pldg.* § 6-1115 to authorize the filing of the Note COA in the second, third and fourth amended complaints.

These conflicts are harmoniously resolved if the rule of law established by *Myers v. Neb. Inv. Council*, 272 Neb. 669, 682 (2006) (a personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)) involving standing is extended to SMJ. APP CT precedent, *In re Forster*, *supra*, addressing mootness arising from a change in circumstances, conflicts with *Eli's Inc.* precedent, as applied by the APP CT.

Statutory conflicts are harmoniously resolved if *Neb. Rev. Stat.* §§ 25-323 and 25-301 are found to address all elements of jurisdiction including SMJ and *Neb. Rev. Stat.* § 25-322 is limited to standing. According to the APP CT, the last sentence of *Neb. Rev. Stat.* § 25-322 found adding Skyline cured a 3½ year SMJ defect. The APP CT's interpretation conflicts with *Neb. Rev. Stat.* § 25-323, as interpreted by *Midwest Renewable I*, which required Skyline to be brought into the proceeding in 2011 to maintain SMJ. Also, the APP CT's interpretation conflicts with *Neb. Rev. Stat.* § 25-301. *Neb. Rev. Stat.* § 25-301 language conflicts with the APP CT holding: Skyline must become a party after the Appellant's 2011 objection, and relation back is permissible only if the substitution is made within a

reasonable period. These conflicts do not arise if *Neb. Rev. Stat.* § 25-322 is not an SMJ statute.

Suggesting *Neb. Rev. Stat.* § 25-322 addresses only standing is supported by commercial arrangements generally referred to as accounts receivable factoring wherein the financing party retains recourse against the assignor. In such cases, the assignor is a Real Party.

The Trial Court and the APP CT have a duty to notice the SMJ issue and inquire. *In re Estate of Crane*, 166 Neb. 268, 274-75 (1958). After the 2011 Overt Event (Appellee Walker's change in status), it was an error not to, *sua sponte*, address the SMJ gap. Skyline had the power to enter the case in 2011 but then resisted. The decisions in the 1st Appeal and the 2nd Appeal sowed confusion instead of harmoniously interpretation of *Neb. Rev. Stat.* §§ 25-301, 25-322 & 25-323, Nebraska Court Rules, and Nebraska case law about the necessity and nature of SMJ.

2nd Assignment of Error: **FACTS RE NEB. U.C.C.:** Stipulated Fact – the Note was a negotiable instrument within the meaning of Neb. U.C.C. 1st APPEAL at 40. The Trial Court deferred a decision on the Appellant's claim against Appellee Walker under *Neb. U.C.C.* § 3-419(e). *Id.* at 36. The APP CT preempted the Neb U.C.C. with common law. *Id.* at 43-44.

2nd Assignment of Error: **APP CT HOLDING RE NEB. U.C.C.:** The APP CT found: "our record does not contain any such motion nor does the bill of exceptions from the hearing on remand contain reference to these issues." 2nd Appeal at 703-704. "The transcript and the

bill of exceptions do not support Raynor's assertion that he presented these issues to the district court. Furthermore, even if he had presented them to the district court, they clearly lie outside the specific directions of the mandate, and the district court had no authority to address them." *Id.* at 704.

2nd Assignment of Error: **APPELLANT'S NEB U.C.C. ARGUMENT:** Appellant supplements the 2nd ISSUE, REASONS FOR GRANTING THE PETITION with the following.

The APP CT had all the authority and facts necessary to reconsider its preemption of the Neb. U.C.C. The APP CT notes that filing an objection with the Trial Court was a futile act. 2nd APPEAL at 704. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 685 (1994) (One is not required to perform a futile act.); *Liljehorn v. Fyfe*, 178 Neb. 532, 536 (1965). The Mandate Rule prohibited the Trial Court from reconsidering the Neb U.C.C. issue – the 2nd Assignment of Error.

