No. 18-___

IN THE

Supreme Court of the United States

ALBERT G. HILL, III, Individually, and as a Beneficiary of the Margaret Hunt Trust Estate, derivatively on behalf of the Margaret Hunt Trust Estate, Individually, as a beneficiary of the Haroldson Lafayette Hunt Jr. Trust Estate, and derivatively on behalf of the Haroldson Lafayette Hunt Jr. Trust Estate; and AHTREY INVESTMENTS, L.L.C.,

Petitioners,

v.

PBL MULTI-STRATEGY FUND, L.P.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should the Court grant the petition, vacate the judgment below, and remand to the District Court for further proceedings, because the Court of Appeals failed to observe established standards for consideration of evidence in connection with a motion for summary judgment, in order to provide uniform standards for all circuits.

LIST OF ALL PARTIES TO THE PROCEEDING

Pursuit to Supreme Court Rule 28.2.1, the undersigned counsel of record certifies that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Ahtrey Investments, LLC, is 100% owned by Albert G. Hill III.

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of the stock in any of the Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

Opinion of the United States Court of Appeals for the Fifth Circuit dated July 13, 2018: *Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P.*, 2018 U.S. App. LEXIS 19280 (5th Cir.2018).

Order of the United States District Court for the Northern District of Texas, Dallas Division, dated January 27, 2017 (ECF#616): *Harrison v. Hill*, 2017 U.S. Dist. LEXIS 222082; 2017 WL 5649604 (N.D.Tex.2017).

Memorandum Opinion and Order of the United States District Court for the Northern District of Texas, Dallas Division, dated September 30, 2016 (ECF#611): *Campbell, Harrison & Dagley LLP v. Hill*, 2016 U.S. Dist. LEXIS 136562 (N.D. Tex.2016).

TO THE HONORABLE UNITED STATES SUPREME COURT:

Albert G. Hill III, Individually, and as a Beneficiary of the Margaret Hunt Trust Estate, derivatively on behalf of the Margaret Hunt Trust Estate, Individually, as a beneficiary of the Haroldson Lafayette Hunt Jr. Trust Estate, and derivatively on behalf of the Haroldson Lafayette Hunt Jr. Trust Estate, (hereafter collectively "Hill") and Ahtrey Investments, LLC ("Ahtrey"), hereby file, pursuant to Rule 12 of the Supreme Court Rules, this their Petition for Writ of Certiorari, asking that this Court, issue its writ to the Fifth Circuit Court of Appeals, and vacate the

judgment in *Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P.*, 2018 U.S. App. LEXIS 19280 (5th Cir.2018). (Petitioners' Appendix, hereafter "Pet.App." at 1), and state the following:

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

1. **Date of the Judgment sought to be reviewed:**

   July 13, 2018 (Pet.App,at 1).

2. **Date of the Order denying rehearing *en banc*:**

   September 6, 2018 (Pet.App.at 22)

3. **Statutory provision believed to confer jurisdiction on this Court:**

   28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

The statutes and Rules involved in the case are as follows: 28 U.S.C. §636 (Pet.App at 193); Rule 56, FED.R.CIV.PROC., (Pet. App.at 202); and Rule 72, FED.R.CIV.PROC. (Pet.App.at 205).

STATEMENT OF THE CASE

Jurisdiction in the District Court was based upon a Federal Question, pursuant to 28 U.S.C.§1331 in the original case, No.3:07-CV-2020. After a settlement was reached in such case, the District Court severed the fee dispute between Hill and various law firms into No.3:10-CV-2269-L, from which this appeal arises. (Pet.App.at 2.)

As noted in the Court of Appeals opinion, Albert G. Hill III ("Hill") was involved in protracted and extremely expensive litigation involving large family trusts. (Pet.App. at 2.) To finance the litigation, he contracted with a predecessor of Respondent PBL Multi-Strategy Fund, LP. A loan agreement was negotiated to provide a $5 million line of credit, which PBL required to be made with a corporate entity. Pet.App.at 3, 28. Accordingly, Ahtrey Investments, LLC., 100% owned by Hill (Pet.App.at 87), was organized.

A loan agreement was executed providing for a $5 million line of credit, for the express purpose of funding the protracted litigation, with the indebtedness guaranteed by Hill individually and secured by assignment as collateral of an interest in the recovery obtained by Hill.1 After approximately one half of the line of credit was drawn down, PBL began experiencing capital shortfalls due to downturns in the stock market and ceased funding pursuant to the line of credit. At approximately the same time Hill's then-current counsel was disqualified by the District Court, and he was required to search for new counsel.[2] Because he no longer had the ability to draw down on the remaining $2.5 million under the line of credit, Hill was forced to retain counsel on a contingency fee basis. (Pet.App.at 87, 120.)

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[1] *See* Guarantee and Collateral Agreement in Support of Motion of Intervenor PBL Multi-strategy Fund, L.P. for Judgment on the Pleadings and for Summary Judgment on Its Claim in Intervention, Pet.App.at 28.

[2] *See* Supplemental Declaration of Albert G. Hill III, Pet.App.at 120

In 2010 a settlement was reached in the litigation and disputes arose with Hill's counsel over the fees claimed, resulting in the severance of the fee disputes as stated above. PBL intervened in the litigation in March, 2011. (Pet.App.at 2.) Petitioners answered and counterclaimed, contending that PBL had breached its agreement to provide a $5 million line of credit. (Pet.App.at 3.) PBL defaulted and failed to answer the Counterclaim filed by Petitioners in April, 2011.

Petitioner and Respondent entered into a settlement agreement, calling for payment by disbursement of settlement proceeds being held by the District Court. (Pet.App.at 4). Following appeals from the fee award in the primary case, payments were disbursed to Hill's former counsel, but with no funds remaining to be disbursed to PBL. (*Id.*)

There was no activity involving PBL's intervention claims for over four years after its default in answering the counterclaim. Then on February 16, 2016, PBL as intervention plaintiff filed a motion for summary judgment, seeking summary judgment granting its claims, and denying Petitioners' Counterclaim. The motion for summary judgment was supported by a Declaration signed by its counsel of record, Troy Phillips, claiming that he also held the title of "liquidator" for the general partner of PBL. (Pet.App.at 24) No supporting documentation concerning the powers and authority of the "liquidator" for PBL.

Petitioners responded to the motion for summary judgment, seeking a continuance to obtain discovery concerning the authority of Phillips, identity of the true owner of the promissory note on which judgment was sought, and a damages expert to support Hill's damages due to his counterclaim. (Pet.App.at 64, 76). Petitioners filed written objections to the Troy Phillips

Declaration, which was the sole evidence to support the requested summary judgment, and sought a continuance under Rule 56(d), FED.R.CIV.PROC., to obtain discovery into the authenticity of the authority of the so-called "liquidator" attorney who had signed the declaration supporting the motion for summary judgment, and to establish the amount of damages suffered by the Petitioners due to the breach by PBL of its loan agreement, caused by its refusal to fund the remaining $2.4 million remaining on its line of credit, which had made it impossible for Petitioners to retain legal representation on a non-contingency basis. (*Id.*).

Specifically, Petitioners sought a continuance to retain an expert witness to opine as to the amount of damages suffered by them due to PBL's failure and refusal to fund the full remaining balance owed on the loan commitment, and to calculate the difference between the cost of pursuing the underlying litigation on an hourly rather than contingency basis. (Pet.App.at 76). Because there was approximately $2.4 million remaining under the loan commitment that had not been funded, and Petitoners were ultimately forced to pay over $24 million in attorneys' fees calculated on a contingency basis, the damages were likely to be very substantial. (*See* Hill Declaration, Pet.App.at 87 and Hill Supplemental Declaration, Pet.App.at 120.)

The motion for summary judgment was referred to the Magistrate Judge for determination. Following briefing submitted to the Magistrate Judge, findings and recommendations were made which included denial of the Motion to Strike the Troy Phillips Declaration, a finding that the Declaration of Hill filed in response to the motion for summary judgment find-

ing was made in bad faith because it allegedly contained false statements, and recommending the granting of the motion for summary judgment. (Pet.App.at 91). Timely objections were filed to the findings and recommendations including a request that the District Court in conducting its *de novo* review also consider the Supplementary Declaration of Hill. (Pet.App.at 116, 139).

The District Court adopted, with some modifications, the findings of the magistrate judge, held that the Supplementary Hill Declaration would not be considered, and granted summary judgment on both PBL's affirmative claims and on Hill's counterclaims. (Pet.App.at 169).

Appeal was taken to the Court of Appeals for the Fifth Circuit, which affirmed the ruling of the District Court. (Pet.App.at 1). Petitioners filed their Motion for Rehearing *En Banc*, which was denied. (Pet.App.at 22). Petitioners are now filing this Petition for Writ of Certiorari, asking that this Honorable Court review the ruling of the Court of Appeals, and reverse the same, remanding this case to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

Introductory Statement

This case presents fundamental questions concerning application of the appropriate, well-established principles for consideration of summary judgment evidence, and application of the proper standards of review and inferences required by law, and to require uniformity among the Circuit Courts of Appeal in application of such rules.

I. THE COURT OF APPEALS ERRONEOUSLY AFFIRMED SUMMARY JUDGMENT BASED UPON AN ATTORNEY DECLARATION LACKING PERSONAL KNOWLEDGE

A. The Court of Appeals applied the wrong standard of review for acceptance of summary judgment evidence

Since the determination to deny Petitioner's motion to strike the Declaration of Troy Phillips in support of the motion for summary judgment was made initially by the Magistrate Judge, and affirmed by the District Court, and was an essential component of the ruling granting summary judgment, the proper standard for review was that of a *de novo* review, and not, as held by the Court of Appeals, whether the ruling was an "abuse of discretion."[3] (Pet.App. at 10).

Numerous courts have held that the "personal knowledge" requirement of the Rule is not met by attorneys' affidavits that fail to establish personal

[3] The case cited by the Court of Appeals, *D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 208 (5th Cir. 2018), deals with evidentiary rulings, and not whether or not the substantive requirements of Rule 56 have been satisfied.

knowledge. *Hoston v. J. R. Watkins Co.,* 300 F2d 869, 870 (9th Cir. 1962); *Walpert v. Bart,* 280 F Supp 1006, 1010 (D. Md. 1967), aff'd, 390 F2d 877 (4th Cir. 1968); *Midland Engineering Co. v. John A. Hall Constr. Co.,* 398 F Supp 981, 990 (N.D. Ind. 1975); *Royal Indem. Co. v. Westinghouse Electric Corp.,* 385 F Supp 520, 523 (S.D.N.Y. 1974); *Commercial Union Ins. Co. v. Albert Pipe & Supply Co.,* 484 F Supp 1153, 1156 (S.D.N.Y. 1980).

The decision of the Court of Appeals in the case sought to be reviewed conflicts with the decisions of other Circuits in the following respect concerning reliance upon the declaration of attorney of record as the sole support presented to comply with Rule 56 (c)(4), FED.R.CIV.PROC. In *Nader v. Blair*, 549 F.3d 953, 963 (4th Cir.2008), the Fourth Circuit found an affidavit sufficient where the affiant was familiar with the record-keeping practices. In *Hernandez-Santiago v. Ecolab, Inc.*, 397 F.3d 30,36 (1st Cir.2005), the First Circuit held that where the affiant merely stated that a review of records revealed certain things, but failed to attest that he had conducted the review or had personal knowledge of the results, the affidavit was insufficient. The Declaration of Troy Phillips herein (Pet.App.at 24) did not establish, on its face, any investigation or analysis such as in *Nader v. Blair*, where the affiant had an executive position and extensive analysis of records was established. The underlying facts here are more like those in *Hernandez-Santiago*, where the affiant stated, just as the Phillips Declaration, that he had looked at documents, but failed to explain just what his position or authority really was.

Here, the Court of Appeals held that it could infer that Phillips had personal knowledge based upon the

face of the affidavit, citing a case where the affidavit in question had been signed by a corporate officer concerning matters within his expertise and duties, after conducting an extensive examination. (Pet.App.at 10), *citing, DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir.2005). That set of facts, however, has no bearing on the case at hand. In *DIRECTV*, the declarant was the Senior Director of Signal Integrity for the corporation, and had reviewed an extensive investigation into signal theft, to report the findings of such investigation conducted under his supervision. There is absolutely no similar set of facts or showing establishing Troy Phillips' knowledge of the transactions between PBL and Petitioners.

This fundamental requirement cannot be created by inference from an assertion that the declarant is the "liquidator" for the general partner of a limited partnership. The term "liquidator" has no established meaning in law, and carries with it no implied powers or knowledge. Furthermore, the knowledge of a general partner of a limited partnership is not necessarily the personal knowledge of the entity itself. Whereas the position of Comptroller or CFO of a corporate entity could well allow a court to infer that the declarant had personal knowledge of the corporation's financial affairs, here the self-pronounced title of "liquidator" establishes no known or generally accepted powers or authority.

B. The Court of Appeals turned the inference rule for summary judgment determination upside down in inferring Phillips' personal knowledge

It is fundamental that in deciding a motion for summary judgment, a court is bound to view all facts

and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, the Court of Appeals applied the inferences contrary to law. It inferred from Phillips' statement that he was the "liquidator" for the general partner of the limited partnership that he therefore had personal knowledge of the transactions between the parties, without requiring any showing of the authority that he had in such capacity. Such an inference, directly in support of a motion for summary judgment, was contrary to law.

II. THE COURT OF APPEALS FAILED TO FOLLOW ESTABLISHED PRINCIPLES FOR GRANTING CONTINUANCE UNDER RULE 56(d), FED.R.CIV.PROC.

A. General Policy favoring continuance

Under Rule 56(d), FED.R.CIV.PROC., the nonmovant is entitled to a continuance of a motion for summary judgment if the nonmovant establishes "for specified reasons" why it cannot bring forward sufficient facts to oppose the motion for summary judgment. The Court of Appeals has repeatedly held that such motions are "broadly favored and should be liberally granted." *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir.2010); *Smith v. Regional Transit Auth.*, 827 F.3d 412, 422 (5th Cir.2016); *Am. Family Assurance Co. v. Biles*, 714 F.3d 887, 894 (5th Cir.2013); *see also, Resolution Trust Corp. v. North Bridge Assocs.,* 22 F.3d 1198 (1st Cir. 1994).

Petitioner recognizes that the granting of a continuance under Rule 56(d) requires a showing of diligence. *See*, *Elvis Presley Enterprises, Inc. v. Elvisly Yours,*

Inc., 936 F.2d 889 (6th Cir. 1991). Here, the Court of Appeals charged Petitioner with having failed to conduct discovery, for the five year period that the main case was pending and on appeal, and the parties were awaiting an order of the District Court that would have consummated the settlement agreement that the parties had reached. Under such circumstances, discovery into the claims of Respondent was neither appropriate nor necessary.

B. The Hill Declaration properly established the need for discovery to support the counterclaim

The counterclaim was based upon PBL's failure to honor its commitment to fund the full amount of $5 million to finance Hill's litigation, asserting that if PBL had funded the remaining $2.4 million remaining under its line of credit, Hill could have obtained other counsel on an hourly basis, thus saving many millions of dollars in fees. This was erroneously dismissed as speculation.

As pointed out above, the District Court was bound to apply all doubts and inferences in favor of the nonmovant. Here, the Court of Appeals explained the lengthy history of the litigation in which Hill had been involved. (Pet.App.at 1-2). That history, coupled with the undisputed fact that the transaction between Petitioners and Respondent was for the purpose of obtaining **$5 million** in funding for legal fees, coupled with the facts already known by the District Court due to the extensive litigation history, should have been more than enough for the Court to infer that Hill had sufficient experience in retaining attorneys for complex litigation in order to know that with a $5 million war chest, he could hire many attorneys to represent him. Indeed, his original Declaration emphasized

that approximately one-half of the committed line of credit– **$2.4 million**– remained unfunded and should have been available to use for the purpose of retaining counsel.

In fact, given the amount of funds that should have been available from such line of credit, the District Court could likely have taken judicial notice that somehow, with a war chest, counsel on an hourly basis could be retained. That is a much more reasonable inference, given knowledge of the legal profession, than assuming that "liquidator" means "I have personal knowledge."

Therefore, as noted above, the Court of Appeals turned the required inferences in the context of a motion for summary judgment upside down, by liberally inferring personal knowledge on the part of Respondent's counsel of record based upon use of an undefined title that he claimed, yet refusing to believe Hill when he testified that if he had available $2.4 million from the unfunded portion of the line of credit, he could have retained counsel on an hourly basis.

C. Hill, the guarantor, was the third party beneficiary of the loan agreement

The District Court and the Court of Appeals brushed aside Hill's counterclaim, based upon the fact that the loan agreement was with Ahtrey, not Hill, and that Ahtrey was not a party to litigation and therefore could not have suffered any damages due to the breach in providing funding for Hill's attorneys' fees. (Pet.App.at 19-20) Here, the overall circumstances of the litigation into which PBL intervened established a history of lengthy, incredibly expensive, litigation, as detailed by the Court of Appeals in its opinion. *(See* Pet.App.at 1-2). The loan agreement in question that

gave rise to PBL's claim was for the express purpose of providing a line of credit in the amount of $5 million to fund the ongoing litigation in which Hill was involved. (*See* Guarantee and Collateral Agreement, Pet.App.at 28).

Generally, a contract may include performance benefitting more than one party. As the Restatement provides:

> **§ 10 Multiple Promisors and Promisees of the Same Performance**
>
> . . .
>
> (2) Where there are more promisees than one in a contract, a promise may be made to some or all of them as a unit, whether or not the same or another performance is separately promised to one or more of them.

Restatement 2d of Contracts.

Additionally, under Texas law[4] the parties may agree to provide performance for a third party beneficiary, if the intent is clearly set forth in the contract between the parties. As the Texas Supreme Court has explained,

> **A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for**

[4] New York law also recognizes the rights of third party beneficiaries to enforce a contract for which they were an intended beneficiary. *Seaver v. Ransom*, 224 N.Y. 233, 239, 120 N.E. 639 (Court of Appeals 1918); *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 44-45, 485 N.E.2d 208 (Court of Appeals 1985).

> **the third party's benefit**. *See, e.g., Knox v. Ball*, 144 Tex. 402, 191 S.W.2d 17, 21 (Tex. 1945); *Edds v. Mitchell,* 143 Tex. 307, 184 S.W.2d 823, 829-30 (Tex. 1945); *Houston Waterworks, 31 S.W. at 180*.
>
> * * *
>
> **In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling**. *See Corpus Christi Bank & Trust v. Smith, 525 S.W.2d 501, 503-04 (Tex. 1975)*. A court will not create a third-party beneficiary contract by implication. *See MJR Corp.,* 760 S.W.2d at 12. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. *See id*. Consequently, a presumption exists that parties contracted for themselves unless it "clearly appears" that they intended a third party to benefit from the contract. *See Corpus Christi,* 525 S.W.2d at 503-4; *Knox,* 191 S.W.2d at 21; *see also MJR Corp.,* 760 S.W.2d at 12.

MCI Telecommunications Corp. v. Texas Utils. Elec. Co., 995 S.W.2d 647, 651 (Tex.1999) (Emphasis added); *accord*, *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 899 (Tex.2009).

The facts of the loan transaction fully established that Hill, the 100% owner of Ahtrey, was pursuing litigation, that he was borrowing funds to finance such litigation, and was the intended beneficiary of the contemplated loan, and this was all known and agreed to between the parties. Hill guaranteed payment of the indebtedness. In fact, the lender secured a collateral interest in proceeds of the litigation which it

agreed to fund. *(See* Guarantee and Collateral Agreement, Pet.App.at 28).

These facts tie in with the facts presented to the Texas Supreme Court in *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, where the Court, in finding the existence of a third party beneficiary contract, emphasized that at the time of entering into the contract, the bank there knew that the contract was being entered into for the benefit of the third party, and also knew that it would likely be the third party that would seek to enforce the contract. 348 S.W.3d at 900.

Further, under New York law even an absolute and unconditional guaranty does not foreclose a guarantor's challenge to wrongful conduct by the creditor which itself caused the inability to perform. *Canterbury Realty & Equip. Corp. v. Poughkeepsie Savings Bank*, 524 N.Y.S.2d 531, 535 (N.Y.Sup.Ct.,App.Div.1988).

III. THE COURT OF APPEALS AFFIRMED A MISAPPLICATION OF RULE 56(h), F.R.CIV.PROC

A. The Declaration was not in bad faith

The District Court, to support its summary judgment ruling, sustained the striking of the Hill Declaration on the basis that it allegedly contained false testimony. (Pet.App.at 111-112). The Magistrate Judge found, and the District Court adopted its finding, that the Hill Declaration stating that if the PBL line of credit had been fully funded, Hill could have retained counsel on an hourly basis, was made in bad faith, and struck the Declaration. (Pet.App.at 111, 178). Although the Court of Appeals asserted that such ruling was not essential to its holding, (Pet.App.at 19), this remains a fundamental error in granting the summary judgment, because it meant

that Petitioners had no evidence to support their claims of damages due to the breach of the loan commitment by PBL.

The relevant portion of the Hill Declaration found false by the Magistrate Judge was the following statement concerning the consequences of PBL failing to continue advancing payment of his attorneys' fees:

> **Deprived of the necessary source of funding for the underlying litigation, I was no longer able to pay my attorneys in the underlying litigation. As a result, I was forced to retain counsel who would charge me on a contingency fee basis**. The first such law finn was Campbell, Harrison & Dagley LLP (CHD). For good cause, I terminated my engagement with CHD. I subsequently retained lawyers Lisa Blue, Charla Aldous and Stephen F. Malouf (BAM) to represent me in the trust litigation.
>
> 11. As a direct result of Palm Beach Multi -Strategy Fund, L.P.' s failure to deliver the remaining funds on the Revolving Credit Note, I entered the aforementioned contingency fee agreements with BAM and CHD. As a direct result of entering the contingency fee agreements I have suffered monetary damages. BAM was paid $25 million in attorney's fees. I litigated the contingency fees claimed by CHD because I believe them to be unconscionable. As a result of entering the contingency fee agreement, CHD has a judgment against me for $41 million in attorney's fees. I believe that the attorney's fee paid to BAM and claimed by CHD were disproportionate to the work done and the recovery that I received in the trust litigation. **Had Palm Beach Multi-Strategy Fund, L.P., not prematurely cut off**

> **the funding under the Revolving Credit Note, I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation**. I believe that if had I continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency basis, then the cost of litigation would have been substantially less. Fmiher, I would not have been in the ensuing costly litigation against BAM and CHD. This consequence was known and foreseeable by PBL when it cut off funding m1der the Revolving Credit Note in 2008.

(Pet.App.at 89). (Emphasis added). The Magistrate Judge found that such testimony was false because Hill's former counsel had ceased representing him because they were disqualified, not because he had stopped paying them. (Pet.App.at 111). However, **at no place in his Declaration did Hill say that nonpayment was the reason he was no longer utilizing such prior counsel.** Nothing in such Declaration was false.

The absurdity of such ruling is underscored by the fact that the disqualification had occurred in the very same court in which the severed attorneys' fees claims were pending, in the proceedings prior to the severance. Accordingly, both the Magistrate Judge and the District Judge were fully aware of the prior proceedings, and would never have been fooled into believing that Hill's prior counsel had been removed due to nonpayment.

The Court of Appeals affirmed the grant of summary judgment where the District Court struck the Hill Declaration because of a finding that it contained false statements. (Pet.App.at 19). This blanket ruling

conflicts with the ruling in *Ft. Hill Builders, Inc. v. National Grange Mut. Ins. Co.,* 866 F2d 11, 16 (1st Cir. 1989), where the Court of Appeals there carefully analyzed the affidavit in question, and declined to award sanctions because the conduct was not egregious, and the positions taken were not entirely unwarranted.

Furthermore, Rule 56(h) expressly requires that when the court is considering an award of sanctions, the offending party must be given an opportunity to respond. Here, Hill was given no such opportunity, and instead a judgment of over $14 million was entered, far more than any sanctions award might have been.

B. It was error to refuse to grant leave to supplement the summary judgment record with the Hill Supplemental Affidavit

Rule 56(h), FED.R.CIV.PROC. requires that if sanctions are to be considered, the offending party must be given the opportunity to respond. Pursuant to 28 U.S.C. §636(b)(1) and Rule 72(b)(3), Fed.R.Civ.Proc., the District Court is authorized to consider supplemental evidence in conducting its *de novo* review of a Magistrate Judge's findings and recommendations.

In objecting to the Findings and Recommendations of the Magistrate Judge, Hill sought to present his Supplemental Declaration, explaining the alleged false statement to demonstrate that it was not false in any sense. In such Supplemental Declaration, Hill stated:

> Bickel & Brewer's disqualification is an event that was highly publicized, so I had no thought of

> hiding that fact when making my original declaration. What I meant when I said in my original declaration that "I was no longer able to pay my attorneys in the underlying litigation" was not just with reference to Bickel & Brewer; rather, I meant that I could not hire any attorneys on an hourly basis. Accordingly, at that time, I was forced to hire first CHD, then BAM, pursuant to contracts containing the onerous blanket contingency in my interest in the MHTE. The other firms I attempted to hire wanted a hefty retainer (which I could not provide), and to be paid on a current hourly basis.
>
> 9. When I said in my original declaration that "I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation," by "such as BAM and CHD," I was referring to contingency attorneys who wanted a blanket contingency interest in all litigation I was involved in at the time. In this regard, my fee contract with Bickel & Brewer and my fee contract with CHD were materially different. The CHD fee agreement included a blanket contingency interest in all litigation I was involved in at the time. (*see* Dkt. 593-1, Supp. pp. 37-39), whereas my contract with Bickel & Brewer did not include a blanket contingency interest in the MHTE estate (see Dkt. 593-1, Supp. App. 18-19), but only in my other recoveries, for example, from the HHTE estate. *Id.* Instead, regarding the MHTE estate, Bickel & Brewer's charges to me were hourly plus expenses. *Id.*

(Pet.App.at 122).

Such Supplemental Declaration clearly explained the confusion and misunderstanding on the part of the Magistrate Judge relating to the original Hill Declaration, and should have been considered, but was not. Other courts have properly recognized that supplementation of the magistrate's record in conducting a *de novo* review is proper. *United States v. White,* 295 F Supp 2d 709 (E.D. Mich. 2003); *Lyons v. Comm'r of Soc. Sec.,* 351 F Supp 2d 659 (E.D. Mich. 2004). It was error for the District Court to refuse to recognize the Supplemental Declaration, and penalize Petitioners by granting summary judgment for $14 million.

Hill explained in his Supplemental Declaration that he would have retained counsel without granting a blanket contingency interest in any and all recovery, and further attached evidence of the amount of fees sought by his counsel based upon the contingency agreement that he had been forced to accept due to PBL's failure to honor its funding commitment. (Pet.App.at 122). Given this evidence of the need for the funding, and the consequences of PBL's breach, Hill clearly satisfied the need to establish "specified reasons" why discovery was needed to present his opposition.

CONCLUSION

For the reasons stated above, and in order to assure uniformity in application of the proper rules for consideration of summary judgment evidence consistent throughout the Circuits, Petitioners Albert G. Hill III, and Ahtrey Investments, LLC submit that the Court should grant this Petition for Writ of Certiorari, vacate the Judgment of the Court of Appeals for the Fifth Circuit, award them their costs of appeal, and general relief.

Respectfully submitted,

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December 6, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed July 13, 2018]

No. 17-10272

CAMPBELL HARRISON & DAGLEY, L.L.P., *et al.*,

Plaintiffs

v.

PBL MULTI-STRATEGY FUND, L.P.,

Intervenor-Plaintiff-Appellee

v.

ALBERT G. HILL, III, individually, and as a Beneficiary of the Margaret Hunt Trust Estate, derivatively on behalf of the Margaret Hunt Trust Estate, individually, as a beneficiary of the Haroldson Lafayette Hunt Jr. Trust Estate, and derivately on behalf of the Haroldson Lafayette Hunt Jr. Trust; ERIN NANCE HILL,

Defendants-Appellants

AHTREY INVESTMENTS, L.L.C.

Intervenor Defendant-Appellant

Appeals from the United States District Court for the Northern District of Texas No. 3:10-CV-2269

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:[*]

PBL Multi-Strategy Fund ("PBL"), one of the creditors of Albert Hill III, intervened in this litigation, seeking a portion of Hill's settlement proceeds from other litigation. PBL claimed that Hill's company had defaulted on a Note that Hill had guaranteed. Hill counterclaimed for breach of contract. PBL and Hill settled their claims against each other, contingent on the court's allocating some of the settlement proceeds to PBL. Years later, there were no proceeds remaining, so PBL moved for summary judgment. The district court denied Hill's motion for a continuance to conduct discovery and his motion to strike some of PBL's evidence, then granted summary judgment to PBL on its claim and Hill's counterclaim. Hill appeals; we affirm.

I. FACTS AND PROCEEDINGS

Defendant-Appellant Albert Hill III has been involved in lengthy litigation concerning the management of two family trusts.[1] After a final judgment in that underlying case (the "2020 case"[2]), the court severed a fee dispute between Hill and his attorneys to create this separate case (the "2269 case"). The 2269 case now involves several of Hill's creditors quarreling over the 2020 settlement proceeds.

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See Hill v. Schilling*, 495 F. App'x 480, 482–83 (5th Cir. 2012).

[2] This is a shorthand version of the case number for the underlying litigation, No. 3:07-CV-2020.

In February 2011, Appellee PBL filed a complaint in intervention in the 2269 case, claiming an interest in Hill's 2020 case settlement proceeds. In its complaint, PBL stated that it was "[formerly known as] Palm Beach Multi-Strategy Fund, L.P." PBL sought to enforce payment of a promissory note (the "Note") executed by Appellant Ahtrey Investments, a company owned by Hill. The principal amount of the Note was $5 million, of which PBL had advanced $2.6 million to fund Hill's litigation costs in the 2020 case.[3] The holder of the Note was "Palm Beach Multi-Strategy Fund." Hill had personally guaranteed the Note (the "Guaranty"). PBL alleged that Ahtrey had defaulted on the Note.

Hill and Ahtrey ("Defendants"[4]) answered the complaint, denying the material allegations, and raising fourteen affirmative defenses. Defendants also counterclaimed, asserting that PBL had breached the terms of the Note by failing to advance the full $5 million in principal. Defendants alleged that as a result of this breach, "Hill was no longer able to pay his attorneys" in the 2020 case and was "forced to retain counsel who would charge him on a contingency fee basis." Defendants claimed that the size of these contingency fees made the underlying litigation considerably more expensive than if Hill had been able to use the Note proceeds to pay hourly fees to his attorneys.

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[3] That balance has accrued interest.

[4] Erin Hill is named as an Appellant on the cover of Defendants' brief, but she was not named in PBL's complaint or as a counter-plaintiff, though she is a party in the overall 2269 case. She is therefore not a party to this appeal.

Early in January 2012, the district court awarded one of the law firms in the 2269 case over $21 million in fees against Hill ("2012 Judgment"). Later that month, PBL and Defendants entered into a settlement agreement. That agreement provided that Hill would pay PBL $3.2 million from the 2020 settlement funds, "pursuant to and contingent upon" a court order. The settlement agreement also specified that if the district court refused to disburse the 2020 settlement funds, the settlement agreement would become void, and the parties could continue to pursue their claims. The parties jointly requested that funds in the 2020 case be disbursed accordingly, but the district court denied that motion pending the resolution of other creditors' claims.

Four years later, in January 2016, the district court disbursed all of the 2020 settlement funds to other creditors. In doing so, the court explained that PBL's interest was subordinate to those interests, so no funds remained in the settlement registry to disburse to PBL.

One month later, PBL moved for summary judgment on its claim and Defendants' counterclaim. PBL's evidence consisted primarily of a declaration from Troy Phillips, the lead attorney representing PBL, who was also the "Liquidator of PBL Holdings, LLC, the general partner of PBL Capital L.P., which is the general partner of [PBL]." Phillips declared that in his capacity as liquidator, he had custody and control of the Note and Guaranty. He also attested that PBL was the owner and holder of the Note, described the disbursements that PBL had made, and calculated PBL's damages.

Defendants responded with three filings. They first moved for a continuance to conduct discovery, noting

the discrepancy between the named lender in the Note, "Palm Beach Multi-Strategy Fund, L.P.," and PBL's full name, "PBL Multi-Strategy Fund, L.P." Defendants asserted that "discovery could show that PBL is not the successor in interest to the Note and Guaranty." Defendants also sought discovery with respect to Phillips's role as "liquidator."

