

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

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Jan 03 2023

SC Court of Appeals

APPEAL FROM YORK COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE DANIEL D. HALL  
CIRCUIT COURT JUDGE

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APPELLATE CASE NO. 2020-001068  
CIVIL ACTION NO. 2020-CP-46-01641

---

Evolve Softworks, LLC,

APPELLANT,

versus

Anthony Burkett,

RESPONDENT.

---

**RECORD ON APPEAL**

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**ATTORNEYS FOR  
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**EVOLVE SOFTWARES, LLC V. ANTHONY BURKETT**

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**William Freeman**

---

**From:** Hall, Daniel D. Law Clerk (Bryant Cannon) <dhallc@sccourts.org>  
**Sent:** Monday, July 06, 2020 10:50 AM  
**To:** William Freeman; Kenneth Raynor; fmacchiaverna@huntermaclean.com  
**Cc:** Strait, Lynn  
**Subject:** RE: Motion to Dismiss: 2020CP4601641-Evolve Softworks LLC v. Anthony Burkett

Good Morning,

Judge Hall received 2 orders in his queue on behalf of Evolve Softworks with regard to the above-referenced case asking to vacate the judgment and alter/amend the form 4 to grant the motion to dismiss **Without Prejudice**. The court stands by its prior ruling granting the Defendant's Motion to Dismiss with prejudice and will remove these orders from its queue.

Thank you,

Bryant T. Cannon, Esq.  
 Law Clerk  
 To The Honorable Judge Daniel D. Hall  
 Chief Administrative Judge of the Sixteenth Judicial Circuit  
 1675 York Hwy, York, SC 29745  
 T: (803) 818-6806  
 E: [DhallLC@sccourts.org](mailto:DhallLC@sccourts.org)

**From:** William Freeman <william@freemanfreemanlaw.com>  
**Sent:** Thursday, June 25, 2020 11:16 AM  
**To:** Hall, Daniel D. Law Clerk (Bryant Cannon) <dhallc@sccourts.org>; Kenneth Raynor <Ken@Raynorlawfirm.com>; fmacchiaverna@huntermaclean.com  
**Cc:** Strait, Lynn <Lynn.strait@yorkcountygov.com>  
**Subject:** RE: Motion to Dismiss: 2020CP4601641-Evolve Softworks LLC v. Anthony Burkett

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. **\*\*\***

Dear Bryant Cannon:

Thank you for the email. If the Court's current inclination is dismissal, could the Plaintiff respectfully request the Court grant us until next week to amend the complaint to include additional facts and dates to address the statute of limitations issue?

Thank you.

Will

William S. F. Freeman  
 Freeman & Freeman, LLC

telephone: (864) 478-8878  
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Greenville, South Carolina 29602  
[william@freemanfreemanlaw.com](mailto:william@freemanfreemanlaw.com)

This is a confidential or privileged communication. If you are not the intended recipient, do not read this communication and delete it immediately.

---

**From:** Hall, Daniel D. Law Clerk (Bryant Cannon) <[dhalllc@sccourts.org](mailto:dhalllc@sccourts.org)>  
**Sent:** Thursday, June 25, 2020 9:57 AM  
**To:** Kenneth Raynor <[Ken@Raynorlawfirm.com](mailto:Ken@Raynorlawfirm.com)>; William Freeman <[william@freemanfreemanlaw.com](mailto:william@freemanfreemanlaw.com)>;  
[fmacchiaverna@huntermaclean.com](mailto:fmacchiaverna@huntermaclean.com)  
**Cc:** Strait, Lynn <[Lynn.strait@yorkcountygov.com](mailto:Lynn.strait@yorkcountygov.com)>  
**Subject:** Motion to Dismiss: 2020CP4601641-Evolve Softworks LLC v. Anthony Burkett

Good Morning Counsel,

I hope you all are well. The Defendant's Motion to Dismiss in the above-referenced case is **Granted**. A Form 4 reflecting this ruling will be filed and signed within the week. Have a great weekend.

Warm Regards,

Bryant T. Cannon, Esq.  
Law Clerk  
To The Honorable Judge Daniel D. Hall  
Chief Administrative Judge of the Sixteenth Judicial Circuit  
1675 York Hwy, York, SC 29745  
T: (803) 818-6806  
E: [DhallLC@sccourts.org](mailto:DhallLC@sccourts.org)

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA  
COUNTY OF York  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4601641

Evolve Softworks Llc  
PLAINTIFF(S)

Anthony Burkett  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

After the consideration by the Court, Defendant's Motion to Dismiss in the above referenced case is Granted, it is so ordered.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/25/2020 .

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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York Common Pleas

**Case Caption:** Evolve Softworks Llc VS Anthony Burkett  
**Case Number:** 2020CP4601641  
**Type:** Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

|                         |   |                               |
|-------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS         |
|                         | ) |                               |
| COUNTY OF YORK          | ) | SIXTEENTH JUDICIAL CIRCUIT    |
|                         | ) |                               |
| EVOLVE SOFTWARES, LLC,  | ) | Civil Action No. _____        |
|                         | ) |                               |
| <b>Plaintiff,</b>       | ) |                               |
|                         | ) |                               |
| <b>vs.</b>              | ) | <b>COMPLAINT</b>              |
|                         | ) |                               |
| ANTHONY BURKETT,        | ) | <b>(Jury Trial Requested)</b> |
|                         | ) |                               |
| <b>Defendant.</b>       | ) |                               |
|                         | ) |                               |

**COMPLAINT**

Plaintiff, Evolve Softworks, LLC (“Evolve”), through undersigned counsel, files its Complaint against Defendant, Anthony Burkett (“Burkett”), and alleges as follows:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff, Evolve, is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business located in Georgia. Evolve is registered with the South Carolina Secretary of State and conducts business at 125 Easy Gap Rd., Anderson, South Carolina 29621.

2. Defendant, Burkett, is over the age of eighteen (18) and resides in York County, South Carolina.

3. This has jurisdiction and venue is proper in York County, South Carolina, because Burkett resides therein and because the cause of action set forth herein accrued in York County, South Carolina.

**STATEMENT OF FACTS**

4. Between 2014 and July 2015, R. Dean Harrell (“Harrell”) loaned to 3 Guys Investments, LLC (“3 Guys”), a total of \$2,084,790.58 at an 8% rate of interest.

5. By October 2016, 3 Guys was in default pursuant to the loans' terms.
6. In consideration for 3 Guys not enforcing the terms of the aforementioned loans, Burkett executed a Guaranty Agreement wherein he agreed to personally guarantee the debt specified therein that 3 Guys Investments, LLC ("3 Guys"), owed at the time to Harrell (the "Debt") not to exceed the principal amount of \$2,600,000.00 plus accrued interest, attorneys' fees, and costs ("Guaranty"). A true and correct copy of the Guaranty is attached hereto as Exhibit "A."
7. Pursuant to the terms of the Guaranty, Burkett personally guaranteed prompt and full payment of the obligations of 3 Guys, including, but not limited to interest, charges, all costs and attorney's fees in the event 3 Guys defaulted on payment of its Debt.
8. Harrell thereafter assigned his rights in and to the Debt and attendant debt instruments to Evolve. A true and correct copy of the Assignment Agreement is attached hereto as Exhibit "B."
9. 3 Guys defaulted on its Debt.
10. Evolve provided notice of same to Burkett and demanded payment in full pursuant to the Guaranty, but Burkett has been unresponsive. A true and correct copy of the notice of default and demand letter ("Notice of Demand") is attached hereto as Composite Exhibit "C."
11. Burkett does not dispute the Debt, he just refuses to pay it.
12. Burkett failed to cure his default under the Guaranty after receipt of the Notice of Demand. The Notice of Demand set forth all the amounts owed under the Guaranty, which included proper notice of Evolve's intention to collect its attorney's fees and costs.
13. By failing to pay the Debt when due and owing, Burkett is in breach of the Guaranty.
14. Evolve has been damaged as a result of Burkett's breach of his Guaranty.

15. By virtue of Burkett's breach of his Guaranty, he owes Evolve at least \$2,197,354.86.

16. To date, none of the above-referenced amounts have been paid to Evolve under the Guaranty by Burkett.

17. Evolve seeks prejudgment and post-judgment interest at the rate of 8% per annum.

**COUNT ONE – BREACH OF GUARANTY**

20. All previous allegations are incorporated by reference as if fully re-alleged herein.

21. By failing to repay the unpaid balance of One Million Nine Hundred Twenty-Four Thousand Seven Hundred Seventy-Eight Dollars and Eighty-Three cents (\$1,924,778.83) and interest of Two Hundred Thousand Five Hundred Seventy-Six Dollars and Three cents (\$272,576.03). Burkett breached his Guaranty and is liable to Evolve for the damages resulting from said breach.

22. Evolve's damages caused by the breach of Burkett's Guaranty include, but are not limited to, the Debt, the interest due on the outstanding Note at the rate of 8% per annum, and other damages related to Burkett's breach.

23. Evolve has performed all of its obligations under the Guaranty, and all requirements by law; Evolve is therefore entitled to recover its damages, including costs and attorneys' fees, as a result of Burkett's breach of his Guaranty.

24. All conditions precedent to the filing of this action have occurred, have been performed, or have otherwise been fulfilled, or their performance has been excused or waived.

**WHEREFORE**, Plaintiff respectfully requests this Court:

A. Enter Judgment against Burkett for actual damages in the amount of \$2,197,354.86 together with interest at the rate of 8% per annum, reasonable attorneys' fees and costs;

- B. That the costs of this action, including Court costs and attorney's fees, be taxed against the Defendant;
- C. Post-judgment interest at the legal rate as set forth by statute and order of the Supreme Court of the State of South Carolina or pursuant to the laws of North Carolina;
- D. Try all appropriate claims before a jury; and
- E. Grant such other equitable or further relief as the Court deems just and proper.

Dated: May 26, 2020.

Respectfully submitted,

/s/ Francesca Macchiaverna  
FRANCESCA MACCHIAVERNA  
South Carolina Bar No.: 16642  
**HUNTER, MACLEAN, EXLEY & DUNN, P.C.**  
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**DIFALCO, FERNANDEZ & KAPLAN**  
Justin B. Kaplan, Esq.  
*(Pro Hac Vice Application Pending)*  
777 Brickell Avenue  
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Miami, Florida 33131  
*jkaplan@dfkfirm.com*

**GUARANTY AGREEMENT**

This Guaranty Agreement (this "Guaranty") is made effective as of October 25, 2016 by Anthony Burkett, (the "Guarantor") of 2998 East View Road, Rock Hill, SC 29732.

This Guaranty is being given to R. Dean Harrell, (the "Creditor") of 5615 Potter Road, Matthews, North Carolina 28104.

This Guaranty is being given for the benefit of the Guarantor and for 3 Guys Investments, LLC (the "Debtor") of 2998 East View Road, Rock Hill, SC 29732.

**I. OBLIGATIONS**

This Guaranty is given by the Guarantor to induce the Creditor not to call the Promissory Note from the Debtor to the Creditor in the principal amount of \$2,600,000.00 ("Note"), and in consideration of the Creditor doing so, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and further acknowledging that the Creditor intends to rely on this Guaranty, the Guarantor guarantees prompt payment when due of all payments and liabilities of the Debtor to the Creditor including without limitation all amounts due and payable pursuant to the Note and all uncollected amounts of any award or judgment in favor of Creditor against the Debtor and/or Burkett and/or Michael Long, whether now existing or hereafter incurred (it being understood and agreed that this Guaranty is a continuing one, except as such duration is specifically limited elsewhere in this Guaranty), whether voluntary or involuntary and however arising, whether secured or unsecured, absolute or contingent, liquidated or unliquidated, and regardless of whether the Debtor may be liable individually or jointly with others, regardless of whether recovery upon any such obligation may be or hereafter become barred or otherwise unenforceable, including interest and charges, and to the extent not prohibited by law, all costs and attorney's fees incurred in attempting to realize upon this Guaranty.

**II. LIMITATION OF AMOUNT**

The liability of the Guarantor pursuant to this Guaranty (exclusive of any costs and expenses incurred by the Creditor to realize upon this Guaranty) shall not at any time exceed the sum of \$2,600,000 plus any outstanding interest, attorney fees, costs or expenses due pursuant to the terms of the Note plus any other amounts owed Harrell by 3 Guys Investments, LLC.

**III. DURATION**

This is a continuing Guaranty and shall not be revoked by the Guarantor. This Guaranty will remain effective until all obligations guaranteed by this Guaranty are completely discharged, but in no event shall this Guaranty be terminated while the Creditor has a membership interest in 3 Guys Investments, LLC.

**IV. NOTICE OF DEFAULT**

The Creditor shall be required to notify the Guarantor of a default by the Debtor in the Debtor's commitments to the Creditor before proceeding against the Guarantor under this Guaranty.

**V. CREDITOR PROVISIONS**

The Creditor may seek to enforce this Guaranty and collect against the Guarantor with or without first seeking recovery from the Debtor. If the Guarantor is required to perform in the place of the Debtor, the Guarantor will assume the place of the Creditor in any legal action against the Debtor. This Guaranty is given with the understanding that the security, if any, is not required to be

exhausted before any claim is asserted against the Guarantor for collection of any debt or the performance of the contract by the Guarantor.

**VI. ASSIGNMENT**

This Guaranty (a) shall bind the successors and assigns of the Guarantor (this Guaranty is not assignable by the Guarantor without the express written consent of the Creditor, and is not affected by the death of the Guarantor), (b) shall inure to the Creditor, its successors and assigns, and (c) may be enforced by any party to whom all or any part of the liabilities may be sold, transferred, or assigned by the Creditor.

**VII. FINANCIAL CONDITION**

The Creditor has no duty to advise the Guarantor of the Debtor's financial condition.

**VIII. CORPORATE AUTHORITY**

The Guarantor certifies that it is not prohibited under its articles of incorporation or bylaws (or its articles of organization or operating agreement, if a limited liability company) to act as the Guarantor.

**IX. ENTIRE AGREEMENT**

This Guaranty contains the entire agreement of the parties with respect to the subject matter of this Guaranty and there are no other promises or conditions in any other agreement, whether oral or written. This Guaranty supersedes any prior written or oral agreements between the parties with respect to the subject matter of this Guaranty.

**X. AMENDMENT**

This Guaranty may be modified or amended, if the amendment is made in writing and is signed by both parties.

**XI. SEVERABILITY**

If any provision of this Guaranty shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Guaranty is invalid or unenforceable, but that by limiting such provision it would become valid or enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

**XII. WAIVER OF CONTRACTUAL RIGHT**

The failure of either party to enforce any provision of this Guaranty shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Guaranty.

**XIII. APPLICABLE LAW**

This Guaranty shall be governed by the laws of the State of North Carolina.

**XIV. RECEIPT**

The Guarantor acknowledges receipt of a copy of this Guaranty.

Guarantor:



Anthony Burkett

STATE OF NORTH CAROLINA  
COUNTY OF UNION

**ASSIGNMENT AGREEMENT**

THIS ASSIGNMENT AGREEMENT entered into this 27th day of March, 2018 by and between:

**R, Dean Harrell** a citizen and resident of Union County, North Carolina ("Harrell");  
**Michael Long**, a citizen and resident of Mecklenburg County, North Carolina ("Long");  
**Anthony Burkett**, a citizen and resident of Fort Mill, South Carolina ("Burkett");  
**Brian C. Bonnette**, a citizen and resident of Commerce, ~~South Carolina~~ Georgia <sup>RSB</sup> ("Bonnette");  
**3 Guys Investments, LLC**, a North Carolina limited liability company ("3 Guys");  
**Evolve Softworks, LLC**, Delaware limited liability company transacting business in the State of North Carolina ("Evolve").

(Harrell, Long, Burkett, Bonnette, 3 Guys and Evolve sometimes collectively referred to as the "Parties").

RECTIALS

WHEREAS, all capitalized terms, unless otherwise defined herein, shall have the meaning set out in the Transaction Documents, as defined below and in the Modification Agreement and Second Loan Agreement of even date herewith; and,

WHEREAS, Harrell, Long and Burkett own, in equal shares, all the membership interest of 3 Guys; and,

WHEREAS, Harrell and ~~Burkett~~ <sup>Bonnette</sup> own all the membership interest in Evolve; and,

WHEREAS, pursuant to an Asset Purchase Agreement and Agreement Pertaining to Ancillary Matters dated October 2, 2014 between BPT Partners, LLC, a Delaware limited liability company and 3 Guys, 3 Guys owns one half (50%) of all assets to BPT, a Limited Partnership, including one half (50%) of right to Orbit Software and it's Intellectual Properties & Software in the United States and Puerto Rico ("BPT Interests");

WHEREAS, on October 25, 2016, Bonnette, Harrell and Evolve entered into an Acquisition Agreement, Loan Agreement, Operating Agreement, Guaranty, Pledges of Membership Interests, Assignments of Membership Interests, Note, Non-Competition Agreement and other related agreements regarding Harrell loaning money to and acquiring a membership interest in Evolve ("Transaction Documents") (the transaction set out in the Transaction Documents is referred to hereafter sometimes as the "Transaction"); and,

THEREFORE, in order to accomplish the desires and agreements of the Parties as set out above, the Parties, in consideration of the mutual terms, conditions, and obligations set out herein, agree as follows:

1. The above Recitals are material terms of this Assignment Agreement and are not mere recitals.
2. Harrell assigns the 3 Guys Note to Evolve and Evolve accepts the same.
3. The Burkett Guaranty shall remain in full force and effect and Burkett reconfirms the terms and conditions of the Burkett Guaranty.
4. 3 Guys shall pay the 3 Guys Note to Evolve.
5. Upon payment in full of the Third Note and only upon payment in full, Harrell shall assign and transfer all his membership interest in 3 Guys to Bonnette.
6. Long and Burkett consent to the assignment of Harrell's membership of 3 Guys to Bonnette and Bonnette shall have all the rights, duties and obligations Harrell had in 3 Guys as a result of Harrell's membership interest. Long and Burkett waive any other requirement set out in the Operating Agreement of 3 Guys or otherwise regarding the transfer of membership interest and agree and confirm that Bonnette shall be a manager/member of 3 Guys with all rights, duties and obligations set out in the Operating Agreement or provided by law.
7. Long and Burkett represent and warrant that nothing in this Assignment Agreement violates 3 Guys Operating Agreement or the duties and obligations pursuant to any agreement arising out of 3 Guys' BPT Interests and further agree to indemnify and hold Harrell harmless from any damages or losses of any kind, including reasonable attorney fees, in the event the forgoing representation and warranty is not correct.
8. All representations, warranties, covenants and obligations made in this Assignment or any certificate or document delivered pursuant hereto shall survive the date of this Assignment Agreement.
9. This Assignment Agreement may be amended, modified or supplemented only by unanimous written agreement of the Parties.
10. This Assignment Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties and their respective heirs, successors and permitted assigns. No Party hereto shall assign either this Assignment Agreement or any of the rights, interests or obligations hereunder without the prior written consent of the other Parties.
11. The laws of the State of North Carolina shall govern the execution, interpretation and performance of this Assignment Agreement without regard to the conflicts of laws provisions thereof. The initiation of any legal proceeding, and any resulting trial, concerning this Assignment Agreement shall occur in Union County, North Carolina.
12. This Assignment Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the


same instrument. Execution by original signature delivered by facsimile transmission or e-mail shall be deemed to be, and shall have the same effect as, execution by original signature.

- 13. The Parties warrant and represent that they are represented by counsel of their choosing or that they had the opportunity to retain counsel and that this Assignment Agreement is a result of negotiations between the Parties. As a result of the foregoing no presumption shall be created in favor for or against any party with respect to the interpretation of any term or provision of this Assignment Agreement as a result of the fact that this Assignment Agreement was prepared by or on behalf of one of the parties or their counsel.
- 14. This Assignment Agreement and the schedules and exhibits hereto, if any, (which are hereby incorporated herein by reference) embody the entire agreement and understanding of the Parties with respect of the subject matter of this Assignment Agreement. This Assignment Agreement supersedes all prior agreements and understandings between the Parties with respect to the transactions contemplated hereby.


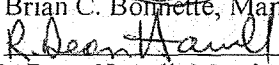
IN WITNESS WHEREOF, the Parties have executed this ASSIGNMENT AGREEMENT as of the date first above written.


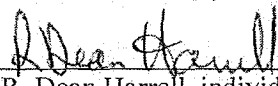
**3 GUYS INVESTMENTS, LLC**

By: \_\_\_\_\_  
Michael Long, Manager/Member

\_\_\_\_\_  
Anthony Burkett, Manager/ Member  
  
\_\_\_\_\_  
R. Dean Harrell, Manager/Member

**EVOLVE SOFTWARES, LLC**

By:   
\_\_\_\_\_  
Brian C. Bonnette, Manager  
  
\_\_\_\_\_  
R. Dean Harrell, Member

  
\_\_\_\_\_  
Brian C. Bonnette, individually  
  
\_\_\_\_\_  
R. Dean Harrell, individually

---

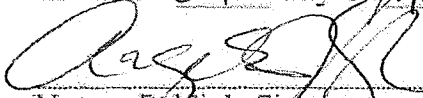
Michael Long, individually

---

Anthony Burkett, individually

STATE OF North Carolina  
COUNTY OF Mecklenburg

The foregoing instrument was acknowledged before  
me this 29 day of Mar, 2018, by Brian Bonnette



Angela S. Jennings

Notary Public's Signature

Notary Name

Personally Known  OR

Type of Identification Produced SCDL

STATE OF North Carolina  
COUNTY OF Mecklenburg

The foregoing instrument was acknowledged before  
me this 29 day of Mar, 2018, by R DeantHansen



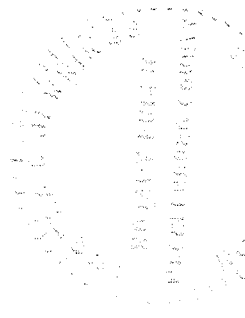
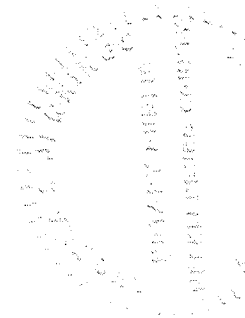
Angela S. Jennings

Notary Public's Signature

Notary Name

Personally Known  OR

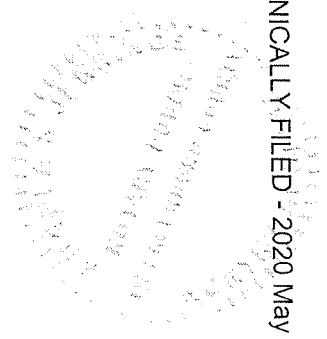
Type of Identification Produced \_\_\_\_\_



STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before  
me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_

\_\_\_\_\_  
Notary Public's Signature                      Notary Name  
Personally Known \_\_\_\_\_ OR  
Type of Identification Produced \_\_\_\_\_



STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

The foregoing instrument was acknowledged before  
me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_

\_\_\_\_\_  
Notary Public's Signature                      Notary Name  
Personally Known \_\_\_\_\_ OR  
Type of Identification Produced \_\_\_\_\_



**Justin B. Kaplan, Esq.**  
Partner  
JKaplan@dfkfirm.com



April 30, 2020

**VIA E-MAIL & FedEx**

Anthony Burkett  
1370 Cameron Road  
York, SC 29745  
anthonyburk11@gmail.com

**Re: Enforcement of Guaranty for Loan to 3 Guys Investments, LLC**

Mr. Burkett:

As you are aware, we have been retained by Evolve Softworks, LLC (“Evolve”), to represent its interests in enforcing the Guaranty Agreement you executed on October 25, 2016, securing a loan R. Dean Harrell made to 3 Guys Investments, LLC (“3 Guys”). On March 29, 2018, Mr. Harrell assigned his interests in the loan and attendant security, including the Guaranty, to Evolve. Having now calculated the exact amount of principal and interest currently due and owing, we wanted to provide this corrected notice pursuant to Section IV of the Guaranty of 3 Guy’s default of its loan obligations and of the Promissory Note described in the Guaranty. As assignee, Evolve hereby demands payment of \$2,197,354.86 no later than May 8, 2020. Please note that this amount does not include attorneys’ fees, costs, or other expenses even though Evolve is entitled to recover same pursuant to the Guaranty. Please further note that should full and complete payment not be made within the time period set forth herein, Evolve has instructed us to pursue all remedies available to it in law and equity.

This shall further serve as notice pursuant to North Carolina General Statute Section 6-21.2 that Evolve will enforce the provisions relative to payment of attorneys’ fees unless you pay the outstanding balance on the account within five (5) days from the date and time of this letter. If you pay the outstanding balance in full before the expiration of such time, you will not be obligated to pay attorneys’ fees, which are statutorily defined as fifteen percent (15%) of the outstanding balance of your account when the action for collection commences.

Payment should be made to the DiFalco, Fernandez & Kaplan IOLTA Account. Feel free to contact me should you have any questions or require wire instructions.

Sincerely,

**DIFALCO, FERNANDEZ & KAPLAN**

/s/ Justin B. Kaplan

Justin B. Kaplan, Esq.

Miami | 777 Brickell Avenue • Suite 630 • Miami, FL 33131 • (t) 305.569.9800 • (f) 866.569.0666  
New York | 845 Third Avenue • 6th Floor • New York, NY 10022 • (t) 212.734.3330 • (f) 866.734.4331

[www.DFKfirm.com](http://www.DFKfirm.com)

**Justin B. Kaplan, Esq.**  
Partner  
JKaplan@dfkfirm.com



April 30, 2020

**VIA E-MAIL FedEx**

Anthony Burkett  
326 Liverpool Rd  
Rock Hill, SC 29730  
anthonyburk11@gmail.com

**Re: Enforcement of Guaranty for Loan to 3 Guys Investments, LLC**

Mr. Burkett:

As you are aware, we have been retained by Evolve Softworks, LLC ("Evolve"), to represent its interests in enforcing the Guaranty Agreement you executed on October 25, 2016, securing a loan R. Dean Harrell made to 3 Guys Investments, LLC ("3 Guys"). On March 29, 2018, Mr. Harrell assigned his interests in the loan and attendant security, including the Guaranty, to Evolve. Having now calculated the exact amount of principal and interest currently due and owing, we wanted to provide this corrected notice pursuant to Section IV of the Guaranty of 3 Guy's default of its loan obligations and of the Promissory Note described in the Guaranty. As assignee, Evolve hereby demands payment of \$2,197,354.86 no later than May 8, 2020. Please note that this amount does not include attorneys' fees, costs, or other expenses even though Evolve is entitled to recover same pursuant to the Guaranty. Please further note that should full and complete payment not be made within the time period set forth herein, Evolve has instructed us to pursue all remedies available to it in law and equity.

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[www.DFKfirm.com](http://www.DFKfirm.com)

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

EVOLVE SOFTWARES, LLC,

Plaintiff,

vs.

ANTHONY BURKETT,

Defendant.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
2020-CP-4601641

**DEFENDANT'S MOTIONS TO**  
**DISMISS**

**NOW COMES** the Defendant and moves the Court pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for an order dismissing the Plaintiff's Complaint on the specific ground that the Plaintiff's claims are barred by the applicable statute of limitations and therefore the complaint fails to state a cause of action upon which relief can be had and shows unto the Court:

1. The Plaintiff filed this action on February 25, 2020.
2. The lawsuit seeks recovery against the Defendant pursuant to an alleged guaranty which is attached to the Complaint as Exhibit A.
3. The Complaint alleges that the debt underlying the alleged guaranty were loans totaling \$2,084,790.58 made by R. Dean Harrell to 3 Guys Investments, LLC. (Para 4, Complaint.)
4. The Complaint alleges that pursuant to the terms of the Guaranty, the Defendant guaranteed prompt and full payment of the obligations of 3 Guys. (Para 7, Complaint.)
5. The Complaint alleges that the debt owed by 3 Guys to Harrell were in default by October 2016. (Para 4, Complaint.)
6. The alleged guaranty attached to the Complaint is dated October 25, 2016.
7. An action for breach of contract must be commenced within three years. S.C. Code Ann. § 15-3-530(1).

8. “[T]he statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults.” *Coastalstates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 759 S.E.2d 152 (S.C. App. 2014).
9. As shown by the allegations of the Complaint, the Plaintiff filed this action to recover under the guaranty more than three years from the date the underlying debt owed by 3 Guys to Harrell was in default and is therefore barred by the applicable statute of limitations.

**NOW COMES** the Defendant and moves the Court pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for an order dismissing the Plaintiff's Complaint on the specific ground that the alleged guaranty upon which the Plaintiff sues was not supported by consideration and therefore the complaint fails to state a cause of action upon which relief can be had and shows unto the Court:

1. The alleged guaranty attached to the Complaint recites that it “is given by the Guarantor to induce the Creditor not to call the Promissory Note from the Debtor to the Crditor...”
2. The alleged guaranty does not provide that the Creditor would forbear from calling the Promissory Note for any particular term nor does the Complaint allege that the Creditor agreed to or did refrain from calling the Promissory Note.
3. The alleged guaranty is governed by the laws of the State of North Carolina.
4. The alleged guaranty is not supported by consideration and is therefore unenforceable.

**WHEREFORE**, the Defendant prays the Court for an order dismissing the Plaintiff's Complaint with prejudice.

Dated: May 29, 2020

**RAYNOR LAW FIRM, PLLC**

/s/ Kenneth R. Raynor

Kenneth R. Raynor  
Attorney for Anthony Burkett  
1822 Cleveland Avenue  
Charlotte, NC 28203

Phone 704.413.3400; Fax 704.731.0774  
*ken@raynorlawfirm.com*  
N.C. Bar No.: 10488  
S.C. Bar No.: 11654  
S.C. Fed. ID No.: 6769

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing was served on this date by depositing a copy of same in the United States Mail, first-class, postage prepaid, addressed to the party/attorney or attorneys for said parties.

Francesca Macchiaverna  
Hunter, Maclean, Exley & Dunn, P.C.  
Post Office Box 9848  
Savannah, GA 31412-0048

Dated: May 29, 2020

/s/ Kenneth R. Raynor  
Kenneth R Raynor  
**RAYNOR LAW FIRM, PLLC**

STATE OF SOUTH CAROLINA  
COUNTY OF YORK

EVOLVE SOFTWARES, LLC,

Plaintiff,

vs.

ANTHONY BURKETT,

Defendant.

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
2020-CP-4601641

**DEFENDANT'S MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS**

**NOW COMES** the Defendant and hereby submits this Memorandum in Support of his Motion to Dismiss.

The Plaintiff filed the complaint in this action seeking to enforce a guaranty by the Defendant of a debt owed by 3 Guys Investments to the Plaintiff. However, the Complaint shows as a matter of law that the claim is barred by the statute of limitations. Moreover, the Complaint fails to describe any consideration necessary to support the enforcement of the guaranty in question. Therefore, the Complaint should be dismissed as a matter of law.

**FACTS**

The facts applicable to this motion are taken from the allegations of the Plaintiff's complaint which are deemed true for the purposes of this motion to dismiss.

Between 2014 and July 2015, R. Dean Harrell loaned to 3 Guys Investments, LLC (3 Guys) a total of \$2,084,790.58. Para 4, Complaint.

By October 2016, 3 Guys was in default of the loan terms. Para 5, Complaint.

In consideration for 3 Guys not enforcing the terms of the loan, the Defendant, Burkett executed a Guaranty Agreement where he agreed to personally guarantee the debt that 3 Guys owed at the time to Harrell. Para 6, Complaint.

A copy of the guaranty is attached to the Complaint as Exhibit A.

The Defendant personally guaranteed prompt and full payment of the obligations of 3 Guys. Para 7, Complaint.

Harrell assigned his rights in the debt owed by 3 Guys to the Plaintiff, as well as the attendant debt instruments.

### **STANDARD OF REVIEW**

Generally, a ruling on a motion to dismiss under Rule 12(b)(6), SCRCPP, must be based solely on the allegations contained in the complaint. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Jarrell v. Petoseed Co.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct.App.1998). *Chewning v. Ford Motor Co.*, 550 S.E.2d 584, 346 S.C. 28 (S.C. App. 2001)

**Issue 1: The Plaintiff's Claim is Barred by the Statute of Limitations Because the Action was Filed More than Three Years from the Default of Payment of the Debt.**

The analysis of the issue in the case at hand requires the analysis of North Carolina substantive law concerning the parties' rights under the Guaranty and South Carolina procedural law, i.e., the application of the statute of limitations for an action on a guaranty.

“[T]he statute of limitations on an action on an absolute guaranty, which is conditioned only on the debtor's default, begins to run when the obligation matures and the debtor defaults.” *Coastalstates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 759 S.E.2d 152 (S.C. App. 2014), citing 38 Am.Jur.2d Guaranty § 96, at 1040 (2010).

“A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity.” *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994).

The Guaranty refers to a Promissory Note in the principal amount of \$2,600,000. The Assignment Agreement refers to the Note as well. However, the complaint refers to loans made between 2014 and 2015. The Complaint does not appear to be an effort to enforce the Promissory Note referenced in the Guaranty but some other debt. Regardless, this debt was in default by October 2016. Para 5, Complaint.

So, to apply the South Carolina statute of limitations, one needs to determine the date the creditor could sue the debtor for a default on the loans under North Carolina law. The reason being is that the Guaranty stated it was governed by North Carolina law.

The guaranty in this case is an absolute guaranty. Under North Carolina law, a guaranty of "the due and punctual payment when due of such sum or sums of is an absolute guaranty. The right to sue upon this absolute guaranty of payment arises immediately upon the failure of the principal debtors to pay the loans.” *Cities Service Oil Company, Howell Oil Company, Inc.*, 34 N.C. App. 295, 300, 237 S.E. 2d 921 (1977). Of course, this rule is in accord with South Carolina law.

The Complaint states that the debt was in default by October 2016. Therefore, the statute of limitations began to run by October 2016. This lawsuit was filed on May 26, 2020, more than 3 years from the date of default. Thus, the lawsuit is barred by the statute of limitations.

The same result applies even in the North Carolina statute of limitations. Under North Carolina law, the statute of limitations for an action on a guaranty is 3 years. *See, Cities Service, supra.*

**Issue II: The Plaintiff's Complaint Should Be Dismissed because No Consideration Existed to Support the Guaranty Agreement.**

Consideration is essential to a valid guaranty contract. *Carolina Eastern, Inc. v. Benson Agri Supply, Inc.*, 310 S.E.2d 393, 66 N.C. App. 180 (N.C. App. 1984) When the guaranty, as in this case, involves a preexisting debt, it must be supported by some new consideration other than the original debt. *Klingstubbins Southeast, Inc. v. 301 Hillsborough St. Partners, LLC*, 721 S.E.2d 749 (N.C. App. 2012) affirmed, 736 S.E.2d 485 (N.C. 2012). *Sollis v. Holman* (N.C. App. 2012); *Accord, Sollis v. Holman* (N.C. App. 2012); *Carolina Eastern, supra.* Interestingly, in *Klingstubbins*, the Court upheld the trial court's granting of a motion to dismiss due to the lack of consideration supporting the guaranty.

Although forbearance may constitute valid legal consideration, it must be based on a promise to forbear made at the time of the parties' contract. "Plaintiff hereunder presented no evidence of an agreement that would have prevented plaintiff from bringing suit earlier. It is incumbent upon plaintiff to prove the consideration supporting a guaranty contract for

a pre-existing debt; the law does not presume such consideration. Plaintiff, not having proved any agreement to forbear, failed to prove the consideration essential to the underlying contract.” *Id.*

In the case at hand, the guaranty fails for the same reason as that stated in *Klingstubbins*. There was no consideration to support the guaranty. The Complaint alleges a pre-existing debt. Then the creation of the guaranty. The guaranty recites that the consideration is given to induce the lender not to call the Note. However, the guaranty does not put any limit on the time period for the forbearance. So, the Plaintiff could have called the Note the day after the guaranty was signed. The Complaint’s lack of allegations showing the existence of an agreement that would have prevented plaintiff from bringing suit earlier fails to establish the consideration necessary to support the guaranty. *See, Carolina Eastern, supra*. The lack of a definite period of agreed forbearance was the reason there was the finding of no consideration to support the guaranty in *Klingstubbins*.

Moreover, while the guaranty references the forbearance to call the Note, the Complaint does not make any allegations to the effect that the Promissory Note existed. Instead of debt evidenced by a Note in the principal amount of \$2,600,000, the Complaint references loans made between 2014 and July 2015 to 3 Guys Investments, LLC (3 Guys) for the total of \$2,084,790.58. Forbearance to call a note which does not exist is no consideration to support a guaranty.

Therefore, the Complaint fails to establish any allegations establishing consideration to support the guaranty. Absent consideration, there is no enforceable contract of guaranty. Therefore, the Complaint should be dismissed with prejudice.

**CONCLUSION**

The Plaintiff filed the Complaint, in this case, more than three years after the loan obligations owed to 3 Guys were in default. Therefore, the Complaint was not filed within the three year statute of limitations applicable to claims on a guaranty. The Plaintiff's lawsuit is barred by the statute of limitations and should be dismissed with prejudice.

Additionally, the Complaint fails to allege the existence of any consideration which is necessary to support the guaranty. Absent consideration, the guaranty is not enforceable. The lack of consideration is another basis upon which the Court should dismiss the Plaintiff's Complaint with prejudice.

Dated: June 16, 2020

**RAYNOR LAW FIRM, PLLC**

/S/ Kenneth R. Raynor

Kenneth R. Raynor

Attorney for Anthony Burkett

1822 Cleveland Avenue

Charlotte, NC 28203

Phone 704.413.3400; Fax 704.731.0774

*ken@raynorlawfirm.com*

N.C. Bar No.: 10488

S.C. Bar No.: 11654

S.C. Fed. ID No.: 6769

|                         |   |                                   |
|-------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA | ) | COURT OF COMMON PLEAS             |
|                         | ) |                                   |
| COUNTY OF YORK          | ) | SIXTEENTH JUDICIAL CIRCUIT        |
|                         | ) |                                   |
| EVOLVE SOFTWARES, LLC,  | ) | Civil Action No. 2020-CP-46-01641 |
|                         | ) |                                   |
| <b>Plaintiff,</b>       | ) |                                   |
|                         | ) |                                   |
|                         | ) |                                   |
| ANTHONY BURKETT,        | ) |                                   |
|                         | ) |                                   |
| <b>Defendant.</b>       | ) |                                   |
| _____                   | ) |                                   |

**PLAINTIFF’S RESPONSE IN OPPOSITION  
TO DEFENDANT’S MOTION TO DISMISS**

Plaintiff, Evolve Softworks, LLC (“**Evolve**”), through undersigned counsel and pursuant to South Carolina Rule of Civil Procedure 12, files this Response in Opposition to Defendant’s Motion to Dismiss (the “**Motion**”), filed by Defendant, Anthony Burkett (“**Burkett**”), and states:

**I. INTRODUCTION**

Burkett defies logic by arguing that the statute of limitations began to run before the Guaranty Agreement (“**Guaranty**”) at issue here was even executed. He also mistakenly argues that Evolve fails to allege consideration. This Court should accordingly deny the Motion for the reasons set forth below.

**II. FACTUAL ALLEGATIONS**

R. Dean Harrell (“**Harrell**”) loaned 3 Guys Investments, LLC (“**3 Guys**”), over \$2,000,000 between 2014 and July 2015. Complaint at ¶4. By October 2016, 3 Guys was in default. *Id.* at ¶5. However, Burkett thereafter agreed to personally guarantee the debt via a Continuing Guaranty in consideration for the primary obligee not enforcing the terms of the loans. *Id.* at ¶6. Thereafter, Harrell assigned his rights in and to the Debt and attendant debt instruments to Evolve. *Id.* at ¶8. After 3 Guys again defaulted on its Debt, Evolve provided notice of same to Burkett, demanding

payment in full pursuant to the Guaranty. *See id.* at ¶¶9-10.

### III. ARGUMENT

Granting a motion to dismiss for failure to state a claim is improper “[i]f the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory.” *Beverly v. Grand Strand Reg’l Med. Ctr., LLC*, 839 S.E.2d 468, 470 (S.C. Ct. App. 2020). Dismissal is inappropriate here.

#### A. The Guaranty Was Supported by Sufficient Consideration.

Burkett incorrectly argues that the Guaranty was not supported by consideration. Here, the Guaranty clearly and unambiguously states that it was made in consideration of the lender “not call[ing] the Promissory Note from the Debtor to the Creditor in the principal amount of \$2,600,000.00.” *See* Complaint, Exhibit “A,” ¶I. “[F]orbearance of a legal right is sufficient consideration for a promise given to secure such forbearance.” *Inv. Properties of Asheville, Inc. v. Norburn*, 188 S.E.2d 342, 345 (N.C. 1972)(superseded by rule on other grounds. Evolve thus sufficiently alleges consideration; and dismissal on that ground would be improper.

Burkett’s argument that Evolve fails to allege the existence of a contract that would have prevented it from bringing suit earlier and fails to establish consideration falls flat at the dismissal stage. The complaint must be “liberally construed for purposes of a motion to dismiss, and the complaint should not be dismissed unless it appears beyond a doubt that the plaintiff could not prove any set of facts support the claim for relief.” *Klingstubbins Southeast, Inc. v. 301 Hillsborough St. Partners, LLC*, 721 S.E.2d 749, 752 (N.C. Ct. App. 2012) (internal quotation omitted). Here, the claimed “lack of allegations” regarding the time limit for forbearance is a factual issue that may not be resolved on a dismissal motion.

Burkett’s heavy reliance on *Klingstubbins* is misplaced. There, an architect sued a developer and guarantor, requesting payment for services rendered. *See id.* at 750. The trial court

dismissed the claim against the guarantor for want of consideration. *See id.* The appellate court reversed on the grounds that the plaintiff sufficiently alleged that he delayed collection against the debtor in reliance upon letters that the guarantor sent the plaintiff. *See id.* at 752. Similar to the plaintiff's allegations in *Klingstubbins*, Evolve alleges here that the Guaranty at issue was provided in consideration for the primary obligee's delayed collection efforts. *See* Complaint, Exhibit "A," ¶I. In that sense, *Klingstubbins* supports denial of Burkett's motion.

**B. Statute of Limitations Does Not Bar Evolve's Claim.**

When considering a motion to dismiss based on the statute of limitations, the trial court must base its ruling "solely upon the allegations set forth on the face of the complaint." *Brown v. Leverette*, 353 S.E.2d 697, 698 (S.C. 1987). It cannot do so here.

Evolve does not allege, as Burkett seems to suggest, that some October 2016 default triggered enforcement of the Guaranty. In fact, Evolve does not even suggest that a default occurred in October 2016. Instead, Evolve alleges that the borrower *was already in default by October 2016*; and that Burkett provided the Guaranty in consideration for forbearing on calling the loan that was already in default. *See* Complaint at ¶¶5-6.

"[I]n no event can a statute of limitation begin to run until plaintiff is entitled to institute action." *Penley v. Penley*, 332 S.E.2d 51, 62 (N.C. 1985). As Evolve could not have enforced any guaranty for a default that predated same, the statute of limitations could not have run. Dismissal is therefore inappropriate.

**IV. CONCLUSION**

Based on the foregoing, this Court should deny the Motion.

Respectfully submitted this 18<sup>th</sup> day of June, 2020.

*/s/ Francesca Macchiaverna*

FRANCESCA MACCHIAVERNA

South Carolina Bar No.: 16642

**HUNTER, MACLEAN, EXLEY & DUNN, P.C.**

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*[fmacchiaverna@huntermaclean.com](mailto:fmacchiaverna@huntermaclean.com)*

**DIFALCO, FERNANDEZ & KAPLAN**

Justin B. Kaplan, Esq.

*(Pro Hac Vice Application Pending)*

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*[jkaplan@dfkfirm.com](mailto:jkaplan@dfkfirm.com)*

**FREEMAN & FREEMAN, LLC**

William S.F. Freeman

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Greenville, South Carolina 29602

*[william@freemanFreemanlaw.com](mailto:william@freemanFreemanlaw.com)*



“A circuit court does not have ‘discretion’ to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a).” *Skydive Myrtle Beach, Inc. v. Horry County.*, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). “Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and *after considering the amended pleading*, the court is certain there is no set of facts upon which relief can be granted.” *Id.* (emphasis added). The South Carolina Supreme Court has therefore held that where, as here, “a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint.” *Id.* (internal quotation omitted).

Evolve would like the opportunity to file and serve an amended complaint that corrects the apparent pleading deficiencies in its initial pleading. However, this Honorable Court dismissed Evolve’s initial Complaint via a “Form 4” Order. A Form 4 Order is generally considered to be a Final Order. *See, e.g. Cheap-O’s Truck Stop, Inc. v. Cloyd*, 350 S.C. 598, 604-605, 567 S.E.2d 514, 518 (Ct. App. 2002). Though unclear and despite the use of a Form 4 Order, this Honorable Court presumably did not intend to dismiss Evolve’s Claim *with prejudice* “without having seen any attempt at amending the complaint.” *Skydive Myrtle Beach, Inc.*, 426 S.C. 175, 183, 826 S.E. 2d at 589. As the South Carolina Supreme Court has stated: “We cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.” *Id.*

That is what will have occurred, however, if this Honorable Court’s dismissal order is considered final. “The immediate filing of a ‘with prejudice’ dismissal order” will have

“effectively prevented [Evolve] from preparing and presenting to the court an amended complaint before the thirty-day deadline for serving the appeal ran.” *Id.*

In light of the irreconcilable contrast between prevailing law regarding amendment upon dismissal for failure to state facts sufficient to constitute a cause of action and the finality of a Form 4 Order, Evolve respectfully requests clarification or amendment of this Court’s Order so that it may file an Amended Complaint in accordance with Rule 15(a)<sup>1</sup> that corrects the pleading deficiencies in its initial pleading to the extent permissible.

Evolve also seeks relief under Rule 59(e) to both clarify the Court’s ruling and/or seek leave to re-file. To the extent this Court’s Order does dismiss Evolve’s initial Complaint with prejudice, Evolve respectfully requests that this Court amend same to reflect that such Order is without prejudice. Evolve also seeks leave to re-file to plead additional facts regarding the activities surrounding the Continuing Guarantee. A party may file a Rule 59(e) motion if, as here, it “believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Elam v. S. Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E. 2d 772, 780 (2004).

Defendant moved to dismiss on the grounds that Evolve’s Complaint was insufficiently plead. “Dismissal, however, does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint.” *Sealy v. Dodge*, 289 S.C. 543, 544, 347 S.E. 2d 504, 505 (1986). Nonetheless, this Court’s Order does not specify whether Evolve may re-file a subsequent action. This Court accordingly failed to rule on an argument or issue. Amendment of the Order to reflect such ruling is accordingly appropriate.

---

<sup>1</sup> Leave to amend “shall be freely given when justice so requires and does not prejudice any other party.” S.C. R. Civ. P. 15(a).

Contemporaneously with the filing of this motion, Evolve is filing proposed draft orders for the Court's consideration.

WHEREFORE, Plaintiff, Evolve Softworks, LLC, respectfully requests that this Honorable Court clarify whether its Order dismissing the Complaint in this action is with or without prejudice, grant leave to re-file, and if it was entered with prejudice, amend the Order consistent with the clarification, as well as grant such other and further relief as is deemed just and proper.

This 2<sup>nd</sup> day of July, 2020.

Respectfully submitted,

/s/ Francesca Macchiaverna

FRANCESCA MACCHIAVERNA

South Carolina Bar No.: 16642

**HUNTER, MACLEAN, EXLEY & DUNN, P.C.**

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*fmacchiaverna@huntermaclean.com*

**DIFALCO, FERNANDEZ & KAPLAN**

Justin B. Kaplan, Esq.

*(Admitted Pro Hac Vice)*

777 Brickell Avenue

Suite 630

Miami, Florida 33131

*jkaplan@dfkfirm.com*

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) SIXTEENTH JUDICIAL CIRCUIT  
COUNTY OF YORK ) 2020-CP-46-01641

EVOLVE SOFTWARES, LLC )  
 )  
vs. ) TRANSCRIPT OF RECORD  
 )  
ANTHONY BURKETT )

JUNE 22, 2020  
YORK, SOUTH CAROLINA

BEFORE THE HONORABLE DANIEL HALL

APPEARANCES:

WILLIAM FREEMAN, ESQUIRE  
GREENVILLE, SOUTH CAROLINA

ATTORNEY FOR THE PLAINTIFF

KENNETH RAY RAYNOR, ESQUIRE  
CHARLOTTE, NORTH CAROLINA

ATTORNEY FOR THE DEFENDANT

SHIRLEY BROOM  
16<sup>TH</sup> Circuit Court Reporter

ORIGINAL PROVIDED TO WILLIAM FREEMAN, ESQUIRE  
ALL FEES ARE PURSUANT TO RULE 607(h)(j) SCACR

COPIES PROVIDED UPON REQUEST

I-N-D-E-X

WITNESSES:

(No testimony taken)

E-X-H-I-B-I-T-S

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>ID.</u> | <u>EV.</u> |
|------------|--------------------|------------|------------|
|------------|--------------------|------------|------------|

(NO EXHIBITS)

1 THE COURT - Good morning.

2 MR. RAYNOR - Good morning, Your Honor.

3 THE COURT - I'm Dan Hall. I'm one of the  
4 resident judges here. And your name?

5 MR. FREEMAN - I'm Will Freeman. I'm here on  
6 behalf of the defendants of this motion. They're in  
7 Savannah and thought I was a lot closer, I'm here -- did I  
8 say defendants? I'm here on behalf of the plaintiff.

9 THE COURT - All right, thank you.

10 And your name?

11 MR. RAYNOR - Ken Raynor, Your Honor.

12 THE COURT - Yes, Mr. Raynor, I think I've -- you  
13 and I have been with each other before.

14 All right, we are on the record in the matter of  
15 2020-CP-46-01641. This is Evolve Softworks, LLC vs.  
16 Anthony Burkett. Representing the plaintiff is Attorney  
17 Will Freeman. Mr. Freeman, where are you from?

18 MR. FREEMAN - Greenville, South Carolina, Your  
19 Honor.

20 THE COURT - Greenville. Representing the  
21 defendant is Mr. Ken Raynor. This appears to be a breach  
22 of contract action. It's a motion to dismiss filed by the  
23 defense, so Mr. Raynor, I'll be glad to hear from you.

24 MR. RAYNOR - Thank you, Your Honor. Yes, this is  
25 a lawsuit by the plaintiff seeking to recover on a

1 guarantee that allegedly was signed by Mr. Burkett, the  
2 defendant, and there are two basic grounds for the motion  
3 to dismiss. The first is that the complaint is -- was  
4 filed outside the statute of limitations and therefore is  
5 barred, and then the second ground is lack of  
6 consideration, and turning to the first issue, the statute  
7 of limitations, Your Honor, it -- this case involves North  
8 Carolina law because the guarantee had a choice of law  
9 provision that designated that North Carolina law would  
10 apply, and so we have to look at North Carolina law to see  
11 when the statute of limitations would begin to accrue.  
12 Quite frankly, I don't think there's any difference under  
13 South Carolina law; it's the same rule, and that is, it  
14 begins to accrue when the holder of the -- or I should say,  
15 in this case, the beneficiary of the guarantee has the  
16 right to sue on that guarantee, and that's a -- I cited the  
17 case in North Carolina City Services vs. Oil Company vs.  
18 Howe, (sic) and in the complaint, the complaint alleges  
19 that the debt which the plaintiff is trying to recover for  
20 under the guarantee was in default in October of 2016, and  
21 so we contend that the statute of limitations has been  
22 running on that debt since 2016. The plaintiff I saw in  
23 their memo in opposition to our motion said, well, look,  
24 you know, the general rule is the statute can't run against  
25 someone until they have the right to sue, and the plaintiff

1 did not receive the guarantee until 2018. In this case,  
2 Your Honor, Evolve was assigned the rights to proceed under  
3 the guarantee and under the underlying debt in 2018, and so  
4 the plaintiff says, well, look, the statute of limitations  
5 can't run until we have the right to sue. Normally that is  
6 the rule, however, that's not true when it -- the person is  
7 an assignee, and the reason being is, the assignee steps  
8 into the shoes of the assignor, and in all intents and  
9 purposes becomes the assignor to have the same rights and  
10 duties, and if you think about it, you know, the statute of  
11 limitations is designed to protect the person from a  
12 lawsuit after a certain period of time, so it would make no  
13 sense that someone could extend the statute of limitations  
14 merely by assigning the instrument, and so after I got  
15 their brief, Your Honor, I did -- just a -- didn't think  
16 that would be an issue, but I have done some additional  
17 research and I have a case from the North Carolina Supreme  
18 Court, *Rose vs. Vulcan Materials* -- if I approach?

19 THE COURT - Yes, you may.

20 MR. RAYNOR - And I've given a copy of this to Mr.  
21 Freeman.

22 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

23 THE COURT - And if I'm looking down, I'm looking  
24 at the filing. I don't mean to show you any disrespect.

25 MR. RAYNOR - That's fine, Your Honor.

1 THE COURT - I'm also following along with what's  
2 been filed in the case. Go ahead.

3 MR. RAYNOR - The Vulcan's material, Rose vs.  
4 Vulcan Materials case, Your Honor, deals with exactly this  
5 topic. If you'll flip over to page 9 of that Opinion, I've  
6 highlighted some language which I think applies to this  
7 case and it, basically, recites what I just said, statute  
8 of limitations may be characterized as the right not to be  
9 sued beyond the time limited, and, you know, that's to  
10 protect the person who's being sued. The -- they go on  
11 into to say that by signing this contract, duly assignee  
12 cannot defer upon the defendant assignee a greater immunity  
13 to suit than the assignor itself possessed. Then it goes  
14 on to say -- and this is just longstanding, generally,  
15 applied law -- the assignee steps into the shoes of the  
16 assignor, so the -- so they don't get an extension of the  
17 statute of limitations, Your Honor, because of the  
18 assignment. They, basically, step into the shoes of the  
19 assignor. I also have a case, if I may approach, from the  
20 bankruptcy court in the Eastern Division of North Carolina,  
21 Your Honor.

22 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

23 MR. RAYNOR - And this case was a 2017 case, and I  
24 just handed it up, Your Honor, to show that the Rose vs.  
25 Vulcan Materials case is still good law. It was cited by

1 this bankruptcy judge in 2017 for the similar -- and I look  
2 on page 6 -- I've highlighted the language -- and it --  
3 similar statement, the assignee of a contractual right  
4 steps into the shoes of the assignor for the purposes of  
5 the statute of limitations defense and takes the right  
6 subject to the offenses that in net (sic) existed, and so,  
7 Your Honor, the statute of limitations began to run when  
8 the wrong went into default. That is the North Carolina  
9 rule and that is the South Carolina rule as well, Your  
10 Honor. It's -- when it runs -- begins to run is when there  
11 is a default and the person holding the guarantor has the  
12 right to sue on that guarantee. This debt went into  
13 default in October of 2016 and, and, obviously, the lawsuit  
14 was filed in 2020 which is more than three years, which is  
15 the applicable statute of limitations, Your Honor. The, um  
16 -- and so that's pretty much the argument on the statute of  
17 limitations. It's pretty cut and dry as far as I can see,  
18 but I'll be glad to answer any questions you have on that.

19 THE COURT - Let's move on to your second issue,  
20 that lack of consideration, then I'll hear from ---

21 MR. RAYNOR - Your Honor, under North Carolina  
22 law, there -- there has to be consideration to support a  
23 guarantee that is given after the time that the debt is  
24 extended. Now, obviously, if I go to the bank to borrow  
25 money and my father goes with me and my father says, I'll

1 guarantee the loan, that's a little different situation  
2 than what we have here, because what we have here is debt  
3 that was created between -- I'm looking at paragraph four  
4 of the complaint -- between 2014 and 2015 Mr. Harold loaned  
5 Three Guys -- that's -- that's their borrower -- a total of  
6 two million eighty-four -- I'm sorry, two million and  
7 eighty-four thousand dollars. So that was in 2014-2015.  
8 The guarantee was executed, according to the complaint, in  
9 2016. And then if you look at paragraph number one, it  
10 says, this guarantee -- and I'm looking at the guarantee  
11 agreement attached to the complaint, paragraph Roman  
12 Numeral I -- this guarantee is given by the grantor to  
13 induce the creditor not to call the promissory note from  
14 the debtor -- or to the creditor in the principal amount of  
15 two million six hundred thousand dollars. The, um -- the  
16 problem with that, Your Honor, there is no period of time  
17 that the holder of the note -- I'm sorry -- the holder of  
18 the debt is agreeing to foreclose -- or forebear I should  
19 say -- from pursuing a lawsuit. You know, the holder of  
20 the debt and the holder of those guarantee (sic) could've  
21 filed the lawsuit the next day or called the note as they  
22 say, and so that really is not consideration that is  
23 required under North Carolina law to support the guarantee  
24 contract. And I've cited in the, uh -- our memorandum in  
25 the case law that supports the requirement for

1 consideration for a antecedent debt, for the guarantee of  
2 that debt. There's another problem with this lack of  
3 consideration in this guarantee, Your Honor, because the --  
4 the guarantee references the -- the fact that the creditor  
5 is not calling the note for two point six million dollars.  
6 If you look at the allegations of the complaint, it -- on  
7 paragraph four, what they're trying to enforce is the  
8 guarantee of -- to collect on these amounts that were  
9 loaned between 2014 and 2015, in paragraph four. Nowhere  
10 in this complaint do they allege that a note, a promissory  
11 note, in the amount of two point six million dollars,  
12 actually, existed, and so in addition to the, um, --  
13 there's no definite time period that the holder of the note  
14 is agreeing not to, quote, call the note. There is no  
15 evidence that a note, actually, existed that the, um,  
16 holder forebear calling, and so -- but regardless, even if  
17 they had -- there's no consideration because there was not  
18 a definite period that they were agreeing not to call the  
19 note. And so the second grounds for the motion is that  
20 there was no consideration to support the guarantee of an  
21 antecedent debt, Your Honor.

22 THE COURT - All right, thank you. Mr. Freeman,  
23 I'll be glad to hear from you.

24 MR. FREEMAN - Thank you, Your Honor. I agree  
25 with almost everything he said, so I just don't agree with

1 his conclusion exactly. If we -- I just want to stick to  
2 the complaint, because this is a motion to dismiss and not  
3 turn this into summary judgment, but what we had here is we  
4 had Mr. Harold a party to this case loaned a little more  
5 than two million dollars to a company called Three Guys.  
6 Harold loans it to Three Guys and that's paragraph four of  
7 the complaint, loaned it at eight percent interest; it's a  
8 loan. So what happens is that Three Guys doesn't pay the  
9 debt. They start going and getting behind -- I'm sorry --  
10 they get -- I'm going to stick to the complaint. They  
11 don't pay the debt between 2014 and 2015. So what happens  
12 is, a new person, his client, comes in and says I would be  
13 the guarantor of this debt right here from Mr. Harold.  
14 That's Mr. Freeman right there -- that's -- Mr. Harold.  
15 And so his client guarantees this entity -- again, it's not  
16 a party to this litigation. Later on Mr. Harold signs it  
17 to my client, the Plaintiff, Evolve. So this -- this  
18 person loaned money to this entity here, and this person  
19 gave a guarantee, so we're not suing on the note. We're  
20 not suing on the promissory note; we're not suing on the  
21 loan. This particular lawsuit's only about enforcing the  
22 guarantee action, which is a whole brand new thing. Right?  
23 And I think some of the law we're hearing about is how you  
24 collect on debts and whatnot. This is a guarantee, and --

1 if we can hand up the guarantee itself, Your Honor, I've  
2 highlighted a couple of parts of it.

3 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

4 MR. FREEMAN - This is a continuing guarantee. It  
5 was made near the end of 2016, and what happens is, you  
6 don't owe the money on the guarantee until the default on  
7 the debt occurs. And so guarantees can lasts for decades.  
8 Right? The statute doesn't run until it's time to collect  
9 on the guarantee, til the demand is made to collect on the  
10 guarantee, and so you can imagine -- I think he said if his  
11 father was his guarantor on a -- of a car -- right? -- he  
12 had seven years of car payments, it would -- he could make  
13 car payments for five years and then quit making them, and  
14 then you could sue on the guarantee three years after the  
15 car payments stopped. So, hey, I signed this guarantee  
16 eight years ago, why you suing me now? No, no, no, I  
17 didn't get the right to sue you until five years in when  
18 the debt payments stopped, when the demand for payment is  
19 made. And so when you have these on-going open-ended  
20 guarantees, North Carolina law and South Carolina law  
21 agree, but just because it's -- it relied on North Carolina  
22 substantive law that is the, uh -- that the City Service  
23 Oil Company that is cited in opposing counsel's brief.  
24 Right? When you have these continuing guarantees, they  
25 continue, and so you don't start the statute of limitations

1 on the day the guarantee is signed, and I think we agree on  
2 that point. You don't start it on the day that it's  
3 signed. In this case it happened to be signed in October  
4 of 2016.

5 THE COURT - Then wouldn't it -- so you're arguing  
6 that there is not a statute of limitations as to  
7 guarantees?

8 MR. FREEMAN - There is not a statute of  
9 limitations as to -- there is a --- there's -- statute of  
10 limitations as to guarantees. Yes, Your Honor. I -- I  
11 wasn't arguing that one doesn't exist, but when does the  
12 statute start ticking is when the demand for payment is  
13 made, because the debt -- remember, we're the -- we're not  
14 the main ---

15 THE COURT - Yeah, I -- I understand ---

16 MR. FREEMAN - So the statute starts when -- and I  
17 -- when you make the demand, when you say, hey, there's  
18 been a problem with this underlying debt and now you got to  
19 step up and pay this guarantee, and so exhibit two to our  
20 complaint is the -- or three -- I'm sorry, Your Honor, --  
21 is the demand for payment, which was April of this year.

22 THE COURT - Well, let me ask you -- all right,  
23 there's a default -- I guess default judgment has been --  
24 has not been entered as to Three Guys. They are -- what's  
25 before the Court is that they are in default and there

1 hasn't been any dispute that Three Guys is in default on  
2 the loan that they were to repay. Is that correct?

3 MR. FREEMAN - I'm going to quote from the  
4 complaint just so I ---

5 THE COURT - All right.

6 MR. FREEMAN - I want to not -- I want to make  
7 sure I'm right, too, Your Honor, before I go saying  
8 something. Paragraph nine of the complaint ---

9 THE COURT - Yeah, Three Guys defaulted on its  
10 debt. Right.

11 MR. FREEMAN - Yeah, paragraph ten, we provided  
12 notice which is Exhibit C.

13 MR. RAYNOR - And also paragraph five for Mr.  
14 Freeman's benefit that -- on October, 2016 Three Guys was  
15 in default.

16 MR. FREEMAN - That's the -- that's the, um --  
17 that's the issue here, Your Honor, that I think we're  
18 confusing. I'm not talking about ---

19 THE COURT - Well, I -- I'm just trying to get the  
20 facts -- did -- the guarantee which is your client,  
21 Burkett, right?

22 MR. RAYNOR - Yes, my client's Burkett, Your  
23 Honor, defendant.

1 THE COURT - Right, Burkett. The guarantee --  
2 well, did they agree to become the guarantee after the  
3 default or prior to the default?

4 MR. FREEMAN - His client agreed to become the  
5 guaran -- to give the guarantee after Three Guys defaulted  
6 to Harold.

7 THE COURT - All right.

8 MR. FREEMAN - In the first default, according to  
9 the complaint, was in 2015 and there was another one in  
10 2016 over two million.

11 THE COURT - Right, right.

12 MR. FREEMAN - So it was signed in late 2016.

13 THE COURT - All right, go ahead.

14 MR. FREEMAN - That's sort of my argument in a  
15 nutshell, and that's -- I think paragraph five is a red  
16 herring. This underlying transaction doesn't really impact  
17 the guarantee. It's not til we start calling the guarantee  
18 that the statute runs.

19 THE COURT - So you would argue that the guarantee  
20 is not in default.

21 MR. FREEMAN - It went into default early this  
22 year.

23 THE COURT - All right.

1 MR. FREEMAN - In default in the sense that we  
2 asked for payment and they -- they didn't -- there was no -  
3 - the check did not come.

4 THE COURT - All right. Mr. Raynor, any response?

5 MR. FREEMAN - And if I can speak to just the  
6 consideration issue?

7 THE COURT - I'm sorry. Yeah, go ahead.

8 MR. FREEMAN - And I don't -- if he'd like to  
9 respond to just that, I can come back ---

10 THE COURT - Yeah, I'm sorry, I thought you were  
11 through with your arguments, but, no, if you want to move  
12 to consideration, I'll be glad to hear you.

13 MR. FREEMAN - And just um -- so I think I've  
14 pointed out, you know, we've got this company here and this  
15 guy here, the consideration is -- and we -- we stand in the  
16 shoes that this guy -- signed and completed (sic); I agree  
17 with that. This position on this side said, hey, we're not  
18 going to sue Three Guys if his client steps up and  
19 guarantees Three Guys' debts. That's the consideration.  
20 This company didn't get sued by this side because his  
21 client stepped up, and that's forbearance; that's classic  
22 consideration, and the -- the King -- what's that King's --  
23 Klings Stubbons (phonetic) case is the one that says --  
24 that's the architect, right? That's -- that's what  
25 happened in this case. The one that he cites I think is

1 real favorable for us. That's the, um, the architect sued  
2 a developer and a guarantor requesting payment to be  
3 concerted and delaying collections against the debtors in  
4 reliance on the letters that the guarantor sent to the  
5 plaintiff. That's -- that consideration under North  
6 Carolina law, but it's -- in this particular case our State  
7 and North Carolina have very similar legal principles. And  
8 the last thing I think -- he touched on this -- I don't  
9 know that was in the motion so much but he said there's no  
10 note, the note's not attached, and again, I think that's  
11 important for this motion is to remember we're not here on  
12 the note and the debt. That did go in default in 2015 and  
13 2016. We're here on the guarantee which is a whole new  
14 instrument. It's attached to the complaint as Exhibit A  
15 and that document says, you know, we want -- the guarantee  
16 is up to two point two million dollars. It actually came  
17 in less in our -- Exhibit C -- we actually -- he never got  
18 the two point six million, but he got over two million for  
19 sure, so, um, to say that the note is here is to conflate  
20 the debt and the guarantee and that's where I really want  
21 to draw a strong the line. The guarantee wasn't signed til  
22 2016; the demand wasn't made til this year on the  
23 guarantee, so we're well within the statute.

24 THE COURT - All right, thank you.

25 MR. FREEMAN - Thank you, Your Honor.

1 THE COURT - All right, Mr. Raynor, anything in  
2 response?

3 MR. RAYNOR - Yes, Your Honor, just a timeline.  
4 The debt that they're seeking to recover against my client  
5 was created in 2014-2015. That debt that they're trying to  
6 recover on went into default some time in October 2016.  
7 The guarantee was dated October 25th, 2016, and so that  
8 debt is in default in October of 2016. According to the  
9 case law, the debt -- I'm sorry -- the statute of  
10 limitations on the guarantee does not begin to accrue when  
11 they give a demand for payment, because if that was true,  
12 they could wait forever to give a demand. The statute of  
13 limitations both under North Carolina law and South  
14 Carolina law begins to accrue when there is a default, and  
15 that default was in 2016. There's -- you know, the only  
16 thing about a default is paragraph -- I'm sorry -- of the  
17 guarantee -- Roman Numeral IV, they had to give notice of  
18 their intention of the sue, but that was the only thing  
19 they had to do, but that does not begin to accrue the  
20 statute of limitations. The Cities case that we cited, the  
21 fact that the guarantee is a continuing guarantee makes no  
22 difference, because in the Cities case the guarantee was a  
23 continuing guarantee as well, and so the touchtone here is  
24 when did that debt that they're trying to recover under the  
25 guarantee go into default, and again that was in 2016.

1           THE COURT - All right, Mr. Freeman, I'll give you  
2 a chance briefly to respond.

3           MR. FREEMAN - The debt was in default in -- Three  
4 Guys made a new deal with Mr. Harold and got out of  
5 default. Right? That was the -- the forbearance is we're  
6 not going to crush you with a lawsuit to get the two  
7 million dollars you owe us. We're going to let you keep  
8 operating your business and your corporation and your  
9 company, but what do we get out of doing this for you, his  
10 client comes in and says, I'll guarantee them. So that --  
11 that's the whole point of the forbearance. Right? That's  
12 the -- that's why there's just so much consideration here  
13 is, if -- if his client were Three Guys, and my client were  
14 Evolve or Mr. Harold, I wouldn't have a problem. Right?

15           THE COURT - Let me ask you this. It seems like -  
16 - y'all help me understand this. Help educate me. Whether  
17 we use the term default or not, in 2016 the loan did not  
18 get paid.

19           MR. FREEMAN - Correct.

20           THE COURT - And there had been no action filed  
21 for an attempt to collect on that unpaid debt.

22           MR. FREEMAN - I don't want to get too far in the  
23 complaint, Your Honor, but there is no allegation that  
24 there was an action filed. How about that?

1 THE COURT - So is it unpaid loan that then your  
2 client then undertakes to guarantee that and for -- his  
3 client ---

4 MR. FREEMAN - His client.

5 THE COURT - --- I'm sorry -- his client undertake  
6 to guarantee as long as legal action is not taken. Is that  
7 -- is that right?

8 MR. FREEMAN - It's not so much not legal action's  
9 not taken, but that they continue to -- and I -- the note -  
10 - the guarantee -- I'm sorry -- the guarantee agreement ---

11 THE COURT - I mean we're based on a legal action  
12 but I mean so forbearance was to not sue.

13 MR. FREEMAN - But they get to keep using the  
14 money. The company gets to keep operating, keep the --  
15 Three Guy -- keep being Three Guys. Right?

16 THE COURT - Right.

17 MR. FREEMAN - That's the -- That's why the debt  
18 doesn't matter, because they got -- the debt -- we made a  
19 new deal about the debt, portion of which was the  
20 guarantee. Right?

21 THE COURT - Right. Okay. All right, Mr. Raynor?

22 MR. RAYNOR - Just real briefly, Your Honor, if  
23 you look at the guarantee agreement, ---

24 THE COURT - Which exhibit?

25 MR. RAYNOR - That is ---

1 MR. FREEMAN - A.

2 MR. RAYNOR - --- A. I don't -- well, my copy  
3 it's not labeled A, but it's -- if you look at paragraph  
4 Roman Numeral I, it says, this guarantee is given by  
5 guarantor to induce the creditor not to call the promissory  
6 note. There's nothing about forbearance from the lawsuit,  
7 and there is no time period. There is nothing about a new  
8 deal. There is nothing about, um, you know, that the  
9 default is overlooked for any period of time, and then if  
10 you look at paragraph Roman Numeral V, and this may go to  
11 some of the questions that you are concerned about, you  
12 know, was there an action taken against the, um, borrower,  
13 Three Guys. Well, paragraph Roman Numeral V, you know,  
14 consistent with most guarantees, it, basically, says there  
15 doesn't have to be any action pursued against the borrower  
16 as a condition to the creditor pursuing actions on the  
17 guarantee, so regardless if they brought a lawsuit against  
18 the borrower or not, they can pursue on this guarantee as  
19 soon as that debt is in arrears, and again if you look at  
20 the complaint, that debt was in arrears and in default in  
21 October of 2016.

22 THE COURT - All right. Okay, I think I have a  
23 decent grasps of it. I'll look at it more closely in  
24 detail, and I'll inform you by the end of next week the  
25 ruling of the Court.

1 MR. RAYNOR - Thank you, Your Honor.

2 THE COURT - All right, thank y'all.

3 MR. FREEMAN - Thank you, Your Honor.

4 (END OF TRANSCRIPT)

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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