The 2nd Assignment of Error questions the power of a Court to preempt the Neb U.C.C. The preemption was by the APP CT. The only record needed for reconsideration was the reported decision in the 1st APPEAL, *Walker v. Probandt*, 25 Neb. App. 30 (2017). Appellant liberally cited the reported decision in his brief. Appellant believes the proper application of Neb. U.C.C. § 3-419(e) would absolve Appellant from the Note liability. That first adjudication of accommodated party and accommodation party, as noted by the APP

CT, can only be made by the Trial Court after another remand. 2nd APPEAL at 713.

Neb. U.C.C. § 3-419 was construed to defeat the statutory purpose. The reasoning ignores Neb U.C.C. § 1-103, legislative instruction regarding interpretation. *Fisher v. PayFlex Systems USA, Inc*., 285 Neb. 808, 817 (Neb. 2013) (The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent). The result is either an unauthorized judicial exception [*State v. Medina-Liborio*, 285 Neb. 626, 633 (2013) (We are not free to create a judicial exception)] or judicial legislation [*Heckman v. Marchio*, 296 Neb. 458, 466 (2017) (finding that creating an exception that is contrary to statute was judicial legislation)]. This error was made by a Court with supervisory authority over District Courts.

3rd Assignment of Error: **FACTS RE SUPERVISORY AUTHORITY:** In addition to facts outlined in the above discussions of the 1st and 2nd Assignments of Error, there was another error supporting this Petition which does not involve the Appellant.

The APP CT's mandate ordered the Trial Court to enter a judgment against Mr. Probandt over issues questioning his management of an Oregon LLC. 1st APPEAL at 39. Probandt was the managing member of the Oregon LLC [T:27, Exhibit 1, ¶ 84] throughout its existence [T:31, Exhibit 1, ¶ 117]. The Oregon LLC was dissolved in 2007 before the Note was executed. [T:27, Exhibit 1, ¶ 88]. In 2009 Appellee Walker disagreed with expenditures and investments made by the

Oregon LLC under Probandt's management. Appellee Walker purported to represent the dissolved Oregon LLC. *Id*. at 34. Probandt contested personal jurisdiction and to preserve his objection, he never participated in the Trial Court's proceedings. *Id*. at 34. The COA, at issue, involved expenditures of the Oregon LLC's funds by the managing member. *Id*. at 38-39. The Trial Court had no SMJ over a COA because of the Internal Affairs Doctrine. Also, Appellee Walker lacked standing because he had no legal authority to represent a dissolved Oregon LLC [Standing]. The Trial Court's judgment is void.

3rd Assignment of Error: **APP CT HOLDING RE MR. PROBANDT:** "Because Probandt failed to file a responsive pleading, the appellants were entitled to a default judgment." 1st APPEAL at 38-39.

3rd Assignment of Error: **APPELLANT'S ARGUMENT RE SUPERVISORY AUTHORITY:** Appellant supplements the ISSUE, REASONS FOR GRANTING THE PETITION for all three assignments of errors with the following.

The appeal by Appellees was *ex parte*. *Ex parte* proceedings the Courts requires caution. *Kaley v. United States*, 571 U.S. 320, 355 (2014) (Justice Roberts, in dissent, "*ex parte* proceedings create a heightened risk of error."). There no evidence that the APP CT examined its jurisdiction to mandate a judgment against Mr. Probandt. 1st APPEAL at 36-40. The APP CT's reasoning left wanting the discipline of legal reasoning that should be employed by a supervisory court

when exercising the Judicial Power of the State of Nebraska. The Probandt mandate was without authority on two jurisdictional grounds: standing and SMJ. *Midwest Renewable I*.

The APP CT's dispositive decisions rested upon a misapplication of jurisdictional law and an unauthorized preemption of the Neb. U.C.C. The decisions are antithetical to the ends of promoting evenhanded, predictable, and consistent development of legal principles; fostering reliance on judicial decisions; and contributing to the actual and perceived integrity of the judicial process.

In conclusion, to bring certainty and clarity to an often-misunderstood fundamental law and to confine courts to their lawful jurisdiction, the APP CT and all lower courts' interest, as well as the public interest are served by accepting this Petition and adjudicating this case.

Appellee John Raynor,

/s/ Patrick M. Heng

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