THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 13 2020
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-5773

Amanda Griffith..Respondent,

vs.

ISL Development, LLC and Steven
Stewart, Individually, of whom
Steven Stewart is..Appellant.

RECORD ON APPEAL – VOLUME I

Capers G. Barr, III
SC Bar No: 00542
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
cgb@barrungermcintosh.com
Attorney for Appellant

Other Counsel of Record:

R. Patrick Flynn, Esq.
Michael W. Allen, Jr., Esq.
POPE FLYNN, LLC
P.O. Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com
Attorneys for Respondent

INDEX

VOLUME I

A. Issue Pleadings

1. Summons and Complaint, filed Oct. 27, 2016 001
2. Amended Answer of Defendants ISL Development, LLC and Steven Stewart, Individually, filed Jan. 11, 2017 011

B. Orders

3. Order of Judge McCoy on liability, filed Dec. 12, 2018 016
4. Order of Judge McCoy on damages, filed March 5, 2019 026
5. Order of Judge McCoy denying reconsideration, filed April 4, 2019 028

C. Trial Briefs and Motions

6. Plaintiff's trial brief, dated Aug. 28, 2018 030
7. Defendants' trial brief, filed Sept. 10, 2018 038
8. Defendants' supplemental trial brief, filed Sept. 10, 2018 044
9. Plaintiff's supplemental trial brief, dated September 14, 2018 057
10. Defendant's reply to Plaintiff's supplemental trial brief, filed September 26, 2018 073
11. Plaintiff's brief in support of damages award and in opposition to Defendants' Motion to alter, amend or reconsider order, dated Jan. 24, 2019 083
12. Memorandum of Defendants re damages/attorney fees, dated January 24, 2019 097
13. Motion of Stewart to alter, amend or reconsider orders, filed March 15, 2019 113

D. Transcripts

14. Transcript of hearing, Aug. 29, 2018 136
15. Transcript of hearing, Jan. 25, 2019 282
16. Plaintiff's attorney fee time statements 301

VOLUME II

E. Trial Exhibits

Exhibit Index 311

Trial Exhibit #1 312

Trial Exhibit #2 313

Trial Exhibit #3 316

Trial Exhibit #4 348

Trial Exhibit #5 389

Trial Exhibit #6 432

Trial Exhibit #7 505

Trial Exhibit #8 507

Trial Exhibit #9 508

Trial Exhibit #10 510

Trial Exhibit #11 586

Trial Exhibit #12 589

Trial Exhibits #13 592

Trial Exhibit #14 599

Trial Exhibit #15 602

Trial Exhibit #16 661

Trial Exhibit #17 671

Trial Exhibit #18 683

Trial Exhibit #19 686

Trial Exhibit #20 688

Trial Exhibit #21 730

F. **Certificate of Counsel** 735

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No: 2016-CP-10- 5773
AMANDA GRIFFITH,	)	
Plaintiff,	)	SUMMONS
vs.	)	(NON-JURY TRIAL)
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)	
Defendants.	)	

FILED
2016 OCT 27 PM 4:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon:

PLAINTIFF'S STTORNEYS: R. Patrick Flynn, Esquire
Michael W. Allen, Jr., Esquire
POPE FLYNN, LLC
P.O. Box 70
Charleston, South Carolina 29402
(843) 834-3426

an Answer to the Complaint which is herewith served upon you, within 30 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

POPE FLYNN, LLC
P.O. Box 70
Charleston, South Carolina 29402
(843) 834-3426

By:
R. Patrick Flynn
Michael W. Allen, Jr.
Attorneys for Amanda Griffith (Plaintiff)

Charleston, South Carolina
October 27, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
Plaintiff,	)	
vs.	)	**COMPLAINT**
	)	**(NON-JURY TRIAL)**
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)	
Defendants.	)	

FILED
2016 OCT 27 PM 4:49
JULIE J. ARMSTRONG
CLERK OF COURT

NOW COMES Plaintiff, Amanda Griffith ("Ms. Griffith"), by and through undersigned counsel, and, complaining of above-named Defendants, ISL Development, LLC ("ISL") and Steven Stewart, individually ("Mr. Stewart"), hereby alleges and states as follows:

IDENTIFICATION OF PARTIES AND FACTUAL BACKGROUND

1. Ms. Griffith is a citizen and resident of Charleston County, South Carolina.

2. Upon information and belief, ISL is a limited liability company which, at all times relevant hereto, was organized and existing pursuant to the laws of the State of California and conducting business in Charleston County, South Carolina.

3. Upon information and belief, Mr. Stewart is a resident and citizen of Charleston County, South Carolina who, at all times relevant hereto, was conducting business in Charleston County, South Carolina as an individual and as a member of ISL.

4. This is an action for recovery of an indebtedness owed by Defendants to Ms. Griffith, arising out of the Promissory Note attached hereto as Exhibit "A" (the "Note"), which was made by ISL (the "Maker"), conveyed to Ms. Griffith (the "Holder"), and personally guaranteed by Mr. Stewart (the "Personal Guarantor").

5. Venue is proper in this Court pursuant to South Carolina Code §15-7-30, et seq.

6. This Court has jurisdiction over the subject matter and parties to the action.

7. At the request of Defendants, on or about December 27, 2012, Ms. Griffith loaned ISL $200,000.00 (the "principal") in connection with ISL's assisted living project in Whittier, California (the "Whittier Project").

8. In consideration for the $200,000.00 loan by Ms. Griffith, ISL executed the Note which described ISL's promise to pay Ms. Griffith monthly payments of $2,000.00 which represented interest-only payments at the rate of Twelve Percent (12%) per annum. These payments were to begin on February 1, 2013 and to continue through March 31, 2013 (the "Maturity Date"), at which time the principal would become due.

9. In January 2013, the parties agreed to a modification of the terms of the Note such that ISL was afforded continued use of the principal beyond the Note's Maturity Date of March 31, 2013 and Mr. Stewart personally guaranteed the payment of all amounts owed under the Note.

10. In the course of dealing between the parties, Defendants ratified this modification of the Note by retaining the principal balance for their benefit and by making interest-only payments to Ms. Griffith consistent with the terms of the modified Note from February, 2013 through July, 2013.

11. Defendants made no further payments to Ms. Griffith in connection with this Note after July, 2013.

12. Pursuant to the Note, if Defendants fail to make payments of principal or interest to Ms. Griffith within Five (5) days after the due date, the Defendants further must pay to Ms. Griffith interest at the rate of 13.5% per annum (the "Default Rate") on the unpaid balance of the past-due principal and accrued interest.

13. The Note further provides that the Defendants agree to pay the costs associated with any efforts by Ms. Griffith to collect amounts owed under the Note, including reasonable attorneys' fees.

14. Following the last payment made by Defendants in July, 2013, Ms. Griffith made repeated inquiries into the status of the Whittier Project and the funds loaned by Ms. Griffith pursuant to the Note, to which Mr. Stewart offered assurance that the amount owed under the Note would be paid to Ms. Griffith.

15. By Certified Letter dated September 12, 2016 (attached as Exhibit "B"), Ms. Griffith called the Note due and demanded payment of the entire balance of principal and past due interest.

16. Despite reasonable assurances made by Mr. Stewart to Ms. Griffith as described above, Defendants have failed to make any payments of principal or accrued interest to Ms. Griffith following the last payment in July, 2013, and Defendants are in default of the Note for failing to repay the principal on demand.

17. Defendants' failure to make monthly interest payments since July 2013 renders Defendants in default of the Note for failing make monthly payments as they became due.

18. To date, Mr. Stewart, as Personal Guarantor of the amounts owed to Ms. Griffith, has failed to make any payments to Ms. Griffith pursuant to his personal guarantee of the Note and Mr. Stewart is, therefore, in default of his obligations as Personal Guarantor.

<u>FOR A FIRST CAUSE OF ACTION</u>
(Collection Action on Promissory Note)

19. Ms. Griffith realleges and reiterates the preceding paragraphs as if fully set forth herein verbatim.

20. ISL conveyed the Note to Ms. Griffith, who remains the Holder of the Note, the payment of which is personally guaranteed by Mr. Stewart.

21. Although demand has been made, ISL has failed to satisfy its obligations pursuant to the terms of the Note and, therefore, ISL is in default of the Note.

22. Despite Ms. Griffith's demand that Mr. Stewart make payment of the amounts owed under the Note pursuant to his personal guarantee, Mr. Stewart has failed to satisfy his obligations as Personal Guarantor of the principal and the Note and, therefore, Mr. Stewart is in default of his obligations as Personal Guarantor.

23. As a direct and proximate result of ISL's default of the Note and Mr. Stewart's default of his personal guarantee, Ms. Griffith has suffered and continues to suffer actual, incidental, consequential, and special damages in a total amount to be determined by the trier of fact.

24. ISL and Mr. Stewart are liable to Ms. Griffith for the damages set forth above including, but not limited to, the outstanding principal of $200,000.00; unpaid accrued interest totaling $78,000.00 as of the date of this Complaint; unpaid default interest totaling $19,822.50 as of the date of this Complaint; plus the costs, attorneys' fees, and litigation expenses associated with Ms. Griffith's efforts to collect the amounts owed; and for such other and further amounts as this Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment/Quantum Meruit)

25. Ms. Griffith realleges and reiterates the preceding paragraphs as if fully set forth herein verbatim.

26. Ms. Griffith conferred a benefit upon Defendants by lending money pursuant to the Note, the repayment of which was personally guaranteed by Mr. Stewart, and the amount owed to

Ms. Griffith now amounts to $297,822.50, which includes principal and accrued interest as of the date of this Complaint.

27. Defendants recognized the benefit by retention and use of the principal for the advancement of the Whittier Project without paying the reasonable value therefor.

28. It would be unjust to permit Defendants to retain this benefit without paying the reasonable value therefor.

29. Therefore, Ms. Griffith is entitled to actual damages of $297,822.50 from Defendants, plus actual, incidental, special, and consequential damages related thereto, including interest, costs, litigation expenses, and attorneys' fees associated with this matter, and for such other and further relief as this Court deems just and proper.

WHEREFORE, Plaintiff prays for Judgment against Defendants in the amount of TWO HUNDRED NINETY-SEVEN THOUSAND EIGHT HUNDRED TWENTY-TWO and 50/100 ($297,822.50) Dollars plus actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact, along with interest, costs, litigation expenses and attorneys' fees associated with this matter, and for such other and further relief as this Court deems just and proper.

POPE FLYNN, LLC

By:

R. Patrick Flynn
Michael W. Allen, Jr.
P.O. Box 70
Charleston, South Carolina 29402
(843) 843-3426
pflynn@popeflynn.com
mallen@popeflynn.com
Attorneys for Amanda Griffith (Plaintiff)

Charleston, South Carolina
October 27, 2016

EXHIBIT "A"

PROMISSORY NOTE

$200,000.00 December 27, 2012

FOR VALUE RECEIVED, ISL DEVELOPMENT, LLC, a California limited liability company ("Maker"), promises to pay to the order of AMANDA GRIFFITH ("Holder"), the principal sum of TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00), together with interest at the rate set forth below from the date hereof, on and subject to the terms and conditions set forth below.

1. Interest. Interest only shall be payable monthly in arrears as follows:

(a) February 1, 2013 and continuing on the first (1st) day of each calendar month thereafter until the Maturity Date, Maker shall make monthly interest-only payments based on a rate of twelve percent (12%) per annum.

(b) If not sooner paid, the entire outstanding principal balance of this Note, together with accrued and unpaid interest and any other amounts due under this Note shall be due and payable on March 31, 2013 (the "Maturity Date").

Interest charges shall be computed on the basis of a year of three hundred sixty five (365) days and actual days clapsed.

2. Place of Payment. All payments hereunder shall be paid to Holder at _________________________, or at such other address as the Holder may from time to time designate in writing to Maker.

3. Payments. Each payment shall be credited first to interest, if any, then due, and the remainder to principal; and interest thereon shall cease to accrue on any amounts so credited to the principal sum. All payments of principal and interest shall be made in lawful money of the United States of America. Accrued interest or principal not paid within five (5) days of the date when due shall, from and after the date when due until paid, bear interest at the rate of 13.50% per annum (the "Default Rate").

4. Prepayment. Maker shall have the right to prepay all or any portion of the principal sum hereof at any time without penalty.

5. Acceleration. In the event that Maker fails to pay punctually when due any installment of principal or interest or other amount payable by Maker under this Note, the entire unpaid principal amount of this Note, together with accrued interest thereon, and any other sum due or to become due hereunder, shall, at the election of Holder, mature and become immediately due and payable without notice of default, presentment or demand for payment, protest or notice of nonpayment or dishonor, notice of acceleration, or other notices or demands of any kind, all of which Maker hereby expressly waives.

305992085.1

6. Attorney's Fees. Upon the occurrence of a default by Maker, Holder shall be entitled to reasonable costs of collection, including reasonable attorneys' fees.

7. Remedies; Waiver. All remedies, either under this Note or by law or otherwise afforded to Holder, shall be cumulative and not alternative, and shall be available to Holder at all times until this Note has been paid and performed in full. No delay or omission to exercise any right, power or remedy accruing to Holder on any breach of Maker or a default under this Note shall impair any such right, power or remedy of Holder, nor shall it be construed as a waiver of or acquiescence in any such breach or default, or of or in any similar breach or default occurring later; nor shall any waiver of any single breach or default be considered a waiver of any other prior or subsequent breach or default. Any waiver, permit, consent or approval of any kind by Holder of any breach or default under this Note, or any provision or condition of this Note, must be in writing and shall be effective only to the extent specifically set forth in that writing.

8. Successors. The terms and provisions of this Note shall bind and inure to the benefit of the parties and their respective successors and permitted assigns.

9. Severability. If any provision of this Note shall for any reason be held to be invalid, illegal or unenforceable, in whole or in part or in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired by such invalidity, illegality or unenforceability.

10. Modification. No Modification of this Note shall be valid or binding unless set forth in writing signed by Holder and Maker.

11. Governing Law; Interpretation. This Note shall be construed and enforced in accordance with the laws of the State of California.

IN WITNESS WHEREOF, the Maker has duly executed this Note on the date first above written.

ISL DEVELOPMENT, LLC,
a California limited liability company

By:
Adam R. Salis, Manager

By:
Steven Stewart, Manager

305992085. 13

EXHIBIT "B"

POPE FLYNN
GROUP

R. Patrick Flynn
Attorney
pflynn@popeflynn.com
DIRECT 843.854.3426

Pope Flynn, LLC
P.O. Box 70
Charleston, SC 29402
www.popeflynn.com

September 12, 2016

Hand Delivery By Process Server
Mr. Steven Stewart
60 Montagu Street
Charleston, SC 29401

RE: Promissory Note - Default Satisfaction Demand

Dear Mr. Stewart:

I have been engaged by Ms. Amanda Griffith in connection with the repayment of debt in the principal amount of $200,000 owed by your company ISL Development, LLC (hereinafter referred to as "ISL"). That debt arose out of a loan made by Ms. Griffith to ISL on December 27, 2012 by means of a Promissory Note (attached hereto as Exhibit "A") which you have since personally guaranteed. I have examined the records of this transaction and have been authorized to take immediate action in pursuit of the collection of the principal balance and interest accrued to date.

It appears that ISL solicited funds in the amount of $200,000 from Ms. Griffith in order to provide liquidity for the operations of ISL. ISL later proposed that Ms. Griffith accept a proportionate ownership of ISL in exchange for the cancellation of the Promissory Note and reclassification of that debt on the books of ISL to additional paid-in capital in favor of Ms. Griffith.

As you are aware, Ms. Griffith rejected the terms of this debt-to-equity conversion and the $200,000 Promissory Note was executed, with a maturity date of March 31, 2013. In her position as creditor to ISL, Ms. Griffith anticipated that ISL would honor the Promissory Note and repay the principal and interest on or before March 31, 2013. As that maturity date approached, however, you agreed to personally guarantee repayment of the principal and interest in exchange for Ms. Griffith's agreement to accept interest-only payments until the balance of principal and accrued interest was repaid in full.

Your personal guarantee agreement was ratified by the performance of ISL's monthly interest-only payments to Ms. Griffith commencing on February 1, 2013 at the rate of 12% per annum. ISL made interest-only payments on that note through July 1, 2013. Despite Ms. Griffith's repeated demands for resolution of this outstanding debt by ISL and you, no further payments were received. This past-due balance owed to Ms. Griffith now exceeds $272,000 based upon interest accrued at the rate of 12% per annum from August 1, 2013 through the date of this letter.

This Promissory Note is in default. In order to avoid further legal efforts to collect this balance due against ISL and enforce your personal guarantee of this past-due balance, I urge you to arrange for immediate repayment of the entire balance due, plus interest through the date of payment. Unless suitable arrangements for this payment are communicated to me before close of business on Friday, September 16, 2016, I intend to initiate appropriate action for all available legal and equitable remedies.

Sincerely,

R. Patrick Flynn, Esquire

RPF:wg
Enclosure

cc w/encl: Ms. Amanda Griffith (via email)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON AMANDA GRIFFITH, Plaintiff, vs. ISL DEVELOPMENT, LLC, and STEVEN STEWART, Individually, Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2016-CP-10-5773 AMENDED ANSWER OF DEFENDANTS ISL DEVELOPMENT, LLC AND STEVEN STEWART, INDIVIDUALLY

FILED
2017 JAN 11 PM 1:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant ISL Development, LLC and Steven Stewart answer the Complaint of the Plaintiff filed October 27, 2016 as follows:

FOR A FIRST DEFENSE

1. The Complaint of the Plaintiff fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The claims of Plaintiff are barred by the Statute of Limitations.

FOR A THIRD DEFENSE

3. The claims of Plaintiff as to the personal liability of Defendant Steven Stewart are barred by the Statute of Frauds.

FOR A FOURTH DEFENSE

4. All allegations of the Complaint are denied unless hereafter admitted.

5. Defendants admit the allegations of the following paragraphs: 1, 11 (on information and belief), 15 and 21.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON AMANDA GRIFFITH, Plaintiff, vs. ISL DEVELOPMENT, LLC, and STEVEN STEWART, Individually, Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2016-CP-10-5773 AMENDED ANSWER OF DEFENDANTS ISL DEVELOPMENT, LLC AND STEVEN STEWART, INDIVIDUALLY

FILED
2017 JAN 11 PM 1:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant ISL Development, LLC and Steven Stewart answer the Complaint of the Plaintiff filed October 27, 2016 as follows:

FOR A FIRST DEFENSE

1. The Complaint of the Plaintiff fails to state facts sufficient to constitute a cause of action.

FOR A SECOND DEFENSE

2. The claims of Plaintiff are barred by the Statute of Limitations.

FOR A THIRD DEFENSE

3. The claims of Plaintiff as to the personal liability of Defendant Steven Stewart are barred by the Statute of Frauds.

FOR A FOURTH DEFENSE

4. All allegations of the Complaint are denied unless hereafter admitted.

5. Defendants admit the allegations of the following paragraphs: 1, 11 (on information and belief), 15 and 21.

6. The allegations of the following paragraphs are denied: 5, 6, 7, 9, 10, 18, 19, 22, 23, 24, 25, 26, 27, 28 and 29.

7. The Defendants admit only so much of paragraph 2 as alleges that ISL is a limited liability company organized pursuant to the laws of the State of California.

8. Answering the allegations of paragraph 3, Defendants admit only so much thereof as alleges that the Defendant Stewart is a resident and citizen of Charleston County, South Carolina.

9. Answering the allegations of paragraph 4, Defendants admits only so much thereof as alleges that this is an action for recovery for an indebtedness on a promissory note.

10. Answering the allegations of paragraph 8, Defendants refer to the written terms of the Note appended to the Complaint, and deny all allegations inconsistent therewith.

11. Answering the allegations of paragraph 12, Defendants refer to the terms of the Note attached as Exhibit A to the Plaintiff's Complaint and deny all other allegations inconsistent therewith. Defendants further and affirmatively deny that the Defendant Steven Stewart is personally liable on the Note.

12. Answering the allegations of paragraph 13, Defendants refer to the terms of the Note, and affirmatively deny that the Defendant Steven Stewart is personally liable thereon.

13. Answering the allegations of paragraph 14, Defendants admits only so much thereof as alleges that Plaintiff made inquiries into the status of the Whittier Project and the funds loaned by Ms. Griffith as an investment therein, and they deny the remaining allegations of paragraph 14 inconsistent herewith.

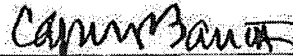
14. Answering the allegations of paragraph 16, Defendants admit only so much thereof as alleges that Defendant ISL Development, LLC failed to make payments following on or about July, 2013 and is in default, and they deny the remaining allegations thereof.

15. Answering the allegations of paragraph 17, Defendant admits only so much thereof as alleges that the Defendant ISL Development is in default and deny the remaining allegations thereof.

16. Answering the allegations of paragraph 20, Defendant admits only so much thereof as alleges that the Plaintiff is the holder of the Note and they deny the remaining allegations thereof.

WHEREFORE Defendants pray that this Court will inquire into the issues joined hereby, and that it will issue its Order denying the prayer of the Plaintiff as to any relief sought; together with such other and further relief as may be just and equitable.

BARR, UNGER & McINTOSH, LLC



Capers G. Barr, III
SC Bar No: 00542
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (FAX)
cgb@barrungermcintosh.com
Attorney for Defendants ISL Development, LLC and Steven Stewart

Charleston, South Carolina
January 9, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
AMANDA GRIFFITH,)
)
Plaintiff,)
)
vs.)
)
ISL DEVELOPMENT, LLC, and)
STEVEN STEWART, Individually,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2016-CP-10-5773

CERTIFICATE OF SERVICE

FILED
2017 JAN 11 PM 1:25
JULIE J. ARMSTRONG
CLERK OF COURT

I hereby certify that I have served a copy of this Amended Answer of Defendants ISL Development, LLC and Steven Stewart to the Complaint of Amanda Griffith by placing a copy of same in the United States Mail this 9th day of January, 2017 with sufficient postage attached thereto and addressed as follows:

R. Patrick Flynn, Esq.
Pope Flynn, LLC
P. O. Box 70
Charleston, SC 29402

Megan E. Gardner
Paralegal to Capers G. Barr, III

Charleston, South Carolina
January 9, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No. 2016-CP-10-5773
	)	
AMANDA GRIFFITH,	)	
	)	
Plaintiff,	)	**ORDER**
v.	)	
	)	
ISL DEVELOPMENT, LLC AND	)	
STEVEN STEWART, INDIVIDUALLY,	)	
	)	
Defendants.	)	
	)	

2018 DEC 12 PM 3: 28

This matter was tried on August 29, 2018 in the Court of Common Pleas, Non-Jury term, in Charleston County, South Carolina. Pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the following Findings of Fact and Conclusions of Law are provided as the Order of this court in favor of the Plaintiff. During the trial, Amanda Griffith ("Griffith") testified as the Plaintiff, and the Defendant Steven Stewart ("Stewart") testified in his individual capacity and in his capacity as a member of Defendant ISL Development, LLC ("ISL"). The parties agreed that the law of the State of California applied to the substantive issues, and that South Carolina law applied as to the procedural issues, including the applicable Statute of Limitations. The parties consented to the trial exhibits submitted, which were entered into evidence without objection.

This court finds that the Plaintiff satisfied her burden of proof, resulting in the following:

I. FINDINGS OF FACT:

The following findings of fact are based upon the trial testimony, which was carefully evaluated as to credibility of the witnesses and testimony, and as to the weight of the evidence and exhibits which were entered into evidence without objection by the parties.

JBM/ll

A. Plaintiff loaned $200,000.00 to Defendant ISL Development, LLC, which was deposited into the ISL bank account on December 28, 2012. ISL executed a Promissory Note on December 27, 2012 (the 'Note'), which provided that "[i]nterest only shall be payable monthly in arrears as follows: (a) February 1, 2013 and continuing on the first (1st) day of each calendar month thereafter until the Maturity Date, Maker shall make monthly interest-only payments based on a rate of twelve percent (12%) per annum. (b) If not sooner paid, the entire outstanding principal balance of this Note, together with accrued and unpaid interest and any other amounts due under this Note shall be due and payable on March 31, 2013 (the 'Maturity Date')."

B. In the email exchange dated January 16, 2013, Defendant personally guaranteed repayment of the Note to Plaintiff.

C. Consistent with that agreement, Plaintiff did not demand repayment of the Note on March 31, 2013, and Stewart testified that he actually received substantial personal benefit from the continued use of the loaned funds beyond March 31, 2013, as he was personally paid a salary from ISL beyond that date. Further, Defendant ISL paid interest to the Henderson Family Trust, which was administered by Defendant Stewart's wife and had invested in the ISL Project. Additionally, after the agreement on January 16, 2013, and continuing after March 31, 2013, Defendants Stewart and ISL confirmed the terms of the January 16, 2013, agreement in that Plaintiff received interest payments from ISL in the amount of $2,000 per month, which were sent to Plaintiff by Defendant Stewart.

D. Defendant ISL paid interest to Plaintiff in the amount of $2,000.00 per month for February, March, April, May, June, July, and August of 2013, although those checks were paid sporadically with some payments made in arrears. The total monthly interest payments made by ISL to Plaintiff pursuant to the Note amounted to $14,000.00.

JBM|2

E. The final interest payment to Plaintiff was by an ISL check signed by Stewart dated November 5, 2013, in the amount of $6,000, which was presumably intended to pay the September, October, and November 2013 monthly interest payments. Stewart requested that Plaintiff delay cashing that check until it was verified that funds were available. Plaintiff delayed accordingly, and when she attempted to cash that check in January 2014, it was returned for Non-Sufficient Funds. Plaintiff received no further checks or other funds from Stewart or ISL after that.

F. There was no evidence that any money in ISL's bank account was earmarked or allocated for payment to creditors or others based on its source. The check and deposit records in evidence indicate that money was routinely added and deducted by deposits and checks out of ISL's accounts without regard to the source of those funds on deposit in that ISL bank account.

G. The Defendant Stewart, a member of ISL Development, LLC ("ISL"), admitted in his trial testimony that ISL was in default of the Promissory Note to Plaintiff dated December 27, 2012, which Note was admitted into evidence without objection.

H. When asked at trial whether, at any time between January 16, 2013, and the time that the final interest payment check bounced in January 2014, he had communicated to Plaintiff that he did not intend to honor his commitment to personally guarantee the repayment of the Note to Plaintiff, Defendant Stewart testified "No, I didn't."

I. On October 27, 2016, Plaintiff brought this lawsuit against Stewart and ISL in order to collect the debt in the amount of $200,000 principal plus accrued interest and reasonable attorney fees for collection from the Defendants. At the time of filing, Stewart was a resident of Charleston County, South Carolina, and the Defendants did not challenge the court's jurisdiction over this matter.

II. CONCLUSIONS OF LAW:

This court finds that this lawsuit was brought within the applicable three-year Statute of Limitations in accordance with South Carolina law and that, in the alternative, this lawsuit was also brought within the applicable Statute of Limitations recognized for this action under California law. Further, this court finds that pursuant to California law and alternatively under South Carolina law, the use of the loaned funds by ISL and the substantial personal benefit which Stewart admitted to receiving from those loaned funds beyond March 31, 2013, represented sufficient consideration actually received by Stewart in exchange for his agreement to personally guarantee repayment of the Note to Plaintiff.

A. The evidence at trial established, the parties acknowledged at trial, and this court finds that the Note contained a choice of law provision, and the chosen forum was California law. The parties further acknowledged at trial and the court finds that while the choice of law provides that California substantive law applies, South Carolina law applies as to procedural aspects of this case, including the applicable three-year statute of limitations.

B. This court finds that Griffith's claims are not barred by South Carolina's three-year statute of limitations, and that in the alternative, her claims were not barred by the applicable Statute of Limitations under California law. Defendant Stewart admitted at trial that the final interest payment he signed and sent to Griffith was by check written from ISL's bank account on November 5, 2013. This court finds that Stewart's testimony established that he requested that Griffith not attempt to cash or deposit that check until January 2014. When she did so, the check was returned due to Non-Sufficient Funds in the account. Plaintiff then brought the instant lawsuit on October 27, 2016, within three years of the last interest payment presented by Stewart. South

JBM|4

Carolina Code § 15-3-530 provides that "an action upon a contract, obligation, or liability, express or implied" must be brought within three years of notice of that claim.

C. This court finds that there was sufficient consideration to support Stewart's agreement to personally guarantee of the repayment of the Note to Plaintiff under California law and, in the alternative, under South Carolina law. As to the substantive law of California as to the enforcement of the Promissory Note and personal guarantee by Defendant Stewart, in *Steiner v. Thexton*, 48 Cal. 4th 411, 226 P.3d 359, 106 Cal. Rptr.3d 252 (Cal. 2010), the Supreme Court of California addressed the question of what constituted sufficient consideration in relation to the personal guarantee agreed by Plaintiff and Stewart:

> In sum, in determining here whether sufficient consideration rendered the option to purchase the 10-acre parcel irrevocable, we consider whether Steiner conferred or agreed to confer a benefit, or suffered or agreed to suffer prejudice that was bargained for in exchange for the option.
>
> The lower courts concluded no such consideration supported the option. They reasoned no money was paid for the grant of the option nor did the work performed and expenses incurred by plaintiffs in pursuit of a parcel split benefit Thexton. *Citing O'Connell v. Lampe*, 206 Cal. 282, 285, 274 P. 336 (1929), and *Drullinger v. Erskine*, 71 Cal.App.2d 492, 495, 163 P.2d 48 (1945), the lower courts explained that the "adequacy of consideration" must be measured at the time an agreement was entered into. The lower courts concluded that, at the time Steiner and Thexton struck their bargain, the promise to seek the parcel split was unenforceable because the escape clause gave plaintiffs the power to terminate the transaction at any time for any reason. Thus, the lower courts held, Steiner's promise was illusory and did not constitute valid consideration. The courts found it immaterial that plaintiffs had begun to perform, because plaintiffs were under no actual obligation to do so. To the contrary, we conclude as a matter of law that plaintiffs' part performance of the bargained-for promise to seek a parcel split created sufficient consideration to render the option irrevocable.
>
> It is true that Steiner's promise to undertake the burden and expense of seeking a parcel split may have been illusory at the time the agreement was entered into, given the language of the escape clause. However, there can be no dispute that plaintiffs subsequently undertook substantial steps toward obtaining the parcel split and incurred significant expenses doing so. Among other things, plaintiffs paid for the required civil engineering and surveying for the parcel and spent a number of months applying to the county planning department for a tentative parcel map, proceeding with the final hearing of the parcel

JBM/5

> review committee, and obtaining approval of the tentative map. On this record, the only possible conclusion is that Steiner both conferred a bargained-for benefit on Thexton and suffered bargained-for prejudice unaffected by his power to cancel, making up for the initially illusory nature of his promise.
>
> . . . Accordingly, plaintiffs' part performance cured the illusory nature of their promise.
>
> *Thexton*, 226 P.3d 359 at 366-67.

D. This court finds that, based upon the evidence presented at trial, there was sufficient consideration exchanged by the parties to support the January 16, 2013, emails between Plaintiff and Stewart as an enforceable agreement between those parties. The Plaintiff's agreement to extend the due date of the Note was supported by Stewart's promise and acceptance of the personal guarantee of repayment of the Note to Plaintiff, and Stewart received sufficient consideration to support his personal guarantee of repayment to Plaintiff in that both Stewart and ISL received actual use and substantial benefit of the borrowed funds beyond the Note's original repayment date of March 31, 2013. Cal. Civ. Code § 1605.

E. This court finds that the Plaintiff's promise to extend the repayment terms of the Note was not illusory, although *Thexton, supra*, 226 P.3d at 366-67, provides that even if such a promise were deemed illusory, "[P]laintiffs' part performance cured the illusory nature of [her] promise." The testimony and evidence presented at trial established that the repayment terms of the Promissory Note were actually extended beyond the March 31, 2013, date, and Stewart admitted in his testimony that the extension of that repayment term and his use of the funds beyond March 31, 2013, were a substantial personal benefit to him. Accordingly, the consideration supporting this loan modification was Griffith's extension of that repayment date, and she actually suffered harm as a result. This personal guarantee obligation is, therefore, enforceable against Defendant Stewart under California law and, in the alternative, under South Carolina law.

JBM/6

F. This court finds that the personal guarantee agreement by Defendant Stewart satisfies the requirements of the Statute of Frauds under California law and, in the alternative, under South Carolina law. The loan modification and personal guarantee are not barred by the California Statute of Frauds, because that statute actually excludes the type of transaction at issue in this lawsuit, specifically, the loan modification and personal guarantee made by Stewart:

> Cal. Civ. Code § 1624. Statute of frauds (emphasis added):
>
> (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
>
> (1) An agreement that by its terms is not to be performed within a year from the making thereof.
>
> *(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.*
>
> ...
>
> Cal. Civ. Code § 2794. Original obligations not requiring a writing (emphasis added):
>
> A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:
>
> ...
>
> *(4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person;*
>
> ...

In *Farr & Stone Ins. Brokers, Inc. v. Lopez*, 61 Cal.App.3d 618 (Cal. App. 1976), Lopez owned a business named Apex, and as Apex's insurance brokers, Farr & Stone paid some of the premiums for insurance coverage when Apex failed to make such payments. Farr & Stone then demanded that Lopez make payments, or the insurance would be cancelled.

The arguments made by Lopez are almost identical to those made by Stewart in challenging his personal guarantee. The following evidence established that Lopez personally guaranteed payment of those premiums if Apex did not pay:

JBM 17

Stone testified that Lopez promised if Apex could not pay the premiums he would pay them out of his own checkbook and that Farr & Stone relied on Lopez's promise in not cancelling the insurance policies. Michael Poland and Carolyn Lopez testified that Lopez said he would personally take care of the premiums. Lopez testified that he said Apex would try to make the payments.

Id. at 621.

Next, Lopez, just as Stewart did in the present case, denied that he made such a promise, but the California appellate court summarily dismissed that contention:

> Lopez contends this evidence fails to support the finding that he promised Farr & Stone he would pay the insurance premium obligation of Apex. In making this contention Lopez ignores a cardinal rule of appellate review: the appellate court will not reweigh conflicting evidence before the trier of fact. Whatever other witnesses might have testified, Lawrence Stone testified that Lopez promised to pay Apex's premiums out of his own checkbook. That testimony is not inherently improbable or unworthy of belief and therefore constitutes substantial evidence to support the trial court's finding. (*Protopappas v. Protopappas*, 213 Cal.App.2d 659, 28 Cal.Rptr. 884 (1963)).

Lopez, 61 Cal.App.3d at 621.

The similarities to the case at bar continue as Lopez, just as Stewart did in the present case, argued that the California Statute of Frauds barred enforcement of his personal guarantee. The promisee, just as Griffith does in the present case, argued that his personal guarantee was covered under an exception to the requirement of a writing under the statute of frauds:

> Lopez contends the statute of frauds bars enforcement of his oral promise. Farr & Stone relies on an exception to the statute in Civil Code section 2794: 'A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: .... (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person . . .'
>
> *Id.*

Next, Lopez claimed, just as Stewart argued initially in the present case, that the statute of frauds exception did not apply because Lopez did not personally receive any direct pecuniary benefit. In the present case, Stewart admitted during his trial testimony that he in fact did receive

JBM/B

substantial personal benefit from the use of the funds loaned by Griffith after the original repayment deadline expired.

> Lopez argues this exception does not apply because there was no consideration beneficial to him in this case because he received nothing of immediate and direct pecuniary benefit. (See *Michael Distrib. Co. v. Tobin*, 225 Cal.App.2d 655, 665, 37 Cal.Rptr. 518.)

Lopez, 61 Cal.App.3d at 621.

Finally, on the statute of repose issue, the California Court of Appeals held that the statute of repose exception applied, and the absence of a writing did not bar the enforcement of Lopez's personal guarantee. That court held that Farr & Stone, like Griffith, suffered harm in consideration by foregoing benefits in reliance on the personal guarantee:

> The statute of frauds does not apply. The forbearance of Farr & Stone to cancel Apex's insurance policies was a detriment to Farr & Stone, which passed up the opportunity to obtain rebates on prepaid premiums, and a benefit to Lopez's children, who had a promised ownership interest in Apex. Lopez, of course, had a direct and personal concern in the welfare of his children and their economic venture.

Id. at 621-22. *See also,* S.C. Code § 26-6-10 *et seq.* and § 32-3-10 *et seq.*

For the foregoing reasons and based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Plaintiff has met her burden of proof in this matter. A hearing as to the damages shall be held at a date and time to be determined by the court and parties as soon as possible.

IT IS SO ORDERED.

Jennifer B. McCoy
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

December 10, 2018

JBM/9

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-10-05773

Amandra Griffith

PLAINTIFF(S)

ISL Development, LLC, and Steven Stewart, individually

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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. ☐ <u>See Page 2 for additional information.</u>

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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

FILED
2019 MAR -5 PM 1:5?
JULIE J. ARMSTRONG
CLERK OF COURT

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:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

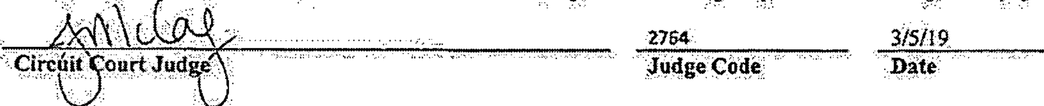
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Amanda Griffith	Steven Stewart	$419,160.54

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



Circuit Court Judge	Judge Code: 2764	Date: 3/5/19

SCRCP Form 4C (02/2017) Page 1 of 4

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2016-CP-10-05773
AMANDA GRIFFITH, Plaintiff, vs. ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY, Defendants.	**ORDER (Damages)**

FILED
2019 MAR -5 PM 1:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY_______

This case was tried before the court on August 29, 2018, without a jury. The court filed its order on December 12, 2018, finding the Defendant Steven Stewart liable as personal guarantor of the loan made by Plaintiff to Defendant ISL Development. A damages hearing was held on Friday, January 25, 2019. Present were Plaintiff Amanda Griffith, represented by Patrick Flynn, esquire, and Defendant Steven Stewart, represented by Capers G. Barr, III, esquire.

ORDER

After considering arguments from both sides and evidence submitted to the court, the court finds:

1. Defendant Stewart is liable to Plaintiff in the amount of $200,000.00, representing the principal balance of the Promissory Note which Defendant Stewart personally guaranteed.

JBM/I

2. Defendant Stewart is liable to the Plaintiff in the amount of $130,000.00, representing the interest owed on the Promissory Note which Defendant Stewart personally guaranteed. Interest is calculated at 12% per annum and commenced on September 1, 2013, as the evidence established that the check representing the monthly payment for September 2013 through November 2013 was returned for Non-Sufficient Funds, and no further interest payments were made after that time. This $130,000.00 interest reflects credit for monthly interest payments made by ISL from February through August, 2013, as reflected by the evidence at trial. There are a total of 65 months of accrued interest between September, 2013, and January, 2019. Sixty-five months at the rate of $2,000.00 per month equals $130,000.00 in total accrued interest to which Plaintiff is entitled.
3. Defendant Stewart is liable to Plaintiff in the amount of $89,160.54, which represents reasonable attorney's fees associated with the Plaintiff's efforts to collect this debt.
4. The total judgment of $419,160.54 shall accrue interest at the rate of Nine and One-Half Percent (9.5% per annum) until the judgement is satisfied in full.

AND IT IS SO ORDERED!

Jennifer B. McCoy, Presiding Judge

March 5, 2019
Charleston, South Carolina

JBM/2

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED

clerkofcourt.charlestoncounty.org

58

CAPERS G. BARR III
11 BROAD STREET
PO BOX 1037
CHARLESTON SC 29402-1037

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order-Motion to Alter or Amend is Denied

CASE NO: 2016CP1005773
Amanda Griffith VS ISL Development Llc , defendant, et al

This judgment was entered on the 04th day of April, 2019, and notice mailed first class on Thursday, April 04, 2019, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at http://clerkofcourt.charlestoncounty.org or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

1820102.201904023580I.00058

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016-CP-10-05773

FILED
2019 APR -4 PM 12: 01
JULIE J. ARMSTRONG
CLERK OF COURT

Amandra Griffith
PLAINTIFF(S)

ISL Development, LLC, and Steven Stewart, individually
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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: Defendant's Motion to Alter or Amend this court's order on March 5, 2019, is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Amanda Griffith	Steven Stewart	

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge — Judge Code: 2764 — Date: 4/1/19

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No. 2016-CP-10-5773
	)	
AMANDA GRIFFITH,	)	
	)	PLAINTIFF'S TRIAL BRIEF
Plaintiff,	)	
v.	)	
	)	
ISL DEVELOPMENT, LLC AND STEVEN STEWART, INDIVIDUALLY,	)	
	)	
Defendants.	)	

The Plaintiff, Amanda Griffith, hereby provides her Pretrial Brief to the Court as follows. This matter has been called for trial on August 29, 2018 before the Honorable Jennifer McCoy in Courtroom 3B of the Charleston County Courthouse, commencing at 10:00 a.m.

(1) A concise, non-argumentative statement of the facts of the case.

The Plaintiff ("Amanda") brought this lawsuit in order to collect a debt in the amount of $200,000 plus accrued interest and reasonable attorney fees for collection from the Defendant Steven Stewart ("Steve"), who personally guaranteed the debt. Steve's company, ISL Development, LLC signed a Promissory Note on December 27, 2012 (the "Note"), and Amanda actually paid the $200,000 to ISL Development pursuant to that Note. The Note required Steve's company to repay the amount with interest at the annual rate of 12% on March 31, 2013.

Originally, Steve contemplated that Amanda would lend the money to his company, but that she would then join the project as an investor, and convert her $200,000 loan into ownership equity. Amanda and Steve signed a Memorandum of Understanding describing that "investment opportunity" for Amanda. Afterwards, Steve presented the proposed investment terms to Amanda by way of a draft Operating Agreement.

Amanda considered that offer, but decided that it was too risky and that she would remain a lender and not become an investor. On January 16, 2013, Amanda emailed Steve and confirmed her decision to remain a lender. However, she wished Steve and his company well, and said that she would be willing to let Steve and his company continue to use those borrowed funds if Steve would personally guarantee repayment. By response email to Amanda also dated January 16, 2013, Steve agreed to personally guarantee repayment of the Note.

Consistent with that amended agreement, Amanda did not call the Note or demand repayment on March 31, 2013. Also consistent with that amended agreement, Steve began to make interest payments of $2,000 per month to Amanda, while he was also paying himself compensation for his work on the project, and making interest payments to his family trust for its investment in the project.

Steve's interest payments to Amanda became less and less regular. His final payment to Amanda was by a check dated November 5, 2013 in the amount of $6,000, as that was intended to catch up with previous months' past due interest. Steve requested that Amanda delay presenting that check to her bank while he verified that funds were available. Amanda did so, and attempted to cash that check in January, 2014.

That check bounced, and Amanda never again received a penny from Steve, despite his personal guarantee that the Note would be repaid to her. Amanda brought this lawsuit against Steve and his company on October 27, 2016.

(2) An objective statement of the facts in controversy.

Amanda and Steve's Memorandum of Understanding of December 27, 2012 provided as follows:

. . . .

5. It is the intent of the parties that, at such time as Amanda and her counsel have approved the form of operating agreement, Amanda shall become a member of ISL and that the Loan shall be immediately converted into a capital contribution from Amanda to the Company.

As noted above, Amanda reviewed the operating agreement and decided that it was too risky for her to invest in the project, so she remained a lender expecting her loan to be repaid.

On January 16, 2013 at 5:17 a.m., Amanda sent the following email to Steve:

. . . All that aside, I was willing to take these risks because you were also taking them and I felt that my risk was linked to yours and that you would take good care of yourself and, by extension, me.

With the new changes in the agreement, this appears less so. I am not a greedy person. My goals are not to lose my capitol and to make a little money. I don't see how this proposal addresses that.

I am happy to lend the $ 200,000 to you if you will personally guarantee the loan.

I think the project is great and I know you will be successful and I wish you the best, Amanda

In response to that email from Amanda, Steve responded by email on January 16, 2013 at 1:04 p.m. as follows:

Hey Amanda,

I can certainly appreciate your concerns and I respect your decision. Of course I will personally guarantee the $200,000.00 and I appreciate your help and consideration.

When we have talked about your investment in our projects, we both had assumed that only a part of the money would come from borrowed funds. I can see what a problem this could create for you.

It is Amanda's position that she and Steve amended the loan agreement as noted above, had a meeting of the minds, and that Steve's part performance by his interest payments until

November 2013 ratified this amended loan agreement.

(3) The legal issues involved. This includes the law applicable to the cause of action and the defense.

The Promissory Note indicates that "[t]his Note shall be construed and enforced in accordance with the laws of the State of California." South Carolina courts enforce such choice of law provisions, applying the substantive law of the chosen forum. However, South Carolina Courts enforce the Statute of Limitations and other procedural aspects of law according to the laws of South Carolina. *See, e.g., Capco of Summerville, Inc. v. J.H. Gayle Construction Co.*, 368 S.C. 137 (2006); *Thornton v. Cessna Aircraft Co.*, 703 F. Supp. 1228, 1230 (D.S.C. 1988) *aff'd and remanded,* 886 F.2d 85 (4th Cir. 1989).

(a) Enforceability of Personal Guaranty; Consideration: It is anticipated that the Defendants will challenge Steve's obligation to personally guarantee the loan repayment to Amanda. Defendants are expected to assert that there was no consideration and that Steve's promise to personally guarantee the repayment to Amanda was gratuitous. Plaintiff's reject that contention as without merit. The evidence will establish that Steve continued to have full use of Amanda's $200,000 for his use in the project well beyond the Note's original due date of March 31, 2013. In fact, the evidence will establish that Steve exhausted all of Amanda's loaned funds by, among other things, payments to himself for his work on the project and interest payments to Steve's family trust, which was an investor in the project. This evidence establishes that Steve actually received consideration which would not have been available had he and Amanda not amended the loan agreement and repayment had been made according to the Note on March 31, 2013.

California Citations:

Cal. Code Civ. § 1624(a)(2); 2794(4).

Schumm v. Berg, 37 Cal. 2d 174, 187-88 (1951) ("'[W]henever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own,'" California Civil Code § 2794(4) applies "'although the effect of the promise may be to pay the debt or discharge the obligation of another.'")

Farr & Stone Ins. Brokers, Inc. v. Lopez, 61 Cal. App. 3d 618 (1976)

(b) South Carolina's Three Year Statute of Limitations: It is anticipated that Defendants will challenge Amanda's claims based upon South Carolina's three-year statute of limitations for the enforcement of contract obligations, S.C. Code Section 15-3-530. As noted above, the evidence will establish that Steve made a check payable to Amanda on November 5, 2013 in the amount of $6,000, representing interest payment pursuant to the amended loan agreement. Thereafter, Steve transmitted that check to Amanda, and requested that she wait to cash the check until he could ensure that funds were available. She agreed and waited until January 2014, when the check bounced.

This lawsuit was commenced on October 27, 2016, within three years from the day that Amanda knew or reasonably should have known that she had a claim against Steve for breach of this amended loan agreement. In the least, South Carolina's doctrine of equitable estoppel would prevent the imposition of a statute of limitations on behalf of a party such as Steve who purposely encouraged Amanda to delay the presentation of his check which he signed on November 5, 2013 and then forwarded to Amanda.

(c) Sufficiency of the Emails as a Writing; Statute of Frauds: The evidence will establish that the emails exchanged by Steve and Amanda on January 16, 2013 established the sufficient detail for the amended loan agreement, such that Steve immediately acknowledged and accepted the obligation to personally guarantee the repayment of the funds to Amanda. Moreover, Steve then immediately used the funds for his own pecuniary benefit to pay himself and his family trust in connection with the project. California law provides that an email transmission such as that exchanged by Steve and Amanda satisfies the requirement of a writing under its Statute of Frauds. See Cal. Code Civ. § 1624(b)(3).

Moreover, the California appellate court has long held that when such a personal guaranty is made for one's own pecuniary advantage, such as Steve's personal payments after the January 16, 2013 emails and still after the original March 31, 2013 due date for repayment of the Note under its original, unamended terms came and went. *See Michael Distrib. Co. v. Tobin,* 225 Cal. App. 2d 655, 664 (1964) (when a promisor provides a guaranty "for his own pecuniary or business advantage," that guaranty "is deemed an original obligation of the promisor and need not be in writing.")

(4) A listing of exhibits, indicating those to which there is disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

The Plaintiff and Defendants have agreed on the following exhibits:

EXH #	**DESCRIPTION**
1	Memorandum of Understanding
2	Promissory Note (ISL Development - Amanda Griffith)
3	Emails between Amanda Griffith/Steve Steward/Adam Salis
4	ISL Operating Agreement (Redline & Clean)
5	ISL Check Ledgers-Receipts
6	ISL Bank Records
7	Demand Letter from Pat Flynn - 9/12/16
8	Demand Response from Steve Stewart - 9/15/16
9	Promissory Note (ISL Development - Henderson Family Trust)

10	Misc. Project Emails
11	Confidentiality Non-Circumvent Agreement (11/29/12)
12	Confidentiality Non-Circumvent Agreement (12/4/12)
13	Email (1/4/13)
14	Email (1/15/13)
15	Confidential Private Placement Agreement (4/11/13)
16	Commercial Mortgage Brokerage Agreement (5/3/13)
17	Brochure (5/10/13)
18	Email (5/23/13)
19	Email (6/17/13)
20	LLC Agreement Summerland Senior Living (09/10/13)
21	Griffith-Stewart Correspondence (Jan 2016)

WITNESSES:

1. Plaintiff Amanda Griffith

2. Defendant Steven Stewart (note that Plaintiff intends to have Mr. Stewart testify in his individual capacity as well as his capacity as a principal of Defendant ISL Development, LLC).

(5) Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.

None anticipated.

(6) Any unusual question or matter which should be brought to the attention of the court.

None at this time.

(7) A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

A mediation was conducted in this matter on May 9, 2018. Attorney Marvin Infinger served as the mediator, and the parties were not able to achieve settlement at mediation. Counsel have continued to communicate since the mediation, but have not been able to reach settlement prior to trial.

Respectfully submitted,

POPE FLYNN, LLC

R. Patrick Flynn
Michael W. Allen, Jr.
P.O. Box 70
Charleston, SC 29402
(843) 834-3426
pflynn@popeflynn.com
mallen@popeflynn.com
Attorneys for Plaintiff Amanda Griffith

Charleston, South Carolina

August 28, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)
) CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,)
)
PLAINTIFF,) **TRIAL BRIEF OF DEFENDANTS**
) **ISL DEVELOPMENT, LLC, AND**
vs.) **STEVEN STEWART,**
) **INDIVIDUALLY**
ISL DEVELOPMENT, LLC, and)
STEVEN STEWART,)
INDIVIDUALLY,)
)
)
DEFENDANTS.)

FILED
2018 SEP 10 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY ______

INTRODUCTION

This is a suit on a promissory note as to Defendant ISL Development, LLC; and on a purported guaranty of that note as to Defendant Stewart. The central issue is whether any purported guaranty by Mr. Stewart was supported by consideration.

STATEMENT OF FACTS

Plaintiff Amanda Griffith is a Charleston architect. Defendant Steve Stewart is a Charleston resident who lives at 60 Montagu Street. Defendant ISL Development, LLC ("ISL") is a two member California LLC, the members of which are Mr. Stewart and Adam Salis, a California lawyer.

Mr. Stewart and his family moved to Charleston from California in 2004 where he had been engaged in land development. He continued to operate his California land development business from Charleston working remotely, and commuting to the west coast from time to time. In Charleston Mr. Stewart also engaged in several historical renovation projects, including his own home.

ISL was formed for the purposes of engaging in California land development. In the same year, 2011, ISL signed a contract to buy a tract in Whitter California for 2.1 million dollars, with the intent to develop there a nursing home facility.

Mr. Stewart is experienced in obtaining "entitlements" from governments and regulatory authorities whereby zoning approvals and permits required to use land for its highest and best use are obtained The process of entitling property is time consuming and expensive, involving many talents, in addition to Mr. Stewart's oversight, from attorneys, land planners, engineers, architects and transportation analysists, to name several. The Whitter project came to be named "Summerland Terrace at Whitter". As stated, Mr. Stewart was responsible for obtaining the necessary entitlements for the project, and the role of Mr. Salis was to obtain funding and financing. The endeavor presented two fundamental options for adding value to undeveloped land: one option was to raise the capital to develop the property as an equity partner with a larger developer; the second option was to sell the entitled property to a developer, deriving profit from the value added by the entitlements.

The process of obtaining the necessary entitlements for a property required that ISL obtain its own operating capital. For those purposes, Mr. Stewart personally deposited $15,000 to the LLC, and he borrowed $450,000 from "Henderson Family Trust", a trust fund held and managed by Mr. Stewart's wife's family.

Mr. Stewart had met Amanda Griffith in Charleston socially, through a mutual friend. By the Summer of 2012 it was determined that ISL's capitalization would not be adequate to carry expenses of entitlement. In conversations with the mutual friend, he suggested to Mr. Stewart that perhaps Amanda Griffith might be interested in investing in the project.

Sometime in 2012 Mr. Stewart met with Amanda Griffith on at least two occasions to discuss her interests in investing in ISL. Ms. Griffith informed Mr. Stewart that she thought she could invest up to $750,000 into ISL, but that she relied on the advice of her attorney and her financial counselor.

By the fall of 2012, all entitlements had been substantially obtained and were in place. ISL then owed payables for many of the services that had been rendered. It was also known and disclosed to Ms. Griffith that Mr. Stewart took a draw of $15,000 per month for his services.

On December 27, 2012, several documents were signed between ISL and Amanda Griffith: First, ISL and Ms. Griffith signed a Memorandum of Understanding reciting a concurrent loan by Ms. Griffith of $200,000 to ISL, which would be due and payable March 31, 2013. The Memorandum of Understanding contemplated that Ms. Griffith would become an equity participant in ISL, and that her $200,000 loan would be converted to equity in the company as a capital contribution.

Secondly, ISL signed and delivered to Ms. Griffith on December 27, 2012, its promissory note for $200,000 due March 31, 2013 together with interest at 12% per annum. Notably, the promissory note provides that it shall be construed and enforced in accordance with the laws of the State of California, and that no modification of the note should be valid or binding unless set forth in writing signed by holder and maker.

Thirdly, Ms. Griffith wire transferred the sum of $200,000 to the account of ISL Development LLC, on December 28, 2012.

On January 16, 2013, Ms. Griffith sent an e-mail to Mr. Stewart and to Mr. Salis advising them that her financial consultant had advised against her entering into the full $750,000

Undisputed Facts.

There is no dispute but that Defendant ISL Development, LLC signed a promissory note to Plaintiff Amanda Griffith on December 27, 2012, promising to repay her loan of $200,000 on March 31, 2013, together with interest at the rate of 12%.

There is no dispute but that Amanda Griffith and ISL Development signed a Memorandum of Understanding on March 27, 2012, whereby it was contemplated that Ms. Griffith's $200,000 promissory note would be converted to equity in ISL.

There is no dispute but that Ms. Griffith and Mr. Stewart exchanged e-mails on January 16, 2013, recited above.

ISSUES

The contested issues in the case are principally legal:

1. Whether Mr. Stewart's gratuitous promise is enforceable; whether there was consideration exchanged for his promise to personally guarantee the loan.

2. Whether the Plaintiff's claims against the Defendants are barred by the Statute of Limitations.

3. Whether the evidence in the case is barred by the Statute of Frauds.

LISTING OF EXHIBITS

There will be no dispute as to any exhibits in the case, and the attorneys have stipulated to their admissibility, and will present either joint or multiple notebooks containing their respective exhibits.

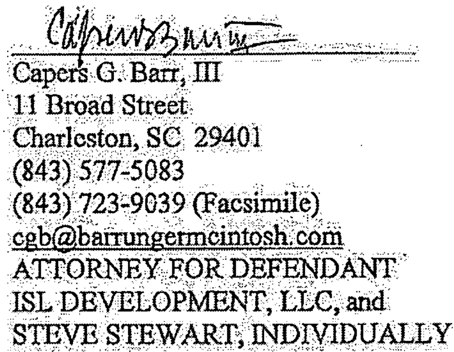
WITNESSES

There will be two witnesses in the case, Ms. Griffith and Mr. Stewart.

MEDIATION

The parties have mediated the case, without success.

BARR, UNGER & McINTOSH, LLC



Capers G. Barr, III
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (Facsimile)
cgb@barrungermcintosh.com
ATTORNEY FOR DEFENDANT
ISL DEVELOPMENT, LLC, and
STEVE STEWART, INDIVIDUALLY

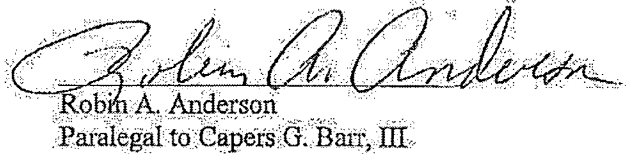
August 28, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
	)	
PLAINTIFF,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
ISL DEVELOPMENT, LLC, and STEVE STEWART, INDIVIDUALLY,	)	
	)	
DEFENDANTS.	)	

FILED
2018 SEP 10 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I hereby certify that I have served a copy of the foregoing Trial Brief of Defendants ISL Development, LLC, and Steven Stewart, Individually to the Plaintiff's by electronic mail and U.S. Mail, to the following addresses:

R. Patrick Flynn, Esq
Michael W. Allen Jr. Esq.
POPE FLYNN, LLC
PO Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com



Robin A. Anderson
Paralegal to Capers G. Barr, III

Charleston, South Carolina
September 7, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AMANDA GRIFFITH,

PLAINTIFF,

vs.

ISL DEVELOPMENT, LLC, and
STEVEN STEWART,
INDIVIDUALLY,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-5773

SUPPLEMENTAL TRIAL BRIEF
OF DEFENDANTS
ISL DEVELOPMENT, LLC, AND
STEVEN STEWART, INDIVIDUALLY

FILED
2018 SEP 10 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Defendant Steve Stewart supplements his Trial Brief as follows:

LACK OF CONSIDERATION.

Plaintiff's claim against Steve Stewart individually is barred because his promise of personal guarantee was gratuitous, and unsupported by consideration.

The California Law of Consideration. The corporate promissory note of ISL Development LLC by its terms provides that it "shall be construed and enforced in accordance with the laws of California". (Exhibit 2 at bates page 95, paragraph 11). "Good consideration" is statutorily defined in California Civil Code Section 1605, as follows:

> "GOOD CONSIDERATION, WHAT. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." (See Exhibit "A" hereto.)

The California case of *Steiner vs Thexton 48 Cal. 4th 411, 106 Ca. Rptr.3d 252, 226 P.3d 359 (2010)* was a suit over an option to purchase real property. The Supreme Court of California

addressed the question of good consideration in the case, after citing California Civil Code Section 1605 quoted above: "It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration... (Citation omitted). The second requirement is that the benefit or prejudice 'must actually be bargained for as the exchange for the promise'. Put another way, the benefit or promise must have induced the promisor's promise"... "The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the benefit of bargain or agreed exchange". *(48 Cal. 4th at 421). Steiner* was cited with approval for this same proposition in the very recent California case of *Property California SCJLW One Corporation vs. Leamy, _____ Cal. Rptr 3d _____, 18 Cal. Daily Op. Serv. 7939, (August 9, 2018.)*

In this case the "promise" of Amanda Griffith was this: "I am happy to lend the $200,000 to you if you will personally guarantee the loan". (Exhibit 3, bates page 122). Ms. Griffith made no new or additional promise with her words. She had already made the $200,000 loan and it was not due until March 31, 2013, 46 days later. The writing upon which Ms. Griffith seeks to make her case for an enforceable contract of guarantee does not contain the requisite exchange of promises. Therefore, Mr. Stewart's promise to personally guarantee the note was not given in exchange for any promise by Ms. Griffith that she had not already made by her advancement of funds on December 28, 2012.

At trial, Mr. Stewart was obviously uncomfortable by his testimony, in reneging on what was a promise based upon a purely a moral obligation that he felt and expressed in the January 16, 2013 e-mail exchange. However, a moral obligation is not sufficient to sustain a case for "good consideration" under California or South Carolina law.

Notwithstanding the antiquated vernacular of California Civil Code Section 1605, "any benefit conferred" upon Steve Stewart by Amanda Griffith by her promise to lend him the $200,000 she had already loaned, was manifestly a benefit to which Mr. Stewart was already lawfully entitled. Section 1605 requires, for there to be good consideration, that the benefit to Mr. Stewart be one to which he "is not lawfully entitled".

Therefore, by any analysis of the statutory words themselves, good consideration cannot be made out for Mr. Stewart's gratuitous promise.

Ms. Griffith's case against Mr. Stewart individually must be denied because of a lack of good consideration.

STATUTE OF FRAUDS.

Plaintiff's claim against Steve Stewart is barred by the California Statute of Frauds.

The statute of frauds is codified in California Civil Section 1624 (see Exhibit "B" attached hereto.).

Whereas California law appears to accept an e-mail as an adequate writing to constitute a memorandum sufficient to satisfy the statute of frauds, the substantive requirements of the writing are not relaxed merely because it is an e-mail. A writing satisfies the requirements of the California Statue of Frauds only "if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." *Sterling vs Taylor 40 Cal. 4th 757, 766, 152 P. 3d 420, 425 (Supreme Court of California 2007)*, citing Restatement 2d Contracts, Section 131.

"The primary purpose of the statute is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made". *Sterling v Taylor, supra, 40 Cal. 4th at 766 (emphasis added).*

The e-mail memorandum in this case is manifestly inadequate to satisfy even the elementary requirements of the California statute of frauds. The e-mail fails to include any new promise made by Amanda Griffith whatsoever, any more than to confirm the promise she had already made and performed on December 28, 2012. There is no expression in the email of an intent to extend the term of the ISL promissory note; there is no reference to a due date. There is no new promise stated, at all.

Thus as a matter of the evidence, the e-mail is insufficient to set forth the requirements of a writing that would satisfy the statute of frauds.

Plaintiff's claim is thus barred by the statute of frauds.

<u>POST HEARING OBSERVATIONS:</u>

The evidence does not support the argument that Mr. Stewart was unjustly enriched by Plaintiff's loan.

Without pleading or otherwise alleging it, Plaintiff for the first time in summation argued that she was defrauded by Steve Stewart; that he lulled her in some way, at the same time profiting from her loan. However, the physical evidence in the case does not support this argument.

Immediately before Amanda Griffith's $200,000 loan was made to ISL, its account balance on December 28, 2012 was $400.38. See the ISL check register, Exhibit 5, bates page ISL 0243. Between December 28, 2012 and February 12, 2013, ISL wrote checks pursuant to its agreement with the Plaintiff to pay the invoices owed to architects, land planners, engineers, for legal services, and as well to Mr. Stewart, to Henderson Family Trust and to Ms. Griffith for interest. The total of the checks between December 18, 2012 and February 12, 2013 was $199,413.46, leaving a balance of $986.92 on February 12, 2013. See Exhibit 5, bates pages ISL 0243 -- 0248. (The accuracy of the check register is corroborated by the bank statements contained in Exhibit 6.)

Plaintiff's argument that ISL and Mr. Stewart benefited from her loan into the fall of 2013 is therefore not supported by the evidence. Rather, as seen in the check register, on March 1, 2013 a return of deposit in the sum of $99,226.00 was deposited to the ISL account. (See Exhibit 5, bates page ISL 0249). It was that injection of funds, not the Plaintiff's loan, that sustained ISL, including for payments of interest to the Plaintiff, into the fall of 2013.

As the evidence at trial demonstrated, although entitlements were in place to go forward with the assisted living home project, Mr. Stewart and Mr. Salis were unsuccessful in raising the capital necessary to proceed with the project; and their efforts to sell their contract with its entitlements, were also unsuccessful.

The reason the ISL note was not paid when due was not because of an agreement to extend its term, but rather it was because ISL had no funds to repay it.

ISL's bank balance on March 31, 2013, the due date of the note, was $63,942.66. See Exhibit 5 at bates page ISL 0251. The Plaintiff testified that she knew ISL did not have the funds to repay her: "It was clear that it wasn't going to be repaid by March 31st." The reason that ISL did not pay the note on March 31st, therefore, is not because there was some agreement to extend the note term, but because ISL simply did not have the funds to pay it, and by her testimony the Plaintiff knew that.

Respectfully, Plaintiff's current position that there was an agreement to extend the term in exchange for Mr. Stewart's gratuitous promise is simply not credible, and more importantly it is not supported by any competent evidence.

CONCLUSION.

In the end, ISL was insolvent and could neither repay its loan obligations to the Henderson Family Trust nor to Ms. Griffith. In the circumstances, the evidence does not support the mutual

exchange of promises between Plaintiff and Steve Stewart to sustain her claim that the guarantee is enforceable. As Mr. Stewart testified, neither he nor ISL received any benefit from his gratuitous promise. Neither was there the requisite writing necessary to satisfy the statute of frauds.

In her redirect examination, Plaintiff testified that "we had already discussed that (Mr. Stewart) would continue to pay me"; and "no length (of time) was mentioned". Plaintiff further testified that her January 16, 2013 e-mail "implies" her promise to extend the time for payment.

However, Plaintiff never testified that promise was exchanged for promise; that is, that she promised to extend the note in exchange for Mr. Stewart's promise to personally guarantee it. And there is no documentary evidence to prove that point. It is the exchange of promise for promise that is required under California law to make out good consideration. Plaintiff has not carried her burden of proof on this necessary element.

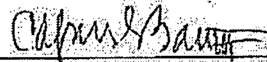
Moreover, Plaintiff's testimony on this issue is totally belied by the fact that on January 12, 2016, three years later, she had an attorney draft a personal note and guarantee that she presented to Mr. Stewart, but that he did not sign. (See Exhibit 21.) The point to be made is not so much that Steve Stewart did not sign the note, but that Plaintiff chose to have it prepared at all. If the email chain proved an enforceable agreement for personal guarantee, why would Plaintiff seek to have that fact confirmed by a separate writing?

Significantly, the proposed January 2016 personal promissory note does not recite as its consideration any earlier agreement by Plaintiff to extend the term of the ISL note, which she now claims to be the consideration exchanged for the promise of guarantee. Importantly, the note was prepared by Plaintiff's lawyer, who it must be presumed was fully informed by her as to the facts. Yet, there is no recital in the January 2016 proffered personal promissory note, or in the proffered

guarantee accompanying it, to an earlier extension of the ISL note as the consideration for a personal promissory note from Mr. Stewart.

ISL Development has no defense to its default in this case, and it is unfortunate that Plaintiff has not been repaid. But Mr. Stewart's wife's family trust has also lost the $450,000 loan that it made to ISL, undoubtedly a source of great embarrassment to him at the least. This development project was entered into with every good and optimistic intention that it would succeed, but it did not. For the very high 12% rate of return on investment promised to Amanda Griffith and to Henderson Family Trust, they each assumed a commensurately high risk of loss. Sadly, that risk did not run in their favor.

BARR, UNGER & McINTOSH, LLC



Capers G. Barr, III
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (Facsimile)
cgb@barrungermcintosh.com
ATTORNEY FOR DEFENDANT
ISL DEVELOPMENT, LLC, and
STEVE STEWART, INDIVIDUALLY

September 7, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
PLAINTIFF,	)	**CERTIFICATE OF SERVICE**
vs.	)	
ISL DEVELOPMENT, LLC, and STEVE STEWART, INDIVIDUALLY,	)	
DEFENDANTS.	)	

FILED
2018 SEP 10 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I hereby certify that I have served a copy of the foregoing Supplemental Trial Brief of Defendants ISL Development, LLC, and Steven Stewart, Individually to the Plaintiff's by electronic mail and U.S. Mail, to the following addresses:

R. Patrick Flynn, Esq
Michael W. Allen Jr. Esq.
POPE FLYNN, LLC
PO Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com

Robin A. Anderson
Paralegal to Capers G. Barr, III

Charleston, South Carolina
September 7, 2018

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 1. Nature of a Contract
Chapter 5. Consideration

West's Ann.Cal.Civ.Code § 1605

§ 1605. Good consideration defined

Currentness

GOOD CONSIDERATION, WHAT. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

Credits
(Enacted in 1872.)

Notes of Decisions (577)

West's Ann. Cal. Civ. Code § 1605, CA CIVIL § 1605
Current with urgency legislation through Ch. 181 of 2018 Reg.Sess

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 2. Manner of Creating Contracts

West's Ann.Cal.Civ.Code § 1624

§ 1624. Statute of frauds

Effective: January 1, 2015
Currentness

(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(b) Notwithstanding paragraph (1) of subdivision (a):

(1) An agreement or contract that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, provided that the agreement or contract is a qualified financial contract as defined in paragraph (2) and one of the following apply:

(A) There is, as provided in paragraph (3), sufficient evidence to indicate that a contract has been made.

(B) The parties thereto by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

(2) For purposes of this subdivision, a "qualified financial contract" means an agreement as to which each party thereto is other than a natural person and that is any of the following:

(A) For the purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metals on a forward, spot, next-day value or other basis.

(B) A contract (other than a contract for the purchase of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade) for the purchase, sale, or transfer of any commodity or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of a dealing in the forward contract trade, or any product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into.

(C) For the purchase and sale of currency, or interbank deposits denominated in United States dollars.

(D) For a currency option, currency swap, or cross-currency rate swap.

(E) For a commodity swap or a commodity option (other than an option contract traded on, or subject to the rules of, a contract market or board of trade).

(F) For a rate swap, basis swap, forward rate transaction, or an interest rate option.

(G) For a security-index swap or option, or a security or securities price swap or option.

(H) An agreement that involves any other similar transaction relating to a price or index (including, without limitation, any transaction or agreement involving any combination of the foregoing, any cap, floor, collar, or similar transaction with respect to a rate, commodity price, commodity index, security or securities price, security index, other price index, or loan price).

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

(I) An option with respect to any of the foregoing.

(3) There is sufficient evidence that a contract has been made in any of the following circumstances:

(A) There is evidence of an electronic communication (including, without limitation, the recording of a telephone call or the tangible written text produced by computer retrieval), admissible in evidence under the laws of this state, sufficient to indicate that in the communication a contract was made between the parties.

(B) A confirmation in writing sufficient to indicate that a contract has been made between the parties and sufficient against the sender is received by the party against whom enforcement is sought no later than the fifth business day after the contract is made (or any other period of time that the parties may agree in writing) and the sender does not receive, on or before the third business day after receipt (or the other period of time that the parties may agree in writing), written objection to a material term of the confirmation. For purposes of this subparagraph, a confirmation or an objection thereto is received at the time there has been an actual receipt by an individual responsible for the transaction or, if earlier, at the time there has been constructive receipt, which is the time actual receipt by that individual would have occurred if the receiving party, as an organization, had exercised reasonable diligence. For the purposes of this subparagraph, a "business day" is a day on which both parties are open and transacting business of the kind involved in that qualified financial contract that is the subject of confirmation.

(C) The party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made.

(D) There is a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker.

For purposes of this paragraph, evidence of an electronic communication indicating the making in that communication of a contract, or a confirmation, admission, note, memorandum, or writing is not insufficient because it omits or incorrectly states one or more material terms agreed upon, as long as the evidence provides a reasonable basis for concluding that a contract was made.

(4) For purposes of this subdivision, the tangible written text produced by telex, telefacsimile, computer retrieval, or other process by which electronic signals are transmitted by telephone or otherwise shall constitute a writing, and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing. The confirmation and notice of objection referred to in subparagraph (B) of paragraph (3) may be communicated by means of telex, telefacsimile, computer, or other similar process by which electronic signals are transmitted by telephone or otherwise, provided that a party claiming to have communicated in that manner shall, unless the parties have otherwise agreed in writing, have the burden of establishing actual or constructive receipt by the other party as set forth in subparagraph (B) of paragraph (3).

(c) This section does not apply to leases subject to Division 10 (commencing with Section 10101) of the Commercial Code.

(d) An electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, including, but not limited to, a text message or instant message format communication, is insufficient under this title to

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

constitute a contract to convey real property, in the absence of a written confirmation that conforms to the requirements of subparagraph (B) of paragraph (3) of subdivision (b).

Credits

(Enacted in 1872. Amended by Code Am.1873-74, c. 612, p. 241, § 190; Code Am.1877-78, c. 165, p. 86, § 1; Stats.1905, c. 451, p. 610, § 1; Stats.1931, c. 1070, p. 2260, § 9; Stats.1937, c. 316, p. 695, § 2; Stats.1963, c. 814, p. 1843, § 1; Stats.1967, c. 52, p. 953, § 1; Stats.1983, c. 842, § 6, operative Jan. 1, 1985; Stats.1985, c. 1315, § 1; Stats.1988, c. 1096, § 1; Stats.1988, c. 1368, § 1.5, operative Jan. 1, 1990; Stats.1998, c. 78 (S.B.1865), § 1; Stats.2014, c. 107 (A.B.2136), § 2, eff. Jan. 1, 2015.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1983 Amendment

Section **1624** is amended to delete the last portion of subdivision 6 (agreement to devise or bequeath property or to make any provision by will) which is superseded by Probate Code Section 150. [16 Cal.L.Rev.Comm.Reports 2301 (1982)].

EDITORIAL COMMENT

Section **1624** of the Civil Code and § 1973 of the Code of Civil Procedure [repealed 1965] contained identical provisions, except that § 1973, in the introductory paragraph, contained the additional provision that "Evidence, therefore, of the agreement, can not be received without the writing or secondary evidence of its contents".

Generally, both sections have been cited by the courts in construing and applying the Statute of Frauds but in a substantial number of cases the courts have cited only one or the other.

Therefore, in order to provide one place in which all the decisions under these provisions may be found, the judicial constructions thereof are combined and merged into a single development under § **1624** of the Civil Code for convenient reference by the Bench and Bar.

Relevant Additional Resources

Additional Resources listed below contain your search terms.

HISTORICAL AND STATUTORY NOTES

As originally enacted in 1872, the section read:

"The following contracts, or some memorandum thereof, expressing the parties, their consent, and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose:

"1. An agreement that by its terms cannot be fully performed within one year;

"2. An agreement made upon consideration of marriage, other than mutual promises to marry."

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) Case No. 2016-CP-10-5773

AMANDA GRIFFITH,

Plaintiff,

v.

ISL DEVELOPMENT, LLC AND STEVEN STEWART, INDIVIDUALLY,

Defendants.

PLAINTIFF'S SUPPLEMENTAL TRIAL BRIEF

The Plaintiff, Amanda Griffith, hereby provides her Supplemental Trial Brief to the Court as follows. This matter was tried on August 29, 2018 before the Honorable Jennifer McCoy in Courtroom 3B of the Charleston County Courthouse, commencing at 10:00 a.m. Following conclusion of the trial, counsel for Defendants requested the opportunity to present a Supplemental Trial Brief, which was submitted to the Court on September 7, 2018. The following Supplemental Trial Brief by Plaintiff is presented in response to Defendants' Supplemental Brief. Further, Plaintiff incorporates by reference the items included in Plaintiff's original trial brief submitted to the Court on August 28, 2018.

I. OVERVIEW OF THE EVIDENCE PRESENTED AT TRIAL:

On January 16, 2013, Steve Stewart promised Amanda Griffith that if she would continue to let ISL use the $200,000 after March 31, 2013, he would personally guarantee that she was repaid according to the terms of the note. That $200,000 was critical to the continued operation of the ISL for its project in Wittier, California, and for future projects that were being planned under the ISL enterprise.

Mr. Stewart and Adam Salis, as co-owners of ISL Development, LLC, desperately needed $200,000 before December 31, 2012 to pay bills owed by ISL. They asked for and received a short-term loan from Ms. Griffith that would be repaid on March 31, 2013, unless they could convince her to become an investor in ISL and convert her loan into equity capital for that company. In fact, they wanted her to contribute that $200,000 plus an additional $550,000 to ISL so that they could fund the project in Wittier.

Ms. Stewart considered the proposal and discussed it with Mr. Stewart and her personal financial advisor, and ultimately she rejected the investment proposal as too risky for her. On January 16, 2013, she confirmed that to Mr. Stewart by email, and indicated that while she would not convert her $200,000 loan to equity, and she would not contribute or loan the additional $550,000, that she nonetheless wished them success and would continue to lend the $200,000 for as long as they needed it, so long as Mr. Stewart personally guaranteed that she would be repaid.

II. PLAINTIFF'S RESPONSE TO DEFENDANTS' LEGAL ARGUMENTS:

A. MS. GRIFFITH PROVIDED VALID CONSIDERATION IN EXCHANGE FOR THE PERSONAL GUARANTEE BY MR. STEWART, AND THIS IS ACTUALLY CONFIRMED BY THE SAME CASE CITED BY COUNSEL FOR DEFENDANTS - *STEINER V. THEXTON*, 226 P.3D 359 (CAL. 2010).

Counsel for Mr. Stewart correctly brings the court's attention to the *Steiner v. Thexton* case, but he reaches the wrong conclusion from that case. ***A closer reading of that case – indeed, simply reading further down that same page he cited – results in a holding that precisely supports Ms. Griffith's position that there was adequate consideration for this loan modification.***

The *Steiner* opinion does reference the California statute regarding consideration. However, the holding of the *Steiner* case is not that the statutory definition is strictly enforced. To the contrary, that opinion fully supports Ms. Griffith's claim under the facts of this case.

1. **Here is what Mr. Stewart's Counsel argued in his Supplemental Trial Brief:**

"The California case of Steiner vs Thexton 48 Cal. 4th 411, 106 Ca. Rptr.3d 252, 226 P.3d 359 (2010) was a suit over an option to purchase real property. The Supreme Court of California addressed the question of good consideration in the case, after citing California Civil Code Section 1605 quoted above: "It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration... (Citation omitted). The second requirement is that the benefit or prejudice 'must actually be bargained for as the exchange for the promise'. Put another way, the benefit or promise must have induced the promisor's promise"... "The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the benefit of bargain or agreed exchange". (48 Cal. 4th at 421). Steiner was cited with approval for this same proposition in the very recent California case of Property California SCJLW One Corporation vs. Leamy, ____ Cal. Rptr 3d ____, 18 Cal. Daily Op. Serv. 7939, (August 9, 2018.)"

Defendants' Supplemental Trial Brief, September 7, 2018, at pp. 1-2.

2. **Here is the continuation of that same paragraph in *Steiner*, and the rest of the *Steiner* opinion, which in fact supports exactly what Ms. Griffith is claiming in this lawsuit:**

In sum, in determining here whether sufficient consideration rendered the option to purchase the 10-acre parcel irrevocable, we consider whether Steiner conferred or agreed to confer a benefit, or suffered or agreed to suffer prejudice that was bargained for in exchange for the option.

261 17 The lower courts concluded no such consideration supported the option. They reasoned no money was paid for the grant of the option nor did the work performed and expenses incurred by plaintiffs in pursuit of a parcel split benefit Thexton. *Citing O'Connell v. Lampe* (1929) 206 Cal. 282, 285, 274 P. 336, and *Drullinger v. Erskine* (1945) 71 Cal.App.2d 492, 495, 163 P.2d 48, the lower courts explained that the "adequacy of consideration" must be measured at the time an agreement was entered into. **The lower courts concluded that, at the time Steiner and Thexton struck their bargain, the promise to seek the parcel split was unenforceable because the escape clause gave plaintiffs the power to terminate the transaction at any time for any reason. Thus, the lower courts held, Steiner's promise was illusory and did not constitute valid consideration.** ***The courts found it immaterial that plaintiffs had begun to perform, because plaintiffs were under no actual obligation to do so. To the contrary, we conclude as a matter of law that *422 plaintiffs' part performance of the bargained-for promise to seek a parcel split created sufficient consideration to render the option irrevocable.

It is true that Steiner's promise to undertake the burden and expense of seeking a parcel split ***may have been illusory at the time the agreement was entered into***, given the language of the escape clause. ***However, there can be no dispute that plaintiffs***

> ***subsequently undertook substantial steps*** toward obtaining the parcel split and incurred significant **367 expenses doing so.10 Among other things, plaintiffs paid for the required civil engineering and surveying for the parcel and spent a number of months applying to the county planning department for a tentative parcel map, proceeding with the final hearing of the parcel review committee, and obtaining approval of the tentative map. ***On this record, the only possible conclusion is that Steiner both conferred a bargained-for benefit on Thexton and suffered bargained-for prejudice unaffected by his power to cancel, making up for the initially illusory nature of his promise.***
>
> ***Accordingly, ***262 plaintiffs' part performance cured the illusory nature of their promise.***

Steiner v. Thexton, 226 P.3d 359, 366-67 (Cal. 2010) (emphasis added).

It is Ms. Griffith's position that the January 16, 2013 emails between her and Mr. Stewart are sufficient evidence to support the loan modification and Mr. Stewart's personal guarantee obligation, and that her promise and actual extension of the Promissory Note repayment terms were sufficient consideration to support that personal guaranty obligation.

Nonetheless, the *Steiner v. Thexton* case provides that even if Ms. Griffith's promise to extend the repayment terms of the Promissory Note was considered illusory for some reason at the time of those January 16, 2013 emails, "***[P]laintiffs' part performance cured the illusory nature of [her] promise.***" There is no dispute that the repayment terms of the Promissory Note were actually extended beyond the March 31, 2013 date, and Mr. Stewart admitted in his testimony that the extension of that repayment term and his use of the funds beyond March 31, 2013 were a substantial personal benefit to him. Accordingly, the consideration supporting this loan modification was Ms. Griffith's extension of that repayment date, and she actually suffered harm as a result. This personal guarantee obligation is, therefore, enforceable against Mr. Stewart.

B. THE LOAN MODIFICATION AND PERSONAL GUARANTEE ARE NOT BARRED BY THE CALIFORNIA STATUTE OF FRAUDS, BECAUSE THAT STATUTE SPECIFICALLY EXCLUDES THIS TYPE OF TRANSACTION.

In his Supplemental Trial Brief, counsel for Mr. Stewart contends that the loan modification and personal guarantee obligation are barred by the Statute of Frauds as follows:

> Whereas California law appears to accept an e-mail as an adequate writing to constitute a memorandum sufficient to satisfy the statute of frauds, the substantive requirements of the writing are not relaxed merely because it is an e-mail. A writing satisfies the requirements of the California Statue of Frauds only "if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." Sterling vs Taylor 40 Cal. 4th 757, 766, 152 P. 3d 420, 425 (Supreme Court of California 2007), citing Restatement 2d Contracts, Section 131.
>
> *Defendants' Supplemental Trial Brief*, September 7, 2018, at p. 3.

However, Defendants' reliance on *Sterling v. Taylor* is misplaced. Instead, a careful reading of the California Statute of Frauds indicates that the statute actually excludes the type of transaction at issue in this lawsuit, specifically, the loan modification and personal guarantee made by Mr. Stewart:

> Cal.Civ.Code § 1624. Statute of frauds (emphasis added):
>
> (a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
>
> (1) An agreement that by its terms is not to be performed within a year from the making thereof.
>
> ***(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.***
>
> . . . .
>
> ***Cal.Civ.Code § 2794.*** Original obligations not requiring a writing (emphasis added):
>
> A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:
>
> . . . .
>
> ***(4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person***;
>
> . . . .

In *Farr & Stone Insurance Brokers, Inc. v. Lopez*, 61 Cal.App.3d 618 (Cal. App. 1976), Lopez owned a business named Apex, and as Apex's insurance brokers, Farr & Stone paid some of the premiums for insurance coverage when Apex failed to make such payments. Farr & Stone then demanded that Lopez make payments, or the insurance would be cancelled.

The arguments made by Lopez are almost identical to those made by Mr. Stewart in challenging his personal guarantee. The following evidence established that Lopez personally guaranteed payment of those premiums if Apex did not pay:

> Stone testified that Lopez promised if Apex could not pay the premiums he would pay them out of his own checkbook and that Farr & Stone relied on Lopez's promise in not cancelling the insurance policies. Michael Poland and Carolyn Lopez testified that Lopez said he would personally take care of the premiums. Lopez testified that he said Apex would try to make the payments.
>
> *Farr & Stone*, 61 Cal.App.3d at 621

Next, Lopez, just as Mr. Stewart did in the present case, denied that he made such a promise, but the California appellate court summarily dismissed that contention:

> Lopez contends this evidence fails to support the finding that he promised Farr & Stone he would pay the insurance premium obligation of Apex. ***In making this contention Lopez ignores a cardinal rule of appellate review: the appellate court will not reweigh conflicting evidence before the trier of fact.*** Whatever other witnesses might have testified, Lawrence Stone testified that Lopez promised to pay Apex's premiums out of his own checkbook. ***That testimony is not inherently improbable or unworthy of belief and therefore constitutes substantial evidence to support the trial court's finding.*** (*Protopappas v. Protopappas*, 213 Cal.App.2d 659, 664, 28 Cal.Rptr. 884.)
>
> *Farr & Stone*, 61 Cal.App.3d at 621.

The similarities to the case at bar continue as Lopez, just as Mr. Stewart did in the present case, argued that the California Statute of Frauds barred enforcement of his personal guarantee. The promisee, just as Ms. Griffith does in the present case, argued that his personal guarantee was covered under an exception to the requirement of a writing under the statute of frauds:

> Lopez contends the statute of frauds bars enforcement of his oral promise. ***Farr & Stone relies on an exception to the statute in Civil Code section 2794: 'A promise to answer for***

the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: . . . (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person. . . .'

Farr & Stone, 61 Cal.App.3d at 621.

Next, Lopez claimed, just as Mr. Stewart argued initially in the present case, that the statute of frauds exception did not apply because Lopez did not personally receive any direct pecuniary benefit. (At least in the present case, as cited in the next section of this brief, Mr. Stewart admitted during his trial testimony that he in fact did receive substantial personal benefit from the use of the funds loaned by Ms. Griffith after the original repayment deadline expired).

> Lopez argues this exception does not apply because there was no consideration beneficial to him in this case because he received nothing of immediate and direct pecuniary benefit. (See *Michael Distributing Co. v. Tobin*, 225 Cal.App.2d 655, 665, 37 Cal.Rptr. 518.)

Farr & Stone, 61 Cal.App.3d at 621.

Finally on the statute of repose issue, the California Court of Appeals held that the statute of repose exception applied, and the absence of a writing did not bar the enforcement of Lopez's personal guarantee. The Court held that Farr & Stone, like Ms. Griffith, suffered harm in consideration by foregoing benefits in reliance on the personal guarantee:

> ***The statute of frauds does not apply. The forbearance of Farr & Stone to cancel Apex's insurance policies was a detriment to Farr & Stone,*** which passed up the opportunity to obtain rebates on prepaid *622 premiums; and a benefit to Lopez's children, who had a promised ownership interest in Apex. Lopez, of course, had a direct and personal concern in the welfare of his children and their economic venture.

Farr & Stone, 61 Cal.App.3d at 621-22.

C. MS. GRIFFITH'S CLAIM IS NOT BARRED BY SOUTH CAROLINA'S THREE-YEAR STATUTE OF LIMITATIONS:

Counsel for Mr. Stewart did not include any arguments as to the statute of limitations in his Supplemental Trial Brief. Mr. Stewart clearly testified at trial that his final interest payment

made to Ms. Griffith was by check written on November 5, 2013. He further testified that he requested that she not deposit that check until January, 2014. When she did so, the check bounced. Ms. Griffith then brought the instant lawsuit on October 27, 2016, within three years of the last payment presented by Mr. Stewart.

D. NONE OF THE MONEY IN ISL'S BANK ACCOUNT WAS EARMARKED OR ALLOCATED BASED ON ITS SOURCE

Mr. Stewart made the implicit argument that because much of the funds loaned by Ms. Stewart were spent prior to the deadline for repayment under the Promissory Note, and that somehow justified the default by ISL and Mr. Stewart's refusal to carry out his personal guarantee. Of course, there is absolutely no evidence or testimony that there was any "earmarking" or other method of allocating money from any particular source within the bank account of ISL Development.

Moreover, "unlike real or personal property, money is fungible." United States v. Sperry Corp., 493 U.S. 52, 62 fn 9, (1989). The check and deposit records in the trial exhibits indicate that money was routinely added and deducted by deposits and checks out of ISL's accounts without regard to the source of those funds. *See* Trial Exhibit 5.

Just as Mr. Stewart paid himself salary draws regardless of the source of the funds within ISL's bank account, ISL would have been liable to repay the loan with whatever funds were on deposit in its bank account on March 31, 2013. But Mr. Stewart made no such repayment from ISL to Ms. Griffith on that date, because he acknowledged, agreed, and ratified that Ms. Griffith was extending the deadline for payment in exchange for his personal guarantee of repayment to her.

III. SPECIFIC TRIAL REFERENCES SUPPORTING PLAINTIFF'S CLAIMS

A. JANUARY 16, 2013 LOAN MODIFICATION EMAILS AND FOLLOWING CONFIRMATION EMAILS OF JANUARY 30, 2013

The following excerpts of the trial evidence are intended to provide the Court a reference in support of the offer, acceptance, and consideration in connection with the loan modification and personal guarantee:

Ms. Griffith indicated that she is willing to allow Mr. Stewart and Mr. Salis to continue to use her $200,000 to further their ISL Development, LLC project in Wittier, California, but her financial position requires her to limit her risk, and she will need a personal guarantee that her loan will be repaid:

> **On Jan 16, 2013, at 5:17 AM, amanda griffith wrote:**
>
> **. . . . All that aside, I was willing to take these risks because you were also taking them and I felt that my risk was linked to yours and that you would take good care of yourself and, by extension, me. With the new changes in the agreement, this appears less so. I am not a greedy person. My goals are not to lose my capitol and to make a little money. I don't see how this proposal addresses that.**
>
> ***I am happy to lend the $ 200,000 to you if you will personally guarantee the loan.***
>
> **I think the project is great and I know you will be successful and I wish you the best, Amanda**
>
> Trial Exhibit, Tab 3, at page bates stamped "Amanda Griffith 122" (Emphasis added).

Mr. Stewart accepted that proposal, and said that

> **I can certainly appreciate your concerns and I respect your decision. *Of course I will personally guarantee the $200,000.00 and I appreciate your help and consideration.***
> **When we have talked about your investment in our projects, we both had assumed that only a part of the money would come from borrowed funds. I can see what a problem this could create for you.**
> * * *
> ***As I have said, I respect your decision regarding the Whittier Project and will personally guarantee the $200,000.00 note for funds already advanced by you.*** **I would like you to still consider the opportunity to invest in future projects as we discussed when we met in Folly Beach.**
> * * *
> **Thank you for all of your assistance thus far and your consideration,**
> **Steve**
>
> Trial Exhibit 3 (Tab 3) at page "Amanda Griffith 123." (Emphasis added).

Ms. Griffith confirmed Mr. Stewart's acceptance of her modified loan terms:

> **On Jan 30, 2013, at 3:12 PM, amanda griffith <grif802@bellsouth.net>wrote:**

I am so sorry. You did send me this email but since I am accustomed to seeing the text before not after the string, I did not read to the end.

I appreciate you responding to me so quickly and *<u>I appreciate your guaranteeing the loan of $200,000</u>*.

Trial Exhibit 3 (Tab 3) at page "Amanda Griffith 124." (Emphasis added).

Mr. Stewart then acknowledged Ms. Griffith's confirmation of his acceptance of the loan modification, including his obligation to personally guarantee the repayment of her loan. Note that this email was two weeks after the original January 16, 2013 exchange of emails regarding the loan modification, and in her January 30, 2013 email above, Ms. Griffith specifically reminds him that the agreement included his personal guarantee. In his response email below, he did not make any effort to retract, recant, or rescind any of his previous emails accepting those terms:

On Wednesday, January 30, 2013 6:35 PM, sstewart@isldevelopment.com <sstewart@isl development.com > wrote:

***<u>Thanks for your response</u>*. I did mail the check today. I will call you when I arrive in Charleston**

Steve

Trial Exhibit 3 (Tab 3) at page "Amanda Griffith 124." (Emphasis added).

B. <u>EVIDENCE THAT MR. STEWART DOES NOT DENY EXISTENCE OF PERSONAL GUARANTEE OBLIGATION:</u>

Interestingly, while Mr. Stewart denies that he has an obligation to repay Ms. Griffith out of his personal funds, he does not deny that he actually obligated himself to make that personal guarantee to Ms. Griffith. For example, the trial evidence contains a letter by Mr. Stewart dated September 15, 2016, in which he wrote:

> . . . . . At no time did I or anyone else offer to guaranty that debt. To the contrary, I had multiple visits with Ms. Griffith prior to her making the loan and spent literally hours speaking with her about the project and the risks involved in making a loan to fund a speculative land development. The interest rate on the loan (12%) was intentionally set far above market rates to reflect that risk and Ms. Griffith accepted the higher returns in light of that known risk. . . . .

Trial Exhibit 8

During his trial testimony on August 29, 2018, however, Mr. Stewart admitted that that he no longer believed that was true. "At the time I wrote this, I had not—I did not have and did not recall the e-mail that is kind of the subject of this and so I'm very sorry about that." Trial Transcript, page 100, lines 3-6.

At another point during his trial testimony, Mr. Stewart acknowledges that the repayment obligation had been modified as follows from the Trial Transcript, starting at page 83, line 11:

> **Q. So you would have been perfectly happy to have paid back this loan on March 31, 2012 [sic 2013]?**
> **A. Had I been able to pay that loan back in March 31st, and that's what we were contractually obligated to do, I would have done it.**

This answer is an acknowledgment of this January 16, 2013 loan modification: he did have funds available in ISL to "pay that loan back" in full or in part on March 31, 2013, but he did not, because ISL was no longer "contractually obligated" to pay back this loan on March 31, 2013.

According to his trial testimony, not once during the period from January 16, 2013 until the date he bounced Ms. Griffith's interest payment check in January, 2014 did Mr. Stewart tell Ms. Griffith that, contrary to his representation in his email accepting her terms on January 16, 2013, that he did not intend to personally guarantee the repayment of her $200,000 under the terms of the note. Trial Transcript at page 90, pp. 4-9.

C. EVIDENCE OF ISL FUNDS AVAILABLE ON MARCH 31, 2013, AND THE HARM SUFFERED BY MS. GRIFFITH FROM EXTENSION OF REPAYMENT TERMS:

The evidence establishes that on March 31, 2013 Mr. Stewart did, in fact, have funds available in ISL to repay at least a substantial part of the $200,000 owed to Ms. Griffith. Trial Exhibit 5 (Tab 5) at page "ISL 0251" is a handwritten check ledger from the ISL checking account dated March 25, 2013. Mr. Stewart testified that this ledger was written by him personally. As of

March 25, 2013, that exhibit shows a balance in the ISL account of $63,942.60. There were no checks written between that date and March 31, 2013.

On April 1, 2013, instead of paying that amount back to Ms. Griffith as the original terms of the promissory note required, Mr. Stewart made no payment to Ms. Griffith at all. In fact, ISL check number 1074 on that date was written by Mr. Stewart to himself for a "salary draw" in the amount of $15,000. The balance was thereby reduced to $48,942.60.

There is additional evidence that funds continued to flow into the ISL account after April 1, 2013, which would have also been available to repay the debt to Ms. Griffith. Mr. Stewart testified that, among other things, ISL received a refund of escrow money once it was no longer pursuing an option for the property in Wittier: "I don't have the document in front of me but it was -- I know that we got a $30,000 -- we extended our first option for $30,000 and we ultimately got back a refund of the escrow amount of about -- right at $100,000, just shy of that." Trial Transcript, page 67, lines 5-9.

In the Trial Transcript, page 53, lines 23-25 and page 54, lines 1-6, Ms. Griffith testified that because this $200,000 loan was never repaid by ISL, and because it was never repaid by Mr. Stewart in violation of his personal guarantee obligation, she was required to sell real estate assets, which is consistent with her statements in the January 16, 2013 email indicating that her financial position required her to receive a personal guarantee in order to allow Mr. Stewart to continue to use her $200,000 beyond the original due date of March 31, 2013.

D. EVIDENCE OF "SUBSTANTIAL PERSONAL BENEFIT" THAT MR. STEWART RECEIVED BY NOT HAVING TO REPAY ISL'S NOTE ON MARCH 31, 2013:

It was not until May 1, 2013 that any check was written to Ms. Griffith, and that was not a check for the balance of the account. Instead, check number 1075 was written to Ms. Griffith in

the amount of $2,000, representing an interest payment pursuant to the modified loan agreement. Of course, Mr. Stewart also wrote check number 1077 to himself for another "salary draw" in the amount of $15,000.

Despite the fact that the final payment on the Promissory Note to his wife's "Henderson Family Trust" was not due until more than four years later on October 31, 2017, Mr. Stewart made an interest payment of $13,500 to that Trust with check number 1070 on June 1, 2013. That, of course, was followed by check 1080 payable to himself for another $15,000 "salary draw" on that same day. Eight days later on June 10, 2013 Mr. Stewart made check 1081 payable to Ms. Stewart for another $2,000 interest payment.

Indeed, Mr. Stewart admitted in his trial testimony that he derived substantial personal benefit from not having to repay Ms. Stewart on March 31, 2013. *See, e.g.*, Trial Transcript at page 105, lines 7-10; and at page 101, lines 3 - 19.

E. EVIDENCE THAT MR. STEWART FULLY UNDERSTOOD THE CONCEPT OF A PERSONAL GUARANTEE, DESPITE HIS EFFORTS TO OBFUSCATE DURING TRIAL:

The overwhelming weight of the evidence presented at trial establishes that Mr. Stewart did in fact accept the obligation of a personal guaranty in exchange for Ms. Griffith's extension of the payment date for her $200,000 promissory note. He clearly had no intention of repaying that note in full, or even in part, to Ms. Griffith on March 31, 2013, which is entirely consistent with the agreement that he reached with Ms. Griffith as evidenced by the exchange of emails on January 16, 2013. Trial Exhibit 3 (Tab 3) at pp. 122.

Of course, Mr. Stewart even admitted that he understood the concept of a personal guarantee. In response to the question of whether he knew what personal guarantee meant from his nearly forty-year business career, he responded: "Yeah, I knew what [a] personal guarantee looks like, I've seen it in writing." Trial Transcript, page 87, lines 2-3. Further, when asked what

he meant by the phrase "guarantee the debt" in his letter, Trial Exhibit 8, Mr. Stewart responded, "I guess I mean personally pay it back." Trial Transcript, page 100, line 24.

Although Mr. Stewart denied having ever signed a personal guarantee agreement of any type in his nearly forty years in business, Trial Transcript, page 96, lines 17-19; page 97, lines 14-17, he later admitted that .

Mr. Stewart attempted to somehow rationalize his failure to honor his personal guarantee obligation by stating at various points that it was a "moral obligation" Trial Transcript at page 85, lines 14 – 25; page 86, lines 1 – 22; and that it would have been "ethically the right thing to do" page 96, lines 8-9, but that he nonetheless did not have an "absolute obligation" to pay out of his pocket, page 96, lines 12-13.

Despite his acknowledgment that he did send the email dated January 16, 2013 indicating that he would personally guarantee the repayment of the $200,000, he later justified his failure to repay Ms. Griffith by stating that "I never signed a document saying that I would personally guarantee it." Trial Transcript, page 95, lines 22-23.

Moreover, in light of his denial of ever signing a personal guarantee, Mr. Stewart admitted that he would have personally repaid money to the bank if ISL owed money for fees or other debt but had no money in the ISL account:

> **Q.** **Who would have paid it off if there was no money in the account and/or is there --**
>
> **A.** **If there was money owing either Adam would have paid it or I would have paid it.**
>
> **Q.** **Out of your pockets?**
>
> **A.** **And I don't have a recollection of doing it so I don't know.**
>
> **Q.** **That's something you would have been prepared to do?**
>
> **A.** **I would have been prepared to pay it?**
>
> **Q.** **You would have been prepared to pay the out of your pocket to the bank?**
>
> **A.** **If I needed to pay it, I would have found some way to pay it.**
>
> **Q.** **Okay.**

A. Because it wasn't a huge amount. If it was $100,000 or something, I wouldn't have done that.

Trial Transcript, page 93, line 19 through page 94, line 7.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff Amanda Griffith submits that the evidence presented at trial, when viewed in the context of the law of the State of California as to substantive issues and the State of South Carolina as to procedural issues such as Statute of Limitations, establishes that the Defendant Steven L. Stewart is liable to the Plaintiff for the repayment of the principal and interest of the amount loaned by Plaintiff, along with reasonable attorney fees, all in an amount to be determined by the Court as trier of fact.

Respectfully submitted,

POPE FLYNN, LLC

R. Patrick Flynn

R. Patrick Flynn
Michael W. Allen, Jr.
P.O. Box 70
Charleston, SC 29402
(843) 834-3426
pflynn@popeflynn.com
mallen@popeflynn.com
Attorneys for Plaintiff Amanda Griffith

Charleston, South Carolina

September 14, 2018

Exhibit to

Plaintiff's Supplemental Trial Brief,

Rough Draft Transcript,

Not included by stipulation of counsel.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
	)	
PLAINTIFF,	)	
	)	**REPLY TO PLAINTIFF'S**
vs.	)	**SUPPLEMENTAL TRIAL BRIEF**
	)	
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)	
	)	
DEFENDANTS.	)	

FILED
2018 SEP 26 AM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY SB

Putting aside the gratuitous, totally unsupported arguments made by Plaintiff in her Supplemental Trial Brief, the issues she raises are these:

1. That Plaintiff provided "valid consideration" in exchange for Steven Stewart's personal guarantee, as confirmed in the California Supreme Court case of *Steiner vs Thexton 48 Cal. 4th 411, 106 Ca. Rptr. 3d 252, 226 P.3d 356 (2010)*

2. California Civil Code Section 2794 does not require a promise to answer for the debt of another to be in writing, where it is upon a consideration beneficial to the promisor.

3. Plaintiff's claim is not barred by the South Carolina three-year statute of limitations.

4. Because the funds in ISL's bank account were not earmarked, the fact that the $200,000.00 loaned by Plaintiff was expended by ISL, as contracted, shortly after the loan was made, is of no matter.

5. The trial evidence supports Plaintiff's position.

Plaintiff's Supplemental Trial Brief was filed responsively to Defendant's Supplemental Trial Brief, so that the arguments made by Defendants in that Brief will not be repeated. Rather, they are incorporated herein.

I. DISCUSSION

1. The California case of *Steiner vs Thexton, 48 Cal. 4th 411, 106 Ca. Rptr. 3d 252, 226 P 3d 356 (Supreme Court of California, 2010)*

Contrary to Plaintiff's argument, the *Steiner* case supports Steven Stewart's position that no good consideration was exchanged for his gratuitous promise to guarantee the note. Although Plaintiff argues otherwise, she fails to acknowledge or to compare the many immensely different facts between *Steiner*, and the instant case.

In the California case, Steiner as purchaser, and Thexton as seller entered into a contract for the purchase and sale of land. A condition of the purchase was that the property be "entitled" at the buyer's expense. That is, Steiner was obligated at his expense to obtain an approved "parcel split" by the appropriate governmental authorities of Thexton's property, whereby Steiner would purchase 10 of the 12 acres owned by Thexton. Thexton had earlier rejected an offer to buy that was contingent on Thexton, the seller, incurring the expense of accomplishing the parcel split.

Although the contract included a $1,000.00 earnest money deposit, it also provided that Steiner, the buyer, could avoid performance and be reimbursed the earnest money, for any reason. Because Steiner could terminate the contract at will, the California Courts construed the agreement as an option.

After the contract was signed, Steiner dutifully performed 75% - 90% of the work necessary to obtain the parcel split, a process that was both time-consuming and costly. Steiner spent approximately $60,000.00. However, before the deadline for performance under the contract Thexton, the seller, terminated the agreement. Steiner sued for a specific performance.

The trial court and the California Court of Appeals held that the contract was not enforceable because it was an "illusory" agreement, unsupported by consideration.

The California Supreme Court reversed the Court of Appeals.

As cited in Stewart's Supplemental Trial Brief, the Court held that there are two requirements in order to find consideration. The promisee must confer (or agree to confer) a benefit or must suffer (or agree to suffer) a prejudice. The trial court held, "for it is not enough, however, to confer a benefit or suffer prejudice for there to be consideration...the second requirement is that the benefit or prejudice must actually be bargained for as the exchange for the promise. Put another way, the benefit or prejudice must have induced the promisor's promise." (48 Cal 4th at 421).

The California Supreme Court acknowledged that at the time it was made, Steiner's promise to buy was illusory because he could avoid performance for any reason. However, because Steiner took significant steps and encouraged significant expense to obtain the bargained-for entitlement, the illusory nature of the promise was cured. Thus, the Court concluded, both elements of consideration were present: First, the effort to obtain the parcel split clearly conferred a benefit on Thexton and constituted prejudice suffered by Steiner. Secondly, the promise to pursue the split was plainly bargained for, and induced Thexton to grant the option. Accordingly, Steiner's part performance cured the illusory nature of their agreement.

In *Steiner*, therefore, there was present the requisite exchange of promises. Whereas Steiner's promise was illusory when it was made, the illusory nature of it was cured by Steiner's substantial partial performance.

Importantly, the exchange of promises in *Steiner* – the terms of their agreement – were clear, palpable, and provable. The terms were written. Here, the facts are substantially dissimilar. Amanda Griffith's promise was "I am happy to loan the $200,000.00 to you, if you will personally guarantee the loan." Steven Stewart's promise was, "Of course, I will personally guarantee the

$200,000.00…note for funds already advanced by you." (Exhibit 3 at bates page 122). Amanda Griffith's promise was illusory and remains so, even today. Her argument, however, is that like Mr. Steiner in the California case, her part performance of an alleged agreement to extend the term of the note cures its illusory nature. The problem with that argument is that the evidence to support it is woefully inadequate. Part 5 of this Brief discusses the trial evidence.

2. The California Statute Of Frauds, California Civil Code Sections 1624 And 2794

In California Civil Code Section 1624 (a) (2), "A special promise to answer for the debt, default of miscarriage of another…is invalid unless it is in writing, except in the cases provided for in Section 2794".

Section 2794 provides: "A promise to answer for the obligation of another…is deemed an original obligation of the promisor, and need not be in writing:…(4) where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person."

The Statute of Frauds issue does little more than turn the central point of this case on its head. The central issue remains whether there was "good consideration" for Steven Stewart's promise to personally guarantee the promissory note. The burden of proof of that proposition is on the Plaintiff, which she fails to meet.

3. The South Carolina Three-Year Statute Of Limitations

Even assuming Steve Stewart's promise was exchanged for Amanda Griffith's agreement to extend the term of the note, it was her testimony when asked how long did she intend for that loan to continue: "until they repaid me". (Transcript 27: 19)

An open promissory note without a due date is deemed to be a demand note. The statute of limitations runs on a demand note as of its time of execution. *Coleman vs. Page's Estate, 202*

SC 486, 25 SE 2d 559 (1943). Because Amanda Griffith contends she agreed to extend the note beyond its March 31, 2013 due date, it became a demand note as of April 1, 2013 and the statute of limitations began to run on that date.

Because suit was not filed in this case until October 27, 2016, more than three years following April 1, 2013, Plaintiff's claim is barred by the statute of limitations. Notwithstanding the payments of interest after April 1, 2013, there was no evidence offered that ISL or Stewart agreed to waive a statute of limitations defense, or that the parties contracted for one. Plaintiff has cited no cases to support her argument that somehow the statute of limitations is tolled on a demand note because interest payments are made.

4. Plaintiff's "Funds Earmarking" Argument

Plaintiff's "earmarking" argument is undoubtedly responsive to Steven Stewart's argument in his Supplemental Trial Brief that the $200,000.00 loaned by Amanda Griffith was substantially expended by early February of 2013.

The point of Stewart's argument is this: Plaintiff knew and agreed when she made the $200,000.00 loan on December 27, 2012, that the proceeds would be used to pay past invoices, and as well to pay Stewart's draw. (TR 51:14). Therefore, two points must be made. First, Amanda Griffith knew and agreed that Stewart would be paid, personally, from the proceeds she was loaning to ISL. That was a part of the original bargain; and Plaintiff's attempt to spin it as somehow sinister borders on disingenuous. Secondly, on the date of the critical e-mail exchange, January 16, 2013, Amanda Griffith knew that ISL was unable to repay her loan. (TR 52:5)

The reason, therefore, that ISL did not pay the note on March 31 was not because there was an agreement to extend the term of the note; rather, it was because ISL did not have the funds to

pay it. Plaintiff knew that fact, and there was no benefit flowing to Steve Stewart, nor a detriment to the Plaintiff for that matter, at the time Stewart agreed to personally guarantee the note.

3. The Trial Evidence

The physical exhibits in this case consists of a large trial evidence notebook with 21 different exhibits, many of the exhibits containing numerous e-mails, bank statements, and other documents. The testimony and the arguments in the case consume 137 pages of draft transcript.

From a review of the entire universe of that evidence, there is not a single document that states, and not once did either Amanda Griffith or Steven Stewart testify, that at the time of the transaction in issue one word was spoken about an extension of the note. Moreover, there was no earlier or later communication about an extension of the note, or that the promise to personally guarantee the note was given in exchange for an extension of its term. The words are simply not in the record of this trial, and because Plaintiff carries the burden of proof, she cannot prevail on the issue.

Instead Steve Stewart, who was obviously embarrassed during his testimony by the fact that ISL was unable to pay Amanda, acted with a well-intentioned animus, believing that ISL could ultimately flip the property or acquire an equity partner, meaning that Amanda would be repaid, as would be his wife's family trust, as well.

Plaintiff's Supplemental Trial Brief at pages 9-15 purports to review the trial evidence to prove that there was the requisite exchange of promises between Amanda and Steve that formed an agreement between them for good consideration. It is noteworthy that Amanda does not cite to one instance where she and Steve discussed an extension of the due date of the note. To the contrary she testified only that they had "discussed" a personal guarantee. She testified, "We had talked about this all along, that he was and that he personally would cover my expenses" (25:3).

However, and importantly, there was no testimony that they "discussed" extending the term of the note, much less that there was the required exchange of promises.

This testimony invokes the holding in the *Steiner* case: "It is not enough, however, to confer a benefit or suffer prejudice for there to be consideration... the second requirement is that the benefit or prejudice must actually be bargained for as the exchange for the promise. Put another way, the benefit or prejudice must have induced the promisor's promise." (48 Cal 4th at 421) (emphasis added.)

The only "inducement" to Steve Stewart's promise of personal guarantee was his sense of moral obligation to Amanda. That is not sufficient, however, to constitute "good consideration".

To the contrary, Steve testified:

> Q: In return for your statement in here "Of course I will personally guarantee the $200,000.00", did you receive any benefit?
>
> A: None was offered, and I received none". (TR 114:19)

CONCLUSION

The investment made by Amanda Griffith, as well as the investment made by Henderson Family Trust, was high risk. That fact is confirmed by the high rate of return, 12%. Sadly for both Amanda Griffith and the Henderson Family Trust the investments were not successful ones, and both of them lost their investments at the end of the day.

The fact of the matter remains, however, that Steve Stewart's promise to Amanda Griffith flowed only from a sense of moral duty, but not from a legal one. It is therefore unenforceable.

Respectfully submitted,

Barr, Unger & McIntosh

By: [signature]
Capers G. Barr, III
P.O. Box 1037
Charleston, SC 29402
(843) 577-5083
(843) 723-9039 (Facsimile)
cgb@barrungermcintosh.com
ATTORNEY FOR DEFENDANT
ISL DEVELOPMENT, LLC AND
STEVE STEWART, INDIVIDUALLY

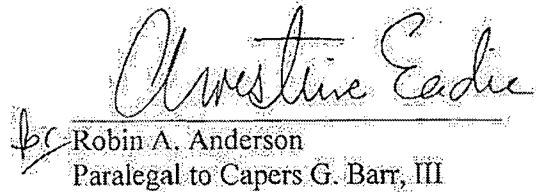
September 24, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
	)	
PLAINTIFF,	)	**CERTIFICATE OF SERVICE**
	)	
vs.	)	
	)	
ISL DEVELOPMENT, LLC, and STEVE STEWART, INDIVIDUALLY,	)	
	)	
DEFENDANTS.	)	

FILED
2018 SEP 26 AM 11:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY ____ SO

I hereby certify that I have served a copy of the foregoing Reply to Plaintiff's Supplemental Trial Brief of ISL Development, LLC, and Steven Stewart, Individually to the Plaintiff's by electronic mail and U.S. Mail, to the following addresses:

R. Patrick Flynn, Esq
Michael W. Allen Jr. Esq.
POPE FLYNN, LLC
PO Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com



for Robin A. Anderson
Paralegal to Capers G. Barr, III

Charleston, South Carolina
September 25, 2018

BARR, UNGER & MCINTOSH LLC

ATTORNEYS AT LAW

Capers G. Barr, III
Direct Dial: 843-377-1227
Email: cgb@barrungermcintosh.com

September 25, 2018

Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

RE: ***Stewart, Steven, et. al. adv. Amanda Griffith***
Case No: 2016-CP-10-5773
Our File No: 2016-1248

Dear Ms. Armstrong:

Enclosed for filing is the Defendants' Reply Brief to Plaintiff's Supplemental Trial Brief in the above case.

Please return copies clocked as filed in the return envelope.

With best regards,

Sincerely,

Capers G. Barr, III

CGBIII/raa
Enclosures (as stated)
cc: The Honorable Jennifer B. McCoy (w/enclosures)
Steven Stewart (w/enclosures)
Adam R. Salis (w/enclosures)
R. Patrick Flynn, Esq. (w/enclosures)
Michael W. Allen, Jr., Esq. (w/enclosures)

11 Broad Street P.O. Box 1037 Charleston, SC 29402
Telephone 843-577-5083 Fax 843-723-9039

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	Case No. 2016-CP-10-5773
	)	
AMANDA GRIFFITH,	)	
	)	**PLAINTIFF'S BRIEF**
Plaintiff,	)	**IN SUPPORT OF DAMAGES AWARD**
v.	)	
	)	**AND IN OPPOSITION TO**
ISL DEVELOPMENT, LLC AND	)	**DEFENDANTS' MOTION TO ALTER,**
STEVEN STEWART,	)	**AMEND, OR RECONSIDER ORDER**
INDIVIDUALLY,	)	
	)	
Defendants.	)	
	)	

The Plaintiff, Amanda Griffith, hereby provides her Brief in Support of Damages Award and in Opposition to Defendants' Motion to Alter, Amend or Reconsider the Order dated December 12, 2018 as follows.

This matter was tried on August 29, 2018, at which time the Honorable Jennifer McCoy directed that a separate hearing would be conducted in order to determine damages to be awarded following a decision on liability. The following Brief by Plaintiff incorporates by reference the Order of the trial court dated December 12, 2018 (the "Order") which made findings of fact and conclusions of law regarding the Defendants' liability. Further, this Brief incorporates by reference the information presented in Plaintiff's original and supplemental trial briefs previously submitted to the Court in this matter, as well as the evidence submitted at trial.

I. DAMAGES TO BE AWARDED TO PLAINTIFF

A. Interest on the Promissory Note:

The Order in Subparagraph I.(A) provided as follows:

> "Plaintiff loaned $200,000.00 to Defendant ISL Development, LLC, which was deposited into the ISL bank account on December 28, 2012. ISL executed a Promissory Note on

December 27, 2012 (the "Note"), which provided that "[i]nterest only shall be payable monthly in arrears as follows: (a) February 1, 2013 and continuing on the first (1st) day of each calendar month thereafter until the Maturity Date, Maker shall make monthly interest-only payments based on a rate of twelve percent (12%) per annum. (b) If not sooner paid, the entire outstanding principal balance of this Note, together with accrued and unpaid interest and any other amounts due under this Note shall be due and payable on March 31, 2013 (the 'Maturity Date')."

See Order attached as Exhibit "A" and Promissory Note attached as Exhibit "B".

The Order in Subparagraph I. (D) provided as follows:

Defendant ISL paid interest to Plaintiff in the amount of $2,000.00 per month for February, March, April, May, June, July, and August of 2013, although those checks were paid sporadically with some payments made in arrears. The total monthly interest payments made by ISL to Plaintiff pursuant to the Note amounted to $14,000.00.

See Order attached as Exhibit "A"

Accordingly, the Plaintiff is entitled to the following measures of damages relating to interest on the Note:

1. That the Defendant Stewart is liable to the Plaintiff in the amount of $200,000.00 representing the principal balance of the Promissory Note executed by Defendant ISL on December 27, 2012 which Defendant Stewart personally guaranteed.

2. That the Defendant Stewart is liable to the Plaintiff in the amount of $130,000.00, representing the interest owed on the Promissory Note which Defendant Stewart personally guaranteed, which interest is calculated at 12% per annum commencing on September 1, 2013, as the evidence established that the check representing the monthly payment for September 2013 through November 2013 was return for Non-Sufficient Funds, and no further interest payments were made after that time. This $130,000.00 interest reflects credit for monthly interest payments made by ISL from February through August, 2013 as reflected by the evidence at trial. There are a total of 65 months of accrued interest between September, 2013 and January, 2019. Sixty-Five

months at the rate of $2,000.00 per month equals $130,000.00 in total accrued interest to which Plaintiff is entitled.

B. Attorney Fees:

The uncontroverted evidence at trial, see Trial Transcript attached as Exhibit "C" at pp. 32-33, established that the Plaintiff agreed to pay to her attorney a contingency fee of One-Third (1/3) of the amount to which she is entitled in this lawsuit. There was substantial evidence to support this contingency fee including consideration of the following factors:

(1) The amount of the fee in proportion to the value of the services performed.
(2) The novelty and difficulty of the questions involved and the skill necessary to perform the legal services properly.
(3) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the attorney performing the services.
(8) The time and labor required.
(9) The informed consent of the client to the fee. *See, e.g., Fergus v. Songer*, 150 Cal.App.4th 552, 561, 59 Cal.Rptr.3d 273, 281 (Court of Appeal, Second District, Div. 6, Cal. 2007).

This award of attorney fees is further supported by viewing the evidence at trial in accordance with the requirements of Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.5, which provides that:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall be communicated to the client, preferably in writing.

There was substantial evidence at trial to support this 1/3 contingency fee agreed by Plaintiff in her trial testimony based upon this Court's evaluation of the foregoing factors in Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.5. This measure of attorney fees is proper under the standards of South Carolina and California rules, law, and legal precedent.

Accordingly, the Plaintiff is entitled to the following measure of attorney's fees in addition to items (1) principal on the Promissory Note and (2) interest on the Promissory Note:

3. That the Defendant Stewart is liable to the Plaintiff in the amount of $110,000.00, which represents reasonable attorney's fees associated with the Plaintiff's efforts to collect this debt, calculated as One-Third of the $330,000 which includes principal and interest on the Promissory Note reflected in items (1) and (2) above.

Note that this contingency fee in the amount of $110,000 is reasonable in light of the actual amount of attorney fees and expenses which were documented in the time records of Plaintiff's counsel. Exhibit "D" is a summary of time and expenses recorded by Plaintiff's counsel throughout the course of this litigation, and includes detailed time entries and details of expenses associated with the litigation. The total amount of legal fees and expenses on Exhibit "D" is $68,160.54.

Plaintiff agreed at trial that her agreement with the undersigned counsel in connection with this collections matter was that counsel would receive one-third of any amounts she collected. See Trial Transcript, Exhibit "C" at pp. 32-33. It is the undersigned's general practice to record time

entries and legal expenses associated with cases, regardless of whether the compensation for those cases is hourly or based upon a contingency fee.

The fact that the records reflected in Exhibit "D" do not, therefore, modify the agreement between Plaintiff and her counsel, as noted in Plaintiff's aforementioned trial testimony, but instead the information in the time and expenses record reflects that a One-Third contingency fee is reasonable in light of the complexity and length of time and effort associated with this collections matter against Defendants. It should be further noted that the time and expenses will continue to accrue in the undersigned's representation of the Plaintiff in any post-trial motions or appeals that will be filed by Defendants, which further supports the reasonableness of the $110,000.00 in legal fees in the contingency fee calculated above.

Finally as to the agreement between Plaintiff and her counsel as to attorney-fees, note that Defendants attempt to challenge this basis by citing various cases and rules which govern the existence and enforceability of contingency-fee agreements as applied to this case. *See, e.g.*, *Syers Properties III v. Rankin*, 226 Cal.App.4th 691 (2014) (Court of Appeals of California, First District, Division Two). Defendants cite the *Syers* case for the proposition that the "lodestar calculus" applicable to attorney fees is essentially a reasonableness standard with factors similar to those applicable in South Carolina. *See, e.g.*, *Maybank v. BB&T*, 416 S.C. 541, 797 S.E.2d 498 (2016).

In their Memorandum dated January 24, 2019, Defendants conclude that "[t]he point to be made is that there is no authority for a court ordered award of a percentage contingency fee. Courts universally hold that the contingency fee agreement is private between lawyer and client, but it is not tantamount to a 'reasonable fee'. . . . South Carolina Law is the same. There is no authority for the court to award a contingency percentage fee as a court ordered fee. Rather the fee must be

'reasonable', and guided by the lodestar calculus." *Defendants' Memorandum* dated January 24, 2019 at pp. 2-3.

However, the Defendants acknowledge that the Courts recognize contingency-fee arrangements to be private between the client and her attorney. There is no dispute over the amount of the contingency fee in this case, as reflected in Plaintiff's trial testimony. For Defendants to attempt to inject themselves into the basis of the fee arrangement between Plaintiff and her counsel would be to claim that Defendants are somehow, perhaps, third-party beneficiaries to the attorney-client agreement between Plaintiff and her counsel. There is no case law or other supporting authority in California or South Carolina which would suggest this to be the case, and Defendants have cited to no such authority in support of their challenge to this contingency fee.

Instead, the relevance of the case law and rules cited above in this Brief are instructive as to the overall reasonableness of the amount of the contingency fee to be awarded by the Court in this matter. The time and expense details shown in Exhibit "D" establish that the $110,000.00 contingency fee is well within a reasonable range when viewed in light of the time, effort, and complexity associated with the pursuit of this collections matter by Plaintiff and her attorney. The Courts in California and South Carolina support the award of reasonable attorney fees, and there is no evidence that the contingency fee of $110,000 is beyond the confines of reasonableness or that it in any way violates any of the "lodestar calculus" or factors listed in the authorities of California or South Carolina.

C. Post-Judgment Interest:

The Plaintiff is further entitled to post-judgment interest to accrue at the rate of Nine and One-Half Percent (9.5% per annum) in accordance with S.C. Code 34-31-20(B), which provides as follows:

> (B) A money decree or judgment of a court enrolled or entered must draw interest according to law. The legal rate of interest is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points.

While it does not appear that the South Carolina Supreme Court has provided an Order formally declaring the rate of post-judgment interest based upon the Wall Street Journal's first edition of January, 2019, the undersigned submits that prime rate to be Five and One-Half Percent (5.5%). That amount plus four percentage points authorized above equals a post-judgment interest rate of Nine and One-Half Percent (9.5%) for the amounts owed by the Defendants to Plaintiff according to the Order and the damages information supplied herein.

Accordingly, in addition to items (1) through (3) listed above, the following item should be included within the order granting damages to the Plaintiff in this matter:

4. That the total judgment amount of $440,000.00 shall accrue interest at the rate of Nine and One-Half Percent (9.5% per annum) until the Judgment is satisfied in full.

II. MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER, AMEND, OR RECONSIDER THE ORDER DATED DECEMBER 12, 2018

A. Defendants' Arguments in their Motion dated January 8, 2019:

1. In their Motion, Defendants challenge the adequacy of the Order as follows:

> In order to provide an adequate basis for evaluation by the undersigned, and potentially at the appellate level, this Court should elaborate upon and enunciate the evidentiary basis for concluding as a fact that there was a "January 16, 2013 agreement" as is stated in the phrases quoted [by Defendants from the Order].

It is Plaintiff's position that, as established at trial, the January 16, 2013 emails between her and Mr. Stewart are sufficient evidence to support the loan modification and Mr. Stewart's personal guarantee obligation, and that her promise and actual extension of the Promissory Note repayment terms were sufficient consideration to support that personal guaranty obligation.

Moreover, even if Ms. Griffith's promise to extend the repayment terms of the Promissory Note was considered illusory for some reason at the time of those January 16, 2013 emails, the *Steiner v. Thexton* case, 48 Cal. 4th 411, 106 Ca. Rptr.3d 252, 226 P.3d 359 (2010), (cited by Plaintiff in its previous briefs) provides that "[P]laintiffs' part performance cured the illusory nature of [her] promise."

There is no dispute that the repayment terms of the Promissory Note were actually extended beyond the March 31, 2013 date, and Mr. Stewart admitted in his testimony that the extension of that repayment term and his use of the funds beyond March 31, 2013 were a substantial personal benefit to him. Accordingly, the consideration supporting this loan modification was Ms. Griffith's extension of that repayment date, and she actually suffered harm as a result. This personal guarantee obligation is, therefore, enforceable against Mr. Stewart.

2. In their Motion dated January 8, 2019, Defendants assert that

> Movant seeks alteration of this conclusion of law because the court cites no South Carolina or California authority to sustain the proposition that is stated. (In addition to not making adequate findings of fact as is discussed in part I of this motion.) Whether there was consideration for Steve Stewart's promise to guarantee the note is the primary legal issue in this case.

In order to respond to this point, Plaintiff's refer back to the argument asserted by Defendants in their Supplemental Trial Brief:

> "The California case of Steiner vs Thexton 48 Cal. 4th 411, 106 Ca. Rptr.3d 252, 226 P.3d 359 (2010) was a suit over an option to purchase real property. The Supreme Court of California addressed the question of good consideration in the case, after citing California Civil Code Section 1605 quoted above: "It is not enough, however, to confer a benefit or

suffer prejudice for there to be consideration... (Citation omitted). The second requirement is that the benefit or prejudice 'must actually be bargained for as the exchange for the promise'. Put another way, the benefit or promise must have induced the promisor's promise"... "The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the benefit of bargain or agreed exchange". (48 Cal. 4th at 421). Steiner was cited with approval for this same proposition in the very recent California case of Property California SCJLW One Corporation vs. Leamy, ____ Cal. Rptr 3d ____, 18 Cal. Daily Op. Serv. 7939, (August 9, 2018.)"

Defendants' Supplemental Trial Brief, September 7, 2018, at pp. 1-2.

Here is the continuation of that same paragraph in *Steiner*, and the rest of the *Steiner* opinion, which in fact supports exactly what Ms. Griffith is claiming in this lawsuit:

In sum, in determining here whether sufficient consideration rendered the option to purchase the 10–acre parcel irrevocable, we consider whether Steiner conferred or agreed to confer a benefit, or suffered or agreed to suffer prejudice that was bargained for in exchange for the option.

261 17 The lower courts concluded no such consideration supported the option. They reasoned no money was paid for the grant of the option nor did the work performed and expenses incurred by plaintiffs in pursuit of a parcel split benefit Thexton. *Citing O'Connell v. Lampe* (1929) 206 Cal. 282, 285, 274 P. 336, and *Drullinger v. Erskine* (1945) 71 Cal.App.2d 492, 495, 163 P.2d 48, the lower courts explained that the "adequacy of consideration" must be measured at the time an agreement was entered into. **The lower courts concluded that, at the time Steiner and Thexton struck their bargain, the promise to seek the parcel split was unenforceable because the escape clause gave plaintiffs the power to terminate the transaction at any time for any reason. Thus, the lower courts held, Steiner's promise was illusory and did not constitute valid consideration.** ***The courts found it immaterial that plaintiffs had begun to perform, because plaintiffs were under no actual obligation to do so. To the contrary, we conclude as a matter of law that *422 plaintiffs' part performance of the bargained-for promise to seek a parcel split created sufficient consideration to render the option irrevocable.

It is true that Steiner's promise to undertake the burden and expense of seeking a parcel split ***may have been illusory at the time the agreement was entered into***, given the language of the escape clause. ***However, there can be no dispute that plaintiffs subsequently undertook substantial steps*** toward obtaining the parcel split and incurred significant **367 expenses doing so.10 Among other things, plaintiffs paid for the required civil engineering and surveying for the parcel and spent a number of months applying to the county planning department for a tentative parcel map, proceeding with the final hearing of the parcel review committee, and obtaining approval of the tentative map. ***On this record, the only possible conclusion is that Steiner both conferred a bargained-for***

> ***benefit on Thexton and suffered bargained-for prejudice unaffected by his power to cancel, making up for the initially illusory nature of his promise.***
>
> . . . ***Accordingly, ***262 plaintiffs' part performance cured the illusory nature of their promise.***

Steiner v. Thexton, 226 P.3d 359, 366-67 (Cal. 2010) (emphasis added).

Accordingly, the evidence at trial and the applicable case law supports that Plaintiff established the elements of an enforceable agreement between Plaintiff and Stewart dated January 16, 2013, including the sufficiency of consideration which Defendants now challenge in their Motion to Alter, Amend, or Reconsider.

3. In their Motion dated January 8, 2019, Defendants assert the following challenge to the language of the Order:

> [T]he Court refers to "Plaintiff's agreement to extend the due date of the note". In section "E", the Court refers to "Plaintiff's promise to extend the repayment terms of the Note", and to Stewart's admitting "that the extension of that repayment term" was beneficial to him. . . . The Court's order does not articulate a fact basis for the conclusions stated above. To the contrary, the trial record supports an opposite conclusion. Steve Stewart's testimony was that the funds benefitted him, but he never testified that any extension of the term of the note benefitted him. See Transcript page 101, lines 13-19; page 105, lines 7-10.

According to the evidence and testimony at trial, it was not until May 1, 2013 that any check was written to Ms. Griffith, and that was not a check for the balance of the account. Instead, check number 1075 was written to Ms. Griffith in the amount of $2,000, representing an interest payment pursuant to the modified loan agreement. Of course, Mr. Stewart also wrote check number 1077 to himself for another "salary draw" in the amount of $15,000.

Despite the fact that the final payment on the Promissory Note to his wife's "Henderson Family Trust" was not due until more than four years later on October 31, 2017, Mr. Stewart made an interest payment of $13,500 to that Trust with check number 1070 on June 1, 2013. That, of

course, was followed by check 1080 payable to himself for another $15,000 "salary draw" on that same day. Eight days later on June 10, 2013 Mr. Stewart made check 1081 payable to Ms. Stewart for another $2,000 interest payment.

Indeed, Mr. Stewart admitted in his trial testimony that he derived substantial personal benefit from not having to repay Ms. Stewart on March 31, 2013. *See, e.g.*, Trial Transcript at page 105, lines 7-10; and at page 101, lines 3 - 19. The Defendants' challenge to the Court's findings in the Order regarding the substantial personal benefit derived by Stewart is overwhelmed by the weight of the evidence on point at trial, and the Court was well within its discretion to determine the facts according to the reasonable inferences from the evidence and testimony provided at trial.

4. In their Motion dated January 8, 2019, Defendants challenge the sufficiency of the Order regarding the extension of the repayment term as follows:

> [T]he Court does not in her order articulate any factual basis to conclude that Plaintiff "promised to extend the repayment terms of the note". Additionally, the Court erroneously concludes that Stewart admitted in his testimony that the extension of the repayment term was a substantial benefit to him. . . . Mr. Stewart's testimony was not that the extension benefited him, but that the loaned funds benefited him. . . . Finally, with respect to Section II E of the Court's order, the Court does not articulate a factual or evidentiary basis for concluding that Griffith "actually suffered harm as a result" of any extension of the repayment date. Clearly, Griffith suffered harm because she was not repaid. However, the issue here is whether there is consideration for any promised extension of the term. The Court does not articulate any reasoning for her conclusion that the Plaintiff suffered harm because of the extension itself.

As with the Defendants' challenge as to the evidence of substantial personal benefit derived by Stewart, the Defendants' challenge to the Court's findings in the Order regarding the harm suffered by Plaintiff due to the extension of the payment terms is overwhelmed by the weight of the evidence on point at trial, and the Court was well within its discretion to determine the facts according to the reasonable inferences from the evidence and testimony provided at trial.

The evidence establishes that on March 31, 2013 Mr. Stewart did, in fact, have funds available in ISL to repay at least a substantial part of the $200,000 owed to Ms. Griffith. Trial Exhibit 5 (Tab 5) at page "ISL 0251" is a handwritten check ledger from the ISL checking account dated March 25, 2013. Mr. Stewart testified that this ledger was written by him personally. As of March 25, 2013, that exhibit shows a balance in the ISL account of $63,942.60. There were no checks written between that date and March 31, 2013.

On April 1, 2013, instead of paying that amount back to Ms. Griffith as the original terms of the promissory note required, Mr. Stewart made no payment to Ms. Griffith at all. In fact, ISL check number 1074 on that date was written by Mr. Stewart to himself for a "salary draw" in the amount of $15,000. The balance was thereby reduced to $48,942.60.

There is additional evidence that funds continued to flow into the ISL account after April 1, 2013, which would have also been available to repay the debt to Ms. Griffith. Mr. Stewart testified that, among other things, ISL received a refund of escrow money once it was no longer pursuing an option for the property in Wittier: "I don't have the document in front of me but it was -- I know that we got a $30,000 – we extended our first option for $30,000 and we ultimately got back a refund of the escrow amount of about -- right at $100,000, just shy of that." Trial Transcript, page 67, lines 5-9.

In the Trial Transcript, page 53, lines 23-25 and page 54, lines 1-6, Ms. Griffith testified that because this $200,000 loan was never repaid by ISL, and because it was never repaid by Mr. Stewart in violation of his personal guarantee obligation, she was required to sell real estate assets, which is consistent with her statements in the January 16, 2013 email indicating that her financial position required her to receive a personal guarantee in order to allow Mr. Stewart to continue to use her $200,000 beyond the original due date of March 31, 2013.

sufficient, the undersigned will gladly comply. However, it is Plaintiff's position that the order meets the requirements of Rule 52, S.C.R.C.P. as interpreted by the South Carolina Supreme Court.

III. CONCLUSION

For the foregoing reasons, the Plaintiff Amanda Griffith submits that the evidence presented at trial, when viewed in the context of the law of the State of California as to substantive issues and the State of South Carolina as to procedural issues establishes that the Defendant Steven L. Stewart is liable to the Plaintiff for the following damages:

1. The Defendant Stewart is liable to the Plaintiff in the amount of $200,000.00 representing the principal balance of the Promissory Note executed by Defendant ISL on December 27, 2012 which Defendant Stewart personally guaranteed.

2. The Defendant Stewart is liable to the Plaintiff in the amount of $130,000.00, representing the interest owed on the Promissory Note which Defendant Stewart personally guaranteed, which interest is calculated at 12% per annum commencing on September 1, 2013, as the evidence established that the check representing the monthly payment for September 2013 through November 2013 was return for Non-Sufficient Funds, and no further interest payments were made after that time. This $130,000.00 interest reflects credit for monthly interest payments made by ISL from February through August, 2013 as reflected by the evidence at trial. There are a total of 65 months of accrued interest between September, 2013 and January, 2019. Sixty-Five months at the rate of $2,000.00 per month equals $130,000.00 in total accrued interest to which Plaintiff is entitled.

3. The Defendant Stewart is liable to the Plaintiff in the amount of $110,000.00, which represents reasonable attorney's fees associated with the Plaintiff's efforts to collect this

debt, calculated as One-Third of the $330,000 which includes principal and interest on the Promissory Note reflected in items (1) and (2) above.

4. The total judgment amount of $440,000.00 shall accrue interest at the rate of Nine and One-Half Percent (9.5% per annum) until the Judgment is satisfied in full.

Respectfully submitted,

POPE FLYNN, LLC

R. Patrick Flynn

R. Patrick Flynn
Michael W. Allen, Jr.
P.O. Box 70
Charleston, SC 29402
(843) 834-3426
pflynn@popeflynn.com
mallen@popeflynn.com
Attorneys for Plaintiff Amanda Griffith

Charleston, South Carolina

January 24, 2019

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)
	) CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)
PLAINTIFF,	) **MEMORANDUM OF DEFENDANTS:**
	) **a. Liability for Attorney Fees;**
vs.	) **b. Scope of Guarantor Liability;**
	) **c. Calculation of Interest.**
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)
DEFENDANTS.	)

This case was tried before the Court on August 29, 2018, without a jury. The Court filed its order on December 12, 2018 finding, *inter alia*, that the Defendant Steven Stewart is liable as personal guarantor of the loan made by Plaintiff to Defendant ISL Development. The Court's order further provides that a hearing on damages would be set for a later date. The damages hearing is set for Friday, January 25, 2019.

Subject to all objections, this Memorandum discusses attorney fees, the scope of guarantor's liability, and the formula for calculation of interest, which are the issues to be decided by the Court at the second phase of the trial.

a. Attorney Fees.

The terms of the promissory note provide in paragraph 6 thereof: "6. Attorney's Fees. Upon the occurrence of a default by Maker, Holder shall be entitled to reasonable attorney costs of collection, including reasonable attorney's fees." (Emphasis added.)

At hearing, and in her proposed order submitted to the Court after hearing, Plaintiff suggested that Defendants should be liable to her for attorney fees calculated in accordance with her contingency fee agreement with her attorney; that is to say, calculated as one-third of any amount recovered.

1. There is no support under the law of California or of South Carolina for a court ordered award of attorney fees to be based upon a contingency percentage.

a. California Law:

i. California Civil Code Section 1717 provides that in any action on contract where the contract provides for the award of attorney fees to the prevailing party, the entitlement is to "reasonable attorney fees in addition to other costs". (Emphasis added.) A copy of the California statute is attached as Exhibit "A".

ii. California decisions support the calculation of attorney fees under the "lodestar method", whereby reasonable fees are calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation. *Syers Properties vs. Rankin*, 226 Cal. App.4th 691. (Copy attached as Exhibit "B"). The lodestar calculation may be adjusted by the court based upon the factors discussed in *Syers*: "...whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." 226 Cal. App.4th at 460.

iii. The point to be made is that there is no authority for a court ordered award of a percentage contingency fee. Courts universally hold that the contingency fee agreement is private between lawyer and client, but it is not tantamount to a "reasonable fee".

b. South Carolina Law is the same. There is no authority for the court to award a contingency percentage fee as a court ordered fee. Rather the fee must be "reasonable", and guided by the lodestar calculus.

i. In *Maybank vs. BB&T*, 416 S.C. 541, 787 S.E.2d 498 (S.Ct. 2016) our Supreme Court affirmed a trial court award of attorney fees calculated under the lodestar

formula, and in which the Trial Court engaged in a careful analysis under the *Jackson vs. Speed* factors.

ii. In *Jackson vs. Speed*, 326 S.C.289, 486 S.E.2d 750 (S.Ct. 1997), citing *Glasscock vs. Glasscock*, 304 S.Ct. 158,403 S.E.2d 313 (S.Ct. 1991), the Supreme Court cited six factors that the trial court must consider and apply in making an award of a reasonable attorney fee: (1) the nature, extent and difficulty of the case; (2) the lawyer's time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) customary fees for similar services in the community.

c. It will be necessary at a minimum for Plaintiff's attorneys to file affidavits with time records to reflect their reasonable time necessarily devoted to the case, which is all-important to the lodestar calculus. Additionally the Plaintiff must show the reasonable hourly rate to be charged against the time expended.

b. Scope of Guarantor Liability.

As the Court recalls, this case does not involve a formal, fully integrated agreement to guarantee an underlying obligation. Rather, the evidence consisted principally of one exchange of emails, and (reserving all objections) the testimony by Plaintiff as to her conversations with Defendant and the expectations she formed based thereon, and also the circumstances of Defendant's continued payments to interest after the due date of the note.

In the circumstances the question is presented whether the evidence supports a conclusion that Steve Stewart should be liable as guarantor of payment of principal and interest only, or whether he should also be liable for the attorney fee provisions. The general rule in South Carolina is that a guaranty of payment is an obligation separate and distinct from the original

note. *Coastal States Bank vs. Hanover Homes of S.C. LLC,* 408 S.C. 510, 759 S.E.2d 152 (Ct.App. 2014).

As a "separate obligation", therefore, the guaranty agreement must either fully incorporate the note, or must itself include terms for the payment of more than principal and interest. Because there is no evidence that the terms of the note were fully incorporated into the "agreement" to guaranty, the court should conclude that the disputed agreement to guaranty was only to pay principal and interest, and not attorney fees.

c. **Calculation of Interest.**

The interest rate provided in the payment terms of the note is 12% per annum. (Note paragraph 1(a)). The default interest rate in paragraph 3 is 13.5%.

Because Plaintiff contends, and the Court has found, that there was an agreement to extend the term of the note, the "default" rate should not apply. Under Plaintiff's theory the due date was extended and the note became a demand note. In the circumstances therefore, Defendants' non-payment on the due date of March 31, 2013 was not an event of default. The original 12% rate should apply, and not the default 13.5% rate.

Respectfully submitted,

BARR, UNGER & McINTOSH, LLC

Capers G. Barr, III
SC Bar No: 00542
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (FAX)
cgb@barrungermcintosh.com
Attorney for Defendants

Charleston, South Carolina
January 24, 2019

EXHIBIT "A"

Cal Civ Code § 1717

Deering's California Codes are current through all 1016 chapters of the 2018 Regular Session and the November 6, 2018 Ballot Measures.

Deering's California Codes Annotated > CIVIL CODE > Division 3 Obligations > Part 3 Obligations Imposed by Law

§ 1717. Contract provision for attorney fees and costs

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)

(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

(c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

History

Added Stats 1968 ch 266 § 1. Amended Stats 1981 ch 888 § 1; Stats 1983 ch 1073 § 1; Stats 1986 ch 377 § 1, ch 785 § 1; *Stats 1987 ch 1080 § 1.*

Annotations

Notes

Editor's Notes—

Amendments:

Editor's Notes—

See note to § 4 for history of Stats 1901 ch 157 p 332 which added a section of this number.

Amendments:

1981 Amendment:

(1) Designated the former section to be subd (a); (2) amended the first paragraph of subd (a) by (a) substituting "the" for "such" after "contract, where"; (b) substituting "that" for "such" after "provisions of"; (c) substituting "either to one of the parties or to the prevailing party, then the party who is determined to be" for "to one of the parties,"; and (d) adding "or she" after "whether he"; (3) added the second paragraph; and (4) added subd (b).

1983 Amendment:

Added the second paragraph of subd (a).

1986 Amendment:

(1) Deleted the comma after "deposits in court" in the third paragraph; and (2) added the last paragraph. (As amended by Stats 1986, ch 785, compared to the section as it read prior to 1986. This section was also amended by an earlier chapter, ch 377. See Gov C § 9605.)

1987 Amendment:

(1) Amended the first paragraph of subd (a) by (a) deleting "the provisions of" after "that contract"; (b) substituting "party prevailing on the contract" for "prevailing party" after ", whether he"; and (c) substituting "other costs" for "costs and necessary disbursements"; (2) substituted "that" for "such" after "provision" in the second paragraph of subd (a); (3) deleted ", upon notice and motion by a party" after ", and shall be" in the third paragraph of subd (a); (4) amended subd (b)(1) by (a) substituting "party prevailing on the contract for purposes of this section" for "prevailing party" in the first sentence; (b) substituting "party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract" for "prevailing party shall be the party who is entitled to recover costs of suit" at the end of the second sentence; and (c) adding the third sentence; (5) substituted "party prevailing on the contract" for "prevailing party" in the second paragraph of subd (b)(2); and (6) added subd (c).

Notes to Decisions

EXHIBIT "B"

Positive
As of: January 24, 2019 5:51 PM Z

Syers Properties III, Inc. v. Rankin

Court of Appeal of California, First Appellate District, Division Two

May 5, 2014, Opinion Filed

A137610

Reporter

226 Cal. App. 4th 691 *; 172 Cal. Rptr. 3d 456 **; 2014 Cal. App. LEXIS 457 ***; 2014 WL 2192362

SYERS PROPERTIES III, INC., Plaintiff and Appellant, v. ANN RANKIN et al., Defendants and Respondents.

Subsequent History: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published May 27, 2014.

Decision reached on appeal by Syers Props. III v. Rankin, 2014 Cal. App. Unpub. LEXIS 3204 (Cal. App. 1st Dist., May 5, 2014)

Time for Granting or Denying Review Extended Syers Properties III, Inc. v. Rankin, 2014 Cal. LEXIS 9426 (Cal., Aug. 18, 2014)

Review denied by Syers Props. III v. Rankin, 2014 Cal. LEXIS 7590 (Cal., Sept. 10, 2014)

Prior History: Superior Court of Alameda County, No. RG10518323, George C. Hernandez, Jr., Judge.

Syers Props. III v. Rankin, 2014 Cal. App. Unpub. LEXIS 3202 (Cal. App. 1st Dist., May 5, 2014)

Core Terms

billed, attorneys, declarations, hourly rate, services, trial court, lodestar, attorney's fees, rates, market rate, prevailing, paralegal, calculation, adjusted, reasonable rate, expended, time records, fee award, spent, defendants', malpractice, preparation, cases, reasonable attorney's fees, defense counsel, actual rate, time spent, comparable, contingent

Case Summary

Procedural Posture

Pursuant to Civ. Code, § 1717, and Code Civ. Proc., § 1033.5, subd. (a)(10)(a), the Alameda County Superior Court, California, awarded attorney fees totaling $843,245.27 to defendants as prevailing parties in a legal malpractice action. Plaintiffs appealed.

Overview

The appellate court concluded that the trial court did not abuse its discretion in accepting defense counsel's computation of attorney hours as hours reasonably spent working on the case. The three attorneys primarily involved in the litigation provided declarations under penalty of perjury in support of the hours sought, which were broken down by hours expended in each category of services rendered. The lead defense attorney averred he had exercised his billing judgment to excise hours actually expended, but which he believed either exceeded the time required for the task or had other reasons to cut. The trial judge was well able to evaluate whether the time expended by counsel in this case, given its complexity and other factors, was reasonable. The judge viewed the services performed as "sophisticated" legal work and stated the hourly rate requested was not even close to the highest hourly rate that he had seen in the San Francisco Bay Area. The trial judge was in the best position to value the services rendered by the attorneys in his courtroom. In the circumstances presented here, the appellate court could not say the judge was clearly wrong.

Outcome

The order granting defendants' motion for attorney fees was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN1[] Standards of Review, Abuse of Discretion

The abuse of discretion standard governs appellate review of the trial court's determination of a reasonable attorney fee.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN2[] Attorney Fees & Expenses, Reasonable Fees

Under the lodestar method, attorney fees are calculated by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Governments > State & Territorial Governments > Legislatures

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN3[] Attorney Fees & Expenses, Reasonable Fees

The lodestar is the basic fee for comparable legal services in the community and that it may be adjusted by the court based on a number of factors in order to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The lodestar adjustment method has also been widely applied by the California Courts of Appeal under a broad range of statutes authorizing attorney fees. Indeed, the legislature appears to have endorsed the lodestar adjustment method of calculating fees, except in certain limited situations. When the legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated. Ketchum v. Moses reaffirmed the primacy of the lodestar method for all fee-shifting statutes.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Governments > Courts > Judges

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN4[] Standards of Review, Clearly Erroneous Review

Regarding the award of attorney fees to a prevailing party, the experienced trial judge is the best judge of the value of professional services rendered in his or her court, and while his or her judgment is subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5[] Attorney Fees & Expenses, Reasonable Fees

Regarding the award of attorney fees to a prevailing party, California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN6[] Attorney Fees & Expenses, Reasonable Fees

Because time records are not required under California

law with respect to an award of attorney fees to a prevailing party, there is no required level of detail that counsel must achieve.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7[] Attorney Fees & Expenses, Reasonable Fees

Regarding the award of attorney fees to a prevailing party, generally, the courts will look to equally difficult or complex types of litigation to determine which market rates to apply. The determination of the market rate is generally based on the rates prevalent in the community where the court is located. There is no requirement that the reasonable market rate mirror the actual rate billed. The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN8[] Attorney Fees & Expenses, Reasonable Fees

The reasonable hourly rate used for the lodestar calculation of attorney fees is that prevailing in the community for similar work.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Pursuant to Civ. Code, § 1717, and Code Civ. Proc., § 1033.5, subd. (a)(10)(a), the trial court awarded attorney fees totaling $843,245.27 to defendants as prevailing parties in a legal malpractice action. (Superior Court of Alameda County, No. RG10518323, George C. Hernandez, Jr., Judge.)

The Court of Appeal affirmed the order granting defendants' motion for attorney fees. The court concluded that the trial court did not abuse its discretion in accepting defense counsel's computation of attorney hours as hours reasonably spent working on the case. The three attorneys primarily involved in the litigation provided declarations under penalty of perjury in support of the hours sought, which were broken down by hours expended in each category of services rendered. The lead defense attorney averred he had exercised his billing judgment to excise hours actually expended, but which he believed either exceeded the time required for the task or had other reasons to cut. The trial judge was well able to evaluate whether the time expended by counsel in this case, given its complexity and other factors, was reasonable. The judge characterized the services performed as sophisticated legal work and stated the hourly rate requested was not even close to the highest hourly rate that he had seen in the San Francisco Bay Area. The trial judge was in the best position to value the services rendered by the attorneys in his courtroom. In the circumstances presented here, the Court of Appeal could not say the judge was clearly wrong. (Opinion by Kline, P. J., with Haerle, J., and Brick, J.,* concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Costs § 13—Attorney Fees—Calculation—Lodestar Method.

Under the lodestar method, attorney fees are calculated by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation.

CA(2)[] (2)

---

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Costs § 13—Attorney Fees—Calculation—Lodestar Method—Fair Market Value—Fee-shifting Statutes.

The lodestar is the basic fee for comparable legal services in the community and that it may be adjusted by the court based on a number of factors in order to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The lodestar adjustment method has also been widely applied by the Courts of Appeal under a broad range of statutes authorizing attorney fees. Indeed, the Legislature appears to have endorsed the lodestar adjustment method of calculating fees, except in certain limited situations. When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated. *Ketchum v. Moses* reaffirmed the primacy of the lodestar method for all fee-shifting statutes.

CA(3)[] (3)

Costs § 13—Attorney Fees—Determination—Value of Professional Services—Review.

Regarding the award of attorney fees to a prevailing party, the experienced trial judge is the best judge of the value of professional services rendered in his or her court, and while his or her judgment is subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.

CA(4)[] (4)

Costs § 13—Attorney Fees—Declaration of Counsel—Computation of Attorney Hours.

Regarding the award of attorney fees to a prevailing party, California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent.

CA(5)[] (5)

Costs § 13—Attorney Fees—Level of Detail.

Because time records are not required under California law with respect to an award of attorney fees to a prevailing party, there is no required level of detail that counsel must achieve.

CA(6)[] (6)

Costs § 13—Attorney Fees—Market Rate—Prevalent in Community.

Regarding the award of attorney fees to a prevailing party, generally, the **[*693]** courts will look to equally difficult or complex types of litigation to determine which market rates to apply. The determination of the market rate is generally based on the rates prevalent in the community where the court is located. There is no requirement that the reasonable market rate mirror the actual rate billed. The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel.

CA(7)[] (7)

Costs § 13—Attorney Fees—Calculation—Lodestar Method—Similar Work.

The reasonable hourly rate used for the lodestar calculation of attorney fees is that prevailing in the community for similar work.

CA(8)[] (8)

Costs § 13—Attorney Fees—Declaration of Counsel—Breakout of Time Expended—Value of Services Rendered.

In a legal malpractice action, the trial court did not abuse its discretion in awarding attorney fees totaling $843,245.27 to defendants as prevailing parties, pursuant to *Civ. Code, § 1717*, and *Code Civ. Proc., § 1033.5, subd. (a)(10)(a)*. The attorneys primarily involved in the litigation provided declarations under penalty of perjury in support of the hours sought, which were broken down by hours expended in each category of services rendered. The trial judge was in the best position to value the services rendered by the attorneys in his courtroom.

[Cal. Forms of Pleading and Practice (2014) ch. 174, Costs and Attorney's Fees, § 174.54; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §§ 304, 306.]

Counsel: Law Office of Joseph Baxter, Joseph Baxter, Sara Baxter; Cannata, Ching & O'Toole, Therese Y. Cannata and Juna Kim for Plaintiff and Appellant.

Murphy, Pearson, Bradley & Feeney, John H. Feeney and Adam M. Koss for Defendants and Respondents.

Judges: Opinion by Kline, P. J., with Haerle, J., and Brick, J.,* concurring.

Opinion by: Kline, P. J.

Opinion

[*694]

[457] KLINE, P. J.—**

INTRODUCTION

Plaintiff Syers Properties III, Inc., challenges the trial court's award of attorney fees in its unsuccessful legal malpractice action against defendants, Attorneys Ann Rankin and Terry Wilkens and the Law Offices of Ann Rankin. In a separate opinion, we have affirmed the judgment in that action. (*Syers Properties III, Inc. v. Rankin* (May 5, 2014, A136018) [nonpub. opn.].) The trial court awarded defendants attorney fees totaling $843,245.27, pursuant to Civil Code section 1717 and Code of Civil Procedure section 1033.5, subdivision (a)(10)(A), as prevailing **[***2]** parties. Plaintiff contends the trial court abused its discretion in two respects in awarding the fees: First, plaintiff maintains the court's determination of reasonable *hours* relied upon inadequate documentation that failed to show the reasonableness of the hours and the specific tasks performed by defense counsel. Second, plaintiff asserts the court abused its discretion in calculating the reasonable *rate*, as it did not inquire into the actual hourly rate charged or whether that actual rate was reasonable under the lodestar formula. We shall affirm the award.

BACKGROUND

Plaintiff sued defendants for legal malpractice and breach of fiduciary duty in defendants' representation of plaintiff in a construction defect case over the course of seven years. Following numerous hearings and motions in limine to resolve legal issues in the action, a jury was empanelled, opening statements were given and plaintiff's first witness was called. The court then granted defendants' pending nonsuit motion. Following the judgment in their favor, defendants sought their attorney fees as the prevailing parties in the malpractice action, pursuant to the attorney-client fee agreement with plaintiff and Civil Code section 1717. **[***3]** Defendants sought a **[**458]** total of $843,245.27 for the combined 2,324.5 hours of attorney and paralegal time spent on the case from its inception, through discovery, numerous pretrial motions, trial, and postjudgment work.

In support of the requested fee, the law firm Murphy, Pearson, Bradley & Feeney, which had represented defendants in the malpractice action, filed declarations from three attorneys who performed the majority of the work (1,949 total hours): named shareholder John H. Feeney and associates Adam M. Koss and Arthur J. Harris. Each of the declarations set forth the attorney's qualifications and experience, described the stages or motions in the litigation in which he had been primarily engaged, and summarized his **[*695]** hours billed to defendants within several specific litigation categories, including the total hours spent in: "Fact investigation and general conferences and correspondence"; "Development of case analysis and strategy"; "Legal research"; "Expert and/or consultant work"; "Status reports to client and carrier"; "Draft pleadings and papers, and other case assessment and development"; "Settlement discussions and mediation"; "Written and document discovery"; "Party, percipient **[***4]** and expert depositions"; "Trial preparation and support, including witnesses and exhibit preparation and examinations"; "Trial motions and submissions"; "Court appearances, including trial"; and "Attorneys' fee motion." These totals were also submitted for each of the three primary attorneys in the form of time bar graphs for each category of work performed.

In addition, Feeney's declaration set forth the hours billed by Associate Attorney David J. Gibson, as well as by each of four paralegals who assisted on the case. This declaration also described the qualifications and experience of Gibson and each of the paralegals, as well as a brief description of the work each performed.[1]

* Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] Feeney declared that Attorney Gibson worked and billed 49.6 hours assisting in file and document management, including

As to the "reasonable rate" of pay, Feeney stated in his declaration that based on his more than 20 years of civil litigation experience, it was his understanding that the prevailing rate or market rate in the San Francisco Bay Area for the services performed by associates Koss and Harris, who were admitted to the California State Bar in December 2006, was approximately $300 per hour; for Gibson, who was admitted in December 2010, it was approximately $250 per hour; and for paralegals Miranda, Tetlow, Hill and Ota it was approximately $150 per hour.

Defendants also relied upon the "*Laffey* Matrix," attached as exhibits to the motion. As described by defendants, the *Laffey* Matrix "is an official source of attorney rates based in the District of Columbia area, which can be adjusted to the San Francisco **[***6]** Bay Area by using the Locality Pay Tables." Application of the same formula used by Chief Judge Walker in *In re HPL Technologies, Inc. Securities Litigation (N.D.Cal. 2005) 366 F.Supp.2d 912, 922, footnote 1* (*HPL Technologies*) provided an **[**459]** approximately 9 percent **[*696]** upward rate over rates in the District of Columbia. Feeney declared that the *Laffey* Matrix hourly rate, adjusted for the San Francisco Bay Area of $517.75 for an attorney with 20-plus years of experience, such as he, represented "a reasonable rate for competent trial counsel of his education and experience, as well as the complexity and specialization of these particular proceedings and the claims alleged therein." He further opined that the *Laffey* Matrix hourly adjusted rate of $299.75 for Attorneys Koss, Harris, and Gibson represented a reasonable rate for competent representation by attorneys of their education and experience, as well as the complexity of the particular proceedings.[2] So, too, did the *Laffey* Matrix hourly adjusted rate of $147.15 for the four paralegals working on the case represent a reasonable rate. Feeney further stated he had personally reviewed the attorney fee billings in the matter and that in finalizing **[***7]** the time entries he had from time to time eliminated time entries incurred because in his "billing judgment, the actual time expended was greater than it should have been or for other reasons."

Plaintiff opposed the fee motion on the grounds the amount sought was unreasonable. It contended the hourly rate requested was significantly higher than the rate actually billed the clients and that the lodestar formula applied had historically been reserved for contingency fee cases and not to a conventional hourly fee case such as the instant attorney malpractice case. Further, plaintiff argued that the declarations were inadequate to document the hours expended and that defendants failed to provide enough specificity about the fees incurred for the court to properly assess their reasonableness. Specifically, plaintiff claimed defense counsel **[***8]** had not disclosed their *actual* hourly rates and had not provided either redacted billing statements or a comparable itemized summary of the expenses incurred. Arguing that defense counsel marketed itself as a premiere insurance defense firm in areas of professional negligence, among others, plaintiff asserted that insurance defense firms usually charged insurance company clients hourly rates significantly below the prevailing market rate, permitting the firm to take on a huge caseload of insurance defense work without the usual administrative overhead issues incurred with a more individual client practice. In short, plaintiff argued the rate sought was much higher than the "market rate for this type of work or law firm." Plaintiff maintained the court should rule defendants were entitled to a fee award based on the fees actually incurred by them and should direct defendants to provide supplemental information with more detail, so plaintiff and defendants could review the billing records to determine whether the time spent was reasonable, necessary, and not duplicative.

[*697]

At the hearing on defendants' fee motion, Feeney offered to submit defendants' bills to the court in camera, should **[***9]** the court wish to review them. The court did not request those bills. Feeney conceded that "[e]very insurance company in the United States

---

document discovery and trial preparation; certified paralegal Miranda worked and billed 200.4 hours performing tasks consisting of managing the document flow of the litigation, including the review, analysis and organization of documents and testimony and assisting in trial preparation; certified paralegal Tetlow worked and billed 15.4 hours performing tasks consisting of mainly support on **[***5]** the fee motion; certified paralegal Hill worked and billed 42.2 hours of trial support, including exhibit preparation and presentation and authorized paralegal Ota worked and billed 67.9 hours performing tasks consisting of managing the document flow of the litigation, including the review, analysis and organization of documents and testimony and assisting in trial preparation.

[2] As to Attorney Gibson, Feeney apparently misspoke in his declaration. The *Laffey* Matrix adjusted for the San Francisco Bay Area yielded an hourly rate calculation of $250.70 for Attorney Gibson, who had less than three years in practice. The mistake had no impact as the fee sought was that using a $250 hourly rate (the adjusted *Laffey* Matrix rate) for Gibson.

that I know of paid below market to their litigation lawyers, but that's not the criteria. That's not the standard. The standard is a reasonable fee." The court observed that "the fee requested [**460] by the defendant in this case, the hourly rate, is not even close to the highest hourly rate that I have seen in this area. The cost of sophisticated legal work is high." The court stated it would look at the question of duplication and time spent "a little closer along with the notes [it had] been taking while you were discussing this matter."

On January 9, 2013, the court granted defendants' fee motion, finding that the rates and hours requested were reasonable and that the adjusted *Laffey* Matrix rates requested by defendants were reasonable and appropriate for the lodestar calculation. Accordingly, it awarded defendants the sum of $843,245.27 based on the hours and rates requested by defendants. This timely appeal followed.

DISCUSSION

I. The Law

HN1[↑] The abuse of discretion standard governs our review of the trial court's determination of a reasonable attorney [***10] fee. (E.g., *Ketchum v. Moses (2001) 24 Cal.4th 1122, 1140 [104 Cal. Rptr. 2d 377, 17 P.3d 735]*; *PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1096 [95 Cal. Rptr. 2d 198, 997 P.2d 511]* (*PLCM Group*); accord, *Nemecek & Cole v. Horn (2012) 208 Cal.App.4th 641, 650 [145 Cal. Rptr. 3d 641]* (*Nemecek*).)

HN2[↑] *CA(1)*[↑] (1) "Under the lodestar method, attorney fees are calculated by first multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate of compensation. (See *Ketchum v. Moses, supra, 24 Cal.4th at p. 1136*; *Serrano v. Priest (1977) 20 Cal.3d 25, 48, fn. 23 [141 Cal. Rptr. 315, 569 P.2d 1303]*, (*Serrano III*); [citation].)" (*Chacon v. Litke (2010) 181 Cal.App.4th 1234, 1259 [105 Cal. Rptr. 3d 214]*; *Id. at p. 1260* [This court held the lodestar method appropriate for calculating the fee award and we affirmed a fee award that exceeded the actual hourly rate under the fee agreement where the fee shifting ordinance at issue provided "[t]he prevailing party shall be entitled to reasonable attorney's fees and costs ... "].)

CA(2)[↑] (2) Our Supreme Court has recognized that *HN3*[↑] the lodestar is the basic fee for comparable legal services in the community and that it may be adjusted [*698] by the court based on a number of factors in order "to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether [***11] the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses, supra, 24 Cal.4th 1122, 1132*.) "The lodestar adjustment method ... has also been widely applied by the Courts of Appeal under a broad range of statutes authorizing attorney fees. [Citations.] [¶] Indeed, ... '[T]he Legislature appears to have endorsed the [lodestar adjustment] method of calculating fees, except in certain limited situations.' [Citation.] When the Legislature has determined that the lodestar adjustment approach is not appropriate, it has expressly so stated." (*Ketchum v. Moses, supra, 24 Cal.4th at pp. 1134–1135*; accord, *Chacon v. Litke, supra, 181 Cal.App.4th at p. 1259*.) *Ketchum v. Moses* "reaffirmed the primacy of the lodestar method for *all* fee-shifting statutes ... ." (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2014 supp.) § 8.4, p. 8-5, italics added; see *Chacon v. Litke, at pp. 1259–1260*.) Here, as appropriate in this type of case, counsel were compensated based on the lodestar calculated by [***12] the court, without adjustment.

CA(3)[↑] (3) [**461] Finally, we recognize that, *HN4*[↑] "[t]he '"experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."' [Citation.]" (*Ketchum v. Moses, supra, 24 Cal.4th at p. 1132*; *PLCM Group, supra, 22 Cal.4th at p. 1096*; accord, *Chacon v. Litke, supra, 181 Cal.App.4th at p. 1259*.)

II. Computation of Hours

CA(4)[↑] (4) The trial court did not abuse its discretion in accepting defense counsel's computation of attorney hours as hours reasonably spent working on the case. It is well established that *HN5*[↑] "California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent. [Citations.]" (Pearl, Cal. Attorney Fee Awards, *supra*, § 9.83, p. 9-70, and authorities cited therein; see, e.g., *Raining Data Corp. v. Barrenechee (2009) 175 Cal.App.4th 1363, 1375–1376 [97 Cal. Rptr. 3d 196]* [declarations sufficient and detailed billing records not

required];[3] Chavez v. Netflix, Inc. (2008) 162 Cal.App.4th 43, 64 [*699] [75 Cal. Rptr. 3d 413] [***13] [same];[4] Weber v. Langholz (1995) 39 Cal.App.4th 1578, 1587 [**462] [46 Cal. Rptr. 2d 677] [same];[5] Trustees of Cent. States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc. (C.D.Cal. 1988) 697 F.Supp. 1538, 1558–1559 [noting more lenient Cal. rule on time records in setting fees under Civ. Code, § 1717].)

HN6[↑] CA(5)[↑] **(5)** "Because time records are not required under California law ... , there is no required level of detail that counsel must achieve. See, e.g., PLCM Group [, supra, 22 Cal.4th at p.] 1098 ('We do not want "a [trial] court, in setting an attorney's fee, [to] become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It ... is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps dwarfing the case in chief." ' quoting Serrano v[.] Unruh [*700] (Serrano IV) (1982) 32 C[al.]3d 621, 642 [186 Cal.Rptr. 754, 652 P.2d 985]). See, e.g., ... Jaramillo v[.] County of Orange (2011) 200 [Cal.App.]4th 811, 830 [133 Cal.Rptr.3d 751] (noting that records included very general descriptions, e.g., "trial prep," "T/C-Client"); City of Colton v[.] Singletary (2012) 206 [Cal.App.]4th 751, 784 [142 Cal.Rptr.3d 74] (declaration stating time spent on various activities); [***17] [citation]." (Pearl, Cal. Attorney Fee Awards, *supra*, § 9.84, p. 9-71.)

The type of categorical breakout of time expended by each attorney and paralegal provided here has been specifically lauded by Hon. Vaughn Walker, former Chief Judge of the United States District Court for the Northern District of California, as "an especially helpful compromise between reporting hours in the aggregate (which is easy to review, but lacks informative detail) and generating a complete line-by-line billing report (which offers great detail, but tends to obscure the forest for the trees)." (In re HPL Technologies, supra, 366 F.Supp.2d 912, 920.)

---

[3] In Raining Data Corp. v. Barrenechea, supra, 175 Cal.App.4th 1363, 1375–1376, the appellant argued that counsel for the respondent Raining Data had failed to meet its initial burden to establish the reasonableness of the fees incurred because it did not submit its attorneys' billing statements and that the declarations submitted by counsel did not provide any basis for determining how much time was spent by any one attorney on any particular claims. Rather, the declarations gave broad descriptions of the work provided by each attorney. Appellant argued the declarations were "'devoid of any information to allow the trial court to determine whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended.'" (*Id. at p. 1375.*) The Court of Appeal rejected the claim, stating: "The law is clear, however, that an award of attorney [***14] fees may be based on counsel's declarations, without production of detailed time records. [Citations.] Raining Data's attorneys provided declarations detailing their experience and expertise supporting their billing rates, and explained the work provided to Raining Data. [Appellant] did not offer any evidence to challenge any statement in Raining Data's counsel's declarations." (*Ibid.*) The appellate court also rejected the claim that the case was overstaffed with attorneys from two law firms on the basis that "[a]n 'assertion [that] is unaccompanied by any citation to the record or any explanation of which fees were unreasonable or duplicative' is insufficient to disturb the trial court's discretionary award of attorney fees. (Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1248 [132 Cal. Rptr. 2d 57].)" (*Id. at p. 1376.*)

[4] In Chavez v. Netflix, Inc., supra, 162 Cal.App.4th 43, attorneys provided declarations stating the total time spent by each of the firm's two partners prosecuting the litigation, but did not provide billing records showing the number of hours the partners spent on particular activities or days. Based on its knowledge of the litigation, [***15] the court made reductions in the hours claimed to reflect its estimate of time spent by both attorneys that could have been handled by one or by attorneys or paralegals with lesser expertise. (*Id. at p. 64.*) In affirming, the Court of Appeal reiterated the rule giving broad discretion to the experienced trial judge to value professional services, acknowledged that detailed timesheets were not required, and observed that a court may award fees based on time estimates for attorneys who do not keep time records. (*Ibid.*)

[5] In Weber v. Langholtz, supra, 39 Cal.App.4th 1578, the court's award of fees was upheld, despite the failure of counsel to state the total number of hours or to substantiate the hours with copies of time records or copies of billing statements. The appellate court concluded: "Counsel's declaration and verified cost memorandum were, however, made under penalty of perjury. Mathematical calculation could show the number of hours was between 90 and 103. The work done was described. The trial court could make its own evaluation of the reasonable worth of the work done in light of the nature of the case, and of the credibility of counsel's declaration unsubstantiated by time [***16] records and billing statements. Although a fee request ordinarily should be documented in great detail, it cannot be said in this particular case that the absence of time records and billing statements deprived the trial court of substantial evidence to support an award; we do not reweigh the evidence. [Citation.]" (*Id. at p. 1587.*)

Finally, we observe that the three attorneys primarily involved in the litigation provided declarations under penalty of perjury in support of the hours sought, which were broken down by hours expended in each category of services rendered. Feeney also averred he had exercised his "billing judgment" to excise hours actually expended, but which he believed either exceeded the time required for the task or had other reasons to cut. Most importantly, the trial judge presided over the entire matter and was well able to evaluate whether the time expended by [***18] counsel in this case, given its complexity and other factors, was reasonable. We find no abuse of discretion here.

III. Reasonable Rate

Plaintiff also challenges the rates applied by the trial court to the hours expended by defense attorneys. Plaintiff contends the trial court abused its discretion in adopting as "reasonable," rates far [**463] exceeding the *actual* rates billed the insurance company footing the bill for the defense. Plaintiff further maintains that the reasonable rate measured by the "market rate" for attorneys in insurance defense firms on cases such as this one was far below that determined by the court to be reasonable and, therefore, the court's reliance on the adjusted *Laffey* Matrix was misplaced.

HN7[] CA(6)[] (6) "Generally, the courts will look to equally difficult or complex types of litigation to determine which market rates to apply. [Citations.]" (Pearl, Cal. Attorney Fee Awards, *supra*, § 9.109, p. 9-93.) "The determination of the 'market rate' is generally based on the rates prevalent in the community where the court is located." (*Id.*, § 9.114, p. 9-98.) Plaintiff presented no [*701] evidence that the San Francisco Bay Area was not an appropriate "community," where the court was located in [***19] Alameda and where counsel for both plaintiff and defendants were located in San Francisco.

There is no requirement that the reasonable market rate mirror the *actual* rate billed. As we stated in *Chacon v. Litke, supra, 181 Cal.App.4th 1234*: "'The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. [Citations.] This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel. [Citations.]' [Citation.]" (*Id. at p. 1260*; accord, *Center for Biological Diversity v. County of San Bernardino (2010) 188 Cal.App.4th 603, 619 [115 Cal. Rptr. 3d 762]*; see *PLCM Group, supra, 22 Cal.4th 1084, 1094* [*Civ. Code, § 1717* permits an award of attorney fees for in-house counsel and the calculation was properly based upon the prevailing market rate in the community for comparable legal services].)

Plaintiff suggests this general rule allowing the "reasonable rate" to vary from the actual rate billed does not apply in cases, such as this, where there is neither a contingent risk regarding payment of the fees, nor other [***20] special circumstance. We disagree.

Nemecek, supra, 208 Cal.App.4th 641 [145 Cal. Rptr. 3d 641], is on point. There, the Court of Appeal expressly rejected the argument that the rate billed by insurance defense counsel in an arbitration over claimed attorney malpractice and fees represented the maximum hourly rate reasonably recoverable as attorney fees. The appellate court refused to "accept a rule that requires a trial court to limit its fee award to the amount incurred in all circumstances except under 'unique factual circumstances' such as pro bono cases, contingency fee cases and representation by in-house counsel." (*Id. at p. 652*.) The Nemecek litigants prevailed in the arbitration. They were represented by counsel hired by their insurer. Nemecek's counsel sought an hourly rate based on the *Laffey* Matrix (for a total fee of $45,759.81) and did not disclose their actual hourly rates in the matter. (*Id. at pp. 650–651*.) In opposition, the appellant presented expert testimony that counsel for Nemecek billed the insurer $100 to $215 per hour for attorney services in the arbitration. The trial court awarded defendant $42,207.31 in reasonable attorney fees and costs—close to the amount sought. [***21] The Court of Appeal affirmed. (*Id. at pp. 651–652*.) In so doing, the court not only rejected the argument that the rate billed by Nemecek's counsel represented the maximum reasonable hourly rate in insurance defense [**464] cases, but also rejected the claim that the fee request should have been denied because fees were paid by the insurer rather than by the client itself. The court relied upon authority stating that "'[p]laintiffs [*702] were not entitled to avoid their contractual obligation to pay reasonable attorney fees based on the fortuitous circumstance that they sued a defendant who obtained insurance coverage providing a defense.'" (*Id. at p. 652*.) (See *PLCM Group, supra, 22 Cal.4th 1084, 1097* [rejecting the argument that the award of fees to in-house counsel based on prevailing market rates for attorney services would likely constitute an " 'unjustified windfall' "].)

In the instant case, the trial court's rate determination was supported not only by the adjusted *Laffey* Matrix, but also by Feeney, an attorney with more than 20 years' experience in civil litigation of this type, who stated under penalty of perjury his opinion as to the prevailing rate in the San Francisco Bay Area for **[***22]** the services performed by the attorneys and paralegals in the case—at rates virtually identical to those calculated in the *Laffey* Matrix as adjusted for the San Francisco-San Jose-Oakland region. Moreover, the trial judge who had presided over the matter viewed the services performed as "sophisticated" legal work and stated the hourly rate requested was "not even close to the highest hourly rate that I have seen in this area."

We reiterate that the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom. (E.g., Ketchum v. Moses, supra, 24 Cal.4th at p. 1132.) In the circumstances presented here, we cannot say this judge was " ' "clearly wrong." ' " (Ketchum v. Moses, supra, 24 Cal.4th at p. 1132.) Consequently, we find no abuse of discretion.

CA(7)[🡅] **(7)** However, we point out that the trial court was neither *required* to follow the *Laffey* Matrix nor to adopt the rate defense counsel opined was the "market rate" for services of this type. Our deference here to the trial court's exercise of its discretion in setting a reasonable attorney fee suggests that had the court determined that the *actual* rate charged was the reasonable rate for the type of services **[***23]** rendered, we would similarly find the court acted within the scope of its discretion. (See *El Escorial Owners' Assn. v. DLC Plastering, Inc. (2007) 154 Cal.App.4th 1337, 1365–1367 [65 Cal.Rptr.3d 524]* [affirming the trial court's reduction of a fee request where, among other things, the trial court found the rates sought were twice the rates billed to the insurance company].) Our Supreme Court has explained that HN8[🡅] the reasonable hourly rate used for the lodestar calculation "is that prevailing in the community *for similar work*." (PLCM Group, supra, 22 Cal.4th at p. 1095, italics added; see Ketchum v. Moses, supra, 24 Cal.4th at p. 1132 ["the lodestar is the basic fee for *comparable legal services* in the community" (italics added)].) A reasonable trial court might determine that the "similar work" or "comparable legal services" related to insurance defense litigation, rather than to civil litigation in general. Were the court to so conclude, it could view the relevant "market" to be that of insurance defense litigation and litigators, rather than general civil litigation. The "market rate" for such services might be limited accordingly. Again, we emphasize that such determinations lie within the broad **[*703]** discretion of the **[***24]** trial court. They raise a number of issues, not the least of which is that the prevailing plaintiff's privately retained counsel in such circumstances could claim a "market **[**465]** rate" reasonable fee far in excess of the "market rate" reasonable fee that could be claimed by a prevailing opponent whose defense counsel was retained by an insurer.

CA(8)[🡅] **(8)** Be that as it may, we are convinced the trial court did not abuse its discretion in its award of attorney fees to defendants in this case.

DISPOSITION

The order granting defendants' motion for attorney fees is affirmed. Each party shall recover its own costs on this appeal.

Haerle, J., and Brick, J.,* concurred.

A petition for a rehearing was denied May 27, 2014, and appellant's petition for review by the Supreme Court was denied September 10, 2014, S219375.

End of Document

---

*Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
	)	
PLAINTIFF,	)	**MOTION OF DEFENDANT STEVEN STEWART TO ALTER, AMEND, OR RECONSIDER ORDERS**
vs.	)	
	)	
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)	
	)	
DEFENDANTS.	)	

2019 MAR 15 PM 2: 2[illegible]
CLERK OF COURT
BY

TO: R. PATRICK FLYNN, ESQ. and MICHAEL W. ALLEN, JR., ESQ., ATTORNEYS FOR PLAINTIFF:

Pursuant to Rules 52(b) and 59(e), South Carolina Rules of Civil Procedure, Defendant Steven Stewart moves for an order of the Court to alter, amend, or reconsider its orders filed herein on December 12, 2018 and March 5, 2019. The undersigned received email notice of entry of the Court's final, March 5th Order on March 7, 2019, and notice by United States Mail on March 12, 2019.

This Motion will be briefed in four parts:

Part I presents an overview of the grounds and arguments.

Part II argues Movant's grounds relating to the final damages and attorney fee Order filed March 5, 2019.

Part III incorporates the arguments previously made in Defendant Stewart's Motion filed December 27, 2018, directed to the Court's order of December 12, 2018.

Part IV summarizes and concludes the arguments.

Part I. Overview of the Grounds and Arguments:

This is a suit on a Promissory Note made by the Defendant ISL Development, LLC to the Plaintiff. There is no dispute that the maker, ISL Development, LLC, defaulted on the Note. The central dispute is whether Steve Stewart is personally liable as guarantor of the Note.

The trial consisted of a liability phase heard without a jury on August 20, 2018, resulting in an order filed December 12, 2018 finding Defendant Stewart to be personally liable as guarantor. A second, damages/attorney fee phase of the trial was heard on January 25, 2019. The Court filed its Order on damages on March 5, 2019.

An overview of the arguments is as follows:

1) The Court must amend or reconsider the award of attorney fees in its Order of March 5, 2019 because the Court did not make the necessary factual and legal findings to support the award. (Part II A below.)

2) The imposition of a judgment interest rate in the court's order should be stricken because interest on judgments is governed by statute and by standing orders of the Supreme Court. (Part II B below.)

3) The Court should reconsider or amend her findings that Steve Stewart is personally liable as Guarantor of the Note, because there was no mutual exchange of promises, and therefore no meeting of the minds to support the conclusion that there was an agreement to extend the term of the promissory note in consideration for Steve Stewart's personal guarantee. Alternatively, the Court should more clearly state her findings of fact, and cite to legal authorities to support those conclusions.(Part III A.)

4) The Court should reconsider or amend her findings that legally adequate consideration was exchanged for Steve Stewart's gratuitous promise to personally guarantee the Note. (Part III B.)

5) A concluding argument is made in Part IV.

Part II. The Order filed March 5, 2019. A: The Court should reconsider and amend its award of attorney fees. B: The Court should reconsider and strike the imposition of interest.

DISCUSSION.

The Applicable Law, in General.

Rule 52(a), South Carolina Rules of Civil Procedure, provides in pertinent part: "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58..."

Trial courts sitting without juries in an action at law write their findings specially and separately to allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the Appellate Courts to perform their proper function in the judicial system. *In re the Treatment and Care of Luckabaugh*, 351 SC 122, 133, 568 S.E.2d 338, 343 (S.Ct. 2002). To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations we give

deference. *In re the Treatment and Care of Luckabaugh* (cipra, 351 SC 133, citing *Welsh Co. of California vs. Strolee of California, Inc.*, 290 F2d 509 (9th Cir.1961).

A. The Court Should Reconsider and Amend Her Award of Attorney Fees.

1) South Carolina Law. In the seminal case of *Baron Data Systems, Inc. v. Loter*, 297 SC 382, 377 S.E.2d 296 (S.Ct. 1989), the Supreme Court restated the general rule in South Carolina that attorney fees are not recoverable unless authorized by contract or statute; and that when there is a contract, the award of attorney's fees is left to the discretion of the trial judge, which will not be disturbed unless an abuse of discretion is shown. 297 SC at 383, 384.

The *Baron Data* court restated the six factors to be considered by a court in awarding a reasonable attorney fee in South Carolina, specifically concluding that "consideration should be given to all six criteria in establishing reasonable attorney fees; none of these six factors is controlling." 297 SC at 384. The six factors are:

(1) The nature, extent and difficulty of the legal services rendered;

(2) The time and labor necessarily devoted to the case;

(3) The professional standing of counsel;

(4) The contingency of compensation;

(5) The fee customarily charged in the locality for similar legal services;

(6) The beneficial results obtained.

The factors set forth in Baron Data have been consistently applied in South Carolina decisions addressing the award of a reasonable attorney fee. See, for example, *Burton v. York County Sheriff's Department*, 358 SC 339. 594 S.E.2d 888 (Ct. App.2004); *Horton v. Jasper County School District*, 423 SC 325, 815 S.E.2d 442 (S.Ct. 2018). In the last cited cases, *Burton* and *Horton*, the Court of Appeals and Supreme Court, respectively, emphasized in their holdings

that "the trial court should make specific findings of fact on the record for each of these factors." See, *Burton*, 358 SC at 358; *Horton*, 423 SC at 330.

This Court's order awarding attorney fees contains only a single sentence awarding an attorney fee of $89,160.54, without any factual findings or any explanation of the rationale by which the figure was calculated. Notably, the time and billing statement filed by Plaintiff's attorneys at trial shows a total of fees and expenses, calculated at the prevailing rate charged by Plaintiff's attorneys, to be $68,160.54. The Court's Order does not address the *Baron Data* factors, and provides no basis upon which this Defendant, or an Appellate Court, might review, understand, and evaluate the Court's rationale for the award.

The *Baron Data* factors are intended to assist the trial court, counsel, and the appellate courts, in evaluating the basis for the fee award. Therefore, this Court should reconsider, amend and supplement her Order filed March 5th, by making findings as to each of the six *Baron Data* factors.

Moreover, there is no basis in the record of this case for any award of fees other than the "lodestar", calculated by multiplying a reasonable hourly fee by the number of hours expended in the case. A careful review of the *Baron Data* factors should reveal that there is no basis for an enhancement beyond the lodestar calculation.

2) California Law. California law is not dissimilar to that of South Carolina. California has codified its policy regarding attorney fee provisions provided by contract, in *California Civil Code* §1717, to provide for reciprocity between contract parties. "The sole purpose of Section 1717 was to transform any unilateral provision in a contract to a reciprocal one, giving the right to fee to whichever party prevails in an action on a contract providing for attorney fees." *Associated Convalescent Enterprises vs. Carl Marks & Co., Inc.*, 33 Cal.App.3rd

16, 108 Cal.Rptr. 782 (Cal.App.1973). Reference to the Code Section becomes, as well, a repository of research references involving attorney fee disputes arising from contract provisions in the State of California.

The case of *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 997 P.2d 511 (S.Ct. CA 2000) involved a dispute between a legal malpractice carrier and its insured attorney over the attorney's refusal to pay the policy deductible amount. A jury found for the insurer on the liability question, and the trial court ordered the insured attorney to pay the insurer's legal fees. The trial court awarded attorney fees based on the reasonable hours expended by counsel for the insurer, multiplied by the prevailing hourly rate in the community for comparable legal services. (An issue in the case, unrelated to the issue here, was whether the insurer was entitled to recover for attorney fees where it was represented by in-house counsel.)

The California Supreme Court there stated: "As the Court of Appeals herein observed, the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.' 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorney fee award.'... The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." 22 Cal.4th at 1095.

The *PLCM* court further held: "After the trial court has performed the calculations of the lodestar, it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the §1717 award so that it is a reasonable figure." ..."The value of legal services performed in a case is a matter in which the trial court has its own expertise...the trial court makes its determination after consideration of a

number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case."... "In the present matter, the Superior Court based the award of attorney fees to the prevailing party, PLCM, on the number of hours expended by counsel multiplied by the prevailing market rate for comparable legal services in San Francisco where counsel is located. No error appears. The Superior Court used a proper standard in calculating the fees." 22 Cal.4th at 1096.

The California case of *Syers Properties III, Inc. vs. Rankin*, 226 Cal.App.4th 691, 172 Cal.Rptr.3rd 456 (Ct. Appt. CA 2014), involved the challenge to an attorney fee award, also arising from an underlying attorney malpractice defense verdict, where the trial court had ordered the Plaintiff to pay attorney fees.

Just as had the California Supreme Court in *PLCM* fourteen years earlier, the Court of Appeals in *Syers* held: "Our Supreme Court has recognized the lodestar is the basic fee for comparable legal services in the community and that it may be adjusted by the court based on a number of factors in order to fix a fee at the fair market value for the particular action. In effect, the Court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market value for such services." 226 Cal.App.4th at 697-698.

"Here, as appropriate in this type of case, counsel were compensated based on the lodestar calculated by the court, without adjustment." *Syers Properties*, 226 Cal.App.4th at 698.

3) Conclusions. Based upon the trial record, the "lodestar" in this case is set by the billing record from Plaintiff's attorneys, calculated at their usual billing rates, for a total amount of $68,160.54 including paralegal fees, and costs. The Court's award of $89,160.54 increases

the lodestar by approximately one-third, but without any findings by the Court to justify either the lodestar to begin with, or any enhancement.

It is clear that under both South Carolina and California law, it is necessary for the trial court to make findings in support of its award of attorney fees. Respectfully, the Court should amend its order to make the necessary findings, first, to fix the lodestar amount and, secondly, if the Court remains so inclined, to justify any enhancement.

B. The Court Should Reconsider and Strike the Imposition of Interest in the Order.

Judgment interest attaches to any money judgment filed in the Circuit Courts, as a matter of law. See South Carolina Code §34-31-20.

Moreover, the judgment interest rate is variable, and changes from year to year because it is based upon the published interest rate in the *Wall Street Journal*, plus a statutory additive as decreed by order of the South Carolina Supreme Court published and filed by January 15th of each year. Therefore, the interest rate being variable, the rate fluctuates on any judgment, from year to year.

It is therefore error for this Court to affix in any permanent sense, by court order, a judgment interest rate. That issue is otherwise fixed by South Carolina Code Section §34-31-20, and by the annual orders filed by the South Carolina Supreme Court.

Part II: The Court Should Alter, Amend, or Reconsider its Order Finding the Individual Liability of Defendant Steven Stewart in its Order filed December 27, 2018.

Movant incorporates herein by referenced his Motion to Alter, Amend or Reconsider Order filed with this Court on December 27, 2018, a copy of which is attached as "Exhibit "A".

Part III: Conclusion.

It is certainly difficult for a fact finder, the court in this instance, to hear the uncontradicted evidence that Steve Stewart promised to personally guarantee payment to Amanda Griffith of the $200,000 she had loaned to the Defendant ISL; to hear that she was not repaid; and to then deny any relief in the case.

But as fact finder and as judge of the law, the court is obligated to follow the law. There was no evidence presented at trial that Amanda Griffith was prejudiced by Steve Stewart's promise. She was surely prejudiced by ISL's inability to pay it, but she knew that ISL could not pay the obligation (Tr. p. 52, line 7; See draft transcript attached as Exhibit "B"), and she hoped to be paid from future ISL developments (Tr. p. 29, line 25). A year and a half after the so-called personal guarantee, Amanda sent to Steve a proposed personal guarantee, that Steve refused to sign (Trial Exhibit 21). Had Amanda truly relied upon the email promise of Steve she would have filed suit at that time.

The better conclusion from the evidence is that Amanda did not pursue collection earlier because she knew ISL could not pay, and her failure to pursue collection at the time was not because of any promise by Steve, but it was because she knew ISL could not pay. Moreover, the promise from Steve was entirely gratuitous and unsupported by any consideration, either in the form of benefit to Steve or detriment to Amanda.

Indeed, the court's order mis-state's Steve's testimony in a material respect. At finding "E" on page 6 of the December 12, 2018 order, the Court states: "...and Stewart admitted in his testimony that the <u>extension</u> of that repayment term and his use of the funds beyond March 31, 2013 were a substantial benefit to him. Accordingly, the consideration supporting this loan

modification was Griffith's extension of that repayment date, and she actually suffered harm as a result. This personal guarantee is, therefore enforceable. . . ." (Emphasis added.)

Attached as "Exhibit "B" to this motion is the rough draft transcript of the trial, upon which both parties have relied. At page 101, lines 3-19, the following colloquy occurs between Plaintiff's counsel and Steve Stewart:

(By Mr. Flynn)

Q. All right. Do you dispute that you have the use of this $200,000 beyond March 31, 2012?

A. Sure, yes. No, I don't dispute it, I'm sorry.

Q. So did you ever go -- did you ever attempt to repay that entire debt at any point to Amanda?

A. No.

Q. Okay. And you had use of that money, you and side had use of 200,000 until you ran out, correct?

A. I would say that ISL had use of that money until ISL ran out.

Q. You personally benefitted from that money because without that 200,000, ISL wouldn't have been able to pay you $15,000 a month in salary, right?

A. .

A. That's correct.

Q. That was a personal benefit to you?

A. That was a personal benefit to me.

Thus, it is obvious that what Steve Stewart testified was that the basic $200,000 loan benefitted ISL and him, personally; but he did not testify that any "extension" benefitted him. In fact, on the date of the email exchange containing Steve's promise, the $200,000 had been

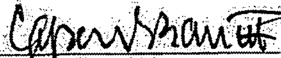
substantially expended. Thus, the order mistakenly cites as his testimony that any extension benefitted him.

Moreover, there was no new consideration for Steve's promise, because the $200,000 had been substantially exhausted for its intended purposes. The parties had agreed that one of its intended purposes included the draws paid to Steve Stewart.

Defendant Steve Stewart asks the court to reconsider her finding that he is personally liable on the note, and to find that he is not. Alternatively he asks that the Order be amended and supplemented in the particulars otherwise discussed in this motion.

Respectfully submitted,

BARR, UNGER & McINTOSH, LLC



Capers G. Barr, III
SC Bar No: 00542
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (FAX)
cgb@barrungermcintosh.com
Attorney for Defendants ISL Development, LLC
and Steven Stewart

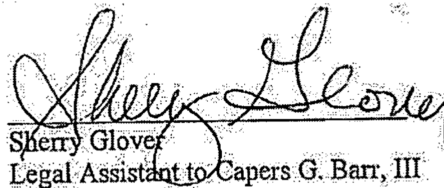
Charleston, South Carolina
March 15, 2019

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH, PLAINTIFF,	**CERTIFICATE OF SERVICE**
vs.	
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY, DEFENDANTS.	

2019 MAR 15 PM 2:23
BY

I hereby certify that I have served a copy of the **MOTION TO ALTER, AMEND, OR RECONSIDER ORDERS** by electronic mail and U.S. Mail, to the following addresses:

R. Patrick Flynn, Esq
Michael W. Allen Jr. Esq.
POPE FLYNN, LLC
PO Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com



Sherry Glover
Legal Assistant to Capers G. Barr, III

Charleston, South Carolina
March 15, 2019

12

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH, PLAINTIFF,	)	**MOTION TO ALTER, AMEND, OR RECONSIDER ORDER**
vs.	)	
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY, DEFENDANTS.	)	

2018 DEC 27 PM 1:10
JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Steven Stewart, individually, moves for an order of the Court to alter, amend, or reconsider her order filed December 12, 2018, pursuant to Rule 52(b) and Rule 59(e) of the South Carolina Rules of Civil Procedure. Movant acknowledges that the Court has not yet entered a final order in the case, and neither has movant yet received written notice of entry of judgment; however, the within motion is filed from an abundance of caution.

The Court's order should be amended and reconsidered in the following particulars, and based upon the authorities discussed in part 5 of this motion.

1. Finding of Fact, "C" on page 2 states "Consistent with that agreement, Plaintiff did not..." in its opening phrase; the Finding also includes the phrase, "Defendants Stewart and ISL confirmed the terms of the January 16, 2013 agreement...." However, the Court makes no prior or subsequent finding with reference to any "January 16, 2013 agreement". In the Findings of Fact, there is only the reference to an e-mail exchange on January 16, 2013, as stated in Finding of Fact "B".

In order to provide an adequate basis for evaluation by the undersigned, and potentially at the appellate level, this Court should elaborate upon and enunciate the evidentiary basis for

1

concluding as a fact that there was a "January 16, 2013 agreement" as is stated in the phrases quoted above.

2. Conclusion of Law II, Valuable Consideration. In its introductory paragraph (page 4 of the order) the Court finds:

> "Further, this Court finds that pursuant to California law and alternatively under South Carolina Law, the use of the loaned funds by ISL and the substantial personal benefit which Stewart admitted to receiving from those loan funds beyond March 31, 2013, represented sufficient consideration actually received by Stewart in exchange for his agreement to personally guarantee repayment of the note to Plaintiff."

Movant seeks alteration of this conclusion of law because the court cites no South Carolina or California authority to sustain the proposition that is stated. (In addition to not making adequate findings of fact as is discussed in part 1 of this motion.) Whether there was consideration for Steve Stewart's promise to guarantee the note is the primary legal issue in this case.

Additionally, the finding is inconsistent with the evidence. On the date of Stewart's e-mail promise, January 16, 2013, of the $200,000 loaned by Plaintiff to ISL on December 28, 2012, only a balance of $17,386.92 remained in the bank account (See Ex. 5, check register, at Bates page 0247; Ex. 6, bank statement, at Bates pages 0006 and 0007); and Plaintiff testified that on that date she knew that ISL was unable to repay the loan. (Transcript page 52, line 9). Therefore, the evidence better supports the conclusion that there was no consideration for Stewart's gratuitous promise, because as of the date of his gratuitous promise there were insufficient funds in the account of ISL to sustain its operations until March 31, the due date of the note; or to pay

the note when it became due. Moreover, as stated above, Plaintiff knew that ISL was then unable to pay the note when it became due

Although Stewart testified he did benefit from the proceeds of the note after its due date, in addition to the small balance on January 16, 2013 discussed above, the evidence shows that on March 31, 2013 the checkbook balance of ISL was $63,942. 66. (Ex. 5, check register, at Bates page 0251; Ex. 6, bank statements at Bates page 0017 and 0018.) Any benefit flowing to Stewart after that date had to have come from other funds, not the funds loaned by Plaintiff.

Of course, the almost unmentioned point here is that the expectations of all parties on December 28, 2012 when Plaintiff loaned the funds was that, in accordance with the MOU signed by the parties (Exhibit 1), her loan would be rolled over into equity, that Plaintiff would contribute additional funds to equity, and that the project would succeed and everyone would profit. Sadly for all, Plaintiff elected not to perform in accordance with the Memorandum of Understanding between the parties (which was admittedly non-binding), and the project could not get off the ground because of a lack of funding. However that was the risk that all parties took. The high, 12% return on ISL's note to plaintiff is but a manifestation of the risks she took. However, everyone lost their investment, not just Plaintiff. Plaintiff lost, as did Henderson Family Trust (Mr. Stewart's wife's family trust, that loaned $450,000 to the project, and who was also not repaid.), as well as Mr. Stewart, who put significant time and something more than $15,000 into the project, as did Adam Salis, who put considerable time into the project.

The fact remains, however, that there was no evidence of an agreement between Plaintiff and Steve Stewart to extend the due date of the note in consideration for his promise to guarantee payment. Because of that, the Court should reconsider her ruling in favor of Plaintiff. Alternatively, the Court should cite to the evidence that supports such an agreement.

3. Conclusion of Law II C, D, E; Valuable Consideration. (Order, pages 5 and 6.)

There is no dispute that Stewart in the January 16, 2013 e-mail promised to guarantee the obligation of ISL. What is disputed, however, is the proposition that the Plaintiff agreed to extend the due date of the note in exchange for Stewart's promise. In section "D" of the conclusions of law, the Court refers to "Plaintiff's agreement to extend the due date of the note". In section "E", the Court refers to 'Plaintiff's promise to extend the repayment terms of the note", and to Stewart's admitting "that the extension of that repayment term" was beneficial to him.

The Court's order does not articulate a fact basis for the conclusions stated above. To the contrary, the trial record supports an opposite conclusion. Steve Stewart's testimony was that the funds benefitted him, but he never testified that any extension of the term of the note benefitted him. See Transcript page 101, lines 13-19; page 105, lines 7-10.

4. Conclusion of law II E: (Order, page 6.)

In the first place, even though this paragraph is contained within the section of the order that is headed "Conclusions of Law", the findings of paragraph II E are factual. Moreover, as discussed elsewhere in this motion, the Court does not in her order articulate any factual basis to conclude that Plaintiff "promised to extend the repayment terms of the note". Additionally, the Court erroneously concludes that Stewart admitted in his testimony that the extension of the repayment term was a substantial benefit to him. This issue is discussed in paragraph 3, above. Mr. Stewart's testimony was not that the extension benefited him, but that the loaned funds benefited him.

Finally, with respect to Section II E of the Court's order, the Court does not articulate a factual or evidentiary basis for concluding that Griffith "actually suffered harm as a result" of any extension of the repayment date. Clearly, Griffith suffered harm because she was not repaid.

However, the issue here is whether there is consideration for any promised extension of the term. The Court does not articulate any reasoning for her conclusion that the Plaintiff suffered harm because of the extension itself. Respectfully, the Court must articulate such reason, if that can be done. If it cannot be done, the Court should reconsider her conclusion that Mr. Stewart's gratuitous promise is enforceable as a matter of law.

Plaintiff knew on the date of Stewart's gratuitous promise that ISL could not repay the note. That is the real reason why she neither demanded payment at that time or even three years later. She was not harmed by the "extension". There was no exchange of promises. Because Mr.Stewart's promise was purely gratuitous, and not supported by consideration, it is unenforceable.

5. Applicable Law

Rule 52(a) of the South Carolina Rules of Civil Procedure requires, *inter alia*, "in all actions tried upon the facts without a jury or an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon..."

The rule is directorial in nature so "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicate or specific factual finding." *Noisette vs Ismail 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991).*

UB #6

However, the South Carolina Supreme Court has held that trial courts, sitting without juries in an action at law, shall write their findings specially and separately to allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues

raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system...the findings must be sufficient to allow the appellate courts, sitting in their appellate capacity, to insure the law is faithfully executed below. The absence of factual findings makes the appellate court's task of reviewing the court order impossible because the reasons underlying the decision are left to speculation. To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations the appellate courts give deference. *In re Treatment and Care of Luckabaugh 351S.C. 122, 568 S.E.2d 338 (S.Ct. 2002).*

Respectfully, the findings of fact and conclusions of law discussed in parts 1-4 of this motion leave to speculation the basis for the court's rulings. Indeed, by revisiting these issues the Court should also reconsider her basic finding that there was the requisite exchange of promises from which the existence of an agreement could be found between Plaintiff and Steve Stewart. Moreover, and even if the existence of an exchange of promises may be concluded, the question whether there was adequate consideration is profoundly troubling.

6. Conclusion

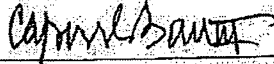
Respectfully, movant urges this court to reconsider her basic finding that movants' gratuitous promise was mutual, and that it was enforceable and supported by consideration.

In the alternative, so as to provide for movant and possibly an appellate court to review this court's factual findings, the issues presented by this motion should be elaborated upon by the court, and an amended order should be issued.

SIGNATURE ON THE NEXT PAGE

Respectfully submitted,

BARR, UNGER & McINTOSH, LLC



Capers G. Barr, III
SC Bar No: 00542
11 Broad Street
Charleston, SC 29401
(843) 577-5083
(843) 723-9039 (FAX)
cgb@barrungermcintosh.com
Attorney for Defendants ISL Development, LLC
and Steven Stewart

Charleston, South Carolina

December 20, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2016-CP-10-5773
AMANDA GRIFFITH,	)	
PLAINTIFF,	)	**CERTIFICATE OF SERVICE**
vs.	)	
ISL DEVELOPMENT, LLC, and STEVEN STEWART, INDIVIDUALLY,	)	
DEFENDANTS.	)	

FILED
2018 DEC 27 PM 1:10
JULIE J. ARMSTRONG
CLERK OF COURT

I hereby certify that I have served a copy of the foregoing Defendants motion to alter, amend, or reconsider order by electronic mail and U.S. Mail, to the following addresses:

R. Patrick Flynn, Esq
Michael W. Allen Jr. Esq.
POPE FLYNN, LLC
PO Box 70
Charleston, SC 29402
pflynn@popeflynn.com
mallen@popeflynn.com

Robin A. Anderson
Paralegal to Capers G. Barr, III

Charleston, South Carolina
December 20, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amanda Griffith,
☐ Plaintiff

v.

ISL Development, LLC, And Steven Stewart, Individually,
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2016-CP-10-5773

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
R. Patrick Flynn, Esq, Bar No. Address: Pope Flynn, LLC, PO Box 70, Charleston, SC 29402 phone: (843) 834-3426 fax: e-mail: pflynn@popeflynn.com other:	Capers G. Barr, Iii, Bar No. 542 Address: Barr, Unger & McIntosh, LLC 11 Broad Street, 2nd Floor, Charleston, SC 29401 phone: (843) 577-5083 fax: (843) 723-9039 e-mail: cgb@barrungermcintosh.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION TO ALTER, AMEND, OR RECONSIDER ORDER
Estimated Time Needed:30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

[signature]
Signature of Attorney for ☐Plaintiff / ☒Defendant

December 20, 2018
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by:

Date Filed:

☐ MOTION FEE COLLECTED:

SCCA/233 (11-03)

☐ CONTESTED – AMOUNT DUE: ____________

SCCA/233 (11-03)

EXHIBIT B:

Rough Draft Transcript to

Motion of Defendant Steven Stewart to Alter, Amend

Not included by stipulation of counsel.

STATE OF SOUTH CAROLINA) Court of Common Pleas
COUNTY OF CHARLESTON) Case No. 2016-CP-10-05773

AMANDA GRIFFITH,
Plaintiff,
vs.) Transcript of Record
ISL DEVELOPMENT LLC, et al,
Defendant.) DATE: August 29, 2018

B E F O R E:

BEFORE THE HONORABLE JENNIFER B. MCCOY

A P P E A R A N C E:

R. PATRICK FLYNN
Attorney for the Plaintiff

CAPERS G. BARR, III
Attorney for the Defendant

Original transcript ordered by:
Barr, Unger & McIntosh

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 THE COURT: Good morning.
2 MR. FLYNN: I'm Pat Flynn for the plaintiff.
3 MR. BARR: Capers Barr.
4 (Joint Exhibit 1, Memorandum of understanding and
5 the promissory note, was marked for identification.)
6 (Joint Exhibit 2, Promissory note, was marked for
7 identification.)
8 (Joint Exhibit 3, E-mails between Amanda Griffith,
9 Adam Salis and Steve Stewart dated December 26th of 2012, was
10 marked for identification.)
11 (Joint Exhibit 4, Amended and restated operating
12 agreement for ISL Development, LLC, was marked for
13 identification.)
14 (Joint Exhibit 5, Check Ledger - Receipts, was
15 marked for identification.)
16 (Joint Exhibit 6, Bank records for ISL
17 Development, was marked for identification.)
18 (Joint Exhibit 7, Letter from Mr. Flynn dated
19 9/12/16, was marked for identification.)
20 (Joint Exhibit 8, Demand response from Steven
21 Stewart dated 9/15/16, was marked for identification.)
22 (Joint Exhibit 9, Promissory note for 450,000 from
23 the Henderson Family Trust dated December 29th, 2000, was
24 marked for identification.)
25 (Joint Exhibit 10, Miscellaneous project e-mails,

1 was marked for identification.)

2 (Joint Exhibit 11, Confidentiality non-circumvent

3 Agreement (11/29/12), was marked for identification.)

4 (Joint Exhibit 12, Confidentiality non-circumvent

5 Agreement (12/4/12), was marked for identification.)

6 (Joint Exhibit 13, E-mail dated 1/4/13, was marked

7 for identification.)

8 (Joint Exhibit 14, E-mail dated 1/15/13, was

9 marked for identification.)

10 (Joint Exhibit 15, Confidential Private Placement

11 Agreement 4/11/13, was marked for identification.)

12 (Joint Exhibit 16, Confidential Mortgage Brokerage

13 Agreement dated 5/3/13, was marked for identification.)

14 (Joint Exhibit 17, Brochure dated 5/10/13, was

15 marked for identification.)

16 (Joint Exhibit 18, E-mail dated 5/23/13, was

17 marked for identification.)

18 (Joint Exhibit 19, E-mail dated 6/17/13, was

19 marked for identification.)

20 (Joint Exhibit 20, LLC Agreement Summerland Senior

21 Living 9/10/13, was marked for identification.)

22 (Joint Exh. 21, Griffith-Steward Correspondence

23 January 2016, was marked for identification.)

24 THE COURT: We are here on behalf of Amanda Griffith

25 v. ISL Development, LLC and Steven Stewart individually.

1 This is a bench trial by consent of the parties from my
2 understanding. And we are ready to begin. If the attorneys
3 announce their names, the clients they represent before we
4 get started, that would be great.
5 MR. FLYNN: Patrick Flynn here for the plaintiff,
6 Amanda Griffith. I have Amanda Griffith at the table. I
7 have my second chair as Michael Allen, my associate, and I
8 also have Emily back there. Emily Silty (ph) is my legal
9 assistant, first trial to observe.
10 THE COURT: Okay.
11 MR. BARR: Good morning, Your Honor. My name is
12 Capers Barr. I'm with the firm of Barr, Unger and Macintosh
13 down on Broad Street. I represent Steve Stewart
14 individually, as well as the corporate defendant ISL
15 Development, LLC. And you will learn in the course of the
16 trial, Mr. Stewart is one of the members of that LLC. The
17 other is a gentleman named Adam Salis. It's a California
18 LLC. And Mr. Salis is a California attorney. So Mr. Stewart
19 is here to testify individually, but as well as in his
20 capacity as a member of ISL.
21 THE COURT: Okay. Thank you so much. Do you all
22 want to give any opening statements or get right to the
23 testimony? It's up to you.
24 MR. FLYNN: Your Honor, I think my opening statement
25 is probably in my plaintiff's trial brief.

1 THE COURT: And I have read both pretrial briefs. I
2 have gone over those. I'm a little bit familiar with what's
3 going on. So if you want to jump right in, that's fine with
4 me.
5 MR. FLYNN: I will call my first witness. If it's
6 okay with the Court, I will refer to her as Amanda.
7 AMANDA EDWARDS GRIFFITH,
8 having been duly sworn, testifies as follows:
9 DIRECT EXAMINATION
10 BY MR. FLYNN:
11 Q. So, Amanda, you stated your name for the record.
12 Can you tell the judge where you grew up.
13 A. I was born and raised in Charleston on Gadsden
14 Street, which I note is around the corner from Mr. Stewart's
15 residence. My father was an engineer. My mother was a
16 teacher. I went to local schools, graduated from
17 architectural school at the University of Virginia in 1976.
18 I've had my own architectural practice, specializing in
19 historic structures since 1984. I'm currently semi-retired.
20 I'm divorced with two children.
21 Q. And the tell me about your children.
22 A. I have twin girls. They are 28.
23 Q. Where do they work?
24 A. One is at the University of Michigan getting her
25 Ph.D. in linguistics. And the other lives in Palo Alto and

1 she's a theater lighting technician.
2 Q. And what type of historical -- rehabilitation
3 architectural?
4 A. I do. And my initial practice, I did a lot of that
5 investment tax credit projects on King Street. I usually
6 don't do residences, but I will if I like you, mostly
7 churches, commercial buildings, things like that. For
8 instance, Middleton Place is a client of mine.
9 Q. And so you are semi-retired, means you are still
10 practicing architecture?
11 A. Still a little bit.
12 Q. Still licensed in South Carolina?
13 A. I am still licensed.
14 Q. When was the first time that you met Mr. Stewart?
15 A. I have a -- we have a mutual friend who was working
16 on his house during his renovation. And we were going out
17 for drinks and so he joined us.
18 Q. Okay. Who was the mutual friend?
19 A. Gino Kollar.
20 Q. And what does Gino do?
21 A. He's a locksmith.
22 Q. And when would that have been?
23 A. 2012.
24 Q. In the summertime?
25 A. Okay.

1 Q. Okay. All right. So tell me, and you met Mr.
2 Stewart and his wife?
3 A. I have never met his wife.
4 Q. Okay. And where were they living at the time?
5 A. At 60 Montague, I believe. No. They were in
6 another house, because they were in construction.
7 Q. Did you have any role in the rehabilitation of 60
8 Montague?
9 A. I did not.
10 Q. Okay. And so when you first met with him, it was
11 through Gino. And then after that, did you see Mr.
12 Stewart -- you've never met his wife, but did you see Mr.
13 Stewart from time to time around the neighborhood, or what
14 was your relationship?
15 A. Through Gino, I think we had dinner a few times,
16 drinks.
17 Q. What was the first time that you understood what Mr.
18 Stewart did for a living?
19 A. Oh, he told me initially about his project that he
20 had completed in California, and moved here. And he's done a
21 couple of renovation projects here.
22 Q. Okay. What was the nature of his work, to your
23 understanding?
24 A. Well, he initially is a plumber, and then became a
25 general contractor, and did a large development project in

1 California.

2 Q. What was he working on at the time? Was he retired

3 when you met him?

4 A. I don't believe so, but he was -- the renovation of

5 his house was a full-time project.

6 Q. Okay. What was your understanding about the project

7 that I will refer to it as the Whittier project?

8 A. It was an assisted living facility in Orange County

9 in an area that desperately needed that type of facility.

10 Q. And what was your understanding of Mr. Stewart's

11 role in that project?

12 A. That he was the developer.

13 Q. What else did you learn from Mr. Stewart about that

14 project?

15 A. Well, initially, we met at his house and in his

16 pool's gazebo. And he had a prospectus that he talked to me

17 about and laid out how they've done the research to see if

18 this was needed. And he explained all of that to me and told

19 me where they were in the project.

20 Q. And who is "they" that you are referring to?

21 A. Adam and Steve.

22 Q. Have you ever met Adam?

23 A. I have not.

24 Q. How do you pronounce his last name?

25 A. Salis.

1 Q. Salis. And what was your understanding of what
2 Adam's role was in this project?
3 A. Well, he was the lawyer and did the legal end of it.
4 And he was the person looking for investors.
5 Q. Okay. And did you ever speak with Adam over the
6 phone?
7 A. We had a phone conference once. I don't recall any
8 other phone calls.
9 Q. And what was the name of the organization that Adam
10 and Mr. Stewart worked with?
11 A. ISL Development, LLC.
12 Q. Okay. So when you first learned about that, about
13 what he did for a living and he talked with you about ISL and
14 the Whittier project, did he at that time ask you if you were
15 interested in lending money to the project?
16 A. Well, he was vetting me as an investor.
17 Q. Is that something that you -- how did that arise?
18 Did you say, hey, I would like to lend you money or did he
19 ask you?
20 A. No. He made a very professional presentation about
21 the project.
22 Q. And so how did that unfold, generally? And we will
23 talk about the specific documents and the e-mails and things
24 like that, but just, generally, how did that process
25 unfold?

1 A. It was at an initial meeting. I believe we met at
2 my house one or two times, exchanged information.
3 Q. And what is the nature of your personal investment
4 portfolio? Is it all in a trust or is it in stocks or do you
5 own real estate?
6 A. I have real estate investments and I have a
7 portfolio managed by Raymond James.
8 Q. Have you engaged in any investment activity or
9 loaned any money to projects like this outside of your
10 professional services people before?
11 A. No.
12 Q. What made you decide to lend the money to Mr.
13 Stewart and Mr. Salis and their organization?
14 A. Well, at the time he was doing the development
15 project, I was in the middle of doing estate planning due to
16 health concerns. And I was looking for ways to augment my
17 portfolio to create cash flow for my portfolio.
18 Q. What would you express as your risk tolerance? Were
19 you looking for an aggressively risky investment or high rate
20 of return at that point?
21 A. Well, it didn't seem that risky to me at the time.
22 Q. Why do you see that? How was it proposed to you?
23 A. They were very professional what they were doing.
24 All the information about the project was right on. You
25 know, he retained professionals, engineers, architects to

1 work with him. The plans were very already developed. And
2 he had plans for managing the facility, should it go to
3 completion. And the numbers looked really good.
4 Q. And when you say "he" and "they", you are referring
5 to --
6 A. ISL Development, LLC.
7 Q. What was your understanding as to Mr. Stewart's role
8 role with that ISL?
9 A. That he was doing all the development, the
10 entitlements, the zoning, hiring the architects and
11 engineers.
12 Q. Was he an owner of ISL?
13 A. He was a manager.
14 Q. Okay. Let me refer you to the exhibit book. And we
15 will start out with Exhibit No. 1. And I will have you tell
16 the Court what Exhibit 1 is. And you can take a minute to
17 refresh your recollection. I don't expect you to memorize
18 this entire book, but if you can sort of review that and tell
19 the Court what Exhibit No. 1 is.
20 A. It's a memorandum of understanding which also
21 accompanied the promissory note. And it outlines what I and
22 ISL Development would do going forward.
23 Q. Okay.
24 A. And outlines the terms of the note.
25 Q. And what was your -- what was your understanding of

1 the proposal that you would become an investor as opposed to
2 a lender in this project as outlined in that?
3 A. That we would discuss it later.
4 Q. Okay. That you and Mr. Stewart would discuss it?
5 A. Uh-huh, and Adam.
6 Q. Okay. All right. When you signed this memorandum
7 of understanding, did you have any preconceived notion that
8 you were never going to convert this loan to an investment,
9 or you were absolutely going to convert this to an
10 investment?
11 A. I didn't know either way.
12 Q. Okay. Let's turn to Exhibit 2. And describe to the
13 Court what that is.
14 A. Promissory note for 200,000, with interest of 12
15 percent paid in arrears and acceleration pre-payment should
16 they wish.
17 Q. And what date did you enter that?
18 A. December 27th, 2012.
19 Q. By the way, if you flip back to Exhibit 1, was that
20 the same date?
21 A. Yes.
22 Q. Do you remember -- sitting here today, do you
23 remember signing these two documents?
24 A. Yes.
25 Q. So how did this promissory note come to be? Was

1 this something that Mr. Stewart gave to you and prepared, or
2 did you negotiate with him? How did that arise?
3 A. We had talked about it, and he needed it before the
4 end of the year. And Adam produced the document and he
5 brought it to me, and I signed it.
6 Q. And so you are not aware? Say no.
7 A. No.
8 Q. And your understanding is Mr. Stewart is not a
9 lawyer?
10 A. No.
11 Q. Mr. Salis?
12 A. Yes.
13 Q. Again, was it your understanding Mr. Salis had
14 prepared this document?
15 A. Yes, it was my understanding that he did all the
16 writing.
17 Q. Okay. What type of input did you have in this? Did
18 you, for example, demand a certain amount of interest rate?
19 A. No.
20 Q. Okay. And any penalty rate or anything like that?
21 Did you demand a specific term?
22 A. No.
23 Q. And this -- so this promissory note, it shows by its
24 terms that it was to be repaid to you on, according to
25 paragraph 1B, due and payable on March 31, 2013. So that

1 would have been a 90-day promissory note?
2 A. Yes.
3 Q. What was your understanding that they were going
4 to -- that they needed money for 90 days to do? Why did they
5 need 90-day money?
6 A. They had invoices they had to pay. And there was an
7 option on the land coming up. And Mr. Stewart needed to be
8 paid.
9 Q. Okay. And when you signed this -- when you signed
10 the memorandum of understanding and they signed the
11 promissory note, was it your understanding that they fully
12 intended to repay you according to that note?
13 A. Yes.
14 Q. Just to add a little color to the project itself, so
15 your understanding was, and you will describe to the Court,
16 that ISL owned land already or it purchased?
17 A. Options --
18 MR. BARR: Excuse me, Your Honor. I realize we are
19 nonjury, but counsel is testifying. Could we object to
20 leading, please?
21 THE COURT: Let her do the bulk of the answer. Go
22 ahead.
23 MR. FLYNN: Thank you, Your Honor.
24 Can you describe what your understanding was of
25 the --

1 A. That the land was optioned.
2 Q. What was your understanding again as to why they
3 needed short-term funds?
4 A. Well, there was an option coming up that needed to
5 be extended. And I believe they had significant
6 architectural engineering fees that needed to be paid.
7 Q. All right. So let's turn to Exhibit 3. This is an
8 e-mail -- by the way, for the Court's edification, sometimes
9 these e-mails are -- it always takes me -- in my Outlook
10 system it shows, I think, most recent first, and then it goes
11 sequentially from there. So if you will bear that in mind as
12 we are determining which one was first, but it's my
13 understanding -- so this was an e-mail from Adam Salis to
14 Steve Stewart. And it was dated December 26th of 2012. And
15 how did you receive this document?
16 A. By e-mail.
17 Q. From whom?
18 A. It was copied to me from Adam.
19 Q. Okay. Are you familiar with this e-mail?
20 A. Yes.
21 Q. And you've reviewed this before, before trial?
22 A. Yes.
23 Q. Can you describe for the Court, generally, what the
24 content of this e-mail was, what the purpose was?
25 A. Well, they had three ways that we could make money

1 on the project, to sell the land once it was entitled to
2 another developer; to find other investors and raise capital
3 and build the project; and to raise capital using the EB-5
4 program and obtain bank financing for the balance of the
5 project.
6 Q. And you received this the day before you signed the
7 note?
8 A. Yes.
9 Q. Was there anything in this e-mail that gave you
10 concern and caused you to question whether you should sign
11 the note?
12 A. No.
13 MR. FLYNN: And, Your Honor, if you go to 3, but
14 what we will do is just -- they are separated by blue pages.
15 So I'm just going to go one after the other.
16 So if you will turn to the next e-mail. Your Honor,
17 I will keep the pace going. We are not going to go through
18 every one like this.
19 Q. So tell me what this e-mail is.
20 A. I had requested -- my attorney had requested that I
21 request the operating agreement, that it's one that we had
22 revised based on some concerns I had had.
23 MR. BARR: Excuse me. I hate to interrupt, but what
24 page are we on?
25 MR. FLYNN: Exhibit 3, and this is the second --

1 it's Exhibit 3.
2 MR. BARR: Which one, 3?
3 MR. FLYNN: Yes.
4 THE WITNESS: And I had requested the paperwork for
5 the other person who gave money to the ISL Development.
6 BY MR. FLYNN:
7 Q. An investor?
8 A. I don't believe so. I believe it was a loan.
9 Q. So you mentioned the operating agreement. First of
10 all, who was your attorney at the time?
11 A. Taso Chakeris.
12 Q. And he's here in Charleston?
13 A. Correct.
14 Q. Prior to this e-mail, had you received a draft
15 operating agreement?
16 A. Yes.
17 Q. And then you discussed that with whom?
18 A. Steve.
19 Q. You made some changes, is what you said. And
20 then -- I'm sorry, you just said in your testimony a moment
21 ago that you needed additional information?
22 A. I had asked for a copy of the note signed by Mary
23 Carolyn Stewart and set for review to verify that that had
24 actually been loaned to ISL Development.
25 Q. Who is Mary Carolyn?

1 A. Steve's wife.

2 MR. FLYNN: All right. We will turn to the next

3 e-mail, which is -- also, Your Honor, it's Bates stamp Amanda

4 Griffith 92 in the lower right-hand corner, for the record.

5 BY MR. FLYNN:

6 Q. So this next one I see is dated December 27th, 2012.

7 Do you recognize this document?

8 A. Yes.

9 Q. What is this document? I'm sorry. What is this

10 document? What is this e-mail?

11 A. It's forwarded the signed note and memorandum of

12 understanding for my signature.

13 Q. Okay. And the signed note, what was your

14 understanding, what note was that?

15 A. The promissory note.

16 Q. Okay, promissory note, Exhibit 1, or Exhibit 2?

17 A. Yes.

18 Q. And the memorandum of understanding, Exhibit 1?

19 A. Say again.

20 Q. And the memorandum of understanding, Exhibit 1?

21 A. Yes.

22 Q. So those were just transferred to you. Next page,

23 which is Amanda Griffith 99, and what is this document?

24 A. Information for where I should wire the money.

25 Q. All right. And the next document, Amanda 100?

1 A. The request for the wire.
2 Q. And 101, the page after that?
3 A. The information where it was wired to the Wells
4 Fargo Bank.
5 Q. And that's what I'm refer to.
6 A. Thank you.
7 Q. All right. Let's go to 102, who are Mike and Maud?
8 A. The owners of the property for the Whittier
9 development.
10 Q. Okay. And do you recognize the next page, 103?
11 A. Yes.
12 Q. What was this document?
13 A. To exercise the first option.
14 Q. Okay. What did this tell you, just in general
15 terms?
16 A. That they still had the property under control and
17 the right to purchase.
18 Q. Next page, 104, Amanda Griffith 104, tell me what
19 that document is. Starts out with "Happy new year".
20 A. It says that I reviewed my financial situation, and
21 the money they need is a little bit more than I am
22 comfortable with, and could they be sure they needed the
23 entire 750,000, which is what they wanted me to invest.
24 Q. Was that described in the promissory note, or where
25 did the 700 -- I haven't heard 750 yet. Where did that come

1 from?
2 A. No, this was discussions between us that were
3 ongoing.
4 Q. Was this $750,000 proposal, that was -- they wanted
5 you to invest another $750,000?
6 A. No, another 550.
7 Q. Okay. And so then, let's see --
8 A. Then the second e-mail is just about what they've
9 been up to.
10 Q. And that second e-mail -- actually, the one from
11 Adam?
12 A. Correct.
13 Q. Actually, for the record, that came first, right?
14 A. Correct.
15 Q. All right. Next one, Amanda 106.
16 MR. BARR: Bates page, please.
17 MR. FLYNN: 106.
18 THE WITNESS: Taso said I needed a lawyer in
19 California. And this was an e-mail from him saying he's
20 going to try to find me a lawyer, and names of three that he
21 had come up with.
22 BY MR. FLYNN:
23 Q. And what was the -- why did you need the California
24 lawyer?
25 A. Because the LLC is registered in California, was

1 registered in California.
2 Q. Did you wind up hiring a California lawyer?
3 A. He wanted me to hire a California lawyer.
4 Q. Did you wind up hiring one?
5 A. I did not.
6 Q. Why not?
7 A. I didn't move forward with the project.
8 Q. Okay.
9 MR. BARR: I'm sorry. What was the answer?
10 THE WITNESS: I didn't move forward with the
11 project.
12 BY MR. FLYNN:
13 Q. All right. Let's -- actually, we will skip on down
14 to exhibit -- skip past 109, 110, and we will go to Amanda
15 Griffith 111. So that's Thursday, January 10. And what was
16 this e-mail?
17 A. This is an e-mail to Steve at the request of Mr.
18 Chakeris that I have a financial statement for the LLC.
19 Q. Okay. Did you receive such a statement from Mr.
20 Stewart?
21 A. I cannot recall.
22 Q. Let's move on to 112.
23 A. This is an e-mail from Adam suggesting small
24 architectural firms -- I mean, excuse me, legal firms for me.
25 Q. And you also then sent one at the bottom half of

1 that page, January 10th, at 12:37 a.m., same line?

2 A. Asking for a recent appraisal of the property.

3 Q. Okay. The Whittier property?

4 A. Correct.

5 Q. Why were you asking for all of this information?

6 A. Mr. Chakeris recommended it.

7 Q. For what purpose?

8 A. For us to ascertain the health of the LLC and the

9 things that had been said to me were actually truthful.

10 Q. All right. Let's turn to next one, Amanda Griffith

11 115.

12 MR. FLYNN: Your Honor, once we get through this

13 section --

14 THE COURT: Take your time. Take your time.

15 MR. FLYNN: Okay.

16 THE COURT: If anybody needs a break, by the way,

17 just wave your hand, let me know. In the meantime, we will

18 just plow through.

19 BY MR. FLYNN:

20 Q. That's a good point. Amanda, if you need a break,

21 let me know.

22 So Amanda Griffith 115, tell me what that is.

23 A. Who is this forwarded from? Anyway, it's about the

24 modified operating agreement for ISL and the appraisal of the

25 project, and the Henderson line and the memorandum of

1 understanding.

2 Q. So this is an e-mail from you to Mr. Stewart?

3 A. Is it? Okay.

4 Q. Well, I'm asking.

5 A. Yes.

6 Q. All right. And those are -- were you asking

7 questions of Mr. Stewart?

8 A. I was asking for this information.

9 Q. Okay.

10 A. And then there are some questions. The question is:

11 Will my $200,000 loan be rolled into the capital when I sign

12 the agreement? I have some questions about paragraphs blah,

13 blah. And then I have some questions about the management

14 fee and what's going to be left after the project -- if the

15 project is sold, is there going to be any money left over.

16 Q. For a quick change of pace, let's turn to Exhibit 4,

17 Tab 4. You might put your thumb back in. We are going to

18 come back where we were. What is Exhibit 4?

19 A. Amended and restated operating agreement for ISL

20 Development, LLC, limited liability company.

21 Q. Is that what you were referring to in these e-mails?

22 A. Yes.

23 Q. Who prepared that document?

24 A. Adam Salis.

25 Q. All right. Let's go back to -- hopefully, you kept

1 your thumb on it, 115. There. Tell the Court what that
2 e-mail string is. I'm sorry. That was the one we just did.
3 Beg your pardon. Let's go to 117.
4 A. This is an e-mail confirming a conference call with
5 my CPA, Jon Beauston.
6 Q. You said John Beauston?
7 A. He's a certified public accountant, my CPA.
8 Q. How do you spell that?
9 A. B-e-a-u-s-t-o-n.
10 Q. Is he a local --
11 A. Yes. I can't remember the name of his firm.
12 Q. How long had you worked with Mr. Beauston?
13 A. Oh, many years, many, many years.
14 Q. And does he handle your personal finances?
15 A. He does; his firm does.
16 Q. And flipping to Amanda Griffith 119, it looks like
17 this may have been cut off. But do you recall receiving that
18 document? What is that document?
19 A. That's a financial statement, the balance sheet for
20 the development company for ISL Development.
21 Q. All right. Let's skip to -- we will skip past 97,
22 and go to Amanda Griffith 121. So tell me -- tell the Court
23 what this e-mail is. Let me -- again, to sort of give myself
24 a framework, so it says January 16th, 2013, 5:17 a.m. Amanda
25 Griffith wrote. You see that?

1 A. Yes.
2 Q. That was your e-mail?
3 A. That was the beginning of Steve's e-mail that
4 included what I had e-mailed him.
5 Q. Okay. And you recall sending that e-mail?
6 A. I do.
7 Q. Tell the Court what you wrote in that e-mail.
8 A. This is the condensation of our meeting, the
9 conference call that we had at John Beauston's office. And
10 he had some concerns about the development company. And he,
11 number one, said that he thought that because I had to borrow
12 the capital to contribute, that this would be too expensive
13 for me and it would max out my borrowing capability.
14 He also said that he has other clients that are in
15 much better financial situation than me that do these types
16 of projects and they normally -- if they put in a majority of
17 the money, that they would have much greater than a 50
18 percent membership; that if we were getting additional
19 investors, my percentage of ownership would be diluted in the
20 future; and that based on the risk involved, that my
21 investment would normally be much higher and that I would be
22 a manager.
23 Q. All right.
24 A. It also talks about my understanding of Steve's
25 position and that I was trying to make this investment as a

1 supplement to my income and not something that I would
2 receive in the future. They were asking me to take preferred
3 interest, I mean, preferred payment, and that my goal was not
4 to lose my capital, but make a little money, and I didn't see
5 how the proposal addressed that, that I was happy to loan him
6 $200,000 if he personally agreed, if he personally guaranteed
7 the loan, and that I wished him the best.
8 Q. Okay. So first part of what you've just discussed
9 was your understanding from John Beauston?
10 A. Correct.
11 Q. And what you've just talked about was from the last
12 paragraph of that, that was your personal work, that's what
13 you wanted to communicate?
14 A. Yes.
15 Q. So tell the Court what that means in plain English.
16 A. In order for me to borrow the money, I actually have
17 the portfolio that would cover this loan, but it was
18 recommended by my advisor not to liquidate my positions in my
19 portfolio to finance this. I was going to borrow against my
20 principal and my portfolio, and this would max out my
21 borrowing capacity.
22 And one of the concerns was that if the appraised
23 value of the property went down, then I would actually have
24 to put more money into my portfolio -- I mean, the appraised
25 value of my portfolio went down, I would have to put in an

1 injection of capital to cover the loan.

2 Q. And when you refer to the loan, that's the 550?

3 A. Correct.

4 Q. And so what is the upshot?

5 A. I was unable to invest in the project.

6 Q. And what's your understanding about what happens?

7 Because you said, I am not going to invest, what happens

8 then? What's your status at that point?

9 A. Well, much later, I realized they weren't able to

10 find any other investors. And because of that and I

11 understood the project -- problem with the EB-5 financing,

12 based on the EB-5 HUD program, that the project wouldn't go

13 forward.

14 Q. Okay. Tell the Court what you are referring to with

15 EB-5 and problems. What is that?

16 A. EB-5 is a HUD project that allows areas in the

17 country that are in need of jobs to allow foreign investors

18 to invest up to $500,000 in the project to receive a green

19 card.

20 Q. All right. And was that -- was it your

21 understanding that was going to be used in the Whittier

22 project?

23 A. Correct, that Adam had potential investors that fit

24 that.

25 Q. And what you had just testified to was -- what was

1 your understanding at that point with respect to EB-5? Was
2 that going forward or --
3 A. No. There was some problem with it. I don't really
4 recall what the problem was. But I thought perhaps that
5 Orange County no longer qualified as a disadvantaged area.
6 Q. All right. Let's go back to the text of your e-mail
7 on page Amanda Griffith 122. And it says, the second-to-last
8 line, starting with, I am happy, I am happy to lend, so tell
9 me what you meant by that line.
10 MR. BARR: Objection, Your Honor. I believe that
11 the parol evidence rule is implicated here.
12 MR. FLYNN: Your Honor, I will withdraw the
13 question.
14 THE COURT: All right.
15 BY MR. FLYNN:
16 Q. Let's go down to the remainder of that page. What
17 is -- can you identify that document?
18 A. Yes.
19 Q. What is that?
20 A. It says he appreciates my concern and respects my
21 decision, that, of course, he will certainly guarantee the
22 200,000, and e appreciates my help and consideration.
23 Q. And "he" is?
24 A. Steve Stewart.
25 Q. Why did you need to get a personal guarantee?

1 A. We had been talking about this all along, that he
2 was involved and that he personally would cover my expenses.
3 Q. Was Mr. Stewart angry with you that you weren't
4 investing at that point?
5 A. Doesn't appear so, no.
6 Q. And let's turn to Amanda Griffith 124. So starting
7 on January 30th, 2013, do you recognize that e-mail? I beg
8 your pardon. There's two references on that date.
9 A. The January 30th?
10 Q. Yes, so after that part right there.
11 A. About "I'm sorry I didn't receive his e-mail"?
12 Q. Yes. If you can tell the Court what that e-mail is.
13 Do you recognize that e-mail?
14 A. "I appreciate you responding to me so quickly and I
15 appreciate your guaranteeing the loan of 200,000."
16 Q. This is from you to whom?
17 A. From Steve Stewart to me.
18 Q. From -- well, let's see. You said from Steve
19 Stewart to you?
20 A. Oh, me to Steve. I'm sorry.
21 Q. Okay.
22 A. You are wearing me down.
23 Q. Okay. All right. That's the last of Exhibit 3. So
24 that's a good summary.
25 So the initial note was to be repaid on March 31,

1 2013. Did you have any problem extending the terms of that
2 personal guarantee?
3 MR. BARR: Objection.
4 THE COURT: What's the objection?
5 MR. BARR: I withdraw it.
6 THE COURT: Go ahead. You can answer the question.
7 THE WITNESS: No.
8 BY MR. FLYNN:
9 Q. Tell the Court why.
10 A. Because they were going to continue to pay me.
11 Q. Pay you?
12 A. Interest on my loan.
13 Q. All right. What was your understanding of the loan
14 terms at that point?
15 A. It was a 12 percent interest only paid in arrears
16 starting on the 1st of February of 2013.
17 Q. And how long did you intend for that loan to
18 continue?
19 A. Until they repaid me.
20 Q. All right. Did you receive payments of interest?
21 A. I did.
22 Q. Let me -- let's skip through, save some time. Do
23 you need water?
24 A. I have some right here. How did you know? Do I
25 have a frog in my voice?

1 Q. No. All right. Did you expect to receive interest
2 payments on a monthly basis?
3 A. Correct.
4 Q. And did you receive interest payments on a monthly
5 basis?
6 A. They were sporadic.
7 Q. So $200,000 note at 12 percent would be how much per
8 year?
9 A. 24,000.
10 Q. Okay. How much per month?
11 A. 1,200 -- no, 2,400, or 2,000.
12 Q. All right. Just testing you.
13 A. I did have algebra.
14 Q. So you were expecting $2,000 per month --
15 A. Correct.
16 Q. -- in analyzed interest. And so how did you
17 receive -- whatever payments you did receive, how did they
18 come to you?
19 A. In a check, by check.
20 Q. And was that mailed to you?
21 A. Sometimes.
22 Q. How else did you receive it?
23 A. It came regularly at first. And then I would
24 receive it in, like, two-month increments.
25 Q. And so at that point, were the checks mailed from 60

1 Montague to your residence here in Charleston?
2 A. Correct.
3 Q. And who wrote those checks to you?
4 A. Steven Stewart.
5 Q. Was that out of his own personal account or an ISL
6 account?
7 A. ISL.
8 Q. All right. Okay. Let's fast-forward to November
9 5th of 2013. So what's your recollection of the status of
10 your interest payments at that point?
11 A. They hadn't been made for one or two or three
12 months, I'm not sure how much.
13 Q. Did you have discussions with Mr. Stewart about the
14 next payment?
15 A. I did.
16 Q. Tell me -- tell the Court about that.
17 A. Well, he agreed to pay me in November. He asked me
18 to hold the check until after the first of the year, which I
19 agreed to do.
20 Q. Did you receive a check?
21 A. I did.
22 Q. And did you comply with the request?
23 A. I did.
24 Q. And what happened when you presented that to your
25 bank for deposit?

1 A. It bounced.
2 Q. Did you communicate with Mr. Stewart after that?
3 A. Yes.
4 Q. And tell the Court about that exchange.
5 A. There was no money.
6 Q. Well, explain that to the Court, what your
7 understanding was at that point.
8 A. My recollection is that there were no funds to cover
9 my check and there would not be in the future.
10 Q. From?
11 A. ISL Development.
12 Q. Okay. And at that point, was it your understanding
13 that Mr. Stewart had personally guaranteed the repayment of
14 the note to you?
15 MR. BARR: Objection.
16 THE WITNESS: Yes.
17 MR. BARR: Leading.
18 THE COURT: Strike that last question from the
19 record. And just you want to rephrase it, you may, or you
20 can move on, whichever you want.
21 MR. FLYNN: Thank you, Your Honor.
22 BY MR. FLYNN:.
23 Q. If ISL didn't have any money, how did you expect to
24 get repaid in January of 2014?
25 A. Future development projects.

1 Q. And from ISL or from Mr. Stewart?
2 A. ISL was disbanded. And there were new LLCs formed
3 for their future development.
4 Q. Did Mr. Stewart or Mr. Salis request that you invest
5 or loan money to those future projects?
6 A. Not after January.
7 Q. Okay. Let's turn to Exhibit 7. And did you request
8 that I prepare this letter?
9 A. Yes.
10 Q. What was your intention in doing so? Tell the
11 Court.
12 A. To get back my money.
13 Q. All right. Does that letter accurately state what
14 your understanding of the terms of the amended loan agreement
15 was?
16 A. Yes.
17 Q. Exhibit 8?
18 A. I'm sorry, say again. Exhibit 8?
19 Q. Yes.
20 A. Okay.
21 Q. Do you recognize that document?
22 A. Yes.
23 Q. What is that?
24 A. It's the promissory note that we saw in previous
25 exhibit.

1 Q. Exhibit 8, I'm sorry.
2 A. A?
3 Q. There you go.
4 A. Oh, keep going, okay.
5 Q. Yeah. I'm sorry. You looked at Exhibit A. And I
6 said 8.
7 A. 8, okay. This is a letter to you from Steven
8 Stewart.
9 Q. Okay. All right. What was your understanding from
10 that letter?
11 A. That Mr. Stewart was pretty angry. And I was
12 responsible for everything that went wrong, and that he was
13 going to actively pursue -- that he would be vigorously
14 defending himself against my claim.
15 Q. Let's turn to Exhibit 9. Do you recognize that
16 document?
17 A. For 450,000?
18 Q. Yes. Do you recognize that document?
19 A. Yes.
20 Q. What is that document? Tell the Court.
21 A. This is a promissory note for 450,000 from the
22 Henderson Family Trust dated December 29th, 2000.
23 Q. And what is your understanding of the -- what is the
24 Henderson Family Trust, to your knowledge?
25 A. This is a family trust that Mr. Stewart's wife is a

1 trustee.

2 Q. So when you presented the $6,000 check dated

3 November 5th of 2013, from ISL when you tried to deposit that

4 and it bounced, did you ever receive any more money, interest

5 or principal or any other money from Mr. Stewart personally?

6 A. No.

7 Q. Is it your -- so we did the math earlier. And you

8 said 200,000 times 12 percent is how much per year?

9 A. 24,000.

10 Q. Okay. Without a calculator, so we've got last

11 interest you received was in 2013, so '14, '15, '16, '17 and

12 '18, so the interest that you would have expected over five

13 years would have been how much? Just tell me what the

14 calculation is and I will --

15 A. 128? I can't do that in my head.

16 Q. 24,000 times 5?

17 A. Yeah.

18 MR. BARR: It's 120.

19 Q. All right. So 120?

20 A. Okay.

21 Q. 120,000?

22 A. Okay.

23 Q. Okay. So is that the amount that you expect Mr.

24 Stewart to pay you in interest?

25 A. Yes, plus attorney's fees.

1 Q. Okay. And what is your agreement with me with
2 respect to what percentage I would take of this?
3 A. That you would get a third of what I received.
4 Q. And so your damages, what you are seeking from Mr.
5 Stewart as personal guarantor is 200,000 in principal,
6 correct?
7 A. Yes.
8 Q. 120,000 in interest?
9 A. Yes.
10 Q. So that's 320,000, plus one-third of that amount,
11 one-third of 320,000 as attorney's fees?
12 A. Correct.
13 Q. Is that the summary of what your damages are today?
14 A. Yes.
15 Q. Do you believe that Mr. Stewart is liable to you to
16 pay that personally?
17 A. I do.
18 Q. Do you recognize Mr. Stewart in the courtroom today?
19 A. Yes.
20 MR. FLYNN: Okay. Your Honor, at this point, I will
21 conclude -- this concludes my questions to Ms. Griffith. And
22 I will turn over to counsel for cross-examination.
23 THE COURT: Okay. Ms. Griffith, Mr. Barr is going
24 to ask you some questions as well. Thank you.
25 MR. BARR: Should we take a break?

1 THE COURT: Do you want to take five minutes? We
2 will take about five-minute break. And you are free to leave
3 the witness stand. Just don't discuss the case with anybody,
4 please, Ms. Griffith.
5 (Whereupon, a recess transpired.)
6 CROSS-EXAMINATION
7 BY MR. BARR:
8 Q. When did you begin your architecture practice?
9 A. 1984.
10 Q. At one time, were you the architect for the City?
11 A. I was.
12 Q. I thought that was the case. And as an architect,
13 you are accustomed to working with other professionals in the
14 development field; isn't that correct?
15 A. Correct.
16 Q. And so that you've come to understand the dynamics
17 of construction, but also the dynamics of the permitting
18 required to get a construction project off the ground?
19 A. Yes.
20 Q. I believe that you met Mr. Stewart through your
21 mutual friend, Gino Kollar? I think you've said that.
22 A. Correct.
23 Q. And you knew Mr. Stewart casually and socially after
24 a couple of occasions together?
25 A. Correct.

1 Q. And isn't it correct that Mr. Kollar suggested that
2 you might be interested in investing in this project?
3 A. Not to my recollection.
4 Q. Okay. And you and Steve had at least two meetings
5 where you discussed the substance of the proposed investment?
6 A. Yes.
7 Q. And I think one was at Charleston Place?
8 A. I don't recall that one.
9 Q. And another was at Folly Beach?
10 A. The first one was at his home.
11 Q. At his home, okay. And in the meeting with Mr.
12 Stewart, whichever one it was, isn't it correct that you also
13 expressed an interest in investing in this project?
14 A. Yes.
15 Q. And you told him that you thought you might have as
16 much as $750,000 to invest?
17 A. Correct.
18 Q. Because you understood, as you previously testified,
19 that that was at least the liquid part of your portfolio?
20 A. Yes.
21 Q. At least you had access to it?
22 A. They were looking for a million, but I didn't have
23 that much.
24 Q. Correct. And prior to your signing -- prior to
25 signings of the documents that we've seen in December of

1 2012, you were provided with information about the project;
2 isn't that correct?
3 A. Correct.
4 Q. And you saw that all the permitting or the
5 permitting had been obtained?
6 A. Correct.
7 Q. That is to say, all the entitlements; is that
8 correct?
9 A. I'm not sure about all of them, but there was
10 substantial work that had been done.
11 Q. Let's talk about that term then just so that the
12 record is clear. What is your understanding of what
13 constitutes entitlements in the context of a land
14 development?
15 A. I know that Mr. Stewart does work with entitlements
16 and creates value in his projects with entitlements, but this
17 was not a major thrust of the Whittier project.
18 Q. Was not what?
19 A. Major thrust of a Whittier project.
20 Q. What did you mean, it was not a major thrust?
21 A. It was my understanding that this healthcare
22 facility was going to be owned and operated by ISL
23 Development, that that was the active thrust of the
24 development, that there were other options, but that that was
25 where the project was moving.

1 Q. Okay. Maybe we got cross-wired there. I had asked
2 you to explain what is meant by entitlements.
3 A. I'm really not familiar with this term.
4 Q. Oh, I'm sorry. I thought you used it in a question
5 back --
6 A. Well, it's been used recently in relationship to the
7 Whittier project. So I understand what Mr. Stewart -- what
8 he means when he says entitlements.
9 Q. So you are saying that as an architect and one
10 dealing in the land development field, you were not familiar
11 with the term "entitlements"?
12 A. No. I've never had an investor who made capital
13 improvements on his project by entitlements, and then flipped
14 it with that in mind.
15 Q. Are you aware, though, that developers do that? Let
16 me ask the question this way. You understand that, for
17 example, if you wanted to develop a piece of land here in --
18 let's say we wanted to develop a hotel, to make it good and
19 controversial here on the peninsula city. There are a number
20 of hoops you have to jump through to get there, right?
21 A. Right.
22 Q. And, I mean, you've got to make sure that the
23 property is zoned in the category that would permit it to be
24 placed in a hotel overlay?
25 A. Correct.

1 Q. Then you've got to go to the planning commission?
2 A. Right.
3 Q. And then to get it put in the overlay, and then
4 you've got to go to the board of zoning appeals to get a
5 special exception permit.
6 A. Correct.
7 Q. And if some sort of rezoning is needed, that needs
8 to go to city council.
9 A. Correct.
10 Q. And all along, the city staff, who is implicated in
11 that, are the planning staff and the engineers. And so
12 compliance has to be shown for parking, traffic control. You
13 are shaking your head. You agree?
14 A. Yes.
15 Q. So if you are not familiar with this term
16 "entitlements", do you understand that, nevertheless, that
17 before a project can get off the ground, all of those
18 approvals need to be in place?
19 A. Yes. I understood that the work he had done up
20 previously was what he was contributing to the project, that
21 it had value.
22 Q. You are saying --
23 A. The value for the work he had done doing those
24 things was his contribution to the development.
25 Q. You told me when we crossed in the hall that you

1 were hard of hearing. And I told you I am too. So you said
2 Mr. Stewart told that you?
3 A. No, I understood that.
4 Q. You understood that?
5 A. The documents say that.
6 Q. You understood that before this conversation about
7 your becoming an investor, that Mr. Stewart had put a lot of
8 effort into obtaining -- I'm going to use the term "those
9 entitlements" in California?
10 A. Correct.
11 Q. And you understood that a number of engineers,
12 architects and planners had been involved. And you saw
13 some --
14 A. Plans, correct.
15 Q. -- some plans that were already in place. And I
16 think you've already said that you understood that those are
17 expensive. And you were told that part of the reason for
18 seeking funding was to pay some invoices that they weren't
19 able yet to pay?
20 A. Correct.
21 Q. Now, at some point in time, you were also told that
22 Mr. Stewart's wife's family had also invested in ISL or made
23 a loan to ISL?
24 A. Correct.
25 Q. And you knew that was $450,000?

1 A. Correct.
2 Q. Isn't it correct then that come the signing up on
3 December the 27th of 2012, and that would be of the
4 memorandum of understanding and the promissory note, the
5 intent going forward was that you were going to invest
6 $750,000 as an equity participant in ISL? That's what the
7 MOU contemplated, correct?
8 A. Correct.
9 Q. But because these immediate invoices were due, you
10 were going to make a short-term loan of $200,000, correct?
11 A. Correct.
12 Q. That would be repayable in 90 days at 12 percent
13 interest?
14 A. Correct.
15 Q. That's a pretty quick return, isn't it?
16 A. For a loan, correct.
17 Q. And then again, contemplating that you would become
18 an equity member, that 200,000 would be rolled into your
19 equity, so you would add another 550 to make your total put
20 $750,000?
21 A. Correct.
22 Q. You agree with that?
23 A. Yes.
24 Q. Okay. Now, all along, you had been consulting with
25 your lawyer, correct? Was it Mr. Chakeris?

1 A. Chakeris. Not all along, only the next following --
2 after the 1st of January.
3 Q. I'm sorry, what?
4 A. Not all along. I only began to consult after the
5 1st of January when we were looking to sign the next
6 document.
7 Q. Okay. Well, let's go to an e-mail here. And let me
8 see then. I didn't understand that. I think the e-mails are
9 under Tab 3 in the joint exhibit notebook. And if you will
10 turn to the Bates page Amanda Griffith 3 e-mail there.
11 THE COURT: Which tab?
12 MR. BARR: Tab 3, Your Honor. It will be Bates Page
13 3.
14 BY MR. BARR:
15 Q. Are you there, Ms. Griffith? Just tell me when you
16 are there. Are you on the page?
17 A. Yes.
18 Q. Okay. So this was an e-mail from Adam to you on
19 December the 26th. So not even the MOU had been assigned
20 then; isn't that correct?
21 A. Correct.
22 Q. And he says on the second line, I'm attaching for
23 your review and your attorney's review a revised operating
24 agreement, including a red line showing the changes we made
25 to the last version of the agreement which Steve gave to you

1 at your last meeting. Also is a copy of a note we signed for
2 your Mary Caroline. That's the $450,000 note -- right? --
3 per your request. Steve will call you tomorrow morning to
4 try to set up a call with you and your attorney to go over
5 these documents.
6 So are you saying then that you never did consult
7 with an attorney?
8 A. I don't think I had up to this point.
9 Q. Even before signing the MOU?
10 A. I didn't sign the MOA.
11 Q. Well, you didn't sign the memorandum of
12 understanding?
13 A. Understanding, but not agreement.
14 Q. Yeah. You signed the memorandum of understanding;
15 is that correct?
16 A. I signed the --
17 Q. That's going to be Tab 1.
18 A. Yes, the memorandum of understanding.
19 Q. Yeah. So Adam Salis is sending the documents to
20 you. Sounds to me, I would suggest to you, it looks like he
21 assumes you are already talking to a lawyer.
22 A. At this point, I did not. There was a great rush to
23 get the money before the end of the year. And I had not
24 retained an attorney.
25 Q. Anyhow, you agreed that the e-mail says what it

1 says. He sent you the operating agreement. He encouraged
2 you to review it with your attorney, correct?
3 A. Correct.
4 Q. And wouldn't you agree by doing that, Steve and
5 Adam, on behalf of ISL, were inviting an exchange of terms?
6 They weren't saying, take it or leave it, were they?
7 A. No.
8 Q. Nor did they have any right to; is that correct?
9 A. Correct.
10 Q. Now, let's flip over to Bates page 115 in this same
11 Tab 3. And tell me when you have reached the page.
12 A. I have.
13 MR. BARR: Your Honor, are you there with us?
14 THE COURT: Almost. Got it.
15 BY MR. BARR:
16 Q. Now, in your direct testimony, I think you told your
17 lawyer that this was an e-mail from you to Steve on January
18 the 10th, Steve Stewart. Let me ask you to revisit that.
19 Because you are saying to whoever received this e-mail:
20 Attached for your inspection is the agreement for my buy into
21 the LLC, memorandum of agreement for the $200,000 loan I
22 already made, appraisal of the entitled property, land prices
23 on page 148, Henderson loan agreement. I've asked for a
24 financial statement for the LLC, but I have not received it.
25 So far my questions are -- now, isn't it correct that that --

1 just revisiting the context of that, that you either sent
2 that to your lawyer or your CPA and not to Steve? You
3 wouldn't be sending Steve back the same documents he sent to
4 you with these same questions, would you?
5 A. Okay. But I wouldn't be asking him the questions in
6 the next paragraph.
7 Q. Well, but wouldn't you be asking whatever
8 professional is reviewing the documents to answer those
9 questions from reading the documents?
10 A. Correct.
11 Q. Isn't that right?
12 A. All right.
13 Q. So you are asking either your lawyer or your CPA,
14 read this, does this mean I'm going to roll my 200 in the
15 capital when I sign?
16 A. I understand what you are saying, yes.
17 Q. Isn't that correct?
18 A. Yes, on January the 10th.
19 Q. So you were consulting -- you were getting advice at
20 least by then, January the 10th?
21 A. Correct, that's what I recall.
22 Q. Okay. But as of that date, would you agree that you
23 had made a loan to ISL of $200,000?
24 A. Correct.
25 Q. And it was due and payable on March the 31st?

1 A. Correct.
2 Q. And if you will turn to Bates Page 2 --
3 A. Of?
4 Q. I'm sorry, Tab 2. Tab 2. Tell me when you are
5 there. Are you there?
6 MR. BARR: Your Honor, are you with us?
7 THE COURT: Uh-huh.
8 BY MR. BARR:
9 Q. Tab 2 is the promissory note. And would you agree
10 with me, going back to the last page, that that is signed
11 only by ISL Development, LLC? You agree with that?
12 A. Correct.
13 Q. That is not a personal obligation of either of the
14 signers, is it?
15 A. Personally, you mean?
16 Q. Yes.
17 A. Correct.
18 Q. And then go back to the second page. And paragraph
19 10 reads: No modification of this note shall be valid or
20 binding unless set forth in writing signed by holder and
21 maker.
22 Do you understand what that meant?
23 A. Correct.
24 Q. Okay. So any changes to this, any additions to
25 this, any supplements to this had to be in writing; is that

1 correct?

2 A. Correct.

3 Q. And you understood that it was due on March the 31st

4 of 2013, right?

5 A. Correct.

6 Q. There's no provision in here for extensions,

7 right?

8 A. Right.

9 Q. And monthly interest-only payments at 12 percent,

10 right?

11 A. Correct.

12 Q. And then it provides on the first page of the

13 promissory note in paragraph 4, says that the maker, that's

14 ISL, could pay it off earlier if they wanted to, correct?

15 A. Correct.

16 Q. And paragraph 5 says that if the maker, ISL, doesn't

17 pay punctually when it's due, any installment of principal or

18 interest or other amount, the entire sum is due, together

19 with accrued interest at the election of the owner and you

20 could demand payment. You understood that, right?

21 A. Correct.

22 Q. And I think you did testify to this effect in your

23 direct testimony, but every payment you received on this note

24 was from ISL, on the account of ISL; isn't that correct?

25 A. Correct.

1 Q. Now, let's go back to Tab 3 and to the e-mail
2 exchange on January the 16th of 2013, which would be
3 beginning at Bates Page 121. Just tell me when you are
4 there.
5 A. On Tab 3, I just have page 1.
6 Q. Beg pardon?
7 A. On Tab 3, I just have page 1 and 2.
8 Q. You don't have a Bates page 121?
9 A. What tab is it?
10 Q. Tab 3, Bates Page 121.
11 A. Thanks. I still don't have 121. There it is.
12 Q. Flip over to 122 now, which is the second page of
13 that. Now, when this e-mail was written -- I apologize. You
14 have to go back to the first page. This e-mail was written
15 on January the 16th of 2013; is that correct?
16 A. Correct.
17 Q. From you to Steve Stewart and to Adam Salis?
18 A. Well, January 30th.
19 Q. The e-mail chain is a little confusing.
20 A. I know.
21 Q. If you go down to the bottom of the page, it says on
22 January the 16th, 2013, at 5:17 a.m., Amanda Griffith
23 wrote --
24 A. But that's included in his January 30th e-mail.
25 It's a thread.

1 Q. Right. But you are writing -- I'm just trying to
2 establish, you are writing this on January the 16th?
3 A. Correct.
4 Q. To Steve Stewart?
5 A. Correct.
6 Q. And you are writing it early in the morning, at
7 5:17?
8 A. Correct. I'm an early riser.
9 Q. Okay. And then if we can flip over to the second
10 page then, so as of this date, is it not correct that you had
11 already made the loan to ISL of $200,000?
12 A. Correct.
13 Q. I think it was funded December the 28th, correct?
14 A. Correct.
15 Q. And it was not -- as of January 16th, it was not yet
16 due, principal was not yet due; is that correct?
17 A. Correct.
18 Q. It wasn't due until March 31st, right? Okay. And
19 in your e-mail at the top of -- the content at the top of
20 page 122, second-to-last sentence, you wrote: I am happy to
21 lend the $200,000 to you if you will personally guarantee the
22 loan. Did I read that correctly?
23 A. Yes.
24 Q. Okay. Now, you did not write, did you, that if you
25 personally guarantee the loan, I promise to extend the term,

1 did you? That's not in those words, is it?

2 A. No.

3 Q. You did not write in those words, if you personally

4 guarantee the loan, I will loan you more, did you?

5 A. No.

6 Q. You did not write, I will agree to extend the

7 maturity date of the loan, did you?

8 A. No.

9 Q. When you wrote this, the loan was still due and

10 payable on March the 31st?

11 A. Yes.

12 Q. So then Steve Stewart wrote, if we go down on Bates

13 page 122 where it says: Hey, Amanda, I can certainly

14 appreciate your concerns and I respect your decision. Of

15 course, I will personally guarantee $200,000. And I

16 appreciate your help and consideration. Did I read that

17 correctly?

18 A. Yes.

19 Q. Then did you read the rest of the text of his

20 e-mail?

21 A. Yes.

22 Q. And he discussed the concept of how he expected the

23 development to be accomplished; isn't that correct?

24 A. Yes.

25 Q. Then on Bates Page 123, at the third paragraph from

1 the bottom, he wrote: As I have said, I respect your
2 decision regarding the Whittier project. And will personally
3 guarantee the $200,000 note for funds already advanced by
4 you. And that was true, wasn't it?
5 A. Yes.
6 Q. It had already been advanced by you. So in exchange
7 for whatever Steve said in this e-mail, the only thing that
8 you said was, I am happy to lend the $200,000 to you; isn't
9 that correct?
10 A. Yes.
11 Q. And that 200,000 had already been loaned, correct?
12 A. Correct.
13 Q. And it was not due for another month?
14 A. Correct.
15 MR. BARR: Thank you. I have no further
16 questions.
17 MR. FLYNN: If I may redirect briefly.
18 REDIRECT EXAMINATION
19 BY MR. FLYNN:
20 Q. So you had testified earlier that your understanding
21 was that this loan modification extended the terms beyond
22 March 31st?
23 A. Yes. In addition to the e-mail, we were verbally
24 speaking.
25 Q. Okay. All right.

1 MR. BARR: I'm sorry. Could I pick up that question
2 and answer again? Forgive me for interrupting.
3 THE COURT: That's okay. You want the court
4 reporter to read back?
5 (Whereupon, the court reporter reads the last
6 question and answer.)
7 Q. After March 31st, you continued to be paid interest?
8 A. Correct.
9 Q. And after March 31st, did Mr. Stewart continue to
10 have use of your 200,000?
11 A. Correct.
12 MR. BARR: Excuse me, Your Honor. Counsel is
13 leading.
14 THE COURT: Okay.
15 MR. FLYNN: I will withdraw it, Your Honor.
16 THE COURT: Thank you.
17 BY MR. FLYNN:
18 Q. Did you call the loan on March 31st?
19 A. No.
20 Q. You were asked about whether you had an attorney at
21 various points along the line to discuss the promissory note
22 terms and things of that nature. Was it your decision to
23 decline this investment opportunity, your personal
24 decision?
25 A. Correct.

1 Q. You also had mentioned -- I just wanted to clarify.
2 You said it's your understanding that ISL was going to
3 actually operate this facility?
4 A. Correct. Oh, wait. I don't know. They might have
5 formed a management company separate.
6 Q. Okay. I know there was some confusion in the
7 cross-examination at that point when you are talking about
8 entitlements. And I wanted to make sure you had a chance to
9 get your point across to the Court regarding that.
10 A. Well, I understood that the work that Mr. Stewart
11 was doing to make the project come into fruition was his
12 capital contribution to ISL or sweat equity. That's what I
13 would call it --
14 Q. Okay.
15 A. -- or did call it back then.
16 Q. Did you understand that your $200,000 was going to
17 just be mostly paid to Steve Stewart?
18 MR. BARR: Objection, leading.
19 THE COURT: If you will just rephrase.
20 MR. FLYNN: I will rephrase that.
21 BY MR. FLYNN:
22 Q. What was your understanding that the $200,000 was
23 going to be used for in the project?
24 A. That Mr. Stewart was going to pay himself and pay
25 invoices for ISL that were due.

1 Q. And you were okay with that?
2 A. Yes.
3 Q. You were asked if you had written specific things in
4 the e-mail on page -- let me get that page here. If you want
5 to flip to Tab 3, Amanda Griffith 122. I believe your
6 question from Mr. Barr was whether you had written certain
7 things in that document regarding the extension of that, the
8 terms of the note, the due date. And what was your
9 understanding of the note with respect to the due date after
10 you and Steve had communicated as on this page?
11 A. We had already discussed that he would continue to
12 pay me.
13 Q. For what length of time?
14 A. No length was mentioned.
15 Q. All right. And that was a change from the
16 promissory note terms?
17 A. Correct. It was clear that it wasn't going to be
18 repaid by March 31st.
19 Q. How have you been harmed by Mr. Stewart's failure to
20 repay this note?
21 MR. BARR: Your Honor, I object. That's not
22 responsive to cross-examination.
23 MR. FLYNN: Okay.
24 THE COURT: Well, to the extent I think it covers
25 the amount. I don't know what you are trying to garner. So

1 I don't know if you could just little bit what was proposed
2 on cross maybe as to monetary damages or otherwise.
3 MR. FLYNN: It is, but I will withdraw it for this
4 moment.
5 Your Honor, I would also like to just clarify for
6 the record that we have -- we are stipulating as to the
7 authenticity of all the exhibits. I wanted to enter these
8 exhibits into the record.
9 MR. BARR: That's correct.
10 MR. FLYNN: I believe there's no objection.
11 MR. BARR: That's correct.
12 MR. FLYNN: So each and everything in that binder.
13 THE COURT: Everything in the exhibits in the binder
14 will be admitted into evidence without objection.
15 (Joint Exhibits 1 - 21 are received in evidence.)
16 MR. BARR: We will just consider them joint exhibits
17 according to the tab numbers.
18 THE COURT: Thank you.
19 MR. FLYNN: If Your Honor will bear with me, I will
20 go through my notes.
21 THE COURT: Take your time.
22 BY MR. FLYNN:
23 Q. There was discussion during cross-examination
24 regarding whether you met at your Folly Beach house or at
25 Steve's house. And it seemed to me a little bit unclear.

1 What is your recollection as to where meetings occurred
2 between you and Mr. Stewart?
3 A. We met in Mr. Stewart's gazebo in his pool in his
4 garden and we also met at my Folly Beach house.
5 Q. All right. And you were living out at Folly Beach
6 at that time?
7 A. My residence was in Edisto.
8 Q. Okay.
9 A. It's a second home.
10 Q. Okay. You still have that second home?
11 A. No.
12 Q. Why not?
13 A. I had to sell it to pay this loan off.
14 MR. FLYNN: Your Honor, I think those are all the
15 questions that I have for Ms. Griffith at this point.
16 THE COURT: Okay. Any recross?
17 MR. BARR: Yes, ma'am. Very briefly.
18 RECROSS-EXAMINATION
19 BY MR. BARR:
20 Q. Ms. Griffith, you might recall I asked the court
21 reporter to reread a question back because I was little
22 confused about it. You were asked about your understanding
23 of the loan modification which extended the term until after
24 March the 31st. What loan modification are you referring to?
25 You were referring to a document.

1 A. The promissory note.
2 Q. But what is the loan modification document that you
3 were referring to?
4 A. I'm referring to this e-mail where Mr. Stewart said
5 he would cover the loan.
6 Q. Oh, okay.
7 A. And his response to me.
8 Q. Okay. So there's no document in here that's marked
9 "loan modification" in it, right?
10 A. No.
11 Q. You are saying -- you are characterizing this e-mail
12 exchange as a loan modification, correct?
13 A. I am.
14 Q. Even though your note says that every change in
15 amendments have to be in writing, correct?
16 A. It's in writing.
17 Q. It is in writing. But it does not say in writing, I
18 will extend this note for you if you will promise to
19 personally guarantee it, does it?
20 A. No.
21 Q. Okay.
22 A. But it implies it.
23 Q. It implies it. Well, then let me ask you to go over
24 to Tab 21 then.
25 A. 121?

1 Q. Very last tab.
2 MR. FLYNN: Your Honor, if I might object, is this
3 within the scope of my redirect?
4 THE COURT: I don't know. I'm curious as well.
5 MR. BARR: I think it's precisely, because it has to
6 do with her characterization of that e-mail exchange as a
7 loan modification which was not uttered in direct. Didn't
8 come up until redirect.
9 MR. FLYNN: I don't know that a new exhibit would be
10 within the scope. I didn't address --
11 MR. BARR: The exhibit is in evidence.
12 THE COURT: I don't know where we are going with
13 this yet. So let's just see.
14 THE WITNESS: Can you tell me where you want me to
15 be?
16 Q. Tab 21, very last.
17 THE COURT: Back of the notebook.
18 Q. Very last tab in the book. Are you familiar with
19 this document?
20 A. Yes.
21 Q. So notwithstanding your testimony now that that
22 e-mail exchange was a loan modification on January the 16th
23 of 2013, you agree that on January the 12th of 2016, three
24 years later, you sent Steve a proposed draft promissory note
25 for $200,000 to be signed by him personally?

1 A. Yes, from my lawyer. Yes, correct.
2 Q. Beg your pardon?
3 A. It was from my lawyer, yes.
4 Q. And was that Mr. Flynn or was that Mr. Chakeris?
5 A. Chakeris.
6 Q. And Mr. Stewart didn't sign it, did he?
7 A. No, he didn't.
8 MR. BARR: Thank you very much. That's all I have.
9 THE COURT: Any other witnesses to call at this
10 time?
11 MR. FLYNN: May I redirect?
12 THE COURT: No. No, I think that's as far as I've
13 ever gone, but thank you.
14 MR. FLYNN: That's fine, Your Honor.
15 THE COURT: You will be able to make a closing
16 argument at the end if you wish.
17 MR. FLYNN: Thank you. You may step down. I'm
18 going to call Mr. Stewart.
19 THE DEFENDANT: May I have a break?
20 THE COURT: Sure, that's no problem. Take another
21 five-minute break.
22 (Whereupon, a recess transpired.)
23 THE COURT: Whose witness is this?
24 MR. FLYNN: This is my witness, Your Honor.
25 STEVEN STEWART,

1 having been duly sworn, testifies as follows:
2 THE CLERK: State your full name and spell your last
3 name for the record.
4 THE WITNESS: My name is Steven Paul Stewart,
5 S-t-e-w-a-r-t.
6 DIRECT EXAMINATION
7 BY MR. FLYNN:
8 Q. Good afternoon, Mr. Stewart. Can you describe for
9 the Court what your personal background is, where you were
10 raised and what your career has been?
11 A. I was born in California. I lived there until I was
12 almost 13, moved to Houston, Texas. My father was an
13 engineer at NASA. And went to school at Texas A&M, where I
14 graduated in 1975 with a degree in economics. And went on to
15 graduate work in architecture, building construction, civil
16 engineering. I had a design/build home building business in
17 College Station, Texas, which is where Texas A&M is for about
18 13 years.
19 I then moved in the late '80s back to California
20 where I was from, and went into the development business with
21 some property that my family had owned. And did that for a
22 number of years. And worked a short time in Colorado as a
23 project manager for a home builder in Boulder, Colorado.
24 Came back to California, as more of a property
25 manager/project manager for another company in California.

1 Q. What year would that have been?

2 A. Pardon me?

3 Q. What year are you at right now?

4 A. That would have been '90s, early '90s. Then I went

5 into the land development business in probably mid-'90s. I

6 don't remember if it was '96 or something. Did that until I

7 moved to South Carolina in -- it was kind of a process. I

8 didn't move on one specific date. I purchased my home at 60

9 Montague in Charleston August 3rd, I believe. I think that's

10 correct. I could be off a day or two.

11 Q. What year?

12 A. 2004.

13 Q. Okay.

14 A. And but didn't get everything moved from California

15 until well into 2005. And still had ongoing business

16 obligations with some development work that I did for that

17 period of time.

18 Q. What brought you to South Carolina in 2004?

19 A. The desire to get out of the California development

20 business. I did very well on several projects. And so I

21 came here to semi-retire.

22 Q. And did you come here because of 60 Montague, or did

23 you buy 60 Montague because you came here?

24 A. I bought 60 Montague because I came here.

25 Q. And had you completed renovations on 60 Montague?

1 A. Yes.
2 Q. Was that project underway at the time of your
3 interaction with Ms. Griffith in connection with this
4 Whittier?
5 A. We completed the renovations to Montague in about
6 2009.
7 Q. When did you meet Adam Salis?
8 A. Adam Salis had been my transaction attorney in
9 California when I was doing land development work. I met
10 him -- I can't say with certainty what date it was. But it
11 was in the mid-'90s.
12 Q. Was this the first -- this Whittier project, I will
13 refer to it as, is this the first development project that
14 you worked with Adam as a --
15 A. Partner, yes.
16 Q. When I say "partner", he was owner of ISL
17 Development?
18 A. We were co-owners and co-managers.
19 Q. What percentages?
20 A. 50/50.
21 Q. Tell me about the Whittier project that's at issue
22 and what we've been discussing this morning. What is that
23 project? Can you describe it for me?
24 A. It was an assisted living and memory care facility
25 to be built on a piece of property that had been a car

1 dealership. And I'm trying to remember how many units it
2 was. It was something around 100 units.
3 Q. And was the intent to own and operate a project
4 after its developed?
5 A. That was what our plan was, but we did have
6 alternatives.
7 Q. Were you personally going to be involved in the
8 operation?
9 A. I would be involved only in the oversight of the
10 building and making sure that it was meeting the requirements
11 proposed by the State for that kind of facility. But I was
12 not going to be operating -- you have to have a separate
13 license to be an operator in California.
14 Q. Was ISL intended to continue to survive as an
15 organization for that purpose?
16 A. ISL would have -- was contemplated to continue as an
17 organization, as an umbrella that would own and participate
18 in the ownership of not only the Whittier project, but other
19 projects that we might try to contemplate.
20 Q. Was this your first assisted living facility
21 development?
22 A. Yes.
23 Q. Was this Adam Salis's first assisted living facility
24 development?
25 A. As a partner?

1 Q. If you know, had he been involved in this type of
2 project?
3 A. He had never been a partner in a project, to my
4 knowledge. He had done a lot of work in the industry for
5 others who owned and operated these.
6 Q. What is your role in ISL Development, LLC?
7 A. Pardon me?
8 Q. What is your role?
9 A. My role was to help acquire -- find and acquire
10 sites that were suitable for what we planned to do, and then
11 to obtain the entitlements, oversee the architect and the
12 engineer and the various other consultants that you have to
13 have along the way, get the property ready to build and
14 presumably get it built out. I was not going to be the
15 general contractor on it. I would have been more like an
16 owner's rep.
17 Q. Did you locate the property that was eventually
18 optioned for this project?
19 A. I think Adam found this property. We both acted in
20 that capacity.
21 Q. Why isn't Adam here today?
22 A. Because he wasn't included in this lawsuit.
23 Q. Okay. Is he a principal of ISL Development, LLC?
24 A. He is and was. ISL Development, LLC, as you know,
25 was dissolved.

1 Q. When was it formed? Well, let me ask it this way.
2 Was it formed right before this Whittier project?
3 A. Yes.
4 Q. Was it formed intended to be a single purpose entity
5 for this Whittier project?
6 A. No. As I already said, it was intended to be an
7 umbrella for ownership of each project which would be -- they
8 would be stand-alone sort of projects.
9 Q. Whose idea was ISL Development?
10 A. It was an idea that was proposed to me by Adam.
11 Q. What does ISL stand for?
12 A. Integrated Senior Living.
13 Q. How much did you invest in this Whittier project?
14 A. There was investment from my wife's family's trust,
15 as you've already heard. And I invested -- I have never
16 totaled it up, but there was initial investment of 15,000
17 that I put in from personal funds. And there were other
18 things that I paid for along the way. I don't recall the
19 number. They were not huge numbers. They were in order of
20 another 10- or $15,000, I suppose.
21 Q. So you probably had $25,000 invested in this
22 project?
23 A. Of my personal money?
24 Q. Yes, sir.
25 A. Yes.

1 Q. Okay.
2 A. That's all I can think of.
3 Q. What else were your sources of personal revenue in
4 2012?
5 A. I'm sorry. I don't quite understand what you are
6 asking.
7 Q. What did you do for a living? Did you receive a
8 salary from any entity in 2012?
9 A. While ISL was active, I received a salary of $15,000
10 a month.
11 Q. And how about Mr. Salis, did he also receive the
12 same amount?
13 A. No, he received nothing.
14 Q. Was he actively involved in the management of ISL?
15 A. He was -- when you say the "management of ISL",
16 ISL's purpose was to entitle the property at that point. And
17 he didn't have any real involvement in that. His job as a
18 partner in ISL was to round up financing.
19 Q. Were you the -- were you personally tax manager
20 partner --
21 A. I think Adam was the tax manager partner.
22 Q. Did he manage the books of ISL?
23 A. We both had access to the books, but we actually
24 used a local accountant here, Bill Jarrard, to do the taxes
25 for ISL.

1 Q. Why -- so did you ever have an office in Whittier?
2 A. No.
3 Q. How often did you go to Whittier? Let me withdraw
4 that and ask -- actually, let me beg your pardon. Let's go
5 to exhibit --
6 A. Would you like to provide me with a copy of those?
7 THE COURT: We will. It's right there on the
8 table.
9 MR. FLYNN: I will. Let me find out exactly which
10 one it is.
11 BY MR. FLYNN:.
12 Q. All right. So Exhibit 9 or Tab 9, do you recognize
13 that document?
14 A. Yes.
15 Q. What is that document?
16 A. Promissory note from ISL Development to the
17 Henderson Family Trust, my wife's family trust.
18 Q. Was that the first capital infusion into ISL?
19 A. No. The 15,000 initial contribution came from me
20 out of our joint checking account, my wife's and my joint
21 checking accounting.
22 Q. When would that have been infused as capital?
23 A. 15,000?
24 Q. Yes, sir.
25 A. I need to refresh your memory on when. It would

1 have been infused about the time we were ready to start the
2 project. We identified the location. Adam had negotiated a
3 purchase agreement for it. And we were ready to start paying
4 consultants. And I don't recall what day it was. I just
5 don't remember, probably late 2010 or possibly 2011.
6 Q. So do you recall the year that ISL was --
7 A. It would have been formed in 2010 or 2011.
8 Q. Okay. And did Adam, did he infuse cash into that
9 organization?
10 A. No.
11 Q. So you said that you had $15,000 from your personal
12 funds infused. And if ISL was formed in 2010, does that help
13 you recall exactly when you would have put that money in?
14 A. It would have been at about the same time.
15 Q. Okay. So the entire capitalization of ISL
16 Development, LLC would have been the 15,000 that came from
17 you personally?
18 A. The initial capitalization, yes.
19 Q. Was Tab 9, that promissory note from your wife's
20 family trust, was that the second capital infusion?
21 A. Yes.
22 Q. There was none between your 15,000 and --
23 A. No.
24 Q. So when did you start drawing a salary or getting
25 compensated by ISL?

1 A. I would have to look at the checkbook register for
2 that, but I don't recall. It was several months after we
3 began. It was maybe five or six months after we began. I
4 don't recall exactly.
5 Q. What was the -- what was the genesis of the $450,000
6 note that we are referring to in Exhibit 9? Why was that
7 required? Why was that money required?
8 A. To pay consultants and to pay my salary.
9 Q. Okay. And you said your salary was $15,000 a month?
10 A. Yes.
11 Q. Tell me about the option for the property in
12 Whittier. Was that to be titled in the name of ISL
13 Development?
14 A. Yes.
15 Q. Where did that money come from?
16 A. That was the money that came out of that $450,000.
17 Q. How much was spent to obtain the option for that
18 Whittier property?
19 A. I don't have the document in front of me, but it
20 was -- I know that we got a $30,000 -- we extended our first
21 option for $30,000. And we ultimately got back a refund of
22 the escrow amount of about -- right at $100,000, just shy of
23 that. So it was at least $130,000.
24 Q. Is your wife the trustee in charge of the Henderson
25 Family Trust?

1 A. She and my daughter Cassandra, or our daughter
2 Cassandra.
3 Q. Are there professional advisors overseeing that
4 trust?
5 A. No.
6 Q. So your wife, is it Carol?
7 A. Mary Caroline.
8 Q. Mary Caroline, does she have full authority over the
9 distribution of that trust?
10 A. She and Cassandra jointly have full authority.
11 Q. Tell me how you came to getting her to give $450,000
12 to ISL Development under that trust?
13 A. The trust has a provision in it that says she may
14 make investments or loan money as she sees fit, specifically
15 calls out real estate investments. And I was aware of that.
16 She was aware of that, and just came about.
17 Q. Okay. And did you offer your wife the opportunity
18 to invest or to have the Henderson Family Trust become an
19 investor in the ISL Development?
20 A. No.
21 Q. So it was purely based on that?
22 A. It was purely a loan.
23 Q. And the terms of that loan were that there would be
24 interest paid 12 percent per annum?
25 A. Correct.

1 Q. All right. So you started paying yourself $15,000 a
2 month. Let me turn to Tab 5. Do you recognize that, those
3 documents?
4 A. Yes.
5 Q. What are those documents?
6 A. This is the tear-out ledger page from the
7 checkbook.
8 Q. You were the sole signatory? You had signatory
9 authority for ISL?
10 A. I did, as well Adam.
11 Q. But you didn't require joint signatures?
12 A. No, we did not.
13 Q. Were you required to have Adam pre-approve all
14 checks or at least consent to all checks that you wrote
15 through ISL?
16 A. Yes. We discussed invoices as they came in and I
17 would pay them.
18 Q. You had one, and I take it it's a Wells Fargo
19 account?
20 A. Yes.
21 Q. Basically, a business checking accounting?
22 A. Correct.
23 Q. Was this the only bank account that ISL Development
24 had?
25 A. There was a savings as part of the business account

1 as part of the package they sold us.
2 Q. Were there also credit cards associated with that?
3 A. Yes, there were.
4 Q. Who had credit cards?
5 A. I had one and Adam had one.
6 Q. Were those to be used for exclusively ISL business?
7 A. Yes.
8 Q. Is all of that in your operating agreement between
9 you and Adam with ISL?
10 A. I don't recall if there was anything that
11 specifically called out credit cards or how they were to be
12 used. It was just a mutual consent thing.
13 Q. So you -- when I look at the first page of Tab 5,
14 the tear-out sheet from the ledger, that's your handwriting?
15 A. Yes, it is.
16 Q. And these came from your documents, your personal
17 documents?
18 A. Yes.
19 Q. Okay. So does that refresh your recollection as to
20 when the initial 15,000, March 16th of 2012?
21 A. Yes, it does.
22 Q. So tell me what the next entry says.
23 A. Hochhauser Blatter Architectural Firm, says for
24 deposit, architectural fees.
25 Q. Okay. Who was Hochhauser Blatter?

1 A. Jay Blatter was the principal architect on the job.
2 His partner was gentleman named Hochhauser who I didn't ever
3 know.
4 Q. Were they the only architects involved in that
5 project?
6 A. They were the only architects involved in that
7 project, yes.
8 Q. What other professionals were involved in that?
9 A. We had engineering professionals. We had traffic
10 engineers. We had soils engineers. We had planning
11 consultants. We had biologists. And I'm sure I'm leaving
12 people out, geotechnical engineers.
13 Q. So all of those, were those all subconsultants to
14 Hochhauser Blatter?
15 A. They were separate consultant agreements.
16 Q. All of those invoices for all those entities came
17 from this ISL checking account?
18 A. Yes.
19 Q. All right. And so can I assume the period of this
20 checking account was formed on or about March 6th, 2012,
21 based on this?
22 A. Yes.
23 Q. You had indicated earlier you thought that ISL had
24 been formed in 2010. Does this change your recollection?
25 A. Yes, it does. I apologize for that.

1 Q. That's okay. I just wanted to make sure. So that
2 was the initial capitalization of 15,000. I see that. So I
3 see on the next page, which is ISL 0226, I see Steinfeld &
4 Associates, market study.
5 A. Uh-huh.
6 Q. California Secretary of State. So all of these
7 things were in connection with the Whittier project?
8 A. Absolutely.
9 Q. And that was something that you are required to do?
10 You could only spend money out of this account for Whittier
11 project?
12 A. Yes.
13 Q. And you did? That was -- you were trying to be
14 pristine about that. You wanted to -- you were in charge of
15 this bank account, and you wanted to make sure that all the
16 money was spent for the Whittier project?
17 A. The money -- the checks that were written out of the
18 account that I wrote were all moneys spent on the Whittier
19 account, or Whittier projects. Pardon me.
20 Q. There were no moneys for your personal residence at
21 60 Montague?
22 A. No.
23 Q. I'm going to refer you to ISL 0238. I see at the
24 bottom this shows Check 1036 for Glenn Keyes Architects?
25 A. Yes.

1 Q. That was the architect for 60 Montague, or one of
2 them, wasn't it?
3 A. He was an architect at 60 Montague, yes.
4 Q. So why is he getting paid out of this account?
5 A. Because he did some interior design work for us on
6 the Whittier project. He was not the architect of record on
7 that project because he has no California license.
8 Q. All right. Okay. And let's flip back to the
9 beginning of this. Can you tell me --
10 MR. FLYNN: Bear with me, Your Honor.
11 THE COURT: No problem.
12 BY MR. FLYNN:.
13 Q. So what I'm getting to is where you first took a
14 paid salary from ISL. And let's see --
15 A. It looks like it's May 2nd, 2012.
16 Q. Okay. All right. And so you continued to pay
17 yourself at the rate of 15,000 per month. And just so that I
18 can understand your handwriting on here, so I'm looking at on
19 page ISL 0228, May 2nd, 2012, that was Check 1006, right?
20 A. Correct.
21 Q. And then right to the right of that, it's $101,100,
22 and it looks like 40 cents. Was that the balance?
23 A. Yes, that was the balance.
24 Q. So just flipping through, I see one on page 230 to
25 the Henderson Family Trust and says "interest". I can't make

1 that out, $38,020.65?

2 A. I, fortunately, can still read my scribble. Says

3 interest through 4/30.

4 Q. So you were getting compensated at $15,000 a month.

5 And the Henderson Family Trust was getting monthly interest

6 payments also out of this, these funds?

7 A. I guess -- my recollection was that I paid my wife's

8 trust quarterly. But I also paid interest based upon when

9 additional deposits were made. It didn't all come in at

10 once. It came in incrementally.

11 Q. What was the plan with respect to replenishing the

12 funds? Eventually, at that rate, you were going to run out

13 of money, kept paying yourself and the family trust. What

14 was the next part of the plan for ISL? Where were you going

15 to get money's from?

16 A. Adam's job was to raise funds.

17 Q. And what was the plan?

18 A. He was approaching other capital partners. He

19 approached people who were in the brokerage business that

20 facilitates that kind of thing. He had direct talks with

21 banks. He conducted that stuff. I was aware of it, because

22 he would tell me about it. He met with kind of an endless

23 stream of investors and people he thought would be interested

24 in this and provided them with offerings and guidelines.

25 Q. Okay. And at the end of the day, ISL ran out of

1 money?

2 A. Yes.

3 Q. Sometime around the end of 2013?

4 A. Certainly about the time Amanda's check bounced,

5 yes.

6 Q. Between your initial deposit of 15,000 and when

7 Amanda's check bounced in January of 2014, how many different

8 investors had put money into ISL?

9 A. The only ones that put money into ISL were either

10 Henderson Family Trust, Amanda, and the $15,000 that I

11 contributed out of our joint checking account. And there

12 were some, as I said, minor bills that I paid along the

13 way.

14 Q. There was an exhibit earlier referencing people

15 named Mike and Maudy?

16 A. Uh-huh.

17 Q. Who are they?

18 A. Mike and Maudy Green were the owners of the property

19 in Whittier.

20 Q. So you were making option payments to them?

21 A. Yes, through the escrow account.

22 Q. When did -- let me turn to Tab 3. First page of Tab

23 3, so was that -- this is December 26th of 2012. And you

24 wrote to Amanda saying, basically, you got three alternative

25 strategies for carrying out the operations of ISL

1 Development. First was sell the land; two, you could raise
2 capital; and three -- well, two, you could raise capital to
3 construct as originally envisioned; and then three was raise
4 capital using the EB-5 program.
5 And then I see you wrote on the next page: Although
6 it's certainly possible none of these strategies will come to
7 fruition.
8 THE COURT: I don't mean to interrupt, Counsel. I
9 couldn't quite hear. Did you ask him if he wrote it?
10 MR. FLYNN: Yes.
11 THE COURT: Or did you mean proverbial "you"?
12 MR. FLYNN: I beg your pardon. I will rephrase,
13 Your Honor.
14 THE COURT: That's okay.
15 MR. FLYNN: So let me step back. The December 26th,
16 2000, that is from Adam Salis. I beg your pardon. I may
17 have misspoken, Your Honor.
18 BY MR. FLYNN:
19 Q. Is that your understanding of what -- was that an
20 accurate assessment of what the plan was --
21 A. Yes.
22 Q. -- for ISL? Which one of those three eventually
23 happened?
24 A. What eventually happened was none of those three
25 options proved to be workable.

1 Q. Okay. It seemed like the first one was to sell the
2 land at 3.1 million. So you were basically -- was that you
3 were going to buy the land and flip it?
4 A. That's what it would amount to, yes.
5 Q. So to that point, as of December 26th, you had only
6 made option payments. Nobody held title to the land. The
7 ISL didn't hold title to the land, correct?
8 A. We did not.
9 Q. Option one, gone. You decided, you, ISL, you and
10 Adam decided you weren't going to buy the land?
11 A. Excuse me?
12 Q. You decided that you weren't going to buy the land
13 or you weren't going to have ISL purchase the land?
14 A. We are not going to be able to purchase it at that
15 time.
16 Q. When did you make that determination, this being
17 December of 2012. You weren't sure, but then between
18 December of '12 and December of '13, when you were basically
19 out of money, in that timeline, when did you make a decision
20 to not purchase?
21 A. Our last option to extend the close of escrow
22 terminated -- I don't know the exact date, but it was, I
23 believe, in February of 2013. And we did continue to
24 actively try to raise capital, because the owner, the Greens,
25 people who you named, didn't have an alternative buyer. And

1 we had a fully entitled project. And so we were trying to
2 raise money to resurrect this thing and get it going. They
3 were aware of that. And they were cooperating with us.
4 Q. And you said "fully entitled", in my notes we
5 discussed earlier with Ms. Griffith. But was there a
6 Certificate of Need from the California Health Authority?
7 A. California does not issue a Certificate of Need.
8 It's purely at the discretion of the local agency, in this
9 case the City of Whittier.
10 Q. So when you said it was fully entitled, what do you
11 mean?
12 A. I mean we had gone through the entitlement process,
13 which includes all of the necessary approvals and by the
14 City. And those approvals are based upon the data presented
15 to them in terms of the architecture, engineering, soils,
16 parking, environmental, whatever things that they required as
17 prerequisite to granting entitlements, the approvals.
18 Q. And at what point did you have that? Did you have
19 that as of December 26th?
20 A. Yes.
21 Q. So that's what ISL spent its money on between March
22 and December of 2012, was getting those entitlements?
23 A. Yes.
24 Q. And this was -- my phrase, at that point, December
25 26th, this was a shovel-ready project, if you want to call

1 educate that. Did you have a building permit ready?
2 A. No. The entitlement phase takes it through
3 conceptual plans. You don't want to spend the money on
4 having the construction drawings done. So you have the
5 approvals.
6 Q. Tell me about the EB-5 plan. It looked like that
7 was part of plan No. 3, strategy No. 3. What is EB-5?
8 A. I don't know exactly what it stands for. But the
9 program is, as Amanda described it, it's a funding mechanism
10 to encourage immigration from qualified people that can
11 invest $500,000 in return for a Green Card. And it was done
12 to help stimulate the economy during that time. And it was
13 based upon what the unemployment rate was in your census data
14 tract. The census data tracts are little blobs of things for
15 the Census Department to keep records of unemployment,
16 average wage rate, that kind of stuff.
17 Q. Was that your responsibility? Did you investigate
18 and come up with the EB-5 plan, or was that Adam?
19 A. Adam was the one that was aware of it. I was the
20 one that attempted to get it approved and used in Whittier.
21 Q. When did that -- was there a point at which you went
22 to some meeting with some government agency and they said,
23 deny, you cannot use this EB-5 for this purpose?
24 A. No, not exactly. It was contingent upon whatever
25 policy that the federal government wanted to impose. And it

1 was -- the program was up for renewal in Congress. And there
2 was a lot of kind of political bickering back and forth. And
3 they decided to make a determination as to what the
4 eligibility rules were going to be. And based upon -- it's a
5 technical thing. And I can explain it to you, if you need me
6 to. But what it really amounted to is they were not going to
7 allow us to average census data tracks, which they had always
8 allowed us to do before, and which they currently do.
9 Q. So that wasn't an option. When did you learn that
10 was not an option?
11 A. It would have been in the spring of 2013.
12 Q. Okay.
13 A. I don't remember exactly when.
14 Q. Okay. Let me have you look at Exhibit 1. That's
15 December 27th. And why did you want to make an offer to
16 Amanda to become an investor in this project?
17 A. Because we wanted to continue the business and try
18 to identify and entitle more projects either to build
19 ourselves and own or to flip to other developers who were
20 wanting to do that for other entities.
21 Q. Amanda had money and you needed it?
22 A. Yes.
23 Q. So why did you -- Exhibit 2 is a promissory note of
24 the same date, December 27th. Why did you get -- why did you
25 decide to make that a 90-day promissory note?

1 A. Where is it?

2 Q. Exhibit 2, Tab 2.

3 A. My recollection is that the idea was that Amanda was
4 going to contribute a total of $750,000. And we needed some
5 short-term financing to finish paying off the costs
6 associated with the entitlement, including my salary for
7 Whittier, that we were going to be making a revolver -- I'm
8 using a term that may not be self-explanatory, but a revolver
9 loan to cycle additional projects through the entitlement
10 process, and then potentially flip them to other interested
11 people.

12 Q. Okay. So what was the magic of having that due
13 on -- having the $200,000 to be repaid on March 31? Was
14 there any logic to that date, or just picked it out of the
15 air?

16 A. I think that we, as Amanda indicated, we were
17 needing to get bills paid by the end of the year. But it was
18 going to take us a little time to formulate the various
19 agreements we needed to formulate and to get it done. So
20 that was kind of setting a deadline.

21 Q. All right. So you had indicated -- I believe you
22 said earlier, that part of those bills needed to be paid were
23 your compensation, right?

24 A. Correct.

25 Q. $15,000 a month. And, basically, at that point, if

1 it weren't for Amanda, ISL would have been out of money by
2 the end of the year?
3 A. Whenever the money ran out, we ran out of money.
4 Q. All right. So let me refer you to -- let me get the
5 page number here. Well, let me ask you briefly, though. So
6 no dispute, Amanda actually signed this note -- I mean,
7 signed that memorandum of understanding. You and Adam Salis
8 signed the note on behalf of ISL?
9 A. Yes.
10 Q. And then Amanda actually paid $200,000 to you by
11 wiring it to ISL's account?
12 A. Yes, she did.
13 Q. Okay. And that was on December 28th?
14 A. I believe so, yes.
15 Q. Okay. By the way, as an aside, by that time, so,
16 Glenn Keyes, he was not working on 60 Montague?
17 A. No. As I said earlier, I completed the restoration
18 of Montague in about five years. So it was about 2009 he was
19 out of there.
20 Q. Okay. So there was some discussion earlier about
21 whether Amanda had discussed this with her local attorney or
22 California attorney or anything else. Did you really care
23 whether Amanda reviewed the promissory -- I mean, the
24 operating agreement with an attorney or CPA or anybody? Did
25 that matter to you?

1 A. Did it matter to me?
2 Q. Yes.
3 A. Yes, it did.
4 Q. Why?
5 A. I think it's a good idea for anyone entering a
6 business arrangement with someone to seek out legal counsel
7 to make sure they understand everything about the documents
8 involved.
9 Q. To your knowledge, did she do so?
10 A. She testified she didn't. So I guess she didn't.
11 Q. Did she -- did she testify that Mr. Beauston looked
12 at any of this?
13 A. Yes.
14 Q. Who is Mr. Beauston; do you know?
15 A. I don't know him personally. I understand from
16 Amanda's testimony that he was a CPA, business CPA.
17 Q. So that's your personal sense, that for Amanda to
18 have decided to invest or not invest, she needed professional
19 advice and she got it from Mr. Beauston?
20 A. She got financial advice from Mr. Beauston. I don't
21 know that he was qualified to give her any legal advice.
22 Q. Did that matter to you? I mean, did that matter to
23 ISL Development?
24 A. It was her choice what to do. You are asking me did
25 it matter to me. And I believe I answered that by saying

1 that I think it's always prudent for someone contemplating a
2 legal arrangement to get legal counsel on it.
3 Q. But what really mattered to ISL Development was that
4 Amanda get the money into the account and keep it there and
5 not pay it back on March 31?
6 A. I don't think that train of thought was going
7 through my mind at that time.
8 Q. Okay. As of January 16th or --
9 A. No.
10 Q. So you would have been perfectly happy to have paid
11 back this loan on March 31, 2012?
12 A. Had I been able to pay that loan back in March 31st
13 and that's what we were contractually obligated to do, I
14 would have done it.
15 Q. Now, let me refer you to page -- also Tab 3. This
16 is Amanda Griffith 121.
17 MR. BARR: What tab?
18 MR. FLYNN: 121.
19 MR. BARR: What tab?
20 MR. BARR: 3.
21 BY MR. FLYNN:.
22 A. Funny thing that happens here, goes from 120 to a
23 blue page to 127.
24 Q. I will get it, actually. Thank you. Okay. Do you
25 recall receiving that e-mail from Amanda on January 16th,

1 2013?

2 A. I recall receiving it, yes.

3 Q. Prior to that e-mail, had you and had Amanda

4 mentioned to you the concept of you personally guaranteeing

5 the repayment of this 200,000?

6 A. I don't recall any conversations where I was asked

7 or was suggested to me that I needed to personally guarantee

8 it, no.

9 Q. All right. So when she wrote that in there on the

10 next page, 122, I'm happy to lend the 200,000 if you will

11 personally guarantee the loan, that was the first time you

12 had ever heard of that?

13 A. That's the first time I recall hearing of it, yes.

14 Q. So within -- let's see. That was 5:17 a.m. And

15 then your response to Amanda was at 4:17 p.m. So call that

16 10 hours and not even factoring in the -- were you in

17 Charleston at that time when you received this?

18 A. I don't remember where I was.

19 Q. I beg your pardon. Were you living in Charleston?

20 A. I've always lived in Charleston. I have had long

21 periods of time when I was in California.

22 Q. Okay. That's fine. So you wrote to her an e-mail

23 in response to that. And I'm asking this just for you to

24 confirm it. But the way I read this is, this is January

25 16th, at 1:04 p.m. So, actually, that's, like, six and a

1 half hours later. And you said -- I'm at page 122.
2 A. Okay.
3 Q. So is that your e-mail there starting, "Hey,
4 Amanda"?
5 A. I believe it is, yes.
6 Q. So that's the very first time that you had heard her
7 say I'm happy -- I'm happy to lend 200,000 if you personally
8 guarantee it. And six and a half hours later, having never
9 even thought about that before, said, hey, Amanda, I can
10 certainly appreciate your concerns. And I respect your
11 decision. Of course I will personally guarantee 200,000.
12 And I appreciate your help and consideration.
13 Is that -- is that what you wrote to her?
14 A. Yes, it was.
15 Q. Okay. Did you intend to personally guarantee the
16 repayment of $200,000 to her at that point when you wrote
17 that?
18 A. No. It was -- I felt a moral obligation to get her
19 repaid. And concurrently with this going on, there had been
20 a lot of documents going back and forth showing the efforts
21 that Adam was making to, you know, resolve the issue of
22 financing the property and taking whatever course of action
23 we needed to take. I was -- I was believing that she will be
24 paid out of whatever method was selected to dispose of the
25 property.

1 Q. So it really wasn't true what you said there, I will
2 be happy to personally guarantee the 200,000? That was a
3 misrepresentation?
4 A. I think it was something that I felt was a moral
5 obligation to get her repaid. And I don't know how else to
6 characterize it other than what I just said.
7 Q. So you said it was a moral obligation, but you
8 didn't intend to do it yourself? Is that the substance of
9 your answer?
10 A. I didn't think I would have to do it myself.
11 Q. So maybe that was where I got off track. Because my
12 question to you was, when you wrote that sentence, "Of
13 course, I will personally guarantee the 200,000 and I
14 appreciate your help and consideration," did you intend to
15 honor that obligation to personally --
16 A. Based upon where I knew the project was and what
17 Adam was doing, I felt confident that we would be able to get
18 her repaid.
19 Q. Okay. But you never intended to pay that money out
20 of your own personal funds?
21 A. I didn't think I ever would have to.
22 Q. Did you ever think that was a -- that, you know, she
23 would rely on that, that statement?
24 A. I didn't think -- I didn't have any thoughts about
25 it one way or another. So I didn't -- I didn't rely on it

1 for any reason.

2 Q. So by 2013, you had been in some way, shape or form,

3 involved in real estate construction, development for almost

4 40 years. And so you are not a novice at that point. You

5 knew what personal guarantee meant, didn't you?

6 A. Yeah, I knew what