Second, Defendants moved to strike Phillips's declaration as hearsay and lacking personal knowledge. Third, Defendants responded to the summary judgment motion, insisting that PBL could not support summary judgment without the Phillips declaration. They also contended that the 2012 Judgment was a final judgment, precluding further action on PBL's claim.

The court referred these motions to a magistrate judge, who denied in relevant part Defendants' motions for a continuance and to strike the Phillips declaration.[5] The magistrate judge recommended summary judgment in favor of PBL and stated that Hill's allegation that PBL's failure to pay forced him to retain attorneys on a contingency basis was false and made in bad faith. Specifically, the magistrate judge concluded that (1) Hill's prior attorneys were disqualified, not terminated because of a lack of funds, and (2) Hill's fee arrangement with that prior attorney was also on a contingency basis.

Defendants objected to the magistrate judge's denial of the motion to strike (but not the motion for a continuance). Defendants also objected to the magistrate judge's recommendation of summary judgment on two

[5] The magistrate judge did strike a portion of the Phillips declaration concerning attorney fees, which does not affect this appeal.

additional grounds: (1) PBL had abandoned its claim, and (2) Defendants had not acted in bad faith. The district court overruled Defendants' objections and granted summary judgment to PBL. As for the Defendants' counterclaim, the district court explained that even if there was no bad faith, Defendants had not presented sufficient evidence to support the damages from PBL's alleged breach of contract. Because Defendants had not established that element, reasoned the court, they could not avoid summary judgment. Defendants appealed.

II. ANALYSIS

Defendants raise the following issues on appeal: (1) The district court should have allowed them a continuance to conduct discovery; (2) it should have stricken the Phillips declaration from the summary judgment record and thereby denied summary judgment; (3) PBL lacked standing to bring its claim; (4) the district court had already issued a final judgment and thus no longer had jurisdiction over the case; and (5) PBL had defaulted. We address each issue in turn.

A. Motion for a Continuance

Defendants did not object in the district court to the magistrate judge's denial of a continuance. When a party fails to object to the district court regarding a magistrate judge's order, an appeal from that order is usually reviewed for plain error.[6] There is an exception to this rule, however, when the magistrate judge does not warn the party of the consequences of failing

[6] *See Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 675 (5th Cir. 2015).

to object.[7] Here, the magistrate judge warned Defendants of the consequences of failing to object to the summary judgment recommendation, but she did not do so with respect to her order on the motion for a continuance. We therefore review this ruling for abuse of discretion.[8]

When a party requests a continuance of a summary judgment motion to conduct discovery, the moving party must—among other requirements—(1) "demonstrat[e] to the trial court specifically how the requested discovery pertains to the pending motion," and (2) "diligently pursue relevant discovery."[9] As to the first requirement, the party must explain "*how* the additional discovery will create a genuine issue of material fact,"[10] and "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts."[11] "If it reasonably appears that further discovery would not produce evidence creating a genu-

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[7] *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc), *superseded on other grounds by* 28 U.S.C. § 636(b)(1). It appears that this exception applies to magistrate judge orders as well as reports and recommendations. *See JM Walker LLC v. Acadia Ins. Co.*, 356 F. App'x 744, 748 (5th Cir. 2009); *cf. Lawrence*, 808 F.3d at 675 & n.7 (applying plain error when the party failed to object to a magistrate judge's denial of a motion for continuance, and suggesting that the magistrate judge had warned of the consequences).

[8] *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016).

[9] *Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992).

[10] *Krim v. BancTexas Grp., Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993).

[11] *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 304–05 (5th Cir. 2004).

ine issue of material fact, the district court's preclusion of further discovery prior to entering summary judgment is not an abuse of discretion."[12]

Defendants highlight three types of evidence that they sought to obtain through discovery: (1) expert testimony on how much Hill could have saved by hiring an attorney on an hourly basis, which would support damages on the counterclaim,[13] (2) evidence that "could show" PBL was not the same entity as (or the successor to) Palm Beach Multi-Strategy Fund, and (3) evidence supporting Phillips's knowledge of the matters in his declaration.

The magistrate judge did not abuse her discretion. First, Defendants brought their counterclaim nearly five years before PBL moved for summary judgment. Defendants therefore had more than ample time to marshal the expert testimony they now seek in support of their damages.[14] Also, evidence concerning the difference between hourly fees and contingent fees (or a combination of the two) would not have forestalled summary judgment. Beyond his own speculation, Hill provided no evidence that he actually would have hired attorneys on an hourly basis. For example, Hill

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[12] *Resolution Tr. Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1401 (5th Cir. 1993).

[13] Defendants do not contest the district court's finding that Ahtrey was not a party to the 2020 case and thus did not suffer damages from PBL's alleged breach.

[14] *Cf. Provost v. Nissen*, 354 F. App'x 180, 182 (5th Cir. 2009) ("Because the ability to produce this information was entirely within Provost's control, he cannot show why he needed additional discovery to oppose the motion for summary judgment."); *Reynolds v. New Orleans City*, 272 F. App'x 331, 341 (5th Cir. 2008) ("[I]n opposing summary judgment, the Plaintiffs failed to even produce that evidence which was within their control[.]").

could have described the law firms that he sought to retain and what they would have charged him. Instead, on this issue, Hill stated only "I believe that if had I continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency basis, then the cost of litigation would have been substantially less." In contrast, PBL showed that Hill retained law firms on a combination of hourly and contingent fees both before and after PBL allegedly stopped making payments.

Second, Defendants' suggestion that discovery could reveal that PBL is not the same entity named in the Note is also speculative. PBL had claimed to be this entity for the nearly five years since it intervened in the litigation.[15] In their counterclaim, Defendants acknowledged that the entity named in the Note (Palm Beach Multi-Strategy Fund) was "the predecessor in interest of PBL." Defendants also signed a settlement agreement stating that PBL was formerly known as Palm Beach Multi-Strategy Fund and that the Note was "between" PBL and Ahtrey. Defendants fail to explain why they no longer believe that PBL is at least the successor to Palm Beach, so it was reasonable for the magistrate judge to conclude that discovery would not yield any such information.

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[15] Defendants repeatedly use the word "successor" to describe the alleged relationship between PBL and Palm Beach Multi-Strategy Fund, but PBL's filings state that PBL is "formerly known as" the entity named in the Note. The language "formerly known as" typically describes the same entity that has simply changed its name, not a successor entity. *See Alley v. Miramon*, 614 F.2d 1372, 1384 (5th Cir. 1980) ("The change of a corporation's name is not a change of the identity of a corporation and has no effect on the corporation's property, rights, or liabilities.").

Third, Defendants sought discovery concerning the basis for Phillips's knowledge of the matters in his declaration. As we explain below, the basis for Phillips's knowledge was evident on the face of the declaration. Because, as with PBL's succession, Defendants did not state what information they expected to uncover, it is unlikely that discovery would have revealed any genuine dispute about Phillips's personal knowledge. The denial of the motion for a continuance was not an abuse of discretion.

B. Motion to Strike the Phillips Declaration

Defendants argue that the Phillips declaration should have been stricken because it is not based on personal knowledge and because PBL's attorney should not be allowed to offer testimony. Denials of motions to strike affidavits are reviewed for abuse of discretion.[16]

Federal Rule of Civil Procedure 56(c) requires that summary judgment affidavits be made on personal knowledge. [17] This requirement is satisfied when the court can reasonably infer personal knowledge from the affidavit itself.[18] Here, the court could infer Phillips's personal knowledge of the matters pertaining to PBL's ownership of the Note and Guaranty and the payments that PBL advanced. First, Phillips explained that he is the "liquidator" of PBL's general partner. Even though the specific duties of a liquidator are not described, this nevertheless suggests that Phillips is PBL's agent. Second, Phillips explained that, in the course of his duties as liquidator, he has

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[16] *See D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 208 (5th Cir. 2018).

[17] FED. R. CIV. P. 56(c)(4).

[18] *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005).

"custody and control" of the Note and Guaranty and that these documents are kept in the regular course of PBL's business. This further supports the conclusion that he is PBL's agent in terms of enforcing the Note and Guaranty. Through these statements, we can infer that Phillips has personal knowledge of the matters in the affidavit.[19]

Defendants' second challenge to the Phillips declaration is based on the fact that Phillips is PBL's lead counsel, which Defendants assert bars Phillips from testifying. Summary judgment may be supported only by declarations that set out facts that would be admissible.[20] Defendants did not object to the declaration on these grounds before the magistrate judge or the district judge, so we review this issue for plain error only.[21] To succeed under that standard, Defendants must show (1) an error, that (2) is clear or obvious, and (3) affected Defendants' substantial rights; and even then we may opt whether to exercise our discretion to correct the error.[22]

In support of their contention that Phillips's testimony is inadmissible, Defendants point to the Texas Rules of Professional Conduct, which prohibit a lawyer from both representing a party and testifying on behalf of that party.[23] But PBL notes two exceptions

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[19] *See DIRECTV*, 420 F.3d at 530 (inferring personal knowledge of a corporate investigation based on an affiant's position within the company).

[20] FED. R. CIV. P. 56(c)(4).

[21] *See Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 506 (5th Cir. 1999), *superseded on other grounds by* Fed. R. Evid. 103(a); FED. R. EVID. 103(e).

[22] *Lawrence*, 808 F.3d at 675.

[23] TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a).

to that prohibition: (1) testimony on an uncontested issue, and (2) testimony that is "a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition."[24] Defendants do not respond to PBL's contention that these exceptions apply. Phillips's declaration is offered to support (1) the existence of the Note and Guaranty, (2) the parties to those agreements, and (3) the amount of damages. Defendants nominally contest some of these elements, but they offer no evidence, much less substantial evidence, in opposition. The second exception, if not both exceptions, thus appears to apply, indicating that there is no error. And, even though attorney declarations are generally disfavored, we have never explicitly prohibited them.[25] Texas courts too have held that a violation of this rule can be waived by the opposing party,[26] indicating that the rule does not affect a substantial right. All told, allowing Phillips's declaration was not plain error.

The district court did not err in considering the Phillips declaration as part of the record. We thus do not need to reach Defendants' assertion that the declaration's exclusion renders summary judgment inappropriate.

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[24] *Id.*

[25] *Cf. Eguia v. Tompkins*, 756 F.2d 1130, 1136 (5th Cir. 1985) (refusing to "condone" affidavit where attorney appeared to lack personal knowledge); *Inglett & Co. v. Everglades Fertilizer Co.*, 255 F.2d 342, 349–50 (5th Cir. 1958) (describing the practice as "unsound").

[26] *BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 514 (Tex. App.—San Antonio 2013, rev. denied).

C. PBL's Standing

Defendants also argue that summary judgment was improper because PBL lacked standing, thereby depriving the district court of subject-matter jurisdiction over its claim. Specifically, Defendants contend that PBL did not prove that it had any interest in the Note; it therefore had no standing to bring a claim for recovery on that Note. Standing is an issue that the cognizant court examines de novo.[27] To have standing, a plaintiff must be "the proper party to assert any cause of action."[28] The court may consider "the complaint supplemented by undisputed facts evidenced in the record."[29]

As noted above, Defendants admitted in their counterclaim and the settlement agreement that PBL was the successor to Palm Beach Multi-Strategy Fund. Parties cannot stipulate to jurisdiction when none exists, but they may admit to facts that support jurisdiction and thereby be prohibited from subsequently attacking jurisdiction on that basis.[30] Defendants claim that these admissions simply amount to Defendants' taking the facts in PBL's claim as true until proven otherwise. But Defendants made these admissions in their own counterclaim and in the settlement

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[27] *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002). Although Defendants did not contest standing below, "standing is essential to the exercise of jurisdiction, and . . . lack of standing can be raised at any time." *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989).

[28] *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 242 (5th Cir. 1993).

[29] *Carroll v. Abide*, 788 F.3d 502, 504 (5th Cir. 2015).

[30] *See City of Brady, Tex. v. Finklea*, 400 F.2d 352, 357–58 (5th Cir. 1968).

agreement, and they had no qualms in denying PBL's alleged facts in their answer. As Defendants admit that PBL has an interest in the Note, PBL has standing.

D. PBL's Alleged Abandonment of Claim

Defendants also contend that the district court lacked jurisdiction because the 2012 Judgment was a final judgment. Whether a district court has jurisdiction is a legal question that we review de novo.[31]

Once a judgment is final, district courts lack jurisdiction to take further action.[32] "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[33] "There are at least two exceptions to the rule that a district court must dispose of all issues for its decision to be final, however."[34] First, "a decision that does not specifically refer to all pending claims will be deemed final if it is clear that the district court *intended*, by the decision, to dispose of all claims."[35] Second, "a decision is final if the only claims not disposed of by the district court were abandoned."[36]

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[31] *McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 353 (5th Cir. 2004).

[32] *See Vaughn v. Mobil Oil Expl. & Producing Se., Inc.*, 891 F.2d 1195, 1197–98 (5th Cir. 1990); *Escamilla v. Santos*, 591 F.2d 1086, 1088 (5th Cir. 1979).

[33] *McLaughlin*, 376 F.3d at 350 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[34] *McLaughlin*, 376 F.3d at 350.

[35] *Id.* at 351; *see Vaughn*, 891 F.2d at 1197.

[36] *McLaughlin*, 376 F.3d at 350; *see Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 705 (5th Cir. 1994).

The fact that this court may have had jurisdiction over Hill's appeal from the 2012 Judgment[37] does not necessarily make it final. Federal Rule of Civil Procedure 54(b) allows a district court to enter a final judgment as to fewer than all of the parties when "there is no just reason for delay."[38] The court need not expressly invoke Rule 54(b), but the court's intention to enter final judgment as to fewer than all of the parties must "appear from the order or from documents referenced in the order."[39]

On its face, the 2012 Judgment does not dispose of all issues and all parties. It makes no mention of PBL's claim, and it only disposes of claims brought by one of the law firms seeking a portion of Hill's settlement funds. Defendants concede that PBL was "absent" from that judgment. The next question, therefore, is whether the district court intended to dispose of PBL's claim in that judgment or to enter a Rule 54(b) partial final judgment.

Defendants contend that the district court's intent was evident from (1) the fact that the court administratively closed the case and (2) a June 2014 order which explained that two other orders from May 2014 "disposed of all pending motions in this case, which

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[37] The court dismissed the portion of the appeal concerning the 2012 Judgment pursuant to an appeal waiver. *Hill*, 495 F. App'x at 483, 487.

[38] FED. R. CIV. P. 54(b).

[39] *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 539 (5th Cir. 1999); *see Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc) (per curiam) ("Where . . . language in the order either independently or together with related parts of the record reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b), we consider the order appealable.").

was closed on January 10, 2012." That order also required all parties to seek the court's permission to file any further motions.

The fact that a court lists a case as administratively closed does not indicate that it has entered a final judgment.[40] Here, the May 2014 orders, like the 2012 Judgment, do not mention PBL. These orders pertain to enforcement of the 2012 Judgment, suggesting that enforcement litigation had been ongoing for more than two years. In that context, the June 2014 order appears to be directed at preventing the parties that were subject to the 2012 Judgment from prolonging the litigation, not to disposing of other unidentified claims.

Defendants also point to a 2015 order in the 2020 case, dismissing another intervenor's claim for lack of subject matter jurisdiction, when the court referred to the 2012 Judgment as a final judgment.[41] But, the court referred only to the claim by Hill's former attorney, suggesting that the 2012 Judgment was final as to that claim, but not necessarily as to all other

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[40] *Mire v. Full Spectrum Lending Inc.*, 389 F.3d 163, 167 (5th Cir. 2004) ("The effect of an administrative closure is no different from a simple stay, except that it affects the count of active cases pending on the court's docket[.]"). In that case, this court determined that the district court did not enter a final judgment, even though the case was "closed." *Id.*

[41] The claim at issue in that order was very similar to this case: that intervenor ("BFS") sought to recover a debt secured by a note executed by Ahtrey; the funds on the note had been used to pay Hill's attorney fees in the 2020 case. The court determined that it did not have supplemental jurisdiction over the claim, even though Defendants argued in the alternative that BFS was "assert[ing] the same claims [as] PBL." BFS later refiled in a separate case, and the court granted summary judgment.

claims. At best, this is tenuous evidence of the court's intent to dispose of PBL's claim.

As for the second exception, the fact that the settlement was contingent on the court's disbursement of funds from the 2020 case undermines Defendants' contention that PBL abandoned its claim. If the 2012 Judgment was final as to PBL, then PBL had no claim to settle. Defendants contend that the district court "had no jurisdiction over" the settlement agreement and did not "ratify" it. But the settlement agreement explains why PBL did not pursue its claim; that is, it could not hasten the court's disbursement of the 2020 settlement funds. The court retained jurisdiction over the claim because PBL had not moved to dismiss the case voluntarily; per the terms of the settlement, it would not do so until the district court had allowed disbursement of the funds. The court denied the disbursement request because "[t]he funds in the Court's registry are only to be distributed after the [other creditors'] claims have been resolved." PBL moved for summary judgment shortly after the court ruled that no funds remained: PBL could not have acted earlier.[42]

The cases that Defendants cite are distinguishable. In *Vaughn v. Mobil Oil Exploration and Producing Southeast, Inc.*, the court had ordered defendant Mobil and cross-defendant EBI to submit their cross-claims "to the court for a determination of the merits on the briefs and the evidence in the record."[43] Mobil accordingly moved for summary judgment on its cross-

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[42] Defendants do not dispute that the settlement agreement was contingent on the district court's action. *Cf. Baccus v. Parrish*, 45 F.3d 958, 959 (5th Cir. 1995) (describing a settlement that was contingent on action by a state legislature).

[43] 891 F.2d at 1196.

claim against EBI; although EBI opposed the motion, it did not move for summary judgment on its own cross-claim.[44] The court at first denied Mobil's motion, but when EBI failed to appear for a pre-trial conference, it granted judgment in favor of Mobil and against EBI.[45] This court held that the district court had intended the judgment to be final and that EBI had abandoned its claim.[46] Similarly, in *DIRECTV, Inc. v. Budden*, the plaintiff brought several claims, but moved for summary judgment, which the district court granted, as to only one of them.[47] This court ruled that the plaintiff had abandoned its other claims by addressing only the single claim and stating that it intended to abandon the others.[48] The district court also labeled its judgment "final," suggesting it intended to "treat[] the claims it disposed of as the only live claims," although the word "final" is not dispositive of that intent.[49]

Here, the court did not label its 2012 Judgment "final"—it only used that label in later filings. In addition, *DIRECTV* and *Vaughn* both involved parties who either (1) sought summary judgment on less than all claims or (2) responded to a motion on less than all claims, indicating the other neglected claims were abandoned. Here, however, PBL did not pursue some

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[44] *Id.*

[45] *Id.*

[46] *Id.* at 1197–98 ("The fact that the December judgment did not mention appellee's cross-claim is neither here nor there; appellee's own behavior caused its claim to lapse. It is clear to us that the district court believed itself entirely quit of the case.").

[47] 420 F.3d at 525.

[48] *Id.* at 525–56.

[49] *Id.* at 526.

claims while neglecting others. Instead, it took no action until it was certain that it would not receive funds pursuant to the settlement.

This case more closely resembles *McLaughlin v. Mississippi Power Co*. There, the court dismissed the plaintiff's complaint, but declined to rule on three counterclaims and a third-party complaint.[50] This court held that even though "the order did purport to dismiss the entire case," "the district court continued to exercise jurisdiction over the case," indicating that the district court did not intend the order to be a final judgment.[51]

PBL promptly pursued its claim after learning that it would not receive funds and did not pursue other claims while neglecting this one; and the district court continued to exercise jurisdiction over this case for years after the 2012 Judgment. PBL thus did not abandon its claim and the 2012 Judgment was not final with respect to PBL. The district court had jurisdiction.

E. Summary Judgment on Defendants' Counterclaim

Finally, Defendants contend that the district court erred in granting summary judgment to PBL on Defendants' breach-of-contract counterclaim. The district court did so because it determined that the Defendants had not proved their damages.[52] Defend-

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[50] *McLaughlin*, 376 F.3d at 350.

[51] *Id.* at 351.

[52] Defendants spent much of oral argument attacking the magistrate judge's bad faith finding. But we need not address that finding here because (1) the district court explicitly stated it would reach the same conclusion even if there was no bad faith,

ants do not explicitly contest that conclusion, contending instead that PBL had defaulted on the counterclaim because it never filed an answer. Defendants did not raise this argument before the magistrate judge or the district court, so we review it for plain error only.[53]

The only effect of failing to answer is that the allegations in the complaint (or counterclaim) are deemed admitted.[54] It does not automatically result in either an entry of default or a default judgment.[55] In *Trotter v. Jack Anderson Enterprises, Inc.*, this court declined to reverse a grant of summary judgment solely because the moving party failed to deny an allegation in an answer.[56] We explained in *Trotter* that the purpose of this rule is "to avoid unfair surprise by

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and (2) Defendants failed to address the bad faith finding in their opening brief.

[53] *See Rushing*, 185 F.3d at 506.

[54] FED. R. CIV. P. 8(b)(6); *cf.* FED. R. CIV. P. 12(a)(1)(B) (a party must answer a counterclaim). Moreover, allegations relating to the amount of damages are an exception to this rule, though it is unclear whether this exception also applies to the *existence* of damages. *See* FED. R. CIV. P. 8(b)(6); *see also* CHARLES ALAN WRIGHT & ARTHUR MILLER ET AL., 5 FED. PRAC. & PROC. CIV. § 1279 (3d ed.) ("[A]verments of damages specifically are exempted from the effect of Rule 8(b)(6) and are not admitted by a failure to deny.").

[55] *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996) ("Because it is important to keep straight default language, a review of the terms regarding defaults is appropriate. A *default* occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules. An *entry of default* is what the clerk enters when the default is established by affidavit or otherwise. After defendant's default has been entered, plaintiff may apply for a judgment based on such default. This is a *default judgment.*" (citation omitted)); *see* FED. R. CIV. P. 55(a) & (b).

[56] 818 F.2d 431, 436 (5th Cir. 1987).

the party who failed to file a responsive pleading."[57] But "[the defendant's] motion for summary judgment, while not a pleading responsive to a complaint, gave [the plaintiff] plain notice that the [allegation] was a matter to be litigated."[58] We stated that "[the defendant's] failure to file an answer, therefore, had no effect on the rights of [the plaintiff] and cannot serve as a ground for reversal."[59] PBL's summary judgment motion notified Defendants that damages was an issue to be litigated, so the district court's grant of summary judgment was not error, let alone plain error. We therefore affirm summary judgment for PBL on the Defendants' counterclaim.[60]

III. CONCLUSION

We AFFIRM the district court's ruling for the reasons stated above.

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[57] *Id.*

[58] *Id.* (citations omitted).

[59] *Id.* (citation omitted).

[60] Defendants do not contest the merits of the summary judgment ruling, i.e., whether there was a genuine dispute as to a material fact. *See* FED. R. CIV. P. 56(a). As a result, we need not address the apparent uncertainty about which state's law to apply: The Note and Guaranty state that New York law governs those contracts, but the magistrate judge applied Texas law when granting summary judgment, which the parties do not contest in their briefs. Moreover, the elements of the claims are substantially similar under each state's law. *Compare Haggard v. Bank of Ozarks Inc.*, 668 F.3d 196, 199 (5th Cir. 2012) (citing Texas law), *and UMLIC VP LLC v. T & M Sales & Envtl. Sys., Inc.*, 176 S.W.3d 595, 611 (Tex. App.—Corpus Christi-Edinburg 2005, rev. denied), *with Superior Fid. Assurance, Ltd. v. Schwartz*, 893 N.Y.S.2d 256, 258 (N.Y. App. Div. 2010), *and Chamberlain v. Amato*, 688 N.Y.S.2d 345, 346 (N.Y. App. Div. 1999).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10272

CAMPBELL HARRISON & DAGLEY, L.L.P., *et al.*,

Plaintiffs

v.

PBL MULTI-STRATEGY FUND, L.P.,

Intervenor-Plaintiff-Appellee

v.

ALBERT G. HILL, III, individually, and as a Beneficiary of the Margaret Hunt Trust Estate, derivatively on behalf of the Margaret Hunt Trust Estate, individually, as a beneficiary of the Haroldson Lafayette Hunt Jr. Trust Estate, and derivatively on behalf of the Haroldson Lafayette Hunt Jr. Trust; ERIN NANCE HILL,

Defendants-Appellants

AHTREY INVESTMENTS, L.L.C.

Intervenor Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 07/13/18, 5 Cir., _____, _____ F.3d _____)

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 02/16/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al*.,

Plaintiffs,

ALBERT G. HILL III, *et al*.,

Defendants.

DECLARATION OF TROY D. PHILLIPS

I declare under penalty of perjury that the following statements are true and correct.

1. I am an attorney with the law firm of Glast, Phillips & Murray, P.C. and am an attorney involved with the above lawsuit. I am also the Liquidator of PBL Holdings, LLC, the general partner of PBL Capital, L.P., which is the general partner of PBL Multi-Strategy Fund, L.P. ("PBL"). As such, I have custody and control of the documents contained in the Appendix to the Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Judgment on the Pleadings and Summary Judgment on its Claim in Intervention with support brief. These documents are kept by PBL in the regular course of its business. Each of the following documents contained in the Appendix is the original or an exact duplicate of the originals:

a. Settlement and Release Agreement dated January 26, 2012, by and between PBL, Hill and Ahtrey (referred to in the PBL motion as the "Agreement.")

b. $5,000,000 Revolving Credit Note dated December 26, 2007 executed by Ahtrey payable to PBL (referred to in the PBL motion as the "Note.")

c. Guarantee and Collateral Agreement dated December 26, 2007 executed by Hill in favor of PBL in connection with the Note (referred to in the PBL motion as the "Guaranty.")

2. PBL advanced $2,600,000 pursuant to the Note as evidenced by its books of account and records. A summary of the dates and amounts of each advance as taken from the PBL books and records is as follows:

December 27, 2007	$1,150,000
February 29, 2008	$ 250,000
April 3, 2008	$ 250,000
May 2, 2008	$ 250,000
June 11, 2008	$ 250,000
August 29, 2008	$ 250,000
February 18, 2009	$ 100,000
March 23, 2009	$ 100,000
Total	$2,600,000

3. PBL is the owner and holder of the Note and has the original in its possession.

4. The total amount due and owing on the Note as of February 15, 2016, after all offsets, payments and credits is $8,172,973.25 comprised of the following:

Principal	$2,600,000.00
Pre-maturity interest to December 26, 2009 from the date of each advance at 18% per annum (net of a credit of $46,861.93)	$ 760,013.25
Post-maturity interest on $3,360,013.25 at 23.32% (18% + 5% X 360/365) from December 26, 2009 to February 15, 2016	$4,812,960.00
	$8,172,973.25

The post-maturity per diem rate is $2,146.73 ($3,360,013.25 X 23.32% = $783,555.07 ÷ 365 = $2,146.73)

5. The Glast, Phillips & Murray, P.C. invoices and summary of professional fees and expenses (App. pp. 81–168) are kept by Glast, Phillips & Murray, P.C. in the regular course of its business. It was in the regular course of that business for an employee or representative of Glast, Phillips & Murray, P.C. to prepare and transmit invoices. Each invoice was made at or near the date on each respective invoice. These invoices show that through January 31, 2016, PBL was billed and paid $75,574.96 for work in this matter. Unbilled time from January 1, 2016 through February 15, 2016 amounts to $16,000 before any adjustments.

6. Effective February 5, 2016 the GPM fee agreement was converted to a contingent fee agreement. A reasonable fee for concluding this case in the trial court, considering time so far expended and anticipating a response by Defendants to PBL's motion and a reply to that response, would be $50,000.

7. Based on my review of the proceedings in this case and related cases, collecting a judgment against

Ahtrey and Hill will be, at best, challenging. Mr. Hill has evidently done everything conceivable to place his assets beyond the reach of his creditors. It may be fairly anticipated that a huge effort will be required to collect PBL's judgment. Considering the contingent nature of the fee and the difficulty in collecting the judgment, an additional $1 million would be a reasonable fee for GPM's services in this matter.

EXECUTED under penalty of perjury in Dallas, Texas on the 16th day of February, 2016.

/s/ Troy D. Phillips
Troy D. Phillips

APPENDIX D

GUARANTEE AND COLLATERAL AGREEMENT, dated as of December 26, 2007, made by ALBERT G. HILL, III (the "Guarantor"), in favor of PALM BEACH MULTI-STRATEGY FUND, L.P., its successors and assigns (the "Lender") as payee under the Revolving Credit Note, dated as of December 26, 2007 (as amended, supplemented or otherwise modified from time to time, the "Note"), executed and delivered by AHTREY INVESTMENTS, LLC, a Texas limited liability company (the "Borrower"), in favor of the Lender.

WITNESSETH:

WHEREAS, pursuant to the Note, the Lender has agreed to make extensions of credit to the Borrower upon the terms and subject to the conditions set forth therein;

WHEREAS, the Guarantor, as sole owner of the Claims Proceeds, has assigned all of his right, title and interest in and to the Claims Proceeds to Borrower and is the sole owner of the equity interests of Borrower;

WHEREAS, it is a condition precedent to the obligation of the Lender to make its extensions of credit to the Borrower under the Note that the Guarantor shall have executed and delivered this Guarantee to Lender;

WHEREAS, the Guarantor will derive substantial direct and indirect benefit from the making of the extensions of credit under Note and the making of this Guarantee; and

WHEREAS, this Guarantee is necessary and convenient to the conduct, promotion and attainment of the business and activities of the Borrower;

NOW, THEREFORE, in consideration of the premises and to induce the Lender to make its extensions of credit to the Borrower under the Note, Guarantor hereby agrees with the Lender, as follows:

SECTION I. DEFINED TERMS

1.1 Definitions.

(a) Unless otherwise defined herein, terms defined in the Note and used herein shall have the meanings given to them in the Note. General Intangibles, Certificated Security, Payment Intangibles, Supporting Obligations, Instruments and Commercial Tort Claims are as defined in the New York UCC.

(b) The following terms shall have the following meanings:

> "B&B Coates Claim": the amount required to pay the legal fee and expense obligations of Guarantor to Bickel & Brewer under the June 30, 2006 Letter Agreement among Guarantor and Bickel &Brewer.
>
> "B&B Hunt Claim": the amount required to pay the legal fee and expense obligations of Guarantor to Bickel & Brewer under the November 8, 2007 Letter Agreement, as amended by an amendment thereto dated December 26, 2007, each among Guarantor and Bickel & Brewer.
>
> "Borrower Obligations": the collective reference to the unpaid principal of and interest under the Note and all other obligations and liabilities of the Borrower (including, without limitation, interest accruing at the then applicable rate provided in the Note after the maturity of the Note and interest accruing at

the then applicable rate provided in the Note after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to the Borrower, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding) to the Lender, whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, the Note, the Collateral Agreement, or any other Loan Document, or any other document made, delivered or given in connection therewith, in each case whether on account of principal, interest, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to the Lender that are required to be paid by the Borrower pursuant to the terms of any of the foregoing agreements).

"Claims": (a) the claims, causes of action, and rights to relief Guarantor, in any capacity, has, has ever had, or has in the future against any person or entity, including but not limited to Theodate Coates, Individually, as purported Trustee of the Fisher Trust, and in any other capacity, arising out of or relating to the claims, facts, events, and/or issues raised or tbat could have been raised in the lawsuit styled *Al G. Hill, III, Individually and on behalf of the Fisher Trust, Plaintiffs, v. Theodate Coates, Defendant,* pending in the Supreme Court of the State of New York, County of New York, Index No. 06/603162 (the "Coates Lawsuit") and (b) the claims,

causes of action, and rights to relief Guarantor, in any capacity, has, has ever had, or has in the future against any person, including but not limited to Tom Hunt, Individually and in his capacity as Trustee of the Margaret Hunt Trust Estate and as Trustee of the Haroldson Lafayette, Jr. Trust Estate, William Schilling, Individually and in his capacity as a member of the Advisory Board of the Margaret Hunt Trust Estate and as a member of the Advisory Board of the Haroldson Lafayette Hunt, Jr. Trust Estate, Ivan Irwin, Jr. Albert G. Hill, *Jr.,* Alinda K. Wikert, Lyda Hill, Heather Washburne, and/or Elisa M. Summers, arising out of or relating to the claims, facts, events, and/or issues raised or that could have been raised in the lawsuit styled *Albert G. Hill, III, et al. v. Tom Hunt, et al.,* pending i n the 14'h District Court of Dallas County, Texas, Cause No. 07-13192 (the "Hunt Lawsuit").

"Claims Proceeds": any and all proceeds, recoveries, awards, judgments, settlements, monies, consideration and benefits from, of, and as a result of any and all of the Claims, including but not limited to the Claims arising out of or relating to the Coates Lawsuit and the Claims arising out of or relating to the Hunt Lawsuit.

"Coates Lawsuit Claim": the Claims arising out of or relating to the Coates Lawsuit.

"Collateral": the Primary Collateral (as defined in Section 3.1) and the Back-Up Collateral (as defined in Section 3.2).

"Collateral Account": the collateral and reserve account established in the name of the Lender with The Bank of New York, in New York, New York, account number 362395 (with specific reference to PBMS AGH Collateral Reserve Account) and maintained under the Lender's sole dominion and control.

"Guarantee": this Guarantee and Collateral Agreement, as the same may be amended, supplemented or otherwise modified from time to time.

"Guarantor Obligations": all obligations and liabilities of Guarantor which may arise under or in connection with this Guarantee (including, without limitation, Section 2) whether on account of guarantee obligations, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to the Lender that are required to be paid by Guarantor pursuant to the terms of this Guarantee or any other Loan Document).

"Investment Property": the collective reference to (a) all "investment property" as such term is defined in Section 9-102(a)(49) of the New York UCC and (b) whether or not including "investment property" as so defined, the Membership Interest.

"Membership Interest": as defined in Section 3.1(a).

"New York UCC": the Uniform Commercial Code as from time to time in effect in the State of New York.

"Proceeds": all "proceeds" as such term is defined in Section 9-102(a)(64) of the Uniform Commercial Code in effect in the State of New York on the date hereof, and, in any events, Including, without limitation, all dividends or distributions of income, profits, surplus or other payment from or with respect to the Membership Interests or collections thereon.

1.2 Other Definitional Provisions.

(a) The words "hereof," "herein", "hereto" and "hereunder" and words of similar import when used in this Guarantee shall refer to this Guarantee as a whole and not to any particular provision of this Guarantee, and Section and Schedule references are to this Guarantee unless otherwise specified.

(b) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

SECTION 2. GUARANTEE

2.1 Guarantee.

(a) The Guarantor hereby absolutely, unconditionally and irrevocably, guarantees to the Lender and its successors, indorsees, transferees and assigns, the prompt and complete payment and performance by the Borrower when due (whether at stated maturity, by acceleration or otherwise) of the Borrower Obligations. Notwithstanding the preceding, Guarantor shall have one Business Day to effect payment after Borrower's failure to pay any Borrower Obligation when due.

(b) The guarantee contained in this Section 2 shall remain in full force and effect until all the Borrower Obligations and the Guarantor Obligations under the guarantee contained in this Section 2 shall have been

satisfied by payment in full and the Revolving Credit Commitment shall be terminated, notwithstanding that from time to time during the term of the Note the Borrower may be free from any Borrower Obligations.

(c) No payment made by the Borrower, the Guarantor, any other guarantor or any other Person or received or collected by the Lender from the Borrower, the Guarantor, any other guarantor or any other Person by virtue of any action or proceeding or any set-off or appropriation or application at any time or from time to time in reduction of or in payment of the Borrower Obligations shall be deemed to modify, reduce, release or otherwise affect the liability of Guarantor hereunder which shall, notwithstanding any such payment (other than any payment received or collected from such Guarantor in respect of the Borrower Obligations), remain liable for the Borrower Obligations until the Borrower Obligations are paid in full and the Revolving Credit Commitment is terminated.

2.2 No Subrogation. Notwithstanding any payment made by Guarantor hereunder or any set-off or application of funds of Guarantor by the Lender, Guarantor shall not be entitled to be subrogated to any of the rights of the Lender against the Borrower or Guarantor or any collateral security or guarantee or right of offset held by the Lender for the payment of the Borrower Obligations, nor shall Guarantor seek or be entitled to seek any contribution or reimbursement from the Borrower in respect of payments made by Guarantor hereunder, until all amounts owing to the Lender by the Borrower on account of the Borrower Obligations are paid in full and the Revolving Credit Commitment is terminated. If any amount shall be paid to any Guarantor on account of such subrogation

rights at any time when all of the Borrower Obligations shall not have been paid in full, such amount shall be held by Guarantor in trust for the Lender, segregated from other funds of Guarantor, and shall, forthwith upon receipt by Guarantor, be turned over to the Lender in the exact form received by Guarantor (duly indorsed by Guarantor to the Lender, if required), to be applied against the Borrower Obligations, whether matured or unmatured, in such order as the Lender may determine.

2.3 Amendments, etc. with respect to the Borrower Obligations Guarantor shall remain obligated hereunder notwithstanding that, without any reservation of rights against Guarantor and without notice to or further assent by Guarantor, any demand for payment of any of the Borrower Obligations made by the Lender may be rescinded by the Lender and any of the Borrower Obligations continued, and the Borrower Obligations or the liability of any other Person upon or for any part thereof, or any collateral security or guarantee therefor or right of offset with respect thereto, may, from time to time, in whole or in part, be renewed, extended, amended, modified, accelerated, compromised, waived, surrendered or released by the Lender, and the Note and the other Loan Documents and any other documents executed and delivered in connection therewith may be amended, modified, supplemented or terminated, in whole or in part, as the Lender may deem advisable from time to time, and any collateral security, guarantee or right of offset at any time held by the Lender for the payment of the Borrower Obligations may be sold, exchanged, waived, surrendered or released. The Lender shall have no obligation to protect, secure, perfect or insure any Lien at any time held by it as security for the Borrower

Obligations or for the guarantee contained in this Section 2 or any property subject thereto.

2.4 Guarantee Absolute and Unconditional. Guarantor waives any and all notice of the creation, renewal, extension or accrual of any of the Borrower Obligations and notice of or proof of reliance by the Lender upon the guarantee contained in this Section 2 or acceptance of the guarantee contained in this Section 2; the Borrower Obligations, and any of them, shall conclusively be deemed to have been created, contracted or incurred, or renewed, extended, amended or waived, in reliance upon the guarantee contained in this Section 2; and all dealings between the Borrower and the Guarantor, on the one hand, and the Lender, on the other hand, likewise shall be conclusively presumed to have been had or consummated in reliance upon the guarantee contained in this Section 2. Guarantor waives notice of acceleration, notice of intent to accelerate, diligence, presentment, protest, demand for payment and notice of default or nonpayment to or upon the Borrower or Guarantor with respect to the Borrower Obligations. Guarantor understands and agrees that the guarantee contained in this Section 2 shall be construed as a continuing, absolute and unconditional guarantee of payment without regard to (I) the validity or enforceability of the Note or any other Loan Document, any of the Borrower Obligations or any other collateral security therefor or guarantee or right of offset with respect thereto at any time or from time to time held by the Lender, (2) any defense, set-off or counterclaim (other than a defense of payment or performance) which may at any time be available to or be asserted by the Borrower or any other Person against the Lender, or (3) any other circumstance whatsoever (with or without notice to or knowledge of the Borrower or

Guarantor) which constitutes, or might be construed to constitute, an equitable or legal discharge of the Borrower for the Borrower Obligations, or of Guarantor under the guarantee contained in this Section 2, in bankruptcy or in any other instance. When making any demand hereunder or otherwise pursuing its rights and remedies hereunder against Guarantor, the Lender may, but shall be under no obligation to, make a similar demand on or otherwise pursue such rights and remedies as it may have against the Borrower or any other Person or against any collateral security or guarantee for the Borrower Obligations or any right of offset with respect thereto, and any failure by the Lender to make any such demand, to pursue such other rights or remedies or to collect any payments from the Borrower or any other Person or to realize upon any such collateral security or guarantee or to exercise any such right of offset, or any release of the Borrower or any other Person or any such collateral security, guarantee or right of offset, shall not relieve Guarantor of any obligation or liability hereunder, and shall not impair or affect the rights and remedies, whether express, implied or available as a matter of law, of the Lender against Guarantor. For the purposes hereof "demand" shall include the commencement and continuance of any legal proceedings.

2.5 Reinstaternent.□The guarantee contained in this Section 2 shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereof, of any of the Borrower Obligations is rescinded or must otherwise be restored or returned by the Lender upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of the Borrower or Guarantor, or upon or as a result of the appointment of a receiver, intervenor or conservator of, or trustee or similar officer for, the Borrower or Guarantor or any

substantial part of its or his property, or otherwise, all as though such payments had not been made.

2.6 Payments. Guarantor hereby guarantees that payments hereunder will be paid to the Lender without set-off or counterclaim.

SECTION 3. GRANT OF SECURITY INTEREST

3.1 Primary Security Interest Guarantor hereby grants to the Lender a security interest in, and lien on, all of Guarantor's right, title and interest in the following property, whether now owned or hereafter acquired (collectively, the "Primary Collateral") as collateral security for the prompt and complete payment and performance when due (whether at the stated maturity, by acceleration or otherwise) of the Guarantor Obligations:

(a) The "Membership Interest" meaning the membership interest listed on Schedule 3, together with any other membership interest certificates, membership interests, interests, options or rights of any nature whatsoever in respect of the Membership Interest in Borrower listed on Schedule 3 that may be issued or granted to, or held by, Guarantor;

(b) all General intangibles (including Payment Intangibles) constituting the Membership Interest;

(c) all Investment Property constituting the Membership Interest;

(d) all books and records pertaining to the Primary Collateral; and

(e) to the extent not otherwise included, all Proceeds and products of any and all of the foregoing, all Supporting Obligations (as defined in the New York UCC) in respect of the foregoing and all collateral

security and guarantees given by any Person with respect to any of the foregoing.

3.2 Back-Up Security Interest Guarantor intends that the assignment by him to Borrower pursuant to the Assignment of Claims Proceeds be an outright assignment and transfer of the Claims Proceeds to Borrower, as opposed to a collateral assignment. However, in the event and to the extent that any or all of the assignment pursuant to the Assignment of Claims Proceeds is held or otherwise determined to be ineffective, invalid or unenforceable, then Guarantor hereby grants to the Lender, effective as of the date of this Guarantee, a security interest in, and lien on, all of Guarantor's right, title and interest in the following property, whether now owned or hereafter acquired (collectively, the "Back-Up Collateral"), as collateral security for the prompt and complete payment and performance when due (whether at the stated maturity, by acceleration or otherwise) of the Guarantor Obligations:

(a) the Coates Lawsuit Claim;

(b) the Commercial Tort Claim constituting the Coates Lawsuit Claim;

(c) the Claims Proceeds;

(d) all General Intangibles (including Payment Intangibles) constituting the Claims Proceeds, or contractual or other rights to the payment of any and all Claims Proceeds; and

(e) to the extent not otherwise included, all Proceeds and products of any and all of the foregoing, all Supporting Obligations (as defined in the New York UCC) in respect of the foregoing and all collateral

security and guarantees given by any Person with respect to any of the foregoing.

SECTION 4. REPRESENTATIONS AND WARRANTIES

To induce the Lender to make its extensions of credit to the Borrower under the Note, Guarantor hereby represents and warrants to the Lender that:

4.1 Compliance with Law. Except as disclosed in Schedule 4.1, Guarantor is in compliance with all Requirements of Law and Contractual Obligations except to the extent that the failure to comply therewith could not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

4.2 Power; Authorization; Enforceable Obligations. Guarantor has the power and authority, and the legal capacity and right, to make, deliver and perform this Guarantee and the Assignment. Guarantor has taken all necessary action to authorize the execution, delivery and performance of this Guarantee and the Assignment. No consent or authorization of, filing with, notice to or other act by or in respect of, any Governmental Authority or any other Person (each, a "Filing") is required in connection with the execution, delivery, performance, validity or enforceability of this Guarantee or the Assignment. Each of the Guarantee and the Assignment has been duly executed and delivered by Guarantor and constitutes a legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles

(whether enforcement is sought by proceedings in equity or at law).

4.3 No Legal Bar. The execution, delivery and performance of this Guarantee and the Assignment by Guarantor will not violate any Requirement of Law or any Contractual Obligation of Guarantor and will not result in, or require, the creation or imposition of any Lien on any of Guarantor's properties or revenues pursuant to any Requirement of Law or any such Contractual Obligation. No Requirement of Law or Contractual Obligation applicable to Guarantor could reasonably be expected to have a Material Adverse Effect.

4.4 Valid Security Interest. This Guarantee is effective to create in favor of the Lender, legal, valid and enforceable security interests in the Collateral described herein. Financing statements in appropriate form have been filed in the appropriate offices and the Liens created under this Guarantee constitute fully perfected Liens in all right, title and interest of the Guarantor in the Collateral, as security for the Guarantor Obligations.

4.5 Perfected First Priority Lien. The security interests granted pursuant to this Guarantee (a) upon completion of the filings and other actions specified on Schedule 1 (which, in the case of all filings and other documents referred to on said Schedule, have been delivered to the Lender in completed and duly executed form) will constitute valid perfected security interests in the Collateral in favor of the Lender, as collateral security for the Guarantor Obligations, enforceable in accordance with the terms hereof against all creditors of Guarantor and any Persons purporting to purchase the Collateral from Guarantor and (b) are prior to any other Liens on the Collateral

in existence on the date hereof except for, in the case of the Back-Up Collateral (other than the Coates Lawsuit Claim) only, the Liens created by the Collateral Agreement, the B&B Hunt Claim and the B&B Coates Claim.

4.6 Principal Residence. On the date hereof, Guarantor's principal residence is specified on Schedule 2.

4.7 Ownership of Collateral. The Guarantor is the owner of 100% of (a) the ownership interests in the Borrower, free and clear of all Liens except for the Lien created by this Guarantee, and (b) the Claims, free and clear of all Liens except for the Lien created by this Guarantee on the Coates Lawsuit Claim. Immediately prior to the Assignment, Guarantor was the owner of 100% of the Claims Proceeds, free and clear of all Liens except for the B&B Hunt Claim and the B&B Coates Claim. For the avoidance of doubt, Guarantor further represents and warrants to Lender that the Membership Interest, the Claims, his beneficiary interests in the trust estates referenced in Section 4.9, and, immediately prior to the Assignment, the Claims Proceeds are his "separate property" for purposes of applicable community property law.

4.8 Membership Interest. The Membership Interest is a "security" (within the meaning of Article 8 of the New York UCC) governed by Article 8 of the New York UCC (and no terms of such Membership Interest provide otherwise), is certificated, and is Investment Property. The certificate evidencing the Membership Interest has been delivered to Lender duly indorsed by Guarantor. The Membership Interest constitutes all outstanding membership interests in the Borrower. The Membership Interest has been duly and validly issued and is fully paid and nonassessable.

4.9 Guarantor Status. Guarantor is a beneficiary of each of the Haroldson L. Hunt, Jr. Trust Estate and the Margaret Hunt Trust Estate. Erin N. Hill, Guarantor's spouse, is not a beneficiary of either the Haroldson L. Hunt, Jr. Trust Estate or the Margaret Hunt Trust Estate.

SECTION 5. COVENANTS

Guarantor covenants and agrees with the Lender that, from and after the date of this Guarantee until the Guarantor Obligations shall have been paid in full, and the Revolving Credit Commitment shall have terminated:

5.1 Compliance with Organizational Documents and Note. Guarantor shall comply with all obligations, requirements and restrictions in the representations, warranties and covenants contained in the Borrower's organizational documents and the Note to the extent such obligations, requirements and restrictions are applicable to Guarantor.

5.2 Maintenance of Perfected Security Interest; Further Documentation; Delivery.

(a) Guarantor shall maintain the security interests created by this Agreement as perfected security interests having at least the priority described in Section 4.5 and shall defend such security interests against the claims and demands of all Persons whomsoever.

(b) At any time and from time to time, upon the written request of the Lender, and at the sole expense of Guarantor, Guarantor will promptly and duly execute and deliver, and have recorded, such further instruments and documents and take such further actions as the Lender may reasonably request for the purpose of obtaining or preserving the full benefits of

this Guarantee and of the rights and powers herein granted, including, without limitation, the filing of any financing or continuation statements under the Uniform Commercial Code (or other similar laws) in effect in any jurisdiction with respect to the security interests created hereby, and, in the case of Investment Property and any other relevant Collateral, taking any actions necessary to enable the Lender to obtain "control" (within the meaning of the New York UCC) with respect thereto.

(c) If any amount payable under or in connection with any of the Collateral shall be or become evidenced by any Instrument of Certificated Security, such Instrument or Certificated Security shall be promptly delivered to Lender duly indorsed in a manner reasonably satisfactory to Lender to be held as Collateral pursuant to this Guarantee.

5.3 Changes in Principal Residence, Name Guarantor will provide 15 days' prior written notice to the Lender of any change in his principal residence and deliver to the Lender all additional executed financing statements and other documents reasonably requested by the Lender to maintain the validity, perfection and priority of the security interests provided for herein.

5.4 Restrictions Related to Borrower and Collateral Guarantor will not (i) vote to enable, or take any other action to permit, Borrower to issue or grant any ownership interests of any nature (other than the Membership Interest currently held by him) or any right to purchase any ownership interests of any nature of Borrower, (ii) sell, assign, transfer, gift, exchange, or otherwise dispose of, or grant a security interest in or Lien on, the Collateral or any interest therein except for, in the case of the Back-Up

Collateral only, the Assignment, the Lien on the Back-Up Collateral created by this Guarantee, the B&B Hunt Claim and the B&B Coates Claim, (iii) cease to own 100% of (a) the ownership interests in Borrower, free and clear of all Liens except for the Lien created by this Guarantee, and (b) the Claims, free and clear of all Liens except for the Lien created by this Guarantee on the Coates Lawsuit Claim, or (iv) vote to enable or take any action to permit, any modification or amendment to the Borrower's organizational or formation documents.

5.5 Claims Proceeds Upon receipt of any Claims Proceeds (whether directly or in respect of the Membership Interest), Guarantor shall promptly pay over, or direct his counsel to pay over, such Claims Proceeds to the Lender for application pursuant to Section 5.2 of the Collateral Agreement or Section 6.3 hereof, as applicable; provided, however, that Bickel & Brewer may first use recoveries from the Hunt Lawsuit to satisfy the B&B Hunt Claim and may first use recoveries from the Coates Lawsuit to satisfy the B&B Coates Claim. For the avoidance of doubt, Bickel & Brewer may not use recoveries from the Hunt Lawsuit to satisfy the B&B Coates Claim and may not use recoveries from the Coates Lawsuit to satisfy the B&B Hunt Claim.

5.6 Membership Interest. If Guarantor shall become entitled to receive or shall receive any certificate (including, without limitation, any certificate representing a dividend or a distribution in connection with any reclassification, increase or reduction of capital or any certificate issued in connection with any reorganization), option or rights in respect of the ownership interests in Borrower, whether in addition to, in substitution of, as a conversion of, or in exchange for,

all or any portion of the Membership Interest, or otherwise in respect thereof, Guarantor shall accept the same as the agent of the Lender, hold the same in trust for the Lender and deliver the same forthwith to the Lender in the exact form received, duly indorsed by Guarantor to the Lender, if required, together with an undated membership interest or other applicable power covering such certificate duly executed in blank by Guarantor, to be held by the Lender, subject to the terms hereof, as additional collateral security for the Guarantor Obligations. Any sums paid upon or in respect of the Membership Interest upon the liquidation or dissolution of Borrower shall be paid over to the Lender to be held by it hereunder as additional collateral security for the Guarantor Obligations, and in case any distribution of capital shall be made on or in respect of the Membership Interest, or any property shall be distributed upon or with respect to the Membership Interest pursuant to the recapitalization or reclassification of the capital of Borrower or pursuant to the reorganization thereof, the property so distributed shall, unless otherwise subject to a perfected security interest in favor of the Lender, be delivered to the Lender to be held by it hereunder as additional collateral security for the Guarantor Obligations. If any sums of money or property so paid or distributed in respect of the Membership Interest shall be received by Guarantor, Guarantor shall, until such money or property is paid or delivered to the Lender, hold such money or property in trust for the Lender, segregated from other funds of Guarantor, as additional collateral security for the Guarantor Obligations.

SECTION 6. REMEDIAL PROVISIONS

6.1 Membership Interest

(a) Unless an Event of Default shall have occurred and be continuing and the Lender shall have given notice to the Guarantor of the Lender's intent to exercise its corresponding rights pursuant to Section 6.1(b), Guarantor shall be permitted to exercise all voting and other rights with respect to the Membership Interest; provided, however, that no vote shall be cast or right exercised or other action taken which, in the Lender's reasonable judgment, would impair the Collateral or which would be inconsistent with or result in any violation of any provision of the Revolving Credit Note, this Guarantee or any other Loan Document, or the Borrower's organizational or formation documents.

(b) Whether or not an Event of Default shall have occurred and be continuing, the Lender shall have the right to receive any and all distributions, payments or other Proceeds paid in respect of the Membership Interest to the extent such distributions, payments or other Proceeds constitute Claims Proceeds, and make application thereof pursuant to Section 5.2 of the Collateral Agreement or Section 6.3 hereof, as applicable. If an Event of Default shall occur and be continuing, (i) Lender shall have the right to receive any or all distributions, payments or other Proceeds paid in respect of the Membership Interest and make application thereof pursuant to Section 6.3 and (ii) any or all of the Membership Interest shall be registered in the name of the Lender or its nominee, and the Lender or its nominee may thereafter exercise (x) all voting and other rights pertaining to such Membership Interest at any meeting of owners of the Borrower and (y) any

and all rights of conversion, exchange and subscription and any other rights, privileges or options pertaining to such Membership Interest as if it were the absolute owner thereof, all without liability except to account for property actually received by it, but the Lender shall have no duty to Guarantor to exercise any such right, privilege or option and shall not be responsible for any failure to do so or delay in so doing.

(c) Guarantor hereby authorizes and instructs Borrower to (i) comply with any instruction received by it from the Lender in writing that (x) states that an Event of Default has occurred and is continuing and (y) is otherwise in accordance with the terms of this Guarantee, without any other or further instructions from Guarantor, and Guarantor agrees that Borrower shall be fully protected in so complying, and (ii) unless otherwise expressly permitted hereby, pay any distributions or other payments with respect to the Membership Interest directly to the Lender.

6.2 Claims Proceeds and Proceeds to he Turned Over to Lender (a) Subject to the proviso in Section 5.5, all distributions, payments or other Proceeds paid in respect of the Membership Interest to the extent constituting Claims Proceeds and (b) after an Event of Default shall have occurred and be continuing, all distributions, payments or other Proceeds paid in respect of the Membership Interest, received by Guarantor shall be held by Guarantor in trust for the Lender, segregated from other funds of Guarantor, and shall, forthwith upon receipt by Guarantor, be turned over to the Lender in the exact form received by Guarantor (duly indorsed by Guarantor to the Lender, if required). All Claims Proceeds and Proceeds constituting Collateral received by the Lender hereunder shall be held by the Lender in the Collateral

Account. All Claims Proceeds and Proceeds constituting Collateral while held by the Lender in the Collateral Account (or by Guarantor in trust for the Lender) shall continue to be held as collateral security for all the Borrower Obligations or Guarantor Obligations, as applicable, and shall not constitute payment thereof until applied as provided in Section 5.2 of the Collateral Agreement or Section 6.3 hereof.

6.3 Application of Claims Proceeds and Proceeds—if an Event of Default shall have occurred and be continuing or otherwise under the circumstances described in Section 6.1(b), at any time, at the Lender's election, the Lender shall apply all or any part of the Claims Proceeds or Proceeds constituting Collateral, as the case may be, whether or not held in the Collateral Account, in payment of the Guarantor Obligations in the following order:

First, to pay incurred and unpaid fees and expenses of the Lender under the Loan Documents;

Second, to the Lender, for application by it towards payment of amounts then due and owing and remaining unpaid in respect of the Guarantor Obligations;

Third, to the Lender, for application by it towards prepayment of the Guarantor Obligations; and

Fourth, any balance remaining after the Guarantor Obligations shall have been paid in full and the Revolving Credit Commitment shall have terminated, shall be paid over to the Borrower or to whomsoever may be lawfully entitled to receive the same.

6.4 Code and Other Remedies—If an Event of Default shall occur and be continuing, the Lender may exercise, in addition to all other rights and remedies granted to it in this Guarantee and in any other

instrument or agreement securing, evidencing or relating to the Guarantor Obligations, all rights and remedies of a secured party under the New York UCC or any other applicable law. Without limiting the generality of the foregoing, the Lender, without demand of performance or other demand, presentment, protest, advertisement or notice of any kind (except any notice required by law referred to below) to or upon Guarantor or any other Person (all and each of which demands, defenses, advertisements and notices are hereby waived), may in such circumstances forthwith collect, receive, appropriate and realize upon the Collateral, or any part thereof, and/or may forthwith sell, lease, assign, give option or options to purchase, or otherwise dispose of and deliver the Collateral or any part thereof (or contract to do any of the foregoing), in one or more parcels at public or private sale or sales, at any exchange, broker's board or office of the Lender or elsewhere upon such terms and conditions as it may deem advisable and at such prices as it may deem best, for cash or on credit or for future delivery without assumption of any credit risk. The Lender shall have the right upon any such public sale or sales, and, to the extent permitted by law, upon any such private sale or sales, to purchase the whole or any part of the Collateral so sold, free of any right or equity of redemption in Guarantor, which right or equity is hereby waived and released. The Lender shall apply the net proceeds of any action taken by it pursuant to this Section 6.4, after deducting all reasonable costs and expenses of every kind incurred in connection therewith or in any way relating to the Collateral or the rights of the Lender hereunder, including, without limitation, reasonable attorneys' fees and disbursements, to the payment in whole or in part of the Guarantor Obligations, as specified in Section 6.3, and

only after such application and after the payment by the Lender of any other amount required by any provision of law, including, without limitation, Section 9615(a)(3) of the New York UCC, need the Lender account for the surplus, if any, to Guarantor. To the extent permitted by applicable law, Guarantor waives all claims, damages and demands it may acquire against the Lender arising out of the exercise by it of any rights hereunder. If any notice of a proposed sale or other disposition of Collateral shall be required by law, such notice shall be deemed reasonable and proper if given at least 10 days before such sale or other disposition.

6.5 Registration

(a) Guarantor recognizes that the Lender may be unable to effect a public sale of any or all the Membership Interest by reason of certain prohibitions contained in the Securities Act and applicable state securities laws or otherwise, and may be compelled to resort to one or more private sales thereof to a restricted group of purchasers which will be obliged to agree, among other things, to acquire such Membership Interest for their own account for investment and not with a view to the distribution or resale thereof. Guarantor acknowledges and agrees that any such private sale may result in prices and other terms less favorable than if such sale were a public sale and, notwithstanding such circumstances, agrees that it is not commercially unreasonable to conduct such a private sale. The Lender shall be under no obligation to delay a sale of any of the Membership Interest for the period of time necessary to permit the Borrower thereof to register such securities for public sale under the Securities Act, or under applicable state securities laws, even if Borrower would agree to do so.

(b) Guarantor agrees to use its commercially reasonable efforts to do or cause to be done all such acts as may be necessary to make such sale or sales of all or any portion of the Membership Interest pursuant to this Section 6.5 valid and binding and in compliance with any and all other applicable Requirements of Law other than the filing of registration, qualification or similar statements under the Securities Act or applicable state securities laws. Guarantor further agrees that a breach of any of the covenants contained in this Section 6.5 will cause irreparable injury to the Lender, that the Lender has no adequate remedy at law in respect of such breach and, as a consequence, that each and every covenant contained in this Section 6.5 shall be specifically enforceable against Guarantor, and Guarantor hereby waives and agrees not to assert any defenses against an action for specific performance of such covenants except for a defense that no Event of Default has occurred under the Revolving Credit Note.

6.6 Deficiency Guarantor shall remain liable for any deficiency if the proceeds of any sale or other disposition of the Collateral are insufficient to pay the Guarantor Obligations and the fees and disbursements of any attorneys employed by the Lender to collect such deficiency.

6.7 Execution of Financing Statements Pursuant to any applicable law, Guarantor authorizes the Lender to file or record financing statements with respect to the Collateral without the signature of Guarantor in such form and in such offices as the Lender reasonably determines appropriate to perfect the security interest of the Lender under this Guarantee. Guarantor authorizes the Lender to use the collateral description contained in this Guarantee in any such financing

statements. Guarantor hereby ratifies and authorizes the filing by the Lender of any financing statement with respect to the Collateral made prior to the date hereof.

6.8 Lender's Appointment as Attorney-in-Fact

(a) Guarantor hereby irrevocably constitutes and appoints the Lender and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of Guarantor and in the name of Guarantor or in its own name, for the purpose of carrying out the terms of this Agreement, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement, and, without limiting the generality of the foregoing, Guarantor hereby gives the Lender the power and right, on behalf of Guarantor, without notice to or assent by Guarantor, to do any or all of the following:

(i) in the name of Guarantor or its own name, or otherwise, take possession of and indorse and collect any checks, drafts, notes, acceptances or other instruments for the payment of moneys due with respect to the Collateral and file any claim or take any other action or proceeding in any court of law or equity or otherwise deemed appropriate by the Lender for the purpose of collecting any and all such moneys due with respect to the Collateral whenever payable;

(ii) (1) direct any party liable for any payment under the Collateral to make payment of any and all moneys due or to become due

thereunder directly to the Lender or as the Lender shall direct; (2) ask or demand for, collect, and receive payment of and receipt for, any and all moneys, claims and other amounts due or to become due at any time in respect of or arising out of the Collateral; (3) sign and indorse any notices and other documents in connection with any of the Collateral; (4) commence and prosecute any suits, actions or proceedings at law or in equity in any court of competent jurisdiction to collect the Collateral or any portion thereof and to enforce any other right in respect of the Collateral; and (5) make any agreement with respect to or otherwise deal with the Collateral as fully and completely as though the Lender were the absolute owner thereof for all purposes, and do, at the Lender's option and Guarantor's expense, at any time, or from time to time, all acts and things which the Lender deems necessary to protect, preserve or realize upon the Collateral and the Lender's security interest therein and to effect the intent of this Agreement, all as fully and effectively as Guarantor might do.

Anything in this Section 6.8(a) to the contrary notwithstanding, the Lender agrees that it will not exercise any rights under the power of attorney provided for in this Section 6.8(a) unless an Event of Default shall have occurred and be continuing.

(b) If Guarantor fails to perform or comply with any of its agreements contained herein, the Lender, at its option, but without any obligation so to do, may perform or comply, or otherwise cause performance or compliance, with such agreement.

(c) The expenses of the Lender incurred in connection with actions undertaken as provided in this Section 6.8 shall be payable by Guarantor to the Lender on demand.

(d) Guarantor hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof. All powers, authorizations and agencies contained in this Agreement are coupled with an interest and are irrevocable until this Agreement is terminated and the security interests created hereby are released.

SECTION 7. MISCELLANEOUS

7.1 Amendments in Writing None of the terms or provisions of this Guarantee may be waived, amended, supplemented or otherwise modified without the written consent or agreement of Guarantor and Lender.

7.2 Notices All notices, requests and demands to or upon the Lender or any Guarantor hereunder to be effective shall be in writing (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered, or three Business Days after being deposited in the mail, postage prepaid, or, in the case of telecopy notice, when received, addressed in the case of the Lender and Guarantor, as follows:

Lender:	Palm Beach Multi-Strategy Fund, L.P. c/o Links Business Capital, L.P. 2911 Turtle Creek Blvd., Suite 1200 Dallas, Texas 75219 Attention: Scott Olson
Guarantor:	Albert G. Hill, III 4433 Bordeaux Dallas, Texas 75205

provided that any notice, request or demand to or upon Lender shall not be effective until received.

7.3 No Waiver by Course of Conduct; Cumulative R.emedies The Lender shall not by any act (except by a written instrument pursuant to Section 7.1), delay, indulgence, omission or otherwise be deemed to have waived any right or remedy hereunder or to have acquiesced in any Default or Event of Default. No failure to exercise, nor any delay in exercising, on the part of the Lender, any right, power or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. A waiver by the Lender of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy which the Lender would otherwise have on any future occasion. The rights and remedies herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

7.4 Successors and Assigns This Guarantee shall be binding upon the successors and assigns of Guarantor and shall inure to the benefit of the Lender and its successors and assigns; provided that Guarantor may not assign, transfer or delegate any of its rights or obligations under this Guarantee without the prior written consent of the Lender.

7.5 Set-Off Guarantor hereby irrevocably authorizes the Lender at any time and from time to time while an Event of Default shall have occurred and be continuing, without notice to Guarantor, any such notice being expressly waived by Guarantor, to set-off as appropriate and apply any and all credits,

indebtedness or claims, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by the Lender to or for the credit or the account of Guarantor, or any part thereof in such amounts as the Lender may elect, against and on account of the obligations and liabilities of Guarantor to the Lender hereunder and claims of every nature and description of the Lender against Guarantor, whether arising hereunder, under the Note, any other Loan Document or otherwise, as the Lender may elect, whether or not the Lender has made any demand for payment and although such obligations, liabilities and claims may be contingent or unmatured. The Lender shall notify Guarantor promptly of any such' set-off and the application made by the Lender of the proceeds thereof, provided that the failure to give such notice shall not affect the validity of such set-off and application. The rights of the Lender under this Section are in addition to other rights and remedies (including, without limitation, other rights of set-off) which the Lender may have.

7.6 Enforcement Expenses; Indemnification

(a) Subject to the terms of the Note, Guarantor agrees to pay, or reimburse Lender for, all its costs and expenses incurred in collecting against Guarantor under the guarantee contained in Section 2 or otherwise enforcing or preserving any rights under this Guarantee, including, without limitation, the fees and disbursements of counsel (including the allocated fees and expenses of in-house counsel) to Lender.

(b) Guarantor agrees to pay, and to save the Lender harmless from, any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery,

enforcement, performance and administration of this Guarantee to the extent the Borrower would be required to do so pursuant to the Note.

(c) The agreements in this Section shall survive repayment of the Guarantor Obligations and all other amounts payable under the Note and the other Loan Documents.

7.7 Severability Any provision of this Guarantee which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

7.8 Section Headings The Section headings used in this Guarantee are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation hereof.

7.9 Integration This Guarantee and the other Loan Documents represent the agreement of the Guarantor and the Lender with respect to the subject matter hereof and thereof, and there are no promises, undertakings, representations or warranties by the Lender relative to the subject matter hereof and thereof not expressly set forth or referred to herein or in the other Loan Documents.

7.10 GOVERNING LAW THIS GUARANTEE SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

7.11 Submission To Jurisdiction: Waivers Guarantor hereby irrevocably and unconditionally;

(a) submits for itself and its property in any legal action or proceeding relating to this Guarantee, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the Courts of the State of New York, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof;

(b) consents that any such action or proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to Guarantor at his address referred to in Section 7.2 or at such other address of which the Lender shall have been notified pursuant thereto;

(d) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and

(e) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

7.12 Acknowledgments Guarantor hereby acknowledges that:

(a) it has been advised by counsel in the negotiation, execution and delivery of this Guarantee;

(b) the Lender has no fiduciary relationship with or duty to Guarantor arising out of or in connection with this Guarantee or any of the other Loan Documents, and the relationship between Guarantor, on the one hand, and the Lender, on the other hand, in connection herewith or therewith is solely that of debtor and creditor; and

(c) no joint venture is created hereby or by the other Loan Documents or otherwise exists by virtue of the transactions contemplated hereby among Guarantor and the Lender.

7.13 Releases At such time as the Note and the other Guarantor Obligations shall have been paid in full and the Revolving Credit Commitment has been terminated, the Collateral shall be released from the Lien created hereby, and this Guarantee and all obligations (other than those expressly stated to survive such termination) of the Lender and Guarantor hereunder shall terminate, all without delivery of any instrument or performance of any act by any party, and all rights to the Collateral shall revert to the Guarantor.

7.14 WAIVER OF JURY TRIAL GUARANTOR AND, BY ACCEPTANCE OF THE BENEFITS HEREOF, LENDER, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS GUARANTEE OR ANY OTHER LOAN DOCUMENT AND FOR ANY COUNTERCLAIM THEREIN.

7.15 Limitation on Interest The Lender and Guarantor intend to contract in strict compliance with

applicable usury law from time to time in effect, and the provisions of the Note limiting the interest for which the Guarantor is obligated are expressly incorporated herein by reference.

7.16 Confidentiality Guarantor and Lender shall keep confidential all information each has furnished or provided to the other (whether written or oral) in connection with the Loan Documents (the "Information"), including, without limitation, the fact that the Lender has made the loan to Borrower and the terms of such loan as evidenced by the Loan Documents; provided, however, that Lender and Guarantor may disclose any of such Information to any of their respective affiliates, agents, attorneys, accountants, employees, partners, members or shareholders but only if such Persons reasonably need to know the Information and agree to be bound hereby. The foregoing confidentiality obligations will not apply to any Information that (a) is or becomes generally available to the public through no action of any party hereto or other Person bound hereby, or (b) is or becomes available to a party hereto or other Person bound hereby on a non-confidential basis from a source that is not prohibited from disclosing such Information by a contractual or legal obligation. The parties understand that certain Information will be publicly available as a result of filed financing statements and court proceedings and filings related to the Claims.

IN WITNESS WHEREOF, the undersigned has caused this Guarantee to be duly executed and delivered as of the date first above written.

Albert G. Hill, III
ALBERT G. HILL, III

Schedule 1

FILINGS AND OTHER ACTIONS REQUIRED TO PERFECT SECURITY INTEREST

Uniform Commercial Code Filings

Secretary of State of the State of Texas

Actions With Respect to Membership Interest

Delivery by Guarantor to Lender of Membership Interest Certificate No. 01, evidencing Guarantor's 100% Membership Interest in Borrower, duly indorsed in blank.

Schedule 2

PRINCIPAL RESIDENCE

4433 Bordeaux
Dallas, Texas 75205

Schedule 3

CERTIFICATED LIMITED LIABILITY COMPANY MEMBERSHIP INTEREST

Issuer	Membership Interest Certificate No.	Membership Interest
AHTREY Investments, LLC.	01	100%

Schedule 4.1

ALLEGED OBLIGATIONS WITH
RESPECT TO ALBERT G. HILL III

1. **Hill 3 Investments, LLC**: By Promissory Note dated September 11, 2007, Hill 3 Investments, LLC borrowed $3 million from JPMorgan Chase Bank, NA. The note provides that outstanding principal and interest is due on December 1, 2007. Al Hill Ill executed a personal guarantee.
2. **III Cell Corporation**: The Albert Hill Trust has a $1.3 million note receivable from III Cell Corporation. The note provides that it matures on December 22, 2007. Al Hill III executed a personal guarantee.
3. **Litigation**: Al Hill III is a defendant in litigation styled *THH Properties Limited Partnership, et al. v. Al G. Hill,* No. 470,255-C, First Judicial District Court, Caddo Parish, Louisiana. Plaintiffs seek to collect $2 million, plus attorneys' fees, costs, and interest contending that Mr. Hill executed a guarantee in the amount of $2 million.

By listing these alleged obligations, Al G. Hill III is not admitting that he is liable for any of them.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 3/22/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

INTERVENTION DEFENDANTS' OBJECTIONS TO AND MOTION TO STRIKE THE DECLARATION OF TROY D. PHILLIPS AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Intervention Defendants ALBERT G. HILL III and AHTREY INVESTMENTS, LLC (collectively, the "Intervention Defendants") hereby object to and move the Court to strike the Declaration of Troy D. Phillips (Dkt. #585-1) (the "Phillips Declaration") attached to the *Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention with Supporting Brief (the* "Motion") (ECF 585) as PBL Appendix Tab A, pp. 76-168, as more particularly set forth in the "Summary of Grounds for Motion," below.

SUMMARY OF GROUNDS FOR MOTION

1. Intervention Plaintiff PBL Multi-Strategy Fund, L.P. ("PBL") filed the Motion on February 16, 2016. By way of the Motion, PBL seeks summary judgment on (i) its affirmative claims against the Intervention Defendants on a promissory note and guaranty, (ii) its claim for attorneys' fees, and (iii) the Intervention Defendants' breach of contract counterclaim. Also by way of the Motion, PBL seeks judgment on the pleadings as to each of the Intervention Defendants' affirmative defenses pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2. The Phillips Declaration is the only declaration/affidavit PBL submits in support of the Motion, a Motion in which PBL asks the Court to award summary judgment in its favor as against Intervention Defendants, jointly and severally, in the sizeable sum of $8,172,973.25, plus additional interest, and a substantial amount of attorneys' fees. The Declarant, Troy D. Phillips ("Phillips"), is PBL's counsel of record in this litigation.

3. The Intervention Defendants object to and move to strike the following portions of the Phillips Declaration:

a. The Intervention Defendants object to and move to strike paragraphs 1-4 of the Phillips Declaration on the grounds that Phillips neither states that he has personal knowledge of the matters set forth therein, nor sufficiently sets forth circumstances showing how he might have acquired personal knowledge of the matters set forth therein.

b. The Intervention Defendants object to and move to strike paragraphs 1(b) and 1(c) of the

Phillips Declaration in that the referenced Note and Guaranty on their face include Palm Beach Multi-Strategy Fund, L.P. as a party, rather than PBL Multi-Strategy Fund, L.P. (PBL), as Phillips states in the those paragraphs of the Phillips Declaration. Moreover, Phillips offers no explanation whatsoever as to the nature of the relationship between PBL and Palm Beach Multi-Strategy Fund, L.P., nor does he offer any explanation as to the nature of any transaction through which PBL might have acquired the right to sue the Intervention Defendants on agreements to which it is not a party.

c. Intervention Defendants object to and move to strike paragraphs 2 and 4 of the Phillips Declaration regarding advances under and amounts due on the Note on grounds that they are hearsay. First, no records of PBL of any sort are attached to evidence the alleged advances made on the Note or the accrual of interest. Second, Phillips states in paragraph 2 that the amounts of the alleged advances were "as taken from the PBL books and records," but offers no information at all as to the nature of such records, or how such records are kept. The Phillips Declaration does not establish any of the required elements to establish any such records as coming within the business records exception to the hearsay rule set out in Rule 803(6) of the Federal Rules of Evidence, and Phillips is not shown to be a custodian or "other qualified witness" as to such records. The Phillips Declaration fails to explain his relationship to PBL Multi-Strategy Fund, L.P., or as Liquidator of a purported

parent entity he would have access to or how he became familiar with PBL Multi-Strategy Fund, L.P.'s with its recordkeeping practices, and became a custodian of record. Accordingly, there is no proper foundation for the admission of any of the evidence.

d. Intervention Defendants object to and move to strike paragraph 5 of the Phillips Affidavit, along with all of the attached invoices included at pages 81- 168 of the Appendix, in that the invoices are hearsay. Federal Rule of Evidence 803(6) requires four prongs to be met in order for a document to qualify under that rule as an exception to hearsay. The invoices do not come within the business records exception to the hearsay rule at Rule 803(6) of the Federal Rules of Civil Procedure because the Phillips Declaration does not establish that the invoices were either (i) made by or transmitted by a person with knowledge of the events recorded therein, or (ii) that the invoices were kept in the regular course of business of Glast, Phillips & Murray, P.C. ("GPM").

e. Intervention Defendants object to and move to strike paragraphs 6 and 7 of the Phillips Declaration on grounds that (i) Phillips does not establish himself as an expert qualified to give the expert opinion as to a reasonable fee set forth therein, and (ii) the Phillips Declaration does not set forth sufficient information to support the opinion that the fees sought are reasonable.

f. Intervention Defendants object to and move to strike paragraph 7 of the Phillips Declaration

on grounds that it is based on pure speculation and conjecture.

ARGUMENT AND AUTHORITIES

Phillips' Lack of Personal Knowledge (Paragraphs 1-4)

4. An affidavit or declaration in support of a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). Although an affidavit need not specifically recite that it is made on personal knowledge, the Court should be able to infer the affiant's personal knowledge and competence to testify from their position or the nature of their participation. *DIRECTV, Inc. v. Budden,* 420 F.3d 521, 530 (5th Cir. 2005).

5. Here, paragraphs 1-4 of the Phillips Declaration are defective because Phillips does not declare that he has personal knowledge of the matters set forth in those paragraphs of the Declaration, nor does he reveal any circumstances that might have caused him to gain personal knowledge of the facts stated.[1] In those paragraphs, Phillips states facts concerning PBL's recordkeeping, the authenticity of the underlying Note and Guaranty, the amounts advanced under the Note and Guaranty, and the amount due and owing thereon. Other than being PBL's attorney of record in this action, the only statement that

[1] By contrast, the Court might rightfully infer that Phillips has personal knowledge of the matters set forth in paragraphs 5-7 of his Declaration, in which he testifies about his law firm's attorneys' fees and invoices, by virtue of his position as an attorney with the law firm in question and his role as an attorney involved in the lawsuit.

Phillips makes that might be construed as an attempt to establish a basis for personal knowledge is as follows: "I am also the Liquidator of PBL Holdings, LLC, the general partner of PBL Capital, L.P., which is the general partner of PBL Multi-Strategy Fund, L.P. ("PBL")." Phillips Decl., PBL's App. at 77, ¶1. This statement does not suffice to establish personal knowledge for several reasons.

6. Simply being "the Liquidator" of the general partner of the general partner of a party does not give rise to an inference of personal knowledge of a promissory note and guaranty allegedly owned by the party. Nothing about the title of "the Liquidator of PBL Holdings, LLC," would indicate that the authenticity and ownership of the Note and Guaranty, PBL's recordkeeping practices as to advances under the Note, or amount due and owing on the Note are matters within Phillip's "sphere of responsibility." *See Budden,* 430 F.3d at 530.

7. Moreover, Phillips gives no indication as to what is the nature of his role as "the Liquidator," including the duties and responsibilities he holds, nor does he testify that he is responsible for the collection of the Note and the Guaranty. Notably, he does not reference any court or other legal proceeding conferring the duties and responsibilities of "the Liquidator" on him.

8. Just like any other affiant, a party's attorney is not competent to give summary judgment evidence without the required showing of personal knowledge, and the Phillips Declaration fails in this regard as to all matters relating to PBL's business dealings. Accordingly, paragraphs 1-4 of the Phillips' Declaration should be stricken in their entirety.

The Facial Discrepancy in the Note and Guaranty (Paragraphs 1(b) and 1(c))

9. In paragraph 1(b), Phillips declares that the Note is "payable to PBL." PBL App. at p. 78, ¶ 1(b). Similarly, in paragraph 1(c), Phillips declares that the Guaranty is "in favor of PBL." PBL App. at 78, ¶ 1(c). It is apparent from the face of both the Note and the Guaranty that they are not "payable to"/"in favor of PBL. Rather, they are payable to/in favor of Palm Beach Multi-Strategy Fund, L.P. PBL App. Tab A, p. 2, Tab B, p. 18. Because the Phillips Declaration makes no effort to reconcile this discrepancy between Phillips' testimony and the face of the documents he purports to authenticate, such as by explaining a transfer of ownership, an entity name change, etc., the testimony is irreconcilable and should thus be stricken.

Phillips' Statements Regarding the Amounts Advanced and Due Under the Note and Guaranty are Hearsay (Paragraphs 2 and 4)

10. In paragraph 2, Phillips lists 8 alleged advances made under the Note totaling $2,600,000 in a chart by date and amount "as evidenced by its books of account and records." Phillips Decl., ¶ 2. This information is hearsay because, in addition to failing to establish Phillips' competence to testify to such matters in general, the information constitutes hearsay. No records are attached to support the advances, no testimony is given to describe what are PBL's recordkeeping procedures pursuant to which the information is kept, and no attempt is made to bring such records within the business records exception to the hearsay rule at Rule 803(6) of the Federal Rules of Civil Procedure.

11. Similarly, in paragraph 4, Phillips states the total amount due under the Note by stating a total amount of principal and a total amount of interest, but (in addition to failing to set forth facts to establish personal knowledge), fails to state from what records the information was obtained, and to bring such records within the business records exception to the hearsay rule.

The GFM Invoices are Hearsay (Paragraph 5 and PBL App. pp. 81-168).

12. Of course, for PBL to rely on the GPM fee invoices, PBL must bring them within an exception to the hearsay rule. While Phillips does state that it was in the regular course of GPM's business for an employee or representative of GPM to prepare and transmit invoices, and that each invoice was made at or near the date on each respective invoice, Phillips fails to testify that the invoices were (i) made by or transmitted by a person with knowledge of the events recorded therein, and (ii) kept in the regular course of the business of Glast, Phillips & Murray, P.C. ("GPM"). Accordingly, not all requirements of the hearsay exception for records of regularly conducted activity are satisfied, and both paragraph 5 and the attached invoices should be stricken. *See* FED. R. CIV. P. 803(6).

Phillips Not Qualified as an Attorneys' Fees Expert (Paragraphs 6 and 7)

13. In paragraph 6 of his Declaration, Phillips gives his opinion as to what would be a reasonable fee for this case in the trial court, and in paragraph 7, he opines as to what would be a reasonable fee for post-judgment discovery. However, Phillips' Declaration contains insufficient information to qualify him as

an expert to give such opinions. For example, Phillips does not state the nature of his practice, how long he has been practicing, and that he is familiar with what are reasonable fees in this area. In fact, the only statement in the Declaration that would go toward Phillips' qualifications to opine as to what are reasonable fees for this case is the bare fact that he is an attorney with GPM. In addition, Phillips fails to give sufficient information to support his opinion, such as the identity and qualifications of the persons working on the case for GPM and their hourly rate, and does not discuss any relevant factors as required by courts in the Fifth Circuit and Texas.

Phillips' Opinion as to Postjudgment Fees is Pure Speculation and Conjecture (Paragraph 7)

14. In paragraph 7 of his Declaration, Phillips gives his opinion that a reasonable fee for the post judgment discovery phase of this litigation would be $1 million, many times the fee Phillips claims is reasonable for the trial court phase of the case. Phillips claims to base this opinion on a review of other proceedings in this case and in other related cases. Because his opinion is nothing more than speculation and conjecture, paragraph 7 of the Declaration should be stricken.

CONCLUSION

15. For all the foregoing reasons, Intervention Defendants request that the Declaration of Troy D. Phillips be stricken as requested herein, and that they be awarded such other and further relief as to which they may be justly entitled.

Respectfully submitted,

ACKERMAN & RAMOS, PLLC
Attorneys and Counselors

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ATTORNEYS FOR
INTERVENTION
DEFENDANTS

CERTIFICATE OF CONFERENCE

I certify that this motion is opposed. On March 22, 2015, I had an e-mail discussion with Troy D. Phillips, counsel for the Intervention Plaintiffs, regarding this Motion (a copy of which was provided to him prior to the e-mail exchange). Agreement on this motion could not be reached because Plaintiffs oppose the relief requested.

By: */s/ Steven T Ramos*
STEVEN T. RAMOS

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the forgoing document with the clerk of the United States District Court, Northern District of Texas, using the ECF system of the Court. The ECF system transmitted a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.
March 22, 2016

By: */s/ Steven T Ramos*
STEVEN T. RAMOS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 3/22/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

ORDER GRANTING INTERVENTION DEFENDANTS' OBJECTIONS TO AND MOTION TO STRIKE THE DECLARATION OF TROY D. PHILLIPS

Before the Court is Defendants Albert G. Hill III and Ahtrey Investments, LLC's Objections to and Motion to Strike the Declaration of Troy D. Phillips (Motion to Strike) attached to the *Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention with Supporting Brief* (the Motion) at Tab G of the Appendix. The Court having considered the motion, response, reply, record and applicable law, GRANTS Defendants Albert G. Hill III and Ahtrey Investments, LLC's Motion to Strike.

THEREFORE, IT IS HEREBY ORDERED that paragraphs 1-4 of the Declaration of Troy D. Phillips (Dkt. #585-1) are hereby stricken in toto.

IT IS FURTHER ORDERED that paragraph 5 of the Declaration of Troy D. Phillips (Dkt. #585-1) is hereby stricken.

IT IS FURTHER ORDERED that paragraphs 6 and 7 of the Declaration of Troy D. Phillips (Dkt. #585-1) are hereby stricken.

Signed this the ___ day of_____, 2016.

_____

Sam A. Lindsay
United States District Court.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 03/22/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

INTERVENTION DEFENDANTS' MOTION FOR CONTINUANCE PURSUANT TO FED. R. CIV. P. 56(d) AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Intervention Defendants ALBERT G. HILL, III and AHTREY INVESTMENTS, LLC (collectively, the "Defendants") hereby move the Court to (i) defer consideration or deny the *Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention with Supporting Brief (the* Motion) (Dkt. 585) as premature, and/or (ii) allow Defendants additional time to obtain affidavits and to conduct discov-

ery necessary to respond to the Motion, all as authorized by Rule 56(d) of the Federal Rules of Civil Procedure.[1]

RELEVANT BACKGROUND

1. The Court is familiar with the history of the underlying litigation proceedings, and a recitation of the history of the entire proceedings is unnecessary to decide this motion. Briefly, this case arose from federal district court litigation forming part of a larger family dispute relating to the management of two trusts created by the late Texas oil magnate H.L. Hunt. Hill initiated the litigation in Texas state court in 2007. *See Campbell Harrison &* Dagley, L.L.P. v. Hill, 2015 U.S. Dist. LEXIS 156375, **14-15 (N.D. Tex. Nov. 19, 2015 (Lindsay, J.)(reciting the procedural history of the case and that the matter has been closed); App. A.[2] After removal of the underlying case to federal court and after several years of litigation, the parties entered into a Global Settlement Agreement (Dkt. 879 in Civil Action No. 3-07-CV-2020-L (the "2020 Action")) and, on November 8, 2010, Judge Reed C. O'Connor issued a final judgment (the "Final Judgment") implementing the parties' settlement agreement (Dkt. 999 in the 2020 Action). *Id.* at ** 15-16.

2. The Final Judgment severed all attorneys' fee claims and certain other creditor claims from the 2020 Action into this separate civil action, No. 3:10-CV-

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[1] Defendants' primary position set forth in their Response to the Motion is that this matter is closed. In the event that the court determines otherwise, Defendants present the arguments and requested relief herein.

[2] Citation to "App." refers to the Appendix in support of Defendants' Response to the Motion filed contemporaneously herewith.

02269 (the "2269 Action"). On February 10, 2011, Plaintiff PBL Multi-Strategy Fund, L.P. filed its motion to intervene in this 2269 Action as a party plaintiff (Dkt. 66) to assert claims against the Defendants on a promissory note and guaranty pursuant to which PBL alleges that it loaned Ahtrey $2.6 million, personally guaranteed by Al Hill, III ("Hill") to fund litigation between Hill and certain defendants, including the 2020 Action. (Dkt. 585, p. 2). PBL also claims a security interest in certain "Proceeds" that Hill might receive or be entitled to receive from two lawsuits, including the 2020 Action. The Court granted the motion to intervene (Dkt. 131), and PBL's complaint in intervention (Dkt. 182) was deemed filed on March 23, 2011. Defendants filed their answer (Dkt. 249) and counterclaim for breach of contract (Dkt. 250) on April 21, 2011.

3. On or about January 26, 2012, PBL and the Defendants entered into a settlement agreement pursuant to which the parties agreed to file a joint motion (Dkt. 1227) in the 2020 Action seeking the Court's approval of the settlement agreement and the Court's authorization of the payment to BPL of the agreed settlement amount of $3.2 million out of the funds in *custodia legis* in the 2020 Action. However, the Court never ruled on the joint motion.

4. After the execution of the settlement agreement and during the pendency of the joint motion, from at least January 26, 2012, the parties took no court action to prosecute or defend PBL's claim in intervention, because the parties had settled the claim.

5. On January 15, 2016, the Court entered an order in the 2020 Action (Dkt. 1686) providing for the disbursement of the funds in *custodia legis;* but the

distribution order did not provide for the distribution of any of the funds in *custodia legis* to PBL.

6. PBL filed the instant Motion on February 16, 2016, approximately 30 days after the Court's distribution order. By way of the Motion, PBL seeks summary judgment on (i) its affirmative claims against the Defendants on the promissory note and guaranty, (ii) its claim for attorneys' fees, and (iii) the Defendants' breach of contract counterclaim. Also by way of the Motion, PBL seeks judgment on the pleadings as to each of the Defendants' affirmative defenses pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

7. No scheduling order has been entered by the Court.

ARGUMENT AND AUTHORITIES

8. Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, a district court may allow additional time for a party to obtain affidavits or declarations or to conduct discovery. Such motions for continuance are broadly favored and should be liberally granted. *See* Fed. R. Civ. P. 56(d)(2); *Culwell v. City of Fort Worth,* 468 F.3d 868, 871 (5th Cir. 2006). "[Rule 56(d)] is an essential ingredient of the federal summary judgment scheme and provides a mechanism for dealing with the problem of premature summary judgment motions." *Lopez-Santiago v. Coconut Thai Grill,* 2015 U.S. Dist. LEXIS 16765 (N.D. Tex. Feb. 11, 2015) (Fitzwater, J.) (quoting *Parakkavetty v. Indus Ina Inc.,* 2004 U.S. Dist. LEXIS 2012, 2004 WL 354317, at *1 (N.D. Tex. Feb. 12, 2004)) (Fitzwater, J.) (citing *Owens v. Estate of Erwin,* 968 F. Supp. 320, 322 (N.D. Tex. 1997)) (Fitzwater, J.) (referring to former Rule 56(0).

9. Here, the Motion is premature because the Court entered its order distributing the funds in *custodia legis* approximately 30 days before PBL filed the Motion. The parties have not even had a reasonable amount of time to consider the impact of the release of the funds on this complex litigation, and on the settlement agreement between PBL and Defendants, let alone had a reasonable time for discovery. *See George v. Go Frac, LLC,* 2016 U.S. Dist. LEXIS 1581, ** 6-7 (W.D. Tex. Jan, 7, 2016) (although Rule 56(b) provides that a motion for summary judgment may be filed "at any time," "the Supreme Court has made clear that the granting of summary judgment is limited until there has been "an adequate time for discovery.")(quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). No discovery has occurred in this matter, and the parties have treated the matter in the same fashion as this Court and the United States Fifth Circuit Court of Appeals have treated this matter — as closed.

10. Under Federal Rule of Civil Procedure 56(d)(2), a nonmovant for summary judgment is entitled to a continuance to "allow time to obtain affidavits or declarations or to take discovery." "A nonmovant is not entitled to a continuance if it `fail[s] to explain what discovery [it] did have, why it was inadequate, and what [it] expected to learn from further discovery' and gives only "vague assertions of the need for additional discovery." *Id.* (quoting *Bauer v. Albemarle Corp.,* 169 F.3d 962, 968 (5th Cir. 1999) (in part quoting *Reese v. Anderson,* 926 F.2d 494, 499 n. 5 (5th Cir. 1991)) (internal quotation marks omitted).

11. Defendants cannot adequately respond to PBL's Motion by March 22, 2016, because Defendants need to take the oral deposition of Scott Olson, principal of

PBL, and a designated representative of PBL with document production. As the summary judgment evidence indicates, there is a facial discrepancy between the Note and Guaranty and the moving party. Specifically, the Note and the Guaranty show that they are not "payable to" or "in favor of PBL. Rather, they are payable to/in favor of Palm Beach Multi-Strategy Fund, L.P. PBL App. Tab A, p. 2, Tab B, p. 18.[3] This discovery could show that PBL is not the successor in interest to the Note and Guaranty and, furthermore, that PBL has no interest in the Note and Guaranty. Such a discovery would defeat summary judgment. The summary judgment evidence raises a clear fact question as to ownership of the Note and Guaranty that is not resolved by Plaintiff's summary judgment evidence, and discovery should be allowed to ferret out the discrepancies.

12. Further, the summary judgment evidence shows that the attorneys of record for PBL claim to be the "Liquidator" of PBL's general partner's general partner. PBL App. Tab F, p. 77. At no time in the Phillips Declaration does he define either the position and/or authority of the "Liquidator" or the authority and/or responsibility that he holds related to the Note and Guaranty. There is no showing in the summary judgment evidence as to (1) who is the successor in interest to the Note and Guaranty other than conclusory statements, and/or (2) the role the Liquidator plays. This information is relevant and material to this case because ownership of the claims at issue would be an essential defense to Defendants.

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[3] "PBL App." refers to PBL's Appendix in support of the Motion.

13. Defendants support the Motion with the Declaration of Troy D. Phillips. PBL App. Tab F, p. 77. The Phillips Declaration contains several conclusory and unsupported statements. Contemporaneous with the filing of this Motion for Continuance, Defendants are filing a Motion to Strike. Defendants incorporate by reference the arguments contained in the Motion to Strike as if fully set forth herein. In short, Defendants seek additional time to discover the role of Troy D. Phillips as "Liquidator," and the basis for his knowledge as set forth in the conclusory statements contained in his Declaration.[4] Such evidence could show that PBL is not the owner of the claims that are the basis of the Motion.

14. Additionally, Defendants need discovery as to the reasons that PBL stopped funding the $2.4 million that remained on the revolving credit. Such discovery would allow Defendants to develop their counterclaims as well as develop their affirmative defenses to Plaintiff's allegations.

15. One of the grounds for summary judgment alleged by Plaintiff is that Defendants have failed to develop and/or show damages. If given additional time for discovery, Defendants will be able to retain an expert who can opine as to the difference in the attorney's fees incurred to date had the arrangement been an hourly rate, as funded by the revolving credit, as opposed to a contingency rate. Such an expert will be able to provide direct evidence in support of Defendants' damages.

16. Defendants also dispute some of the supporting facts that underlie the Motion with regard how to

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[4] After reviewing the Phillips Declaration, there is a question as to whether he is a fact witness.

Defendants used the monies loaned by the Plaintiff. In particular, Defendants have attached hereto and incorporate by reference the Declaration of Michael Collins that shows that the money loaned to the Defendants was in fact for legitimate and reasonable uses.

17. Defendants did not previously use the discovery process earlier to secure the necessary documents and information because the parties had settled the claim and treated this case as closed.

18. Defendants will suffer actual and substantial prejudice if they are not permitted to take the requested depositions, given the additional time to retain experts, and time to develop the necessary defenses to the allegations. Defendants cannot obtain the information sought from any other source.

19. The request for continuance will not prejudice PBL because no scheduling deadlines have been set, this matter has been treated as closed, PBL has abandoned its claims, and the matter has languished for over 4 years.

20. This request for continuance is not merely for delay, but so that justice may be done.

21. Defendants ask the Court to allow them 150 days to conduct discovery and file their response to the Motion.

CONCLUSION

22. For these reasons, Defendants ask the Court to continue the deadline for responding to the Motion to allow them time to conduct the requested discovery.

Respectfully submitted,

ACKERMAN & RAMOS, PLLC
Attorneys and Counselors

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ATTORNEYS FOR
INTERVENTION
DEFENDANTS

/s/ Albert G. Hill, III
Albert G. Hill, III

/s/ Ahtrey Investments, LLC
Ahtrey Investments, LLC
By: Albert G. Hill, III
Its:

DECLARATION UNDER PENALTY OF PERJURY

My name is Albert G. Hill, HI. I am a party to the above-referenced cause, and I am the sole owner of Ahtrey Investments, LLC, which is a party to the above-referenced cause. I declare under penalty of perjury under the laws of the United States that the foregoing paragraphs 1-7 are true and correct.

/s/ Albert G. Hill, III
Albert G. Hill, III

CERTIFICATE OF CONFERENCE

I certify that this motion is opposed. On March 22, 2015, I exchanged e-mails with Troy D. Phillips, counsel for the Plaintiffs, regarding this Motion. Agreement on this motion could not be reached because Plaintiffs oppose the relief requested.

By: */s/Steven T Ramos*
STEVEN T. RAMOS

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the forgoing document with the clerk of the United States District Court, Northern District of Texas, using the ECF system of the Court. The ECF system transmitted a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means. In addition, pursuant to Rule 42.1 of the Local Civil Rules for the Northern District of Texas, I certify that this document was transmitted in the same manner on the same date to all attorneys who have consented in writing to accept this notice as service of this document by electronic means in the case to be consolidated.

March 22, 2016

By: */s/Steven T Ramos*
STEVEN T. RAMOS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al*.,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al*.,

Defendants.

ORDER GRANTING INTERVENTION
DEFENDANTS' MOTION FOR CONTINUANCE
PURSUANT TO FED. R. CIV. P. 56(d)

Before the Court is Defendants Albert G. Hill III and Ahtrey Investments, LLC's Motion for Continuance Pursuant To Fed. R. Civ. P. 56(D). The Court having considered the motion, response, reply, record and applicable law, GRANTS Defendants Albert G. Hill III and Ahtrey Investments, LLC's Motion For Continuance.

Signed this the ____ day of _____, 2016.

_____
Sam A. Lindsay
United States District Court.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 03/23/16]

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Civil Action No. 3:10-CV-2269-L

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CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

———

DECLARATION OF ALBERT G. HILL, III

State of Georgia, USA
County of Fulton

1. I, Albert G. Hill, III, submit this declaration under 28 U.S.C. § 1746.

2. I declare under penalty of perjury that all of the facts stated in this document are true and correct and based upon my own personal knowledge and belief.

3. I provide this Declaration in support of my response to Plaintiff's motion for judgment on the pleadings, motion for summary judgment and my request for a continuance.

4. I am the sole owner of Ahtrey Investments, LLC (Ahtrey).

5. In 2005, my father, Albert G. Hill, Jr., (Hill Jr.) signed an irrevocable disclaimer of a portion of his interest in the Margaret Hunt Trust Estate (MHTE) in favor of his three children. The effect of that disclaimer was that when Margaret Hunt (Hill Jr.'s mother) died, that I along with my two siblings would become an income beneficiary of the MHTE. In 2007, Margaret Hunt passed away. My father and I subsequently got into an argument, and Hill Jr. tried to undo the irrevocable disclaimer he had signed in favor of his children by filing a lawsuit in Texas state court, contending that he had been incompetent when he signed the disclaimer. In November 2007, I sued Hill Jr., the trustees of two trusts in which I held a beneficial interest — the MHTE and the Haroldson Lafayette Hunt, Jr. Trust Estate ("HHTE") — and additional family members (collectively, the "Underlying Defendants") in Texas state court alleging a number of claims, including violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. The Underlying Defendants removed the action to the United States District Court for the Northern District of Texas (Case No. 3: 07-CV-02020-O). A critical issue in the underlying litigation was whether the disclaimer signed by Hill Jr. in 2005 was valid (as I claimed) or invalid (as Hill Jr. claimed).

7. To fund the underlying litigation, Ahtrey and I entered into the Revolving Credit Note with Palm Beach Multi-Strategy Fund, L.P.

8. In particular, pursuant to the terms of a December 26, 2007 Revolving Credit Note, Palm Beach Multi-Strategy Fund, L.P. was to provide a line of credit in the amount of $5,000,000, with the parties' understanding that this was to be the source of funding for the underlying litigation.

9. In October, 2008 Palm Beach Multi-Strategy Fund, L.P., informed me that no more funds would be provided under the $5,000,000 line of credits even though approximately $2,500,000 in promised funds remained available under the line of credit. Other than several additional advances in 2009, Palm Beach Multi-Strategy Fund, L.P., refused to provide additional funding under the line of credit. I discussed with Palm Beach Multi-Strategy Fund, L.P. the fact their cutting off of the funds would cause severe consequences for my pursuit of the trust-related litigation.

10. Deprived of the necessary source of funding for the underlying litigation, I was no longer able to pay my attorneys in the underlying litigation. As a result, I was forced to retain counsel who would charge me on a contingency fee basis. The first such law firm was Campbell, Harrison & Dagley LLP (CHD). For good cause, I terminated my engagement with CHD. I subsequently retained lawyers Lisa Blue, Charla Aldous and Stephen F. Malouf (BAM) to represent me in the trust litigation.

11. As a direct result of Palm Beach Multi-Strategy Fund, L.P.'s failure to deliver the remaining funds on the Revolving Credit Note, I entered the aforementioned contingency fee agreements with BAM and CHD. As a direct result of entering the contingency fee agreements I have suffered monetary damages. BAM was paid $25 million in attorney's fees. I litigated the contingency fees claimed by CHD because I believe them to be unconscionable. As a result of entering the contingency fee agreement, CHD has a judgment against me for $41 million in attorney's fees, I believe that the attorney's fee paid to BAM and claimed by CHD were disproportionate to the work done and the recovery that I received in the trust litigation. Had

Palm Beach Multi-Strategy Fund, L.P., not prematurely cut off the funding under the Revolving Credit Note, I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation. I believe that if had I continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency basis, then the cost of litigation would have been substantially less. Further, I would not have been in the ensuing costly litigation against BAM and CHD. This consequence was known and foreseeable by PBL when it cut off funding under the Revolving Credit Note in 2008.

12. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed in Fulton County, State of Georgia, on the 22nd day of March, 2016.

/s/ Albert G. Hill, III
Albert G. Hill, III

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 08/19/16]

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Case No. 3:10-CV-02269-L-BK

———

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, and ERIN HILL, individually and on behalf of her minor children, N. HILL, C. HILL, and A. HILL,

Defendants.

———

ORDER

Before the Court are *Intervention Defendants' Objections to and Motion to Strike Declaration of Troy D. Phillips*, Doc. 587; *Intervention Defendants' Motion for Continuance Pursuant to FED. R. CIV. P. 56(d)*, Doc. 588; *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. to Strike Intervenor-Defendants' Untimely Pleadings*, Doc. 592; *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. for Leave to File Supplemental Appendix*, Doc. 593; and *Intervention Defendants' Motion for Leave to File Response*, Doc. 596. Upon consideration, *Intervention Defendants' Objections to and Motion to Strike Declaration of Troy D. Phillips*, Doc. 587, is GRANTED IN PART; *Intervention Defendants' Motion for Continuance Pursuant to FED. R. CIV. P. 56(d)*, Doc. 588, is DENIED; *Motion of*

Intervenor-PBL Multi-Strategy Fund, L.P. to Strike Intervenor-Defendants' Untimely Pleadings, Doc. 592, is DENIED; *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. for Leave to File Supplemental Appendix*, Doc. 593, is GRANTED; and *Intervention Defendants' Motion for Leave to File Response*, Doc. 596, is GRANTED.

A. Procedural History

In March 2011, PBL Multi-Strategy Fund, L.P. ("PBL") filed a claim-in-intervention to enforce payment of a Note (the "Note") alleged to have been executed by Ahtrey Investments, L.L.C. ("Ahtrey"), pursuant to which PBL advanced $2.6 million to fund litigation between Albert G. Hill III ("Hill III") as a plaintiff and certain defendants, in Case No. 3:07-CV-2020-LBK (the "2020 case"). Doc. 182. Hill III is alleged to have personally guaranteed payment ("the Guaranty") of the Note by Ahtrey. Doc. 182 at 2. Hill III and Ahtrey (collectively, "Defendants") filed an answer and a counterclaim for breach of contract. Doc. 249; Doc. 250.

In January 2012, PBL and Defendants entered into a settlement agreement (the "Agreement") requesting that the Court authorize payment to PBL of $3.2 million out of funds in the court's registry in the 2020 case. 2020 case at Doc. #1227. The Court did not rule on the motion and, in January 2016, entered an order in the 2020 case disbursing the registry funds, none of which were distributed to PBL. 2020 case at Doc. #1686. The Agreement expired by its own terms when no registry funds were disbursed to PBL. Doc. 585-1 at 41-42. PBL now has moved for summary judgment on its claims and has requested that the Court enter judgment in its favor on Defendants' affirmative

defenses. Doc. 585. Several procedural motions are now before the Court for determination.

B. Argument and Analysis

1. *Objections to and Motion to Strike Declaration of Troy D. Phillips, Doc. 587*[1]

Defendants first move to strike portions of the declaration of PBL attorney Troy Phillips filed in support of PBL's summary judgment motion. They contend that (1) Phillips does not sufficiently indicate his personal knowledge of the documents, accounts, and records described; (2) there is an inconsistency between the business name on the Note and Guaranty and the entity, PBL, to which Phillips refers in the declaration; (3) the declaration's references to advances made and amounts due on the Note are unsupported hearsay; (4) the attached invoices reflecting attorneys' fees are hearsay and do not come within the business records exception; (5) Phillips has not established that he is qualified to give an expert opinion as to what constitutes a reasonable attorneys' fee; and (6) Phillips' opinion as to a reasonable fee for post-judgment work is speculative. Doc. 587 at 3-4, 8.

PBL responds that (1) Phillips' possession of the Note and Guaranty in his capacity as agent for PBL is sufficient proof of their existence and his personal

[1] PBL has moved to strike as untimely Defendants' (1) *Objections to and Motion to Strike Declaration of Troy D. Phillips*; *(2) Motion for Continuance*; (3) *Response to PBL's Motion for Judgment on the Pleadings and for Summary Judgment*; (4) Appendix to the *Response*; and (5) Defendants' brief in Support of the *Response*. Having considered Defendants' attorney's explanation for the untimely filings Defendants' *Motion for Leave to File Response*, Doc. 596, is **GRANTED**, and PBL's *Motion to Strike Untimely Pleadings*, Doc. 592, is **DENIED**.

knowledge; (2) Hill III himself relies on the Agreement and has admitted the approximate amount that PBL advanced him; (3) the records Phillips relied on in making his declaration fall within the business record hearsay exception; and (4) as an attorney admitted to practice in this Court, Phillips is prima facie qualified to express an opinion as to reasonable attorney's fees in a case in which he is lead counsel. Doc. 595 at 7-8.

Upon review and consideration of the law, the pleadings, and the parties' arguments, the Court finds that the Phillips declaration is largely adequate for purposes of supporting PBL's dispositive motion. It is undisputed that Phillips acts as agent and attorney for PBL, and he avers that he had possession of the relevant documents, which is sufficient. TEX. BUS. & COM. CODE §§ 3.301, 3.308. Hill III acknowledges execution of the Note and that PBL advanced roughly half of the $5 million credit line. Doc. 590 at 28. Further, Phillips' declaration sets forth in sufficient detail the dates and amounts of advances to Ahtrey under the Note. Doc. 585 at 81; *Am. 10-Minute Oil Change, Inc. v. Metro. Nat'l Bank-Farmers Branch*, 783 S.W.2d 598, 601 (Tex.App.— Dallas 1989) (holding that an affidavit made on a bank officer's personal knowledge was sufficient to support summary judgment where it identified the notes and guaranty and designated the principal balance). Similarly, the invoices from Phillips' law firm qualify as business records and are thus adequate to prove the attorneys' fees incurred to date.[2] TEX. CIV. PRAC. & REM. CODE § 38.004 (1) (providing that a court may take judicial

[2] While Defendants challenge Phillips' ability to attest to the reasonableness of the fees he has charged in the case to date, the declaration does not offer such an opinion; it merely states the total charges incurred and paid. Doc. 585-1 at 82.

notice of the usual and customary attorneys' fees and of the contents of the case file without receiving further evidence).

That notwithstanding, PBL has not sufficiently proven its case for reimbursement of attorneys' fees, however. Nowhere does Phillips describe his education or experience, his or his colleagues' hourly rates, or the usual rate for similar services in the community for this type of case. He has thus not carried his burden of establishing the reasonableness of the fees charged. *See* Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). Moreover, a determination of what constitutes a reasonable fee for future services is sheer speculation. That finding is more appropriately made at the conclusion of the case. Accordingly, Defendants' motion to strike paragraphs 6 and 7 of Phillips' declaration, Doc. 587, is **GRANTED**, but without prejudice to PBL's ability to seek leave of court to move for attorneys' fees and costs at a future time. In all other respects, the motion is **DENIED**.

2. *Defendants' Motion for Continuance Pursuant to FED. R. CIV. P. 56(D),* Doc. 588

In this motion, Defendants request that the Court defer consideration of PBL's dispositive motion and/or allow Defendants additional time to obtain affidavits and conduct discovery necessary to respond to the motion pursuant to Rule 56(d). Doc. 588 at 3-4. Defendants contend that PBL's dispositive motion is premature because (1) the Court entered its order distributing the registry funds only 30 days before PBL filed the motion; (2) the parties have not had sufficient time to consider the impact of the release of the funds on the case and on the Agreement between PBL and Defendants; and (3) there has not been time for discovery. Doc. 588 at 4. Defendants assert that

PBL's summary judgment evidence raises a question as to ownership of the Note and Guaranty, and they should be permitted to conduct discovery to resolve the discrepancies, as well as to determine (1) why PBL did not fund the $2.4 million that remained on the line of credit; and (2) the amount of damages Defendants suffered as a result. Doc. 588 at 5-6.

PBL responds that Defendants have not adequately stated under oath what specific, material facts they cannot present that are essential to oppose PBL's dispositive motion. Doc. 595 at 2-3. PBL avers that there is no genuine dispute as to ownership of the Note and Guaranty. Doc. 595 at 4-5. Additionally, PBL asserts that there is no need for discovery as to why it stopped providing funding to Defendants because the Note and Guaranty specify that payments must be made regardless of the validity or enforceability of the Note or any defense or counterclaim. Doc. 595 at 5-6. Finally, PBL contends that the issue of damages need not be explored because (1) Ahtrey was not a party to any of the litigation so it could not have any damages; and (2) Hill III personally was not a signor on the Note so he cannot enforce a claim against PBL for breach of the funding commitment. Doc. 595 at 6.

Rule 56(d) of the Federal Rules of Civil Procedure provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to summary judgment], the court may (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

FED. R. CIV. P. 56(d). The rule authorizes a court to grant a continuance when a nonmovant has not had an opportunity to conduct discovery that is essential to his opposition to a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).

To comply with Rule 56(d), the party opposing summary judgment must show (1) why he needs additional discovery and (2) how that discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999). Although the burden is not a heavy one, the nonmovant must justify his entitlement to a continuance by presenting specific facts explaining his inability to make a substantive response. *Union City Barge Line, Inc. v. Union Carbide Co.*, 823 F.2d 129, 137 (5th Cir. 1987). A claim that further discovery might reveal facts of which the nonmovant is currently unaware is insufficient. *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988). A party may not rely on vague assertions that additional discovery will produce needed, but unspecified facts, *Union City*, 823 F.2d at 137, but instead must identify a genuine issue of material fact that justifies the continuance pending further discovery. *See Woods v. Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1415 (5th Cir. 1987).

As aptly noted by PBL, Hill III's verification of the Rule 56(d) motion explicitly covers only the first seven paragraphs of the motion which only set forth the procedural history of the case. *See* Doc. 588 at 1-3. Defendants' arguments and the "specific facts" for which discovery is sought are not verified as required by the rule. *See* FED. R. CIV. P. 56(d) (requiring nonmovant to show by affidavit or declaration *specified reasons* that it cannot present essential facts to

oppose to summary judgment). This alone warrants denial of a continuance. *See Jones v. City of Ennis*, No. 04-CV-2605-L, 2005 WL 2428895, at *10-11 (N.D. Tex. 2005) (Lindsay, J.) (holding that a nonmovant's failure to file an affidavit explaining why he cannot oppose the summary judgment motion on the merits fails to satisfy Rule 56 requirements).

Even if the motion had properly been verified, a continuance is not warranted in this case. At this point, the parties have had ample time to consider the impact of the release of the registry funds, and Defendants have had several months since the filing of PBL's summary judgment motion to determine the ownership of the Note and Guaranty. Indeed, Phillips points out in his declaration that PBL identified itself as the original payee of the Note in its complaint. Doc. 66-1 (captioned "PBL Multi-Strategy Fund, L.P. f/k/a 'Palm Beach Multi Strategy Fund, L.P.'"). Indeed, in their counter-complaint, Defendants themselves referred to PBL Multi-Strategy Fund, L.P. as being the "predecessor in interest of PBL." Doc. 250 at 3. There is no need for discovery into that issue.

Finally, discovery into why PBL stopped funding the underlying litigation and the amount of damages Defendants are alleged to have suffered as a result is not warranted. Defendants have not identified with specificity any information they hope to discover that would create a genuine issue of material fact. *Woods*, 826 F.2d at 1415. To the contrary, they rely only on vague assertions that additional discovery will produce needed, but unspecified facts. *Union City*, 823 F.2d at 137. This is insufficient to warrant relief under Rule 56(d). *Washington*, 839 F.2d at 1123. Accordingly, Defendants' *Motion for Continuance Pursuant to FED. R. CIV. P. 56(d)*, Doc. 588, is **DENIED**.

3. *PBL's Motion for Leave to File Supplemental Appendix, Doc. 593*

In connection with the filing of its reply brief in support of its dispositive motions, PBL requests leave of court to file a supplemental appendix in order to respond to Hill III's affidavit in opposition to dismissal. The supplemental material consists of agreements between (1) PBL, Ahtrey, and Hill III and the Bickel & Brewer law firm ("B & B"); and (2) PBL, Ahtrey and Hill III and the Campbell Harrison & Dagley law firm ("CHD"). Doc. 593-1 at 7-13; Doc. 593-1 at 33-37. Attached to the respective agreements are the contracts between Hill III and B & B and Hill III and CHD. Doc. 593-1 at 20-25, 26-31; Doc. 593-1 at 38-52. Both attorney contracts provide for a combination of hourly fees with a contingent fee of 20% of any recovery in the 2020 case for B & B, and a 15% contingent fee for CHD, which was lowered to 10% if the case settled before a date certain.[3] Doc. 593-1 at 21, 26-27; Doc. 593-1 at 39-40. PBL contends that these contracts establish that Hill III's sworn statement that he had to employ lawyers on a contingent fee basis because PBL refused to fund the full $5 million is materially false. Doc. 593 at 1-2. PBL further notes that B & B was disqualified from representing Hill III in September 2008 and did not withdraw because Hill III could not pay the firm as he has falsely alleged. Doc. 593 at 2; 2020 case at Doc. #126 (disqualification order).

[3] PBL incorrectly states that B & B's contingency fee was 30% when that percentage, in fact, relates to another case.

Defendants oppose PBL's request to file the supplemental documents, arguing that PBL should have anticipated the need for the documents when it moved for summary judgment and the documents demonstrate that there are genuine issues of material fact at play. Doc. 599 at 2, 4-5.

PBL replies that Defendants' anticipation argument fails because (1) once PBL moved for summary judgment arguing that Defendants had proved no damages, Defendants had to produce evidence to the contrary; and (2) PBL wanted to bring the falsity of Hill III's declaration to the Court's attention so that proper action could be taken. Doc. 600 at 3-4.

Upon consideration, the Court finds that PBL's argument is sound and legally justified and adopts its reasoning as that of the Court. Additionally, if Defendants wanted to reframe their affirmative defenses and supplement the record with appropriate supporting material as they state, they should have included the documents with their request for leave to file same. As such, *PBL's Motion for Leave to File Supplemental Appendix,* Doc. 593, is **GRANTED**.

C. Conclusion

For the foregoing reasons, *Intervention Defendants' Objections to and Motion to Strike Declaration of Troy D. Phillips*, Doc. 587, is **GRANTED IN PART**; *Intervention Defendants' Motion for Continuance Pursuant to FED. R. CIV. P. 56(d)*, Doc. 588, is **DENIED**; *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. to Strike Intervenor-Defendants' Untimely Pleadings*, Doc. 592, is **DENIED**; *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. for Leave to File Supple-*

mental Appendix, Doc. 593, is **GRANTED**; and *Intervention Defendants' Motion for Leave to File Response*, Doc. 596, is **GRANTED**.

SO ORDERED on August 19, 2016.

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES
MAGISTRATE JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 08/19/16]

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Case No. 3:10-CV-02269-L-BK

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CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, and ERIN HILL, individually and on behalf of her minor children, N. HILL, C. HILL, and A. HILL,

Defendants.

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FINDINGS, CONCLUSIONS, AND RECOMMENDATION

This cause is before the Court for a recommendation on Intervenor-Plaintiff PBL's *Motion for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention*. Doc. 585. For the reasons that follow, it is recommended that the motion be **GRANTED IN PART**.

A. Procedural History

The history of this case is well known to the parties and will not be repeated at length here. In short, PBL Multi-Strategy Fund, L.P. ("PBL") filed a claim-in-intervention in March 2011 to enforce payment of a note (the "Note") alleged to have been executed by Ahtrey Investments, L.L.C. ("Ahtrey") with an original

principal amount of $5 million. Doc. 182 at 3. Pursuant to the terms of the Note, PBL advanced $2.6 million to fund litigation between Albert G. Hill III ("Hill III") as a plaintiff and certain defendants, including in underlying Case No. 3:07-CV-2020-L-BK (the "2020 case"). Doc. 182. Hill III is alleged to have personally guaranteed payment of the Note by Ahtrey ("the Guaranty"), which ultimately went into default. Doc. 182 at 2.

When the judgment in the 2020 case ordered Hill III's creditors' claims severed and filed in the instant case, PBL was granted leave to intervene to seek recovery under the Note and Guaranty and attorneys' fees from both Hill III and Ahtrey (collectively "Defendants"). Doc. 133; Doc. 182. Defendants filed a counterclaim against PBL, asserting that PBL breached the parties' agreement under the Note to provide a $5 million line of credit when PBL cut off funding for no reason, even though approximately $2.5 million was still available. Doc. 250 at 3-5. Defendants contended that as a result, Hill III could no longer pay his attorneys for representation in the 2020 case and had to retain counsel who charged him on a contingency fee basis, which cost him significantly more in attorneys' fees. Doc. 250 at 4-5.

In January 2012, PBL and Defendants entered into a settlement agreement (the "Agreement"), and filed a joint motion requesting that the Court authorize payment to PBL of $3.2 million from the funds in the registry for the 2020 case. 2020 case at Doc. #1227. The undersigned stayed consideration of that motion as well as several others, pending resolution of the appeal that Hill III had taken from the final judgment in the 2020 case. 2020 case at Doc. #1293. Following entry of the mandate in that appeal and years of

miscellaneous post-judgment litigation, District Judge Lindsay entered an order in January 2016 disbursing the registry funds in the 2020 case to two of Hill III's creditors (the "Disbursement Order"). 2020 case at Doc. #1686. Judge Lindsay noted that because all of the funds in the registry were earmarked for those creditors, there were no funds left in the registry to be distributed to PBL.[1] 2020 case at Doc. #1686 at 32.

The parties' Agreement expired by its own terms when no court registry funds were disbursed to PBL and the Disbursement Order became final.[2] Doc. 585-1 at 41-42 (providing that payment of the settlement funds was contingent on the District Court; "In the event the Court refuses to allow disbursement of the Settlement Funds . . . this Agreement shall be of no further force or effect" such that the parties could once again assert their claims and defenses). PBL now moves for summary judgment on its claim to enforce the Note and Guaranty and as to Defendants' counterclaim. Doc. 585. PBL also has requested that the Court enter judgment in its favor on Defendants' affirmative defenses pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[3] Doc. 585.

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[1] PBL conceded that the law firms commonly referred to as CHD and CNBW had contingent fee claims which had priority over PBL's claims and that CHD also had priority for its hourly fees.

[2] Defendants' argument to the contrary was rendered moot when Hill III's appeal of the Disbursement Order was dismissed for failure to prosecute. 2020 case at Doc. #1709; Doc. 591 at 9-10.

[3] In the interest of expediency, the Court will overlook PBL's counsel's failure to comply with the Northern District's briefing rules. *See* N.D. TEX. LOCAL RULE 56.3, 56.5.

B. Parties' Arguments

1. Abandonment of PBL's Claim

Defendants argue initially that PBL's dismissal motions are precluded in the instant case because the judgment is final and the case is closed and has been treated as such. Doc. 591 at 5-7. Thus, they assert, PBL has abandoned its claim. Doc. 591 at 8-9.

PBL responds that the Court's Disbursement Order disposed of all claims except its claim, which only sought to establish the priority of its debt. Doc. 594 at 4. PBL argues that its action against Defendants on the Note and Guaranty has never been ruled on, expressly or by implication, by any court in any case. Doc. 594 at 4. As such, PBL asserts, the only effect of the Court's Disbursement Order is that PBL has to find a source other than the registry funds in the 2020 case to satisfy its claims against Defendants once it has obtained a judgment. Doc. 594 at 4.

Defendants' position is meritless. They argue that final judgment occurred in January 2012 when the Court awarded attorneys' fees to Hill III's prior attorneys Blue, Aldous, and Malouf ("BAM"). Doc. 591 at 5. It is true that the Court referred to the instant case as closed on that date, but that was explicitly in reference to the BAM matter. Doc. 568 (citing Doc. 566). Defendants, however, overlook the fact that there also were ongoing fee disputes with several other of Hill III's creditors which were proceeding in both the 2020 case as well as in a separate arbitration case. Those disputes were not resolved until January 15, 2016, when the Judge Lindsay entered the Disbursement Order and noted that PBL would receive no funds because there was not enough money to satisfy its claim. 2020 case at Doc. #1686. PBL filed the

instant motion 30 days later in this case, in which it previously had intervened. *See* Doc. 131 (granting PBL leave to file a complaint in intervention); *see also* 2020 case at Doc. #999 (final judgment ordering that "claims asserted in this Court by any other creditors of Al III or Erin, are hereby severed into a separate action."). Until the Disbursement Order in the 2020 case was entered, PBL could not have known the outcome of its claim. Tying PBL's time to seek relief to the entry of an award in favor of BAM is nonsensical. PBL cannot be said to have abandoned its claim on these facts.

2. Effect of the Parties' Agreement

Defendants next argue that PBL is not entitled to summary judgment because the parties' Agreement is still in effect, and PBL has breached the Agreement by filing for summary judgment prematurely. Doc. 591 at 9-10.

PBL properly observes that the Agreement was contingent upon the Court's entry of a final order disbursing the agreed-upon settlement funds to PBL, and no such order was entered. Doc. 594 at 4-5. This condition precedent to the enforceability of the Agreement failed to occur, and the Agreement thus became a nullity. *See Centex Co. v. Dalton*, 840 S.W. 2d 952, 956 (Tex. 1992) (holding that a condition precedent must be satisfied before a right can accrue to enforce a contractual obligation).

3. PBL's Motion for Summary Judgment, Doc. 585

a. Applicable Law

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party moving for summary judgment has the initial burden of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotes omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* (citation omitted). Nevertheless, when ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Id.*

b. Supporting Evidence

PBL has submitted evidence showing that in December 2007, Ahtrey executed and delivered the Note to PBL (f/k/a "Palm Beach Multi-Strategy Fund"), which is the holder and owner of the Note. Doc. 585-1 at 5-19. Hill III personally guaranteed payment of the Note in the Guaranty dated December 26, 2007. Doc. 585-1 at 21-38. PBL advanced Defendants $2,600,000 in installments, as substantiated by the declaration of Troy Phillips, PBL's attorney for and liquidator

of PBL Holdings, LLC, the general partner of PBL Capital, L.P., which is the general partner of PBL.[4] Doc. 585-1 at 80-81. Just two weeks before the Note and Guaranty were executed, the defendants in the 2020 case moved to disqualify Hill III's then-counsel, Bickel & Brewer ("B & B"). 2020 case at Doc. #5. That motion was granted in September 2008. 2020 case at Doc. #126. Following Defendants' default on the loan, PBL intervened in this case in March 2011. Doc. 182. Thirty days after the Disbursement Order was entered in the 2020 case, PBL filed this motion. Doc. 585. As of the filing of the motion, Defendants owed PBL $8,172,973.25, with interest continuing to accrue at a rate of $2,146.73 a day. Doc. 585-1 at 81-82.

c. Recovery on the Note and Guaranty

Pursuant to Texas law, to recover from Ahtrey on the Note, PBL must establish: (1) the existence of the Note; (2) that it is the legal holder or owner of the Note; (3) that Ahtrey is the maker of the Note; and (4) the balance due and owing on the Note. *SeeUMLIC VP, LLC v. T&M Sales & Enviro. Syst., Inc*., 176 S.W.3d 595, 611 (Tex. App. – Corpus Christi 2005). Once a note holder establishes these facts, it is entitled to recover if the maker of the note fails to establish a defense. *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex.App. – Houston [14th Dist.] 1994). PBL has met all of these requirements. There is no dispute that the Note exists. Doc. 585-1 at 5-19. "Palm Beach Multi-Strategy Fund, L.P.," a/k/a PBL, is the holder and

[4] Defendants argue that PBL relied entirely on the affidavit of Troy Phillips to prove its case, and the affidavit should be stricken. Doc. 587 at 10-11. This Court, however, has denied Defendants' motion to strike the affidavit in a separate order entered on this date.

owner of the Note as demonstrated by the Note itself. Doc. 585-1 at 2, 5. Ahtrey is plainly the maker of the Note. Doc. 585-1 at 5, 8. Additionally, a sum certain is owed on the Note. Doc. 585-1 at 81-82. Lastly, Ahtrey has not established any defense. *Blankenship*, 899 S.W.2d at 238.

To recover damages from Hill III on the Guaranty, PBL must prove: (1) the existence and ownership of the guaranty; (2) the terms of the underlying contract by the holder; (3) the occurrence of a default in payment of the obligation; and (4) the guarantor's failure or refusal to perform. *Haggard v. Bank of the Ozarks, Inc.*, 668 F.3d 196, 199 (5th Cir. 2012). There is no dispute that the Guaranty exists and that PBL is the legal holder thereof. Doc. 585-1 at 21-34. The terms of the obligation that Hill III guaranteed are clearly set forth in the Guaranty. Doc. 585-1 at 23-25. Defendants do not dispute that a default occurred when the Note matured in December 2009 and neither Ahtrey nor Hill III, as guarantor, tendered to PBL the amount due. *See* Doc. 182 at 3. Accordingly, PBL's motion for summary judgment should be **GRANTED** allowing PBL to recover on the Note and Guaranty.

d. Attorneys' Fees

PBL also moves for summary judgment on its claim for past attorneys' fees of $91,000.00 and anticipated future fees of almost $1.2 million. Doc. 585 at 12-13. PBL has not sufficiently supported its case for attorneys' fees, however. As to fees currently owed, nowhere does Phillips describe his education or experience, his or his colleagues' hourly rates, or the usual rate for similar services in the community for this type of case. He has thus not carried his burden of establishing the reasonableness of the fees charged. *See*

Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). Moreover, a determination of what constitutes a reasonable fee for future services is sheer speculation. As such, PBL's motion for summary judgment regarding attorneys' fees should be **DENIED WITHOUT PREJUDICE**.[5]

5. Defendants' Counterclaim

PBL next moves for summary judgment on Defendants' counterclaim, arguing that there is no evidence in the record of the amounts Hill III was contractually obligated to pay either B & B or CHD, so any possible damages are unknown. Further, PBL points to the Guaranty, which provides that it constitutes a continuing, absolute, and unconditional guarantee of payment notwithstanding the validity of the Note or any defense, set-off, or counterclaim available to Ahtrey. Doc. 585-1 at 24.

Defendants respond that PBL's wrongful decision to cut off funding for the underlying litigation caused Hill III to suffer significant monetary damages because he was forced to hire more costly attorneys on a contingency basis. Doc. 591 at 11. In a declaration in opposition to PBL's motion, Hill III attests that PBL refused to provide the approximately $2.5 million in funds that remained available on his $5 million line of credit, despite the fact that he had advised PBL that cutting off the funds would cause severe consequences in his pursuit of the 2020 case. Doc. 590 at 29. Hill III alleges that, as a result, he could no longer pay his attorneys and "was forced to retain counsel who would charge me on a contingency fee basis," namely CHD

[5] In an order entered on this date, the undersigned struck portions of Phillips' affidavit to the extent PBL sought reimbursement of future attorneys' fees and costs.

and, subsequently, BAM. Doc. 590 at 29-30. He contends that, as a result of having to enter into contingency agreements, he suffered monetary damages when judgments were entered against him for $41 million in favor of CHD and $25 million in favor of BAM. Doc. 590 at 30. Defendants also oppose summary judgment on PBL's contention that the Guaranty is absolute and unconditional because such a guaranty does not prevent a guarantor from claiming that the creditor's wrongful post-execution conduct caused the guarantor's liability. Doc. 591 at 12.

In reply, PBL contends that Hill III's recent declaration that he had to turn to more expensive attorneys after PBL cut off his funding is both untimely and made in bad faith in light of the fact that B & B was disqualified from the case. Doc. 594 at 6-7. PBL also takes issue with Hill III's failure to reveal that both B & B and CHD had a contingency arrangement with him. Doc. 594 at 7.

As PBL observes and the Court agrees, Ahtrey was not a party to the 2020 case, so it did not incur any obligation for Hill III's attorney's fees to CHD or BAM. Doc. 585 at 14-15. Accordingly, it suffered no damages as a result of Hill III having hired CHD and BAM to replace B & B. Thus, PBL is entitled to summary judgment on Ahtrey's breach of contract counterclaim. *See Case Corp. v. Hi-Class Bus. Syst. of Am., Inc.*, 184 S.W.3d 760, 769 (Tex. App.– Dallas 2005) (holding that damages are an essential element of a breach of contract claim).

Turning to Hill III's counterclaim, even a cursory review of the docket sheet in the 2020 case makes evident that B & B were *disqualified* following extensive litigation about the matter, not terminated due to Hill

III's lack of funds. Moreover, review of PBL's supplemental appendix which contains the attorney-client agreements reveals that both B & B *and* CHD were representing Hill III on a contingency basis.[6] The Court views the false statements in Hill III's declaration as having been made in bad faith pursuant to Rule 56(h). *See* FED. R. CIV. P. 56(h) (providing that if a court finds that a declaration was submitted in bad faith, the court – after notice and time to respond – may order the submitting party to pay the other party's resulting reasonable expenses and attorneys' fees and the offender also may be held in contempt or subjected to other sanctions). Because dismissal of Hill III's counterclaim is warranted on this basis, the Court need not address the issue of whether the Guaranty was absolutely and unconditionally binding. For the reasons set forth, PBL's motion for summary judgment on Defendants' counterclaim should be **GRANTED**.

5. Defendants' Affirmative Defenses

Relying on Rule 12(c) of the Federal Rules of Civil Procedure, PBL next seeks judgment on the pleadings in relation to each of Defendants' 13 affirmative defenses, asserting that they lack factual detail and contain only legal conclusions. Doc. 585 at 14. Defendants argue that Rule 12(f) is the appropriate mechanism for striking affirmative defenses, and any such motion is untimely. Doc. 591 at 12-13.

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[6] The Court granted PBL's *Motion for Leave to File Supplemental Appendix*, Doc. 593, in a separate order entered on this date. Although Defendants note that they wish to submit a supplemental appendix as well, they neither submit the proposed appendix nor describe what documents would be contained therein.

Assuming that a Rule 12(c) motion is the appropriate vehicle to dispose of the affirmative defenses, PBL has not shown that it is entitled to that relief.[7] Rule 12(c) provides that "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." A Rule 12(c) motion "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (quotation omitted). In this case, PBL has not pointed to any undisputed material facts in the record relating to Defendants' affirmative defenses that warrant judgment on PBL's behalf.

That notwithstanding, if the district judge accepts the finding herein that summary judgment in PBL's favor is warranted, the affirmative defenses advanced by Defendants are of no moment. *See AMS Staff Leasing, N.A. Ltd. v. Assoc. Contract Truckmen, Inc.*, No. 04-CV-1344-D, 2006 WL 1096777, at *6 (N.D. Tex. 2006) (Fitzwater, J.) (holding that a grant of summary judgment in full rendered moot a party's request for

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[7] The weight of authority suggests that a motion to strike defenses under Rule 12(f) is the correct mechanism to deploy when a plaintiff disputes the sufficiency of some of a defendant's defenses. *See United States v. Brink*, No. C-10-243, 2011 WL 835828, at *2 (S.D. Tex. 2011); 5C Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1369 (3d ed. 1998) ("If a plaintiff seeks to dispute the legal sufficiency of fewer than all of the defenses raised in the defendant's pleading, he should proceed under Rule 12(f) rather than under Rule 12(c)"). A Rule 12(f) motion filed at this juncture would be untimely. FED. R. CIV. P. 12(f) (requiring motion to be filed within 21 days after being served with a pleading to which a response is not allowed).

summary judgment on affirmative defenses). Thus, PBL's request for dismissal of Defendants' affirmative defenses under Rule 12(c) should be **DENIED**.

C. Conclusion

For the foregoing reasons, it is recommended that PBL's *Motion for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention*, Doc. 585, be **GRANTED IN PART**.

SO RECOMMENDED on August 19, 2016.

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES
MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district judge, except upon

grounds of plain error. *See* Douglass *v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

/s/ Renee Harris Toliver
RENEE HARRIS TOLIVER
UNITED STATES
MAGISTRATE JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 09/02/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

INTERVENTION DEFENDANTS' MOTION FOR LEAVE TO FILE FURTHER EVIDENCE PURSUANT TO FED. R. CIV. P. 72(b)(3) AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Intervention Defendants ALBERT G. HILL III and AHTREY INVESTMENTS, LLC (collectively, Defendants) hereby move for leave to file further evidence in the form of the attached *Supplemental Declaration of Albert G. Hill, III* ("Supplemental Declaration") pursuant to Fed. R. Civ. P. 72(b)(3).

1. The Court had referred certain procedural and dispositive motions to United States Magistrate Judge Renee Harris Tolliver (the "Magistrate Judge") and, on August 19, 2016, the Magistrate Judge filed an *Order* (Dkt. 602) on the procedural motions, and her

Findings, Conclusions, and Recommendation (Dkt. 603) on the dispositive motions. Contemporaneously with the filing of this motion, Defendants are filing their objections to certain of the Magistrate Judge's various rulings and recommendations.

2. In her *Order*, and in her *Findings, Conclusions and Recommendation*, Magistrate Judge Tolliver made certain findings to the effect that the *Declaration of Albert G. Hill, III* (the "Hill Declaration") (Dkt. 590, pp. 28-31), which Defendants filed in support of their response to the *Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Judgment on the Pleadings and for Summary Judgment on its claim in Intervention with Supporting Brief* (Dkt. 585), contained statements that are materially false and/or was filed in bad faith under Rule 56(h) of the Federal Rules of Civil Procedure. *See* Dkt. 602, p. 8, Dkt. 603. pp. 9-10.

3. As explained in Defendants' objections to the Magistrate Judge's order and recommendation, the Magistrate Judge's findings as to the Hill Declaration are clearly erroneous and contrary to law in that the conclusion that Hill's Declaration was materially false is not the only conclusion to be drawn from the summary judgment evidence presented to the Court. In this regard, "[w]hen weighing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant." *Acker v. Deboer, Inc*., 429 F. Supp. 2d 828, 2006 U.S. Dist. LEXIS 23086 (N.D. Tex. 2006). "The court cannot make a credibility determination in light of conflicting evidence or competing inferences." *Id*. As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the

evidence," the motion for summary judgment must be denied." *Id*.

4. Under Rule 72(b)(3) of the Federal Rules of Civil Procedure, the Court is authorized to receive further evidence in the course of its de novo review of the Magistrate Judge's findings and recommendations on dispositive motions. The district court's decision on whether to receive further evidence is reviewed for abuse of discretion. *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998).

5. Pursuant to the authority of the Court to accept further evidence in its de novo review, Defendants seek leave to file the Supplemental Declaration in the form attached hereto as Exhibit "1." The purpose of the *Supplemental Declaration* is for Mr. Hill to shed more light on the statements in the Hill Declaration that the Magistrate Judge has characterized as false.

6. Of course, an accusation that affidavit testimony was false, and that an affidavit was filed in bad faith, cannot be taken lightly, and PBL will not be prejudiced by the Court's consideration of the further evidence.

CONCLUSION

7. For all the foregoing reasons, Intervention Defendants request that the Court grant Defendants leave to file the *Supplemental Declaration of Albert G. Hill, III* in the form attached hereto as Exhibit "1," and that they be awarded such other and further relief as to which they may be justly entitled.

Respectfully submitted,

ACKERMAN & RAMOS, PLLC
Attorneys and Counselors

8226 Douglas Avenue, Suite 330
Dallas, Texas 75225
(214) 346-4200 (Telephone)
(214) 346-4201 (Facsimile)

By: /s/*Steven T. Ramos*
STEVEN T. RAMOS
State Bar No. 00784812
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W. RANDALL ACKERMAN
State Bar No. 00832475
wra@ack-law.com

ATTORNEYS FOR
INTERVENTION
DEFENDANTS

CERTIFICATE OF CONFERENCE

I certify that this motion is opposed. On September 2, 2016, I held a conference with Troy D. Phillips, counsel for the Intervention Plaintiffs. Agreement on this motion could not be reached because opposing counsel opposes the relief sought.

By: /s/*Steven T. Ramos*
STEVEN T. RAMOS

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the forgoing document with the clerk of the United States District Court, Northern District of Texas, using the ECF system of the Court. The ECF system transmitted a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means. September 2, 2016

By: /s/*Steven T. Ramos*
STEVEN T. RAMOS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 09/02/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,

Plaintiffs,

v.

ALBERT G. HILL, III, *et al.*,

Defendants.

SUPPLEMENTAL DECLARATION OF ALBERT G. HILL, III

State of Georgia, USA
County of Fulton

1. I, Albert G. Hill, III, submit this declaration under 28 U.S.C. § 1746.

2. I declare under penalty of perjury that all of the facts stated in this document are true and correct and based upon my own personal knowledge and belief.

3. I provide this Declaration in support of my objections to the Magistrate Judge's *Order* on procedural motions, and her *Findings, Conclusions, and Recommendation*, both filed on August 19, 2016. All defined terms used here are used as defined in my original declaration.

4. In paragraph 10 of my original declaration filed in this matter on March 23, 2016 (Dkt. 590, pp. 28-31),

I stated as follows: "Deprived of the necessary source of funding for the underlying litigation, I was no longer able to pay my attorneys in the underlying litigation. As a result, I was forced to retain counsel who would charge me on a contingency fee basis."

5. In paragraph 11 of my original declaration, I also stated as follows:

> Had Palm Beach Multi-Strategy Fund, L.P. not prematurely cut off the funding under the Revolving Credit Note, I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation. I believe that if I had I [sic] continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency basis, then the cost of litigation would have been substantially less.

6. I am aware that Palm Beach Multi-Strategy Fund, L.P. ("PBL") takes the position that these statements and other statements regarding these matters in my original declaration in support of my counterclaim and my affirmative defense of prior material breach are materially false, and that the Magistrate Judge has adopted PBL's reasoning. I stand by these statements as being true and correct, and submit this supplemental declaration to explain how the conclusion that PBL and the Magistrate Judge have reached as to the falsity of my testimony is wrong.

7. The last regular payment that PBL made to me under the Note was a payment of $250,000 in August 2008 (although I did receive two smaller payment s of $100,000 each from PBL or individuals affiliated with PBL several months later, in February and March, 2009), which precipitated a "perfect storm"

with respect to my ability to fund my litigation. Specifically, the last payment of my funding occurred just before my counsel, Bickel & Brewer, was disqualified in September 2008, followed by the stock market crash of October 2008. *See* http://www.money-zine.com/investing/stocks/stock-market-crash-of-2008/.

8. Bickel & Brewer's disqualification is an event that was highly publicized, so I had no thought of hiding that fact when making my original declaration. What I meant when I said in my original declaration that "I was no longer able to pay my attorneys in the underlying litigation" was not just with reference to Bickel & Brewer; rather, I meant that I could not hire any attorneys on an hourly basis. Accordingly, at that time, I was forced to hire first CHD, then BAM, pursuant to contracts containing the onerous blanket contingency in my interest in the MHTE. The other firms I attempted to hire wanted a hefty retainer (which I could not provide), and to be paid on a current hourly basis.

9. When I said in my original declaration that "I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation," by "such as BAM and CHD," I was referring to contingency attorneys who wanted a blanket contingency interest in all litigation I was involved in at the time. In this regard, my fee contract with Bickel & Brewer and my fee contract with CHD were materially different. The CHD fee agreement included a blanket contingency interest in all litigation I was involved in at the time. *(see* Dkt. 593-1, Supp. pp. 37-39), whereas my contract with Bickel & Brewer did not include a blanket contingency interest in the MHTE estate (see Dkt. 593-1, Supp. App. 18-19), but only in my other recoveries, for example, from

the HHTE estate. *Id.* Instead, regarding the MHTE estate, Bickel & Brewer's charges to me were hourly plus expenses. *Id.*

10. Attached to this supplemental declaration as Exhibit A is an exhibit that CHD introduced at AAA arbitration that reflects the amounts of attorneys' fees that they sought to recover from me. This exhibit demonstrates that the financial impact in this one difference in the two fee agreements alone amounted to at least an extra approximately $20 million differences in legal fees adjudged against me.

11. Attached hereto as Exhibit B is a copy of a *Plaintiff's Original Petition* filed in Dallas County District Court on August 10, 2016, styled *PBL Multi-Strategy Fund, L.P. v. Comerica Bank, et al.,* No. DC-16-09627.

Executed in Fulton County, State of Georgia, on the 2nd day of September, 2016.

/s/ Albert G. Hill, III
Albert G. Hill, III

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Gross Recoveries Summary

		15%
Al III's 1/3 share of the December 27, 2008 MHTE distribution placed into the registry of Probate Court No. 2 (with accrued interest)	$1,381,929	**$207,289**
Al III's 1/3 share of the April 29, 2009 MHTE distribution retained by the MHTE trustee (with accrued interest)	$19,720,239	**$2,958,035**
Al III's 1/3 share of the December 15, 2009 MHTE distribution retained by the MHTE trustee (with accrued interest)	$9,755,865	**$1,463,379**
Payment from the HHTE to Al III in settlement of disputed claims	$10,500,000	**$1,575,000**
Payment from Al Jr. to Al III in settlement of disputed claims	$29,308,776	**$4,396,316**
Value of assets agreed as being held for the benefit of Al III in the MHTE - Albert G. Hill III Trust	$97,778,364	**$14,666,754**
		15%
TOTAL	**$169,445,173**	**$25,266,773**

Exhibit "A"

Gross Recoveries: Payments from MHTE to Al III

Fee Agreement (Ex. 1)	Settlement Agreement (Ex. 343)	Final Judgment (Ex. 398)
2.a: the value on the date of Resolution of any and all assets, cash or non-cash consideration distributed or to be distributed to or for the benefit of Clients (or any one or more of them), whether directly or indirectly, in trust or otherwise from the assets of the [MHTE] or the assets of the [HHTE] or both, prior to the expiration of twenty-one (21) years after the death of Margaret Hunt (in the case of the [MHTE]) and the expiration of twenty-one (21) years after the death of Haroldson Lafayette Hunt, Jr. (in the case of the [HHTE]);	§ III.2(a): Al Jr. acknowledges that the Disclaimer is valid and enforceable and shall be given full force and effect with the result that Al III, Heather, and Elisa each shall receive his or her pro rata share of all interests as set forth in the Disclaimer at the time of Margaret Hunt Hill's death. As a result, Al III … shall receive 25% of Al Jr.'s interest in distributions from the MHTE as stated in the Agreed Final Judgment in the Margaret Probate Suit, which sum is currently in the registry of Probate Court No. 2 [of] Dallas, Dallas County, Texas or separately accounted for in the MHTE.	¶ 17: All income attributable to Al III's separate interest in the MHTE and available for distribution (including without limitation the amount tendered to, but not deposited with, the registry of Probate Court No. 2 Dallas, Dallas County, Texas but excluding the amount on deposit with the registry of such court) shall be disbursed to Al III within ten (10) days after entry of this Final Judgment by payment from the MHTE into the registry of this Court for the benefit and account of Al III…. ¶ 41: IT IS ORDERED that the Clerk of this Court is DIRECTED to accept into the registry of this Court for the above-referenced severed action all sums required to be deposited into the Court's registry for the benefit of Al III and the interpleaded funds in connection with the Margaret Probate Suit transferred from the registry of Probate Court No. 2 of Dallas County, Texas and from the trustee of the MHTE relating to Al III's interest in the MHTE.

Gross Recoveries

Al III's 1/3 share of the December 27, 2008 MHTE distribution placed into the registry of Probate Court No. 2 (with accrued interest)	$1,381,929
Al III's 1/3 share of the April 29, 2009 MHTE distribution retained by the MHTE trustee (with accrued interest)	$19,720,239
Al III's 1/3 share of the December 15, 2009 MHTE distribution retained by the MHTE trustee (with accrued interest)	$9,755,865

Gross Recovery: Payment from HHTE to Al III

Fee Agreement (Ex. 1)	Settlement Agreement (Ex. 343)	Final Judgment (Ex. 398)
2.a: the value on the date of Resolution of any and all assets, cash or non-cash consideration distributed or to be distributed to or for the benefit of Clients (or any one or more of them), whether directly or indirectly, in trust or otherwise from the assets of the [MHTE] or the assets of the [HHTE] or both, prior to the expiration of twenty-one (21) years after the death of Margaret Hunt (in the case of the [MHTE]) and the expiration of twenty-one (21) years after the death of Haroldson Lafayette Hunt, Jr. (in the case of the [HHTE]);	§ III.3(b): The trustees and advisory board members of the MHTE and the HHTE agree to do the following . . . Cause to be paid in settlement of disputed claims to Al III by payment made to the registry of the Federal Court an amount equal to $10.5 million from the HHTE within ten (10) days after entry of the Agreed Final Judgment in the Federal Suit.	¶ 21: IT IS FURTHER ORDERED that the trustee and advisory board members of the HHTE shall cause to be paid in settlement of disputed claims to Al III, by payment made to the registry of this Court for Al III's benefit, a total sum of $10.5 million from the HHTE within ten (10) days after the Court's entry of this Final Judgment.

Gross Recovery

Payment from the HHTE to Al III in settlement of disputed claims	$10,500,000

Gross Recoveries: Payments from Al Jr. to Al III

Fee Agreement (Ex. 1)	Settlement Agreement (Ex. 343)	Final Judgment (Ex. 398)
2.c: the value on the date of Resolution of any assets, cash or non-cash consideration received or to be received by or for the benefit of Clients (or any one or more of them), directly or indirectly, in trust or otherwise, in connection with any Resolution of the matters in dispute in Civil Action No. 3:07-CV-02020-O and/or the State Court Actions, from any source whatsoever other than the [MHTE] or the [HHTE] or the other trusts which are the subject of the lawsuits listed on the attached Exhibit "A".	§ III.2(b): Al Jr. agrees to do the following … Pay in settlement of disputed claims to Al III, by payment made to the registry of the Federal Court for the benefit of Al III, the total sum of $30 million, paid in four annual installments of $7.5 million each (one on each anniversary of the date the first installment is due), that start 24 months after the effective date of the Agreed Final Judgment in the Federal Suit (the "Al Jr. Settlement"). [NOTE: The parties agreed Al Jr. would make an additional payment of $675,000 during the negotiations after the Settlement Agreement and before the Final Judgment. See ECF 998 at 2.]	¶ 21: IT IS ORDERED that Al Jr. shall pay in settlement of disputed claims to Al III, with no admission of fault or liability by Al Jr., any and all such fault or liability being expressly denied by Al Jr., by payment made to the registry of this Court for Al III's benefit, the total sum of $30.675 million paid as follows….

Gross Recovery

Payment from Al Jr. to Al III in settlement of disputed claims	(Present Value of) $30,675,000*	$29,308,776

Per revised schedule to expert report of Saul Solomon.

Gross Recovery: Creation of Separate MHTE Trust for Al III

Fee Agreement (Ex. 1)	Settlement Agreement (Ex. 343)	Final Judgment (Ex. 398)
2.b: the value on the date of Resolution of any and all assets, cash or non-cash consideration held for the benefit of Clients (or any one or more of them) or partitioned for the benefit of Clients (or any one or more of them) or otherwise segregated, identified, agreed or acknowledged as being held for the benefit of Clients (or any one or more of them) from the assets of the [MHTE] or the assets of the [HHTE] or both, from which Clients (or any one or more of them) have the right to receive distribution of income and/or principal or the reasonable expectation that they will receive distribution of income and/or principal prior to the expiration of twenty-one (21) years after the death of Margaret Hunt (in the case of the [MHTE]) and the expiration of twenty-one (21) years after the death of Haroldson Lafayette Hunt, Jr. (in the case of the [HHTE]);	§ III.2(a): Al Jr. acknowledges that the Disclaimer is valid and enforceable and shall be given full force and effect with the result that Al III, Heather, and Elisa each shall receive his or her pro rata share of all interests as set forth in the Disclaimer at the time of Margaret Hunt Hill's death. As a result, Al III shall be entitled to be the beneficiary of his share of the corpus of the MHTE assets…. § III.5(h): Concurrently with its approval of this Agreement, the Agreeing Parties shall jointly request that the Federal Court, the Honorable Reed O'Connor, enter an Agreed Final Judgment in the Federal Suit providing that the MHTE and the HHTE shall be divided into separate trusts (the "New Hunt Trusts") for each beneficiary in proportion to his or her beneficial ownership, as follows…. §III.3(e): Al III agrees to replace all Trustees for (1) Al III's MHTE New Hunt Trust … with a bank trustee with greater than $10 billion in assets under management adjusted for inflation (a "Bank Trustee"). Al III shall select the Bank Trustees for all Al III Trusts for which a Bank Trustee is to be appointed.	¶ 8.i: One-twelfth (1/12) of the MHTE shall be set aside as a separate trust for the benefit of Al III as the sole current Beneficiary (as the term "Beneficiary" is defined in the MHTE) of such separate trust. i. The name of this separate trust shall be the "MHTE - Albert G. Hill III Trust." ii. The Court hereby APPROVES the appointment of the following successor trustee and advisory board members of the MHTE - Albert G. Hill III Trust, who shall succeed to such position in accordance with Article II, Section 3 of the Articles of Agreement and Declaration of Trust of the MHTE, as of the date the current trustee and advisory board members resign from their respective positions: a) Trustee _____ [Al III's Bank Trustee];[6] b) Advisory Board Member Al III; and c) Advisory Board Member A. Kimbrough Davis. [6] Al III is ORDERED to submit the name of the person he would like to serve in this capacity within ten (10) days of the Court entering this Final Judgment.

Gross Recovery

Value of assets agreed as being held for the benefit of Al III in the MHTE – Albert G. Hill III Trust	$97,778,364

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IN THE DISTRICT COURT JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Cause No. DC-16-09627

PBL MULTI-STRATEGY FUND, L.P.,

Plaintiff;

v.

COMERICA BANK, solely in its capacity as trustee of the Albert G. Hill, III 2010 Gift Trust f/b/o Albert G. Hill, IV; the Albert G. Hill, III 2010 Gift Trust f/b/o Nance H. Hill; and the Albert G. Hill, III 2010 Gift Trust f/b/o Caroline M. Hill

Defendants.

PLAINTIFF'S ORIGINAL PETITION

PBL MULTI-STRATEGY FUND, L.P. ("PBL") brings this suit against Comerica Bank ("Bank") solely in its capacity as trustee of the three trusts listed in the caption hereof and for its claims states:

DISCOVERY CONTROL PLAN

1. Plaintiff proposes that discovery should be conducted in accordance with a discovery control plan under "level 3" as provided in T.R.Civ. P. Rule 190.4 (level 3).

PARTIES

2. Plaintiff is a Delaware limited partnership whose sole place of business is in Dallas, Texas.

3. Defendant is a national banking association or corporation whose principal place of business in

located in Dallas, Texas as well. Defendant may be served by serving its registered agent Corporate Creations Network Inc. at 2425 W. Loop South #200, Houston, Texas 77027.

VENUE

4. Venue is proper in Dallas County because the parties' respective principal offices are in Dallas County and the material facts all occurred in Dallas County.

MATERIAL FACTS

5. On or about December 26, 2007, Ahtrey Investments, L.L.C. ("Ahtrey") executed and delivered a Note (the "Note") dated December 26, 2007 executed by Ahtrey pursuant to which PBL (then known as "Palm Beach Multi-Strategy Fund") advanced $2.6 million to fund litigation between Albert G. Hill, III ("Hill") and certain defendants.

6. Hill personally guaranteed payment of the Note.

7. PBL advanced $2,600,000 pursuant to the Note. The dates and amounts of each advance are:

December 27, 2007	$1,150,000
February 29, 2008	$ 250,000
April 3, 2008	$ 250,000
May 2, 2008	$ 250,000
June 11, 2008	$ 250,000
August 29, 2008	$ 250,000
February 18, 2009	$ 100,000
March 23, 2009	$ 100,000

Total	$2,600,000

8. The principal balance of the Note outstanding from time-to-time bears interest at the lesser of eighteen percent per annum or the maximum non-usurious rate calculated under New York law as agreed in the Note and in the Guaranty.

9. The Note matured according to its terms on December 26, 2009 (the "Maturity Date").

10. As of the Maturity Date, interest had accrued on the principal balance in the net amount of $760,013.25 (after a credit on October 30, 2008 in the amount of $46,861.93), so that when added to the principal of $2,600,000, the total amount due and owing at maturity was $3,360,013.25.

11. According to the terms of the Note, past due principal and interest bear interest at the lesser of 23% per annum (5% over the pre-maturity rate), calculated on the basis of a 360-day year (effective rate, 23.32%) or the maximum rate allowed under New York law.

12. The total amount due and owing on the Note as of July 1, 2016 is $8,464,928.53 consisting of

Principal	$2,600,000.00
Pre-maturity Interest	$ 760,013.25
Post-maturity Interest	$5,104,915.28

Interest continues to accrue at the rate of $2,146.73 per day.

13. No payments have been made on the Note except for $46,861.93 on October 30, 2008 which was credited to accrued interest on that date resulting in net pre-maturity interest in the amount of $760,013.25 ("Plaintiff's Debt").

14. PBL is a secured creditor of Hill by reason of a security agreement dated December 26, 2007 (the "Security Agreement") executed by Ahtrey.

15. PBL's collateral ("Collateral") consists of the proceeds realized by Hill from two lawsuits one of which being case number 3:07-CV-2020 now pending on the docket of United States District Court for the Northern District of Texas (the "Underlying Case"). "Proceeds" as defined in the Security Agreement means and consists in part of any money or property which Hill in his individual and representative capacities, is entitled to recover or receive, or becomes entitled to recover or receive resulting from any compromise, settlement, covenant-not-to-sue, release, judgment, or other disposition of the Underlying Case. The Security Agreement also covers proceeds of the Collateral.

16. Plaintiff's security interest in the Collateral was perfected by filing a financing statement with the Texas Secretary of State on December 27, 2007 bearing the file number 07-0043346996.

17. Albert G. Hill III is the creator or settlor of the Albert G. Hill, III 2010 Gift Trust f/b/o Albert G. Hill, IV; the Albert G. Hill III 2010 Gift Trust f/b/o Nance H. Hill and the Albert G. Hill III 2010 Gift Trust f/b/o Caroline M. Hill (collectively, the "Trusts.") Defendant is the trustee of the Trusts.

18. In about January 2016 Hill transferred approximately $20 million (the "Money") to the Trusts (the "Transfer") for which he did not receive reasonably equivalent value.

19. Hill was legally insolvent at the time of the Transfer.

20. At the time of the Transfer, Hill believed or reasonably should have believed that he would incur debts, in particular to Plaintiff and to Scott Olson, beyond his ability to pay as they came due.

21. The Transfer was made with the actual intent to hinder, delay or defraud Plaintiff, Scott Olson or both in that the Transfer:

a. was to Hill's children who, for the purpose of the Texas Fraudulent Transfer Act were "insiders;"

b. Hill retained control of the money after the Transfer;

c. Hill had been sued by Plaintiff and Scott Olson, as well as others, before the Transfer; and

d. Hill was insolvent or became insolvent shortly before or shortly after the Transfer was made.

COUNT I: FRAUDULENT TRANSFER

22. Plaintiff incorporates by reference paragraphs 5-21 inclusive as though restated at length.

23. Because Plaintiff was a creditor of Hill at the time of the Transfer, the Transfer is fraudulent and void as to Plaintiff.

24. Because Defendant, in its capacity as Trustee, did not give reasonably equivalent value for the Transfer, Defendant, in its capacity as Trustee, is liable to Plaintiff out of assets of the Trust for the lesser of the amount of the money comprising the Transfer or the amount of Plaintiff's Debt together with interest from the date of the Transfer and reasonable attorney's fees as provided in Tex. Bus. & Comm. Code §24.013.

25. As provided in Tex. Bus. & Comm. Code §24.008(a)(3)(A), Plaintiff is entitled to a temporary injunction prohibiting the further transfer or distribution of assets of the Trusts and such other relief as will protect Plaintiff from dissipation of the Trusts' assets during the pendency of this case.

COUNT II: FORECLOSURE OF SECURITY INTEREST

26. Plaintiff incorporates by reference paragraphs 5-21 inclusive as though restated at length.

27. The Money transferred to the Trusts constituted Plaintiff's Collateral under the Security Agreement.

28. Because Plaintiff's Security Interest was perfected, Defendant, in its capacity as Trustee of the Trusts, took the Collateral subject to Plaintiff's Security Interest.

29. Plaintiff is therefore entitled to foreclosure of its Security Interest in the Collateral in the hands of Defendant. Defendant should be ordered to turn over to Plaintiff so much of the Collateral in Defendant's hands as may be necessary to satisfy Plaintiff's claim.

30. In addition to the amount of principal and interest due and owing on the Note, Plaintiff is entitled to recover reasonable attorney's fees as provided in the Note and Security Agreement. The value of the Collateral which Defendant should turn over to Plaintiff must therefore include an amount sufficient to cover Plaintiff's reasonable attorney's fees incurred in prosecution of this action.

COUNT III. CONVERSION

31. Plaintiff incorporates by reference paragraphs 5-21 inclusive as though restated at length.

32. Pursuant to the terms of the Security Agreement, Hill was obligated to deliver the Money to Plaintiff. Instead, Hill effected the Transfer of the Money to the Trusts.

33. The Money constitutes a specific, identifiable fund. Therefor the Transfer of the Money constitutes conversion of the Money.

34. As recipient of the Transfer, Defendant, in its capacity as Trustee of the Trusts, is liable to Plaintiff for the conversion of the Money up to the amount of Plaintiff's Debt plus reasonable attorney's fees as provided in the Note and Security Agreement.

RELIEF REQUESTED

Plaintiff requests the following relief:

a. a temporary injunction enjoining Defendant in its trustee capacity from transferring any money or property from the Trusts during the pendency of this case;

b. judgment against Defendant in its trustee capacity for the amount due and owing to Plaintiff on the Note, plus reasonable attorney's fees;

c. foreclosure of the Security Interest by ordering Defendant in its trustee capacity to turn over to Plaintiff, Trusts' assets sufficient to satisfy the amount due and owing to Plaintiff on the Debt, plus reasonable attorney's fees and the estimated costs of disposition of the property so transferred; and

d. costs and general relief.

Respectfully submitted,

/s/ Troy D. Phillips

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APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 09/02/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY, *et al.*,
Plaintiffs,
v.
ALBERT G. HILL, III, *et al.*,
Defendants.

INTERVENTION DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S (I) ORDER ON PROCEDURAL MOTIONS AND (II) FINDINGS, CONCLUSIONS AND RECOMMENDATION AND BRIEF IN SUPPORT THEREOF

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IN THE UNITED STATES DISTRICT COURT
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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and Local Civil Rules 72.1 and 72.2, Intervention Defendants ALBERT G. HILL III and AHTREY INVESTMENTS, LLC timely file the following objections to (i) the Magistrate Judge's *Order* (Dkt. 602) (the "Procedural Order") on certain procedural motions, and (ii) *Findings, Conclusions, and Recommendation* (Dkt. 603) (the "Recommendation"), both filed on August 19, 2016.

BACKGROUND

1. This case arose from federal district court litigation forming part of a larger family dispute relating to the management of two trusts created by the late Texas oil magnate H.L. Hunt. Hill initiated the litigation in Texas state court in 2007. *See Memorandum Opinion and Order*, Dkt. 1660, pp. 10-18 (App[1]. Tab B). After removal of the underlying case to federal court and after several years of litigation, the parties entered into a Global Settlement Agreement (Dkt. 879) in Civil Action No. 3-07-CV-2020-L (the "2020 Action"), and, on November 8, 2010, Judge Reed C. O'Connor issued a final judgment (the "Final Judgment") implementing the parties' settlement agreement (Dkt. 999 in the 2020 Action). The Final Judgment severed all attorneys' fee claims and certain other creditor claims from the 2020 Action into this separate civil action, No. 3:10- CV-02269 (the "2269 Action").

2. On February 10, 2011, Intervention Plaintiff PBL Multi-Strategy Fund, L.P. ("PBL") filed its motion to intervene in this 2269 Action as a party plaintiff (Dkt. 66) to assert claims against Ahtrey Investments, LLC ("Ahtrey") and Albert G. Hill, III ("Hill") (Hill and Ahtrey are collectively referred to herein as "Defendants") on a promissory note (the "Note") and guaranty (the "Guaranty") pursuant to which PBL alleged that it loaned Ahtrey $2.6 million, personally guaranteed by Hill, to fund litigation between Hill and certain defendants, including the 2020 Action. (Dkt. 585, p. 2). PBL also claimed a security interest in certain "Proceeds" that Hill might receive or be entitled to

[1] "App." refers to Defendants' appendix filed along with these objections.

receive from two lawsuits, including the 2020 Action. The Court granted the motion to intervene (Dkt. 131), and PBL's Complaint in Intervention (Dkt. 182) (the "Complaint") was deemed filed on March 23, 2011.

3. In response to the Complaint, Defendants filed a counterclaim (Dkt. 250) (the "Counterclaim") alleging that PBL breached the Note by cutting off funding under the Note's $5,000,000 line of credit, even though nearly half of the promised funds remained available. Intervention Defendants further alleged that this cutting off of funding caused Defendants to suffer damages in that Hill was forced to retain contingency fee attorneys with whom he has been involved in protracted and expensive litigation. Also in response to the Complaint, Defendants filed their answer (Dkt. 249) (the "Answer"), asserting numerous affirmative defenses, including PBL's prior material breach of the Note and related agreements.

4. On or about January 26, 2012, PBL and Defendants entered into a settlement agreement (Dkt. 585-1, Tab C) (the "PBL Settlement Agreement") pursuant to which the parties agreed to file a joint motion (Dkt. 1227) (the "Joint Motion") in the 2020 Action seeking the Court's approval of the PBL Settlement Agreement and the Court's authorization of the payment to PBL of the agreed settlement amount of $3.2 million out of the funds in *custodia legis* in the 2020 Action. However, the Court never ruled on the Joint Motion.

5. After the execution of the PBL Settlement Agreement and during the pendency of the Joint Motion, from at least January 26, 2012, the parties took no action to prosecute or defend PBL's Complaint in the 2269 Action because the parties had settled the claim.

A Judgment was entered in favor of the BAM attorneys on January 10, 2012, and an appeal was taken to the United States Court of Appeals for the Fifth Circuit on April 12, 2012. This Court has referred to the Judgment as final, and the case is closed. *See* App. Tab A, pp. 8 9; App. Tab. B, pp. 16, 17 n.6; App. Tab C, p. 19. No scheduling order has been entered in this case, and, until the filing of PBL's dispositive motion, no action had been taken by any party except as it relates to appellate and post-judgment matters.

6. On January 15, 2016, the Court entered an order in the 2020 Action (Dkt. 1686) (the "Disbursement Order") providing for the disbursement of the funds in *custodia legis*; but the distribution order did not provide for the distribution of any of the funds in *custodia legis* to PBL.

7. PBL filed its *Motion of Intervenor-PBL Multi-Strategy Fund, L.P. for Judgmenton the Pleadings and for Summary Judgment on its Claim in Intervention with Supporting Brief* (the "Motion for Summary Judgment") on February 16, 2016, only 32 days after the Court's signing of the Disbursement Order. (Dkt. 585). By way of its Motion for Summary Judgment, PBL sought (i) summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on its affirmative claims on the Note and Guaranty, as well as on its claim for attorneys' fees, (ii) summary judgment pursuant to Rule 56 on the Defendants' Counterclaim, and (iii) judgment on the pleadings pursuant to Rule 12(c) on Defendants' affirmative defenses.

8. Defendants filed their *Intervention Defendants' Response to Intervenor PBL Multi-Strategy Fund, L.P.'s Motion for Judgment on the Pleadings, and for Summary Judgment on its Claim in Intervention* (Dkt. 589) (the "Summary Judgment Response") on March

23, 2016. The Summary Judgment Response was supported by the Declaration of Albert G. Hill, III ("Hill Declaration) (Dkt. 590, App, Tab G). Along with the response, Intervention Defendants also filed their *Intervention Defendants' Motion for Continuance Pursuant to Fed. R. Civ. P. 56(d) and Brief in Support Thereof* (the "Motion for Continuance") (Dkt. 588), asking the Court to allow them additional time to obtain affidavits and to conduct discovery necessary to respond to the Motion for Summary Judgment. Also along with the Summary Judgment Response, Intervention Defendants filed their *Intervention Defendants' Objections to and Motion to Strike the Declaration of Troy D. Phillips and Brief in Support Thereof* (the "Motion to Strike") (Dkt. 587), objecting to and moving the Court to strike the declaration of PBL's counsel, Troy D. Phillips (the "Phillips Declaration") (Dkt. 585-1) on which PBL relied in support of its Motion for Summary Judgment.

9. PBL filed its *Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Leave to File Supplemental Appendix* (Dkt. 593) (the "Motion to Supplement") on March 30, 2016, asking the Court for leave to file a supplemental appendix in response to Defendants' Hill Declaration.

10. The Court referred all pending motions to United States Magistrate Judge Renee Harris Tolliver (the "Magistrate Judge") and, on August 19, 2016, the Magistrate Judge filed the Procedural Order and the Recommendation. Among other things, by way of the Procedural Order, the Magistrate Judge granted Defendants' Motion to Strike in part and granted PBL's Motion to Supplement. Pursuant to the Recommendation, the Magistrate Judge recommended that

PBL's Motion for Summary Judgment be granted in part.

11. Defendants file these objections to the Procedural Order and the Recommendation pursuant to Rule 72 of the Federal Rules of Civil Procedure and Rules 72.1 and 72.2 of the Local Civil Rules.

DEFENDANTS' OBJECTIONS, WITH ARGUMENT AND AUTHORITIES

A. Objections to the Magistrate Judge's Procedural Order on Non-Dispositive Matters.

12. When a party objects to the magistrate judge's written order on pretrial matters that are not dispositive of a party's claim or defense, the district judge is to set aside any part of the order "that is clearly erroneous or is contrary to law." . Fed. R. Civ. P. 72(a). *See also* 28 U.S.C. § 636(b)(1).

13. First Objection to the Procedural Order. Defendants object to the Magistrate Judge's denial of their Motion to Strike as to paragraphs 1-4 of the Phillips Declaration, in which Phillips, PBL's counsel in this lawsuit, testifies as to the essential elements of PBL's claims on the Note and Guaranty. (Order, pp. 2-4).

14. In particular, in their Motion to Strike, Defendants lodged the following objections as to Phillips' failure to demonstrate his competency to testify to the matters set forth in paragraphs 1-4:

a. The Intervention Defendants object to and move to strike paragraphs 1-4 of the **Phillips Declaration on grounds that Phillips neither states that he has personal knowledge of the matters set forth therein, nor sufficiently sets**

forth circumstances showing how he might have acquired personal knowledge of the matters set forth therein.

* * *

c. Intervention Defendants object to and move to strike paragraphs 2 and 4 of the Phillips Declaration regarding advances under and amounts due on the Note on grounds that they are hearsay. **First, no records of PBL of any sort are attached to evidence the alleged advances made on the Note or the accrual of interest. Second, Phillips states in paragraph 2 that the amounts of the alleged advances were "as taken from the PBL books and records," but offers no information at all as to the nature of such records, or how such records are kept. The Phillips Declaration does not establish any of the required elements to establish any such records as coming within the business records exception to the hearsay rule set out in Rule 803(6) of the Federal Rules of Evidence, and Phillips is not shown to be a custodian or "other qualified witness" as to such records. The Phillips Declaration fails to explain his relationship to PBL Multi-Strategy Fund, L.P., or [sic] as Liquidator of a purported parent entity he would have access to or how he became familiar with PBL Multi-Strategy Fund, L.P.'s [sic] with its**

> **recordkeeping practices, and became a custodian of record.** Accordingly, there is no proper foundation for the admission of any of the evidence.

Motion to Strike (Dkt. 587), pp. 2-3 (emphasis added).

15. The Magistrate Judge overruled these objections going to Phillips' lack of competency as a witness:

> Upon review and consideration of the law, the pleadings, and the parties' arguments, the Court finds that the Phillips declaration is largely adequate for purposes of supporting PBL's dispositive motion. **It is undisputed that Phillips acts as agent and attorney for PBL, and he avers that he had possession of the relevant documents, which is sufficient.** Tex. Bus. & Comm. Code §§ 3.301, 3,308. **Hill III acknowledges execution of the Note and that PBL advanced roughly half of the $5 million credit line. Doc. 590 at 28. Further, Phillips' declaration sets forth in sufficient detail the dates and amounts of advances to Ahtrey under the Note.** Doc. 585 at 81; *Am. 10-Minutes Oil Change, Inc. v. Metro. Nat'l Bank Farmers Branch*, 783 S.W.2d 598, 601 (Tex. App. – Dallas 1989 (holding that an affidavit made on a bank officer's personal knowledge was sufficient to support summary judgment where it identified the notes and guaranty and designated the principal balance.).

Procedural Order, pp. 3-4 (emphasis added).

16. Defendants respectfully submit that the Magistrate Judge's ruling on this issue is clearly

erroneous, and contrary to law. It is well-established that an affidavit in support of a motion for summary judgment must be made on personal knowledge. Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge."). Thus, the fact that Phillips failed to recite that he had personal knowledge of the facts set forth in his declaration is not fatal in and of itself, but it becomes so when viewed in combination with his complete failure to set forth any facts explaining the circumstances as to how he acquired personal knowledge. *See DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005) (although an affidavit need not specifically recite that it is made on personal knowledge, the Court should be able to infer the affiant's personal knowledge and competence to testify from their position or the nature of their participation).

17. Neither the fact of Phillips' status as PBL's outside counsel, nor the fact of his status as the "Liquidator" of the general partner of PBL's general partner gives rise to an inference of personal knowledge of the Note and the Guaranty. Nothing about the title of "Liquidator of PBL Holdings, LLC," indicates that the authenticity and ownership of the Note and Guaranty, PBL's recordkeeping practices as to advances under the Note, or the amount due and owing on the Note are matters within Phillip's "sphere of responsibility." *See Budden*, 430 F.3d at 530. He gives no indication as to what are his duties and responsibilities as "Liquidator" for PBL, nor does he testify that he is responsible for the collection of the Note and the Guaranty. Notably, he does not reference any court or other legal proceeding conferring the duties and responsibilities of the "Liquidator" on him. The Magistrate Judge's extremely broad reading of the

term "personal knowledge" eviscerates the personal knowledge requirement.

18. The *American 10-Minute Oil Change* case that the Magistrate Judge cites on this point is distinguishable in that in that case, the affiant was not the bank's outside legal counsel, but was instead an officer of the bank/plaintiff, and the affidavit indicated that the officer had personal knowledge. *American 10-Minute Oil Change, Inc. v. Metro Nat'l BankFarmer's Branch*, 783 S.W.2d 598,601 (Tex. App. – Dallas 1989). Further, the fact that Hill has admitted executing the Note, and that PBL advanced roughly half the credit line to him, does not suffice to meet PBL's burden of establishing that there is no genuine issue of material fact as to the current ownership of the Note and Guaranty, and the current balance due thereunder.

19. <u>Second Objection to the Procedural Order</u>. Defendants object to the Magistrate Judge's granting of PBL's Motion for Leave, including her finding that PBL's argument is "sound and legally justified," and her adopting PBL's argument as the reasoning of the Court, insofar as the Magistrate Judge's granting of PBL's Motion for Leave is based on a finding that the Hill Declaration was false and/or in bad faith. (Order, pp. 7-9).

20. After receiving Defendants' Summary Judgment Response, PBL filed its Motion for Leave, seeking leave to file a supplemental appendix consisting of two Claims Proceeds Agreements between Hill and Bickel & Brewer, and Campbell Harrison & Dagley, L.L.P, respectively. Attached to the Bickel & Brewer Claims Proceeds Agreement is a June 30, 2006 fee agreement between Hill and Bickel & Brewer (the "B&B Agreement") (Dkt. 593-1, pp. 5-29). The other

Claims Proceeds Agreement attached to the supplemental appendix is with CHD (the "CHD Agreement") (Dkt. 593-1, pp. 31-50).

21. In its Motion for Leave, PBL argued that it was proffering the documents to prove the alleged material falsity of a portion of the Hill Declaration:

> 3. These contracts establish that Mr. Hill's declaration insofar as he avers that he had to employ lawyers on a contingent fee basis because PBL refused to fund the maximum loan amount of $5 million provided in the Note is materially false. **These documents establish conclusively that Mr. Hill's attorneys were employed on a contingent fee basis from the inception of the litigation and for a year and a half prior to execution of the Note. These contracts further establish conclusively that Mr. Hill got a much better deal (20%) from Campbell Harrison & Dagley then he had with Bickel & Brewer.**
>
> 4. This material standing along [sic] even more so when considered in light of the undisputed evidence already before the Court showing that **Bickel & Brewer were disqualified as Mr. Hill's counsel and did not resign because he could not pay them**., establish that MR. Hill's declaration was made in bad faith contrary to F.R. Civ.P. Rule 56(h).

Motion for Leave, pp. 1-2 (emphasis added).

22. To the extent that the Magistrate Judge's adoption of PBL's argument and reasoning constitutes a finding that the Hill Declaration was materially

false, Defendants object to that finding as clearly erroneous and contrary to law. The paragraphs of the Hill Declaration that PBL contended were demonstrated by the materials in its supplemental appendix to be false, which go both towards Defendants' Counterclaim, and their affirmative defense of prior material breach, are as follows:

> 9. In October, 2008 Palm Beach Multi-Strategy Fund, L.P., informed me that no more funds would be provided under the $5,000,000 line of credit, even though approximately $2,500,000 in promised funds remained available under the line of credit. Other than several additional advances in 2009, Palm Beach Multi-Strategy Fund, L.P. refused to provide additional funding under the line of credit. I discussed with Palm Beach Multi-Strategy Fund, L.P. the fact their cutting off of the funds would cause severe consequences for my pursuit of the trust-related litigation.
>
> 10. **Deprived of the necessary source of funding for the underlying litigation, I was no longer able to pay my attorneys in the underlying litigation. As a result, I was forced to retain counsel who would charge me on a contingency fee basis**. The first such law firm was Campbell, Harrison & Dagley LLP (CHD). For good cause, I terminated my engagement with CHD. I subsequently retained lawyers Lisa Blue, Charla Aldous and Stephen F. Malouf (BAM) to represent me in the trust litigation.
>
> 11. **As a direct result of Palm Beach Multi-Strategy Fund, L.P.'s failure to**

> **deliver the remaining funds on the Revolving Credit Note, I entered the aforementioned contingency fee agreements with BAM and CHD. As a direct result of entering the contingency fee agreements I have suffered monetary damages.** BAM was paid $25 million in attorneys' fees. I litigated the contingency fees claimed by CHD because I believe them to be unconscionable. As a result of entering the contingency fee agreement, CHD has a judgment against me for $41 million in attorney's fees. I believe that the attorney's fee paid to BAM and claimed by CHD were disproportionate to the work done and the recovery that I received in the trust litigation. **Had Palm Beach Multi-Strategy Fund, L.P. not prematurely cut off the funding under the Revolving Credit Note, I would not have been forced to hire contingency fee lawyers such as BAM and CHD to continue pursuing the underlying litigation . I believe that if had I continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency basis, then the cost of litigation would have been substantially less.** Further, I would not have been in the ensuing costly litigation against BAM and CHD. This consequence was known and foreseeable by PBL when it cut off funding under the Revolving Credit Note in 2008.

App. Tab G, ¶¶ 9-11 (emphasis added).

23. PBL argued that the attorney fee contracts included in its supplemental appendix "establish that Hill III's sworn statement that he had to employ lawyers on a contingent fee basis because PBL refused to fund the full $5 million is materially false, and the Magistrate Judge adopted that argument. Procedural Order, p. 8. PBL (and the Magistrate Judge) argues that this is so because both the B&B Agreement, and his contract with CHD, provide for both an hourly and contingent fee component. *Id*. Thus, argues PBL, "these contracts establish that Hill III's sworn statement that he had to employ lawyers on a contingent fee basis because PBL refused to fund the full $5 million is materially false." *Id.* Further, as to B&B's disqualification, PBL notes (and the Magistrate Judge adopts) that "B&B was disqualified from representing Hill III in September 2008 and did not withdraw because Hill III could not pay the firm as he has falsely alleged." *Id.*

24. The Magistrate Judge's adoption of PBL's s reasoning to arrive at the conclusion that Hill's Declaration is materially false is clearly erroneous and contrary to law in that the conclusion that Hill's Declaration was materially false is not the only conclusion to be drawn from the summary judgment evidence presented to the Court. In this regard, "[w]hen weighing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the nonmovant." *Acker v. Deboer, Inc*., 429 F. Supp. 2d 828, 2006 U.S. Dist. LEXIS 23086 (N.D. Tex. 2006). "The court cannot make a credibility determination in light of conflicting evidence or competing inferences." *Id*. As long as there appears to be some support for the disputed allegations such that "reasonable minds

could differ as to the import of the evidence," the motion for summary judgment must be denied." *Id*.

25. The fact that both the B&B Agreement and the CHD agreement contain a contingency fee component does not mean that Hill's testimony is necessarily false, as the two fee agreements were materially different as to the nature of the contingency interests, with the CHD blanket contingency interest being much more onerous. *Compare* Dkt 593-1, Supp. App. pp. 18-19, with Dkt. 593-1, pp. 37-39. The CHD fee agreement included a blanket contingency interest in all litigation Hill was involved in at the time. (Dkt. 593-1, Supp. 37-39), whereas the B&B Agreement did not include a blanket contingency interest in the MHTE estate (see Dkt. 593-1, Supp. App. 18-19), but only in his other recoveries, for example, from the HHTE estate. *Id*. Instead, regarding the MHTE estate, Bickel & Brewer's charges were hourly plus expenses.[2]

26. The Magistrate Judge also adopted PBL's argument that B&B was disqualified from representing Hill III in September 2008 and did not withdraw because Hill III could not pay the firm as he has falsely alleged." *Id*. The fact that Bickel & Brewer was disqualified at about the same time that PBL made its

[2] Contemporaneously with the filing of these objections, Hill is filing a motion for leave to file a supplemental declaration of Hill, in which Hill reaffirms his original declaration, and explains his testimony to the Court. Hill files his motion for leave pursuant to Fed. R. Civ. P. 72(b)(3), which allows the district judge to "receive further evidence" when considering objections to the Magistrate Judge's ruling on dispositive motions. As discussed, *infra,* the same issue as to the alleged material falsity of the Hill Declaration is raised as to the Magistrate Judge's Recommendation, which as to a dispositive motion.

last regular payment to Hill does not necessarily mean that the Hill Declaration is false. As Bickel & Brewer's disqualification is known to the Court and all parties, as well as having been highly publicized, Hill had no intention of "hiding" the fact of that disqualification from the Court. Rather, the fact that Bickel & Brewer was disqualified, and the fact that Hill had to retain CHD on a much more onerous blanket contingent fee basis as a result of PBL's stopping funding of the Note, are not mutually exclusive. The statement in Hill's Declaration that he was "no longer able to pay my attorneys in the underlying litigation," is not just with reference to Bickel & Brewer; rather, Hill was at that time unable to hire any attorneys on an hourly basis, and to pay the retainer they required. As a result, Hill was forced to hire first CHD, then BAM, pursuant to contracts containing the onerous blanket contingency in his interest in the MHTE.

27. Instead of jumping to the deduction that Hill's testimony was false, the Magistrate Judge was required to construe the summary judgment evidence in a light most favorable to Hill. Because it is clear that the Magistrate Judge did not apply this standard in reviewing Hill's sworn testimony, her granting of the Motion for Leave was clearly erroneous, insofar as it was based on the alleged material falsity of the Hill Declaration.

B. Objections to the Magistrate Judge's Recommendation on Dispositive Matters.

23. When a party objects to the magistrate judge's written order on pretrial matters that are dispositive of a party's claim or defense, the district judge is to conduct a de novo review of any part of the magistrate judge's disposition as to which proper objection has been made. Fed. R. Civ. P. 72(b)(3). "The district judge

may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). *See also* 28 U.S.C. § 636(b)(1)(C). For the reasons as to which specific objection is made below, Intervention Defendants object to the Magistrate Judge's recommendation that the Court grant in part of *PBL's Motion for Judgment on the Pleadings and for Summary Judgment on its Claim in Intervention* (Dkt. 585) (the "Motion for Summary Judgment").

24. **First Objection to the Recommendation. The Magistrate Judge erroneously concluded that PBL did not abandon its claims against Intervention Defendants in this action. (Recommendation, pp. 3-4).**

25. In response to the Motion for Summary Judgment, Defendants argued that PBL is precluded from asserting its claims against Defendants in this 2269 action because a final judgment has been entered and the case is closed. Summary Judgment Response (Dkt. 591, pp. 5-9). The Magistrate Judge erroneously dismissed Defendants' position as "meritless." Recommendation (Dkt. 603, p. 3).

26. On January 10, 2012, the Court entered a Judgment (Dkt. 384) that awarded attorneys' fees to the BAM attorneys. App. Tab F, pp. 24-26. An appeal from said 2269 Judgment was taken to the United States Court of Appeals for the Fifth Circuit on April 14, 2012 (Dkt. 419). App. Tab E, pp. 22-23. The case was subsequently closed. App. Tab C, p. 19.

27. Although the 2269 Judgment is not expressly titled as a "final" judgment and does not contain language expressly disposing of all claims and all parties, there is no genuine issue of material fact that the

Court and all parties to the 2269 Action have treated the Judgment as a final judgment. In its November 23, 2015 *Memorandum Opinion and Order* in the 2020 Action denying putative intervenor Blind Faith Speculation, LLC's motion to intervene, the Court clearly and unequivocally characterized the 2269 Judgment as final:

> A Final Judgment was entered in this civil action on November 8, 2010 (Doc. 999), and was affirmed by the Fifth Circuit in 2012. *See Hill v. Schilling*, 495 F. App'x. 480, 482-83 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 2859, 186 L. Ed. 2d 911 (2013). Moreover, the Final Judgment severed all attorneys' fees claims and potential creditor's claims into the 2269 Action. **On January 10, 2012, the court entered a final judgment in that action** awarding attorney's fees to Hill III's former counsel (Doc. 384). **The Fifth Circuit has affirmed that final judgment**. *Hill*, 495 F. App'x at 487.

Memorandum Opinion and Order dated Nov. 23, 2015 (Dkt. 1660) (emphasis added and footnote omitted). App. Tab B, p. 16. In that same opinion, the Court also referenced the conclusion of the 2269 Action in a footnote:

> BFS has failed to satisfy the court that its motion, **filed approximately five years after Judge O'Connor issued a Final Judgment in this matter** (see Doc. 999), is timely. . . . **In addition, the 2269 Action that Judge O'Connor opened to handle claims by potential creditors seeking to intervene has similarly been concluded.**

App. Tab B, p. 17, n. 6 (emphasis added).

28. In addition to the fact that a final judgment has been entered in the 2269 Action, this Court has made no bones about the fact that this case is closed. For example, in an order dated nearly two years ago, June 3, 2014, the Court emphatically stated that the case is closed and ordered that no motions be filed except after first obtaining leave for good cause shown:

> The court issued an Order, as well as a Memorandum Opinion and Order, in this action on May 29, 2014. These two documents disposed of all pending motions in this case, which **was closed on January 10, 2012. As this action is closed** and all pending motions have been disposed of, the court has no interest in ruling on motions that have no merit or those that unnecessarily extend acrimonious and protected litigation. *Accordingly, no further motions may be filed by any party in this action without leave of court. No motion will be allowed unless a party establishes to the court that good cause exists to file the requested motion. The filing of any motion that violates this order will subject the offending party or attorney to appropriate sanctions*.

App. Tab C, p. 19 (Emphasis added, italics in original).

29. Consistent with the Court's determination that this case is closed and final, the District Clerk's office sent a notice to all parties that the case has been finally disposed. Local Rule 79.2(a) for the United States District for the Northern District of Texas provides that while a case is pending, no exhibit in the custody of the clerk may be removed without an order

from the presiding judge. Local Rule 79.2(b) provides that all exhibits must be removed within 60 days after final disposition of the matter and that after that date the exhibits may be destroyed or otherwise disposed by the clerk. By way of a docket entry and letter sent to all parties, on March 27, 2015, the Deputy Clerk of the Court provided notice to all parties of the scheduled destruction of the exhibits 60 days from the date of notice. The act of providing notice was consistent with the Court's determination that this matter is closed and final disposition has occurred.

30. "No exact formation of 'finality' exists. The courts have, however, used various yardsticks to determine the finality of a judgment." *Vaughn v. Mobil Oil Expl. & Prod. Southeast, Inc.*, 891 F.2d 1195, 1197 (5th Cir. 1990). In *Vaughn*, the Fifth Circuit stated that "[t]he intention of the judge is crucial in determining finality." *Id*. The Fifth Circuit takes a practical approach to finality:

> Moreover, the Supreme Court has consistently emphasized that, consonant with legislative intent, a 'practical rather than a technical construction' best serves the policies underlying the purposes of the finality requirement." **Thus, we are inclined to fasten finality upon a judgment that reflects the intention of the judge to dispose of all the business before him or her.**

Id. (emphasis added and internal citations omitted).

31. In *Vaughn*, a defendant, EBI, responded to the motion of a co-defendant, Mobil, for summary judgment on its indemnity cross-claim, but did not pursue its own cross-claim against Mobil. *Id*. EBI failed to

attend a pretrial conference, and Mobil's motion for summary judgment was granted as unopposed. *Id*. Three months later, the trial court granted judgment in favor of Mobil. *Id*. The court closed the case, and EBI made no effort to pursue the claim until several months later, when its new counsel moved to vacate the judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Id*. The trial court granted EBI's motion, finding that because the judgment left the cross-claim unresolved, the judgment was interlocutory. *Id*. The court withdrew the judgment and ordered the parties to brief the cross- claims. *Id*.

32. On appeal, Mobil contended that the trial court did not have authority to withdraw the judgment and rule on the merits because the judgment in favor of Mobil was final. *Id*. at 1197-98. The Fifth Circuit agreed and reversed a later judgment in the case:

> The facts show that on December 6, 1986, Judge Sear handed down a judgment couched in language calculated to conclude all claims before him. The judgment found for Mobil and against EBI on Mobil's claim for contribution. The language was specific and heavy with conclusion. Nothing in the district court's disposition suggested that judgment was incomplete. Indeed, the judge closed the case. The clerk, obeying rules 58 and 79 of the Federal Rules of Civil Procedure, entered judgment. The parties went home. In all respects, and to all parties, judgment was final.

Id. at 1197-1199 (footnote omitted). Under these circumstances, the court found that EBI had abandoned its claim, noting that "trial courts will not rule on claims—buried in pleadings—that go unpressed before the court." *Id*. at 1198.

33. Significantly, the Fifth Circuit rejected EBI's reliance on Rule 54(b) of the Federal Rules of Civil Procedure, which provides that in a case with multiple parties and multiple claims an order:

> that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). Instead, the court held that EBI's abandonment of its claim removed the suit from the scope of Rule 54(b):

> We can only construe appellee's failure to urge its claims before the district court as an intention to abandon that part of its case. Appellee's abandonment, therefore, removed the suit from rule 54(b). The fact that the December judgment did not mention appellee's cross-claim is neither here nor there; appellee's own behavior caused its claim to lapse. It is clear to us that the district court believed itself entirely quit of the case. Further, EBI having abandoned its cross-claim, the judgment of the district court did in fact dispose of all the live issues before it.

Id. at 1198-99 (internal citations omitted).

34. The Fifth Circuit reiterated these principles in *DIRECTV, Inc. v. Budden*, 420 F.3d 521 (5th Cir. 2005):

> It is true that the district court only explicitly addressed the § 605(e)(4) claim. It is also true

> that, in general, when a district court only addresses one claim or party in a multi-claim or multi-party situation, the judgment is not final unless the court abides by the provisions of Rule 54. Here, the district court did [525] not, per Rule 54, "(1) expressly determine[] that there is no just reason for delay, and (2) expressly direct[] entry of a judgment."
>
> **However, these facts fall by the wayside where all of the remaining claims have already been abandoned and the district court intended to dispose of all claims before it.** In determining finality, we have "advocated a practical interpretation that looked to the intention of the district court" and held that "if the judgment reflects an intent to dispose of all issues before the district court, we will characterize that judgment as final."

Id. at 525 (emphasis added). *See also McLaughlin v. Miss. Power Co*., 376 F.3d 344, 350-51 (5th Cir. 2004) (a decision is final if the only claims not disposed of were abandoned, and a decision that does not specifically reference pending claims will be final if it is clear that the district court intended to dispose of all claims).

35. As Defendants argued to the Magistrate Judge, there is no genuine issue of material fact that PBL abandoned its claims against Defendants. Accordingly, the 2269 Judgment is final. The Magistrate Judge gave Defendants' argument short shrift, failing to address Defendants' cited authorities supporting a finding of abandonment, and stating that the closing of the case in January 2012 was only as to the BAM matter. *Id*., p. 4. However, the record as cited above

belies this contention. The fact that, as the Magistrate Judge argues, there were fee disputes going on in the 2020 Action, as well as a separate arbitration case is of no moment. The Magistrate Judge states that "[u]ntil the Disbursement Order in the 2020 case was entered, PBL could not have known the outcome of its claim." *Id*., p. 4. Although this is true, it says nothing about PBL's abandonment of its claim as far as *this action* is concerned. PBL had chosen to settle its suit against Defendants in this action, and pursue it in other courts.[3]

36. **Second Objection to the Recommendation. The Magistrate Judge erroneously recommended that PBL be granted summary judgment on Defendants' Counterclaim based on her conclusion that Hill III's declaration in support of damages "was submitted in bad faith" as the summary judgment record does not require that conclusion, and the Magistrate Judge was required to view the evidence in the light most favorable to Hill. (Recommendation, pp. 8-10).**

37. In making her recommendation that PBL be granted summary judgment on Defendants' Counterclaim, the Magistrate Judge again concluded that the Hill Declaration contained false statements. Recommendation (Dkt. 603, pp 9-10) ("The Court views the

[3] Indeed, PBL has not stopped pursuing its claim on the Note and Guaranty in other venues. Just nine days before the Magistrate Judge issued her rulings in this case, on August 10, 2016, PBL commenced an action against Comerica Bank, as trustee of Hill's childrens' trusts, seeking to recover on theories of fraudulent transfer and conversion. *See PBL Multi-Strategy Fund, L.P. v. Comerica Bank*, No. DC-16-09627, in the District Court of Dallas County, Texas.

false statements in Hill III's declaration as having been made in bad faith pursuant to Rule 56(h).").

38. As set forth above in Defendants' argument with regard to the Magistrate Judge's ruling on the Motion to Supplement, which is incorporated at this point by reference, the Magistrate Judge clearly erred in leaping to this conclusion on the facts presented, especially considering the fact that she was required to view the summary judgment evidence in the light most favorable to Defendants. As previously explained, the contingency component of the B&B fee agreement was far less onerous than the blanket contingency provision contained in the CHD fee agreement, which resulted in at least an extra $20 million in fees as to CHD alone being awarded against Hill. Moreover, as also previously noted, the fact of B&B's disqualification and Hill's testimony that PBL's cutting off funding required him to hire other attorneys on a contingency basis are not mutually exclusive.

39. Accordingly, upon de novo review, Defendants request that the Court reject the Magistrate Judge's finding that the Hill Declaration was made in bad faith.

REQUEST FOR RELIEF

For the foregoing reasons, the Defendants ask the Court to:

(i) Reject the Magistrate Judge's recommendation to grant PBL's Motion for Summary Judgment, and rule on the Motion for Summary Judgment after first granting Intervention Defendants' Motion to Strike.

(ii) Reverse the Magistrate Judge's Procedural Order insofar as it denies Intervention Defendants' Motion to Strike in part.

(iii) Reverse the Magistrate Judge's Procedural Order insofar as it grants PBL's Motion to Supplement based on a finding that the Hill Declaration was filed in bad faith.

(iv) Receive further evidence in the form of the Supplemental Declaration of Albert G. Hill, III, as Defendants request in their contemporaneously filed motion.

(v) Grant Defendants such other and further relief as to which they may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR
INTERVENTION
DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the forgoing document with the clerk of the United States District Court, Northern District of Texas, using the ECF system of the Court. The ECF system transmitted a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means. In addition, pursuant to Rule 42.1 of the Local Civil Rules for the Northern District of Texas, I certify that this document was transmitted in the same manner on the same date to all attorneys who have consented in writing to accept this notice as service of this document by electronic means in the case to be consolidated.

September 2, 2016

By: /s/*Steven T. Ramos*
Steven T. Ramos

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "RECORD EXCERPTS" was served either by ECF electronic noticing or by first class mail, postage prepaid, to the parties to this action, on this 27th day of June, 2017.

/s/ Ty Clevenger
Ty Clevenger

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 09/30/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY L.L.P. and
CALLOWAY, NORRIS, BURDETTE AND WEBER, PLLC,

Plaintiffs,

v.

ALBERT G. HILL, III AND ERIN HILL, individually
and on behalf of her minor children,
N. Hill, C. Hill, and A. Hill,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the court is Intervenor Plaintiff PBL Multi-Strategy Fund, L.P.'s Motion for Judgment on the Pleadings and Motion for Summary Judgment on its Claim in Intervention ("Motion") (Doc. 585), filed February 16, 2016; the Motion of Intervenor PBL Multi-Strategy Fund, L.P. for Leave to File Motion Requesting Reference to Magistrate Judge (Doc. 605), filed August 26, 2016; and Intervention Defendants' Motion for Leave to File Further Evidence Pursuant to Fed. R. Civ. P. 72(b)(3) (Doc. 607), filed September 9, 2016.

I. Factual and Procedural Background

In March 2011, Intervenor Plaintiff PBL Multi-Strategy Fund, L.P. ("PBL") filed a claim in intervention against Intervenor Defendants Ahtrey Investments, L.L.C. ("Ahtrey") and Albert G. Hill, III ("Hill III") (collectively, "Defendants") to enforce payment of a December 26, 2007 Revolving Credit Note ("Note") that was executed by PBL, as lender, and Ahtrey, as borrower, and personally guaranteed by Hill III under the Guarantee and Collateral Agreement ("Guarantee"). The original principal amount of the Note was $5 million. PBL advanced a total of $2.6 million under the Note to Hill III between December 27, 2007, and March 23, 2009, to fund litigation brought by Hill III, including *Hill, III v. Tom Hunt*, *et al.*, 3:07-CV-2020-L (the "2020 case"). The Note matured according to its terms on December 26, 2009.

In April 2011, Defendants filed a counterclaim for breach of contract against PBL, alleging that PBL breached the Note by abruptly cutting off funding under the Note in October 2008, even though approximately $2.5 million in funds remained available. Hill III maintained that he and Ahtrey were damaged as a result because, "with no funds to pay attorneys, Hill [III] was forced to retain contingency fee attorneys, including the Malouf Group [Blue, Aldous, and Malouf] and Campbell, Harrison & Dagley" to continue prosecuting and funding his litigation. Defs.' Counter-Compl. 5. Defendants assert that Hill III's litigation expenses would have been substantially less if PBL had not cutoff funding under the Note because he would have been able to continue funding the litigation with attorneys engaged on an hourly rather than a contingency fee basis. Defendants also asserted a number of affirmative defenses.

In January 2012, PBL and Defendants entered into a settlement agreement ("Agreement") and filed a joint motion requesting that the court authorize payment to PBL of $3.2 million from the funds in the registry for the 2020 case. The motion was stayed pending resolution of the appeal that Hill III took from the 2010 final judgment in the 2020 case. In January 2016, after issuance of the mandate for that appeal and years of postjudgment litigation, the court entered an order disbursing the registry funds in the 2020 case to two of Hill III's creditors. Because all of the funds in the registry were earmarked for those creditors, there were no funds left in the registry to distribute to PBL under the Agreement. The parties' Agreement expired by its own terms when no court registry funds were disbursed to PBL and the court's disbursement order became final.

On February 16, 2016, PBL moved for summary judgment on: (1) its claim to recover from Ahtrey and Hill III the amount of the debt made the basis of PBL's claim, plus attorney's fees and interest as allowed under the Note and Guarantee, and (ii) Defendants' breach of contract counterclaim. PBL also moved for judgment on the pleadings with respect to Defendants' affirmative defenses. In support of its summary motion, PBL presented evidence to establish that, as of February 15, 2016, the total amount due and owing on the Note is $8,172,973.25, which consists of $2,600,000 in principal; $760,013.25 in pre-maturity interest; and $4,812,960 in post-maturity interest. According to PBL's evidence, interest continues to accrue at the rate of $2,146.73 per day under the Note. No payments have been made on the Note except for $46,861.93 paid on October 30, 2008, which was credited to accrued interest on that date resulting in net prematurity interest in the amount of $760,013.25. PBL presented

evidence establishing that, as the guarantor of Ahtrey's debt on the Note, Hill is jointly and severally liable to PBL in the amount of $8,172,973.25, plus interest at $2,146.73 per day for each day after February 15, 2016. PBL also seeks $91,000 for attorney's fees incurred in this action through the filing of its Motion, plus an award of attorney's fees in the amount of almost $1.2 million for anticipated future fees.

On August 19, 2016, United States Magistrate Judge Renée Harris Toliver entered the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report") (Doc. 603), recommending that the court grant in part and deny in part PBL's Motion (Doc. 585). The magistrate judge recommended that the summary judgment be granted with respect to PBL's claims to recover on the Note and Guarantee and Defendants' counterclaim for breach of contract but denied without prejudice with respect to PBL's request for attorney's fees because its evidence is insufficient to establish the reasonableness of the fees incurred. The magistrate judge also concluded that PBL's request for anticipated future attorney's fees is speculative. The magistrate judge recommended that the court deny PBL's motion for judgment on the pleadings, which seeks judgment on Defendants' affirmative defenses. The magistrate judge, nevertheless, noted that, "if the district judge accepts the finding herein that summary judgment in PBL's favor is warranted, the affirmative defenses advanced by Defendants are of no moment." Report 11.

On the same date, the magistrate judge entered an order ("Order") (Doc. 602) on miscellaneous nondispositive motions that relate to PBL's dispositive Motion. In the Order, the magistrate judge granted in

part Defendants' Objections to and Motion to Strike Declaration of Troy D. Phillips ("Phillips") (Doc. 587); denied Defendants' Motion for Continuance Pursuant to FED. R. CIV. P. 56(d) (Doc. 588); denied the Motion of PBL to Strike Defendants' Untimely Pleadings (Doc. 592); granted the Motion of PBL for Leave to File Supplemental Appendix (Doc. 593); and granted Defendants' Motion for Leave to File Response (Doc. 596).

On August 26, 2016, PBL sought leave to file a motion to refer to the magistrate judge an amended motion for attorney's fees, in light of the magistrate judge's denial without prejudice of its request for attorney's fees that was made in conjunction with its Motion. On September 2, 2016, Defendants filed two objections to the Report. Defendants also filed two objections to the Order regarding their Motion to Strike the Declaration of Troy D. Phillips, which was submitted by PBL in support of its Motion. In addition, Defendants filed a motion for leave to file additional evidence for the court's consideration in ruling on their objections. Defendants seek to submit a supplemental declaration of Hill III to explain the discrepancies and "shed more light on the statements in the Hill Declaration that the Magistrate Judge . . . characterized as false" and made in bad faith. Defs.' Mot. for Leave 3.

Having reviewed PBL's Motion, the parties' briefs, evidence, file, record in this case, Report, and Defendants' objections to the Report, and having conducting a de novo review of the portions of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge in the Report are correct, and **accepts** them as those of the court *as herein modified*. Further, the court determines that the portions of the magistrate judge's

Order (Doc. 602), to which objection was made by Defendants, are not clearly erroneous or contrary to law. Accordingly, the court **overrules** Defendants' objections to the Report and Order.

II. Standard of Review

A magistrate judge's determination regarding a dispositive matter is reviewed de novo if a party timely objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). A magistrate judge's determination regarding a nondispositive matter is reviewed under the "clearly erroneous or contrary to law" standard. 28 U.S.C. 636(b)(1)(A); Fed. R. Civ. P. 72(a) ("[t]he district judge in the case must . . . modify or set aside any part of the order that is clearly erroneous or is contrary to law."). This highly deferential standard requires the court to affirm the decision of the magistrate judge unless "on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed." *United States v. Unites States Gypsum Co.*, 333 U.S. 364, 395 (1948). As explained by the court in *Arters v. Univision Radio Broadcasting TX, L.P.*, No. 3:07-CV-0957-D, 2009 WL 1313285 (N.D. Tex. May 12, 2009):

> The clearly erroneous standard applies to the factual components of the magistrate judge's decision. The district court may not disturb a factual finding of the magistrate judge unless, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. If a magistrate judge's account of the evidence is plausible in light of the record viewed in its entirety, a district judge may not reverse it. The legal conclusions of the magistrate judge are reviewable

> de novo, and the district judge reverses if the magistrate judge erred in some respect in [his] legal conclusions. [T]he abuse of discretion standard governs review of that vast area of choice that remains to the [magistrate judge] who has properly applied the law to fact findings that are not clearly erroneous.

Id. at *2 (citations and internal quotations marks omitted).

III. Analysis

A. Objections to Order on the Parties' Nondispositive Motions (Doc. 602)

In their first objection to the Order, Defendants object to the magistrate judge's denial of their "Motion to Strike as to paragraphs 1-4 of the Phillips[‘] Declaration, in which Phillips, PBL's counsel in this lawsuit, testifies as to the essential elements of PBL's claims on the Note and Guarantee. (Order, pp. 2-4)." Defs.' Obj. 8-11. Defendants contend that Phillips' declaration and his status as PBL's counsel and the liquidator of PBL's general partner are insufficient to establish that he has personal knowledge and is competent to testify regarding the matters in his declaration that pertain to the Note and Guarantee.

In their second objection, Defendants contend that the magistrate judge erred in granting "PBL's Motion for Leave, including her finding that PBL's argument is "sound and legally justified," and her adopting PBL's argument as the reasoning of the Court, insofar as the Magistrate Judge's granting of PBL's Motion for Leave is based on a finding that the Hill Declaration was false and/or [made] in bad faith. (Order, pp. 7-9)." *Id.* at 11-16. Defendants contend that the magistrate judge's finding that Hill III's declaration contains

materially false statements and was made in bad faith is clearly erroneous.

After considering the Order (Doc. 602), the objections to the Order, the motions and evidence related to the objections, and based on its familiarity with litigants and the record in this case, the court determines that the portions of the magistrate judge's Order, to which objection was made by Defendants, are not clearly erroneous or contrary to law. Accordingly, the court overrules Defendants' objections to the Order.

B. Objections to Report on PBL's Dispositive Motion (Doc. 603)

Defendants contend that, on pages three through four of the Report, the magistrate judge "erroneously concluded that PBL did not abandon its claims against . . . Defendants in this action." Defs.' Obj. 16-21. In addition, Defendants contend that, on pages eight through ten of the Report, the magistrate judge "erroneously recommended that PBL be granted summary judgment on Defendants' Counterclaim based on her conclusion that Hill III's declaration in support of damages was submitted in bad faith as the summary judgment record does not require that conclusion, and the Magistrate Judge was required to view the evidence in the light most favorable to Hill." *Id.* at 22-23 (citation and internal quotation marks omitted).

Having reviewed PBL's Motion, the parties' briefs, evidence, the file, record in this case, Report, and Defendants' objections to the Report, and having conducting a de novo review of the portions of the Report to which objection was made, the court determines that the findings and conclusions of the magistrate judge in the Report are correct, and **accepts** them as those of the court *as herein modified* by the court.

Moreover, even assuming that Hill III's declaration was not made in bad faith, Defendants' evidence regarding its breach of contract counterclaim is insufficient to raise a genuine dispute of material fact as to whether Defendants suffered damages as a result of PBL's alleged breach.[*] As noted by PBL and the magistrate judge in her Report, Ahtrey was not a party to the 2020 case and did not incur any obligations for Hill III's attorney's fees to Hill III's counsel Blue, Aldous, and Malouf ("BAM") or Campbell, Harrison & Dagley LLP ("CHD"). The magistrate judge, therefore, correctly concluded that Ahtrey suffered no damages as a result of Hill III hiring CHD and BAM to replace Bickel & Brewer ("B&B") as his counsel, making summary judgment as to Ahtrey's breach of contract counterclaim appropriate.

Summary judgment as to Hill III's breach of contract counterclaim is similarly appropriate because Hill III's only evidence of damages sustained as a result of PBL's alleged breach is the following statement in his declaration:

> I believe that if I had continued to fund the litigation with attorneys engaged on an hourly basis instead of a contingency fee basis, then the cost of litigation would have been substantially less. Further, I would not have

[*] The parties appear to acknowledge that New York law governs the Note and Guarantee, and both the Note and Guarantee state that they are governed by New York law. "The essential elements of a claim for breach of contract under New York law are: (1) the existence of a contract; (2) due performance by plaintiff; (3) breach of the contract by defendant; and (4) damage as a result of the breach." *Campo v. 1st Nationwide Bank*, 857 F. Supp. 264, 270 (E.D.N.Y. 1994).

> been in the ensuing costly litigation against BAM and CHD.

Defs.' Sum. J. App. 28. Hill III's belief in this regard, however, is not supported by any competent summary judgment evidence and based entirely on speculation that: (1) he would have been able to find substitute counsel willing to represent him on an hourly basis rather than a contingency fee basis; (2) the cost of the 2020 litigation and related arbitration would have been substantially less if he had been able to find substitute counsel willing to work on an hourly rather than a contingency fee basis, even though the 2020 litigation continued for several years in large part due to Hill III's frequent hiring and firing of attorneys, including CHD and BAM, which resulted in him having to pay both law firms on a contingency fee basis from the same recovery, and his litigious conduct in unreasonably and vexatiously multiplying proceedings by filing patently frivolous motions after a final judgment was entered in the 2020 case in 2010; and (3) he would not have been involved in litigation with BAM and CHD, or other counsel regarding the attorney's fees charged, if he had retained counsel on an hourly rather than a contingency fee basis.

Mere conclusory allegations such as those in Hill III's declaration are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Likewise, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). Accordingly, even if the court considers Hill III's declaration and the statements that the magistrate found to be materially false and made in

bad faith, it is insufficient to raise a genuine dispute of material fact as to the element of damages for Hill III's contract claim against PBL. Accordingly, PBL is entitled to judgment as a matter of law on Hill III's breach of contract counterclaim.

IV. Defendants' Motion for Leave (Doc. 607)

As previously noted, Defendants seek leave to file additional evidence for the court's consideration in ruling on their objections. Specifically, Defendants seek to submit a supplemental declaration of Hill III to explain certain discrepancies in Hill III's original declaration and "shed more light on the statements in the Hill Declaration that the Magistrate Judge . . . characterized as false" and made in bad faith. Defs.' Mot. for Leave 3. For the reasons already explained, PBL is entitled to judgment on Defendants' breach of contract counterclaim even if the court considers the statements in Hill III's declaration that the magistrate judge found to be materially false and made in bad faith. Hill III's supplemental declaration and evidence do not change the basis for the court's determination in this regard. Further, the court cannot consider Exhibit A to Hill III's supplemental declaration because it constitutes inadmissible hearsay evidence, as it is an out of court statement offered for the truth of the matter asserted in the document, for which no exception applies. *See* Fed. R. Evid. 801(c). According to Hill III's supplemental declaration, Exhibit A is an exhibit that was prepared and used by CHD in the arbitration against him. Hill III asserts that this exhibit, which appears to be demonstrative in nature, "reflects the amounts of attorney's fees that [CHD] sought to recover from [him]." Supp. Decl. of Hill III ¶ 10. Because this evidence is inadmissible hearsay, it is not competent summary judgment evidence and

cannot be considered by the court in ruling on PBL's Motion. Accordingly, for all of these reasons, the court will deny Defendants' Motion for Leave (Doc. 607).

V. PBL's Motion for Leave (Doc. 605)

In light of the magistrate judge's recommendation that the court deny without prejudice their motion for attorney's fees and the court's local civil rule that allows the filing of only one summary judgment motion, PBL seeks leave to file an amended motion for attorney's fees to address the deficiency noted by the magistrate judge regarding the reasonableness of attorney's fees incurred and requested. The court generally considers the issue of attorney's fees postjudgment pursuant to Federal Rule of Civil Procedure 54(d) and, therefore, will deny PBL's Motion for Leave (Doc. 605). PBL may submit postjudgment, pursuant to Rule 54(d)(2), a motion for reasonable attorney's fees and costs with a detailed description and supporting documentation of the fees and costs incurred. Any motion filed by PBL must address the deficiencies noted by the magistrate judge.

VI. Defendants' Affirmative Defenses

Although Defendants did not object to the magistrate judge's recommendation that, "if the district judge accepts the finding herein that summary judgment in PBL's favor is warranted, the affirmative defenses advanced by Defendants are of no moment," Report 11, the court modifies this portion of the Report to provide clarification regarding the disposition of Defendants' affirmative defenses.

Defendants pleaded the following laundry list of affirmative defenses in response to PBL's claims to recover under the Note and Guarantee: lack of informed consent, PBL's breach of the Note and

related agreements, mistake, unclean hands, equitable estoppel, offset, the contract is unenforceable as against public policy and the interest rate is usurious, lack of mutual assent, lack of consideration, failure of consideration, failure to mitigate damages, prevention of performance by PBL, and waiver. PBL moved for judgment on the pleadings as to these defenses and for summary judgment on its claims to recover under the Note and Guarantee and Defendants' breach of contract counterclaim. The magistrate judge recommended that the court deny PBL's motion for judgment on the pleadings as to Defendants' affirmative defenses, which the court concludes is correct, and no objections to this recommendation by the magistrate judge were asserted; nor were any objections asserted to the magistrate judge's recommendation that, "if the district judge accepts the finding herein that summary judgment in PBL's favor is warranted, the affirmative defenses advanced by Defendants are of no moment." Report 11. The magistrate judge's finding that Defendants' affirmative defenses fail as a result of the court's disposition of PBL summary judgment on PBL's claim and Defendants' counterclaim is correct, however, the court's reasoning in reaching this conclusion varies slightly from that of the magistrate judge.

"The Fifth Circuit has held repeatedly that if a party fails to pursue a claim or defense beyond the initial pleading, the issue is deemed abandoned" or waived. *See Black v. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006) (concluding that plaintiff abandoned a retaliation claim when she failed to defend the claim in response to motion to dismiss); *Vela v. City of Houston*, 276 F.3d 659, 678-79 (5th Cir. 2001) (reasoning that a limitations defense that was pleaded but not subsequently raised in opposition to a motion for summary judgment was waived).

Here, PBL moved for summary judgment on its claim to recover under the Note and Guarantee and Defendants' counterclaim for breach of contract, and it met its summary judgment burden with respect to both. In response to PBL's Motion for Judgment on the Pleadings, Defendants merely assert, with respect to their affirmative defenses of prior material breach and unclean hands, that, "the Declaration of Albert G. Hill, III establishes that the Defendants have plenty of facts to flesh out these defenses should this case proceed." Defs.' Resp. to PBL's Mot. 13. Defendants further assert, without explanation that, "although PBL has not moved for summary judgment of the affirmative defenses . . . the Hill Declaration evidences that there are genuine issues of material fact in support of these affirmative defenses." *Id.* at 13-14.

From this conclusory response, it appears that Defendants mistakenly assume that, because PBL moved for summary judgment on its claim and Defendants' counterclaim but not Defendants' affirmative defenses, they were not required to come forward with evidence to support their affirmative defenses in response to PBL's summary judgment motion. This assumption is incorrect. *See Vela*, 276 at 678-79. Moreover, Defendants fail to point to specific facts in Hill III's declaration or explain why the statements in his declaration are sufficient to raise a genuine dispute of material fact as to any of their affirmative defenses. After reviewing Hill III's declaration, the court determines that it is not sufficient to raise a genuine dispute of material fact as to any of their affirmative defenses. Accordingly, the court determines that PBL is entitled to judgment on Defendants' affirmative defenses because Defendants waived the defenses or, alternatively, because Defendants failed to raise a

genuine dispute of material fact as to them in response to PBL's summary judgment motion.

VII. Conclusion

For the reasons stated, the court **concludes**, after conducting a de novo review of the portions of the Report (Doc. 603) to which objection was made, that the findings and conclusions of the magistrate judge in the Report are correct, and **accepts** them as those of the court *as herein modified*. Further, the court concludes that the portions of the magistrate judge's Order (Doc. 602), to which objection was made, are not clearly erroneous or contrary to law. Accordingly, the court **overrules** Defendants' objections to the Report and Order; **grants** PBL's Motion for Summary Judgment, except for its request for attorney's fees, which is **denied without prejudice** (Doc. 585); denies PBL's Motion for Judgment on the Pleadings (Doc. 585); and **dismisses with prejudice** Defendants' breach of contract counterclaim and affirmative defenses. Further, the court **denies** PBL's Motion for Leave to File Motion Requesting Reference to Magistrate Judge (Doc. 605); and **denies** Defendants' Motion for Leave to File Further Evidence Pursuant to Fed. R. Civ. P. 72(b)(3) (Doc. 607).

Based on the evidence submitted by PBL, the court hereby orders that judgment be entered in favor of PBL against Defendants jointly and severally in the amount of **$8,658,134.23**, which consists of the amount of unpaid principal and accrued interest owed under the Note and Guarantee. No prejudgment interest was requested, and none will be awarded. Postjudgment interest on the total amount awarded to PBL shall accrue at the applicable federal rate of .60% from the date of entry of the judgment until paid in full. The court will enter a judgment in favor of PBL

by separate document pursuant to Rule 58 of the Federal Rules of Civil Procedure.

It is so ordered this 30th day of September, 2016.

/s/ Sam A. Lindsay
Sam A. Lindsay
United Sttes District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 09/30/16]

Civil Action No. 3:10-CV-2269-L

CAMPBELL HARRISON & DAGLEY L.L.P. and
CALLOWAY, NORRIS, BURDETTE AND WEBER, PLLC,

Plaintiffs,

v.

ALBERT G. HILL, III AND ERIN HILL, individually
and on behalf of her minor children,
N. Hill, C. Hill, and A. Hill,

Defendants.

JUDGMENT

The court issues this final judgment pursuant to its memorandum opinion and order of September 30, 2016. Accordingly, it is hereby **ordered, adjudged, and decreed** that Intervenor Plaintiff PBL Multi-Strategy Fund, L.P. ("Intervenor Plaintiff") is entitled to and shall recover against Intervenor Defendants Ahtrey Investments, L.L.C. and Albert G. Hill, III (collectively, "Defendants") jointly and severally **$8,658,134.23**, which consists of the amount of unpaid principal and accrued interest owed under the Revolving Credit Note and Guarantee and Collateral Agreement; that postjudgment interest shall accrue at the applicable federal rate of **.60%** on the amount awarded **($8,658,134.23)** from the date of this judgment until it

is paid in full; that Defendants take nothing against Intervenor Plaintiff and all relief requested by Defendants is **denied**; that this action is **dismissed with prejudice**; that all allowable and reasonable costs of court are taxed against Defendants; and that all relief not expressly granted herein is denied, except for Intervenor Plaintiff's request for attorney's fees, which the court will consider postjudgment.

Signed this 30th day of September, 2016.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

APPENDIX N

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 01/27/17]

Civil Action No. 3:10-CV-2269-L-BK

CAMPBELL HARRISON & DAGLEY, *et al*.,

Plaintiffs,

v.

ALBERT G. HILL III, *et al*.,

Defendants.

ORDER

Before the court is Intervenor PBL Multi-Strategy Fund, L.P.'s ("PBL") Motion to Alter or Amend Judgment (Doc. 614*)*. By its motion, timely filed pursuant to Federal Rule of Civil Procedure 59(e), PBL seeks to alter or amend the court's September 30, 2016 judgment (Doc. 612), in which the court rendered judgment in PBL's favor on its claims against intervenor-defendants Albert G. Hill III ("Hill III") and Ahtrey Investments, L.L.C. ("Ahtrey") in the amount of $8,658,134.23, jointly and severally, consisting of the amount of unpaid principal and accrued interest owed under the Revolving Credit Note ("Note") and Guarantee and Collateral Agreement. The judgment also provided that postjudgment interest would accrue at the then-applicable federal rate of .60% from the date of judgment until the amount was paid in full. The certificate of conference to the motion reflects that

Hill III and Ahtrey oppose the motion. No response, however, was filed on behalf of either. Having considered the motion, record, and applicable law, the court **grants** the motion for the reasons that follow.

I.

Reconsideration of a judgment is an extraordinary remedy. 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2810.1 at 124 (2d ed. 1995). Therefore, the Rule 59(e) standard "favors denial of motions to alter or amend a judgment . . . ." *Southern Contractors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). District courts have considerable discretion in deciding whether to reopen a case in response to a Rule 59(e) motion. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). Before a court can grant a motion pursuant to Rule 59(e), the moving party must "clearly establish a manifest error of law or must present newly-discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); *see also Texas Comptroller of Pub. Acct's v. Transtex Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002) (Relief under Rule 59(e) is warranted "to correct a manifest error of law."). A Rule 59(e) motion may not be used, however, to reargue facts upon which the court has already ruled on or resolved to the movant's dissatisfaction. *See* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2810.1 at 127-28.

II.

PBL's motion seeks to amend or modify the judgment to provide for interest from the date of judgment at the post-maturity contract rate rather than the federal judgment rate under 28 U.S.C. §1961. In its motion for summary judgment (Doc. 585), PBL

requested judgment for the amount due on the Note as of the date of filing "plus interest as provided in the parties['] agreement at the rate of $2,146.73 per day after February 15, 2016." (Doc. 614-1, p. 9). This language was not sufficiently clear to indicate to the court at the time that PBL was seeking to supplant the postjudgment statutory interest rate with a different rate agreed upon by the parties. Nevertheless, the court will now address whether a different postjudgment interest rate controls in this matter.

Although 28 U.S.C. §1961 provides the postjudgment interest rate generally, the parties are free to provide a higher rate by contract. *See Hymel, Inc. v. UNC, Inc.*, 994 F.2d 260, 266 (5th Cir. 1993); *Tricon Energy, Ltd. v. Vinmar Int'l, Ltd*., 2012 WL 176438, 2 (S.D. Tex. 2012), *aff'd*, 718 F.3d 448 (5th Cir. 2013). To override the statutory rate, the contract must expressly refer to postjudgment interest. *Tricon Energy*, 2012 WL 176438, *supra*.

The Note made the basis of PBL's claim provides:

> Overdue principal and interest shall bear interest, *before and after judgment*, for each day that such amounts are overdue at the lesser of (i) *the Fixed Rate plus five percent (5%) per annum*, and (ii) the Maximum Rate. Interest shall be calculated on the basis of a 360-day year consisting of twelve 30-day months.

(Doc. 614-1, p. 12, ¶(c)(1)) (emphasis added). The Note provides that the "Fixed Rate" shall be 18%. *See id.* PBL is asking the court to calculate the postjudgment interest rate based on the 18% Fixed Rate plus 5% per annum, rather than the .60% then-applicable federal

rate. The language in the Note concerning postjudgment interest is nearly identical to the language in *Hymel*, where the court concluded that the parties had expressly contracted to a different rate than the statutory rate when the controlling agreement provided that "all past due interest and/or principal shall bear interest from maturity until paid, *both before and after judgment* ...[.]" 994 F.2d at 265-66 (emphasis added.) Under controlling precedent, the court, therefore, concludes that the parties in this case clearly and unmistakably expressed the intention that the contractual post-maturity rate continue in effect postjudgment.

III.

For the reasons herein stated, the court **grants** Intervenor PBL Multi-Strategy Fund, L.P.'s ("PBL") Motion to Alter or Amend Judgment (Doc. 614*)*. The court **directs** PBL to file an amended form of judgment consistent with this order by **3:00 p.m., Tuesday, January 31, 2017.**

It is so ordered this 27th day of January, 2017.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

APPENDIX O

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed 01/30/17]

Civil Action No. 3:10-CV-2269-L-BK

CAMPBELL HARRISON & DAGLEY, L.L.P. and
CALLOWAY, NORRIS, BURDETTE AND WEBER, PLLC,

Plaintiffs,

ALBERT G. HILL III, *et al*.,

Defendants.

AMENDED FINAL JUDGMENT

The court issues this final judgment pursuant to its memorandum opinion and order of September 30, 2016 (Doc. 611) and its order of January 27, 2017 (Doc. 616). This amended judgment **amends** and **supersedes** the September 30, 2016, judgment (Doc. 612), to provide for postjudgment interest at the post-maturity rate provided in the parties' contract. Accordingly, it is hereby **ordered, adjudged and decreed** that Intervenor Plaintiff PBL Multi-Strategy Fund, L.P. ("Intervenor-Plaintiff") is entitled to and shall recover against Intervenor Defendants Ahtrey Investments, L.L.C. and Albert G. Hill, III (collectively, "Defendants"), jointly and severally, **$8,658,134.23**, which consists of the amount of unpaid principal and accrued interest owed under the Revolving Credit Note and Guarantee and Collateral Agreement; that postjudgment interest shall accrue at the contract rate of

23.32%, as provided in the Revolving Credit Note, on the amount awarded **($8,658,134.23)** from the date of this judgment until it is paid in full; that Defendants take nothing against Intervenor Plaintiff and all relief requested by Defendants is **denied**; that this action is **dismissed with prejudice**; that all allowable and reasonable costs of court are taxed against Defendants; and that all relief not expressly granted herein is **denied**, except for Intervenor Plaintiff's request for attorney's fees, which the court will consider postjudgment.[*]

It is so ordered this 30th day of January, 2017.

/s/ Sam A. Lindsay
Sam A. Lindsay
United States District Judge

[*] The court did not allow time for Defendants to comment on the terms contained in this amended final judgment, given Defendants' failure to file any response to Intervenor-Plaintiff's Motion to Alter or Amend Judgment, which the court granted on January 27, 2017 (Doc. 616), and which forms the basis of this amended final judgment. Such failure to file a response constitutes a waiver by Defendants of their right to now assert any objections to this amended final judgment.

APPENDIX P

28 U.S.C.S. § 636

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate [magistrate judge] serving under this chapter [*28 USCS § 631* et seq.] shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under *section 3401, title 18, United States Code*, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the

findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

(2) A judge may designate a magistrate [magistrate judge] to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate [magistrate judge] to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of *rule 53(b) of the Federal Rules of Civil Procedure* for the United States district courts.

(3) A magistrate [magistrate judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates [magistrate judge's] shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate [magistrate judge] or a part-time United States magistrate [magistrate judge] who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate [magistrate judge] may exercise such jurisdiction, if such magistrate [magistrate judge] meets the bar membership requirements set forth in section 631(b)(1) [*28 USCS § 631(b)(1)*] and

the chief judge of the district court certifies that a full-time magistrate [magistrate judge] is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate [magistrate judge] is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate [magistrate judge] to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate [magistrate judge] may again advise the parties of the availability of the magistrate [magistrate judge], but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates [magistrate judges] shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate [magistrate judge] in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate [magistrate judge] designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in

this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate [magistrate judge] under this subsection.

(5) The magistrate [magistrate judge] shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [*28 USCS §§ 631* et seq.] shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this *title [28 USCS § 2072*].

(e) Contempt authority.

(1) In general. United States magistrate judge serving under this chapter [*28 USCS §§ 631* et seq.] shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court. Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties

under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders. The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The

appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate [magistrate judge] may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate [magistrate judge] shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate [magistrate judge] so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [*28 USCS § 635*].

(g) A United States magistrate [magistrate judge] may perform the verification function required by *section 4107 of title 18, United States Code*. A magistrate [magistrate judge] may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by *section 4109 of title 18, United States Code*, and may perform such functions beyond the territorial limits of the United States. A magistrate [magistrate judge] assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate [magistrate judge] who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a

magistrate [magistrate judge] in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate [magistrate judge] may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this *title [28 USCS § 377*] or in subchapter III of chapter 83, and chapter 84, of title 5 *5 USCS §§ 8331* et seq., *8401* et seq.] which are applicable to such magistrate [magistrate judge]. The requirements set forth in subsections (a), (b)(3), and (d) of section 631 [*28 USCS § 631*], and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate [magistrate judge], shall not apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this *title [28 USCS § 375*]. Any other requirement set forth in section 631(b) [*28 USCS § 631(b)*] shall apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this *title [28 USCS § 375*] unless such retired magistrate [magistrate judge] met such requirement upon appointment or reappointment as a magistrate under section 631 [*28 USCS § 631*].

APPENDIX Q

U.S.C.S. Fed Rules Civ Proc R 56

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order

.(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

APPENDIX R

U.S.C.S. Fed Rules Civ Proc R 72

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) *Findings and Recommendations.* A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) *Objections.* Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 14 days after being served with a copy. Unless the district

judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) *Resolving Objections.* The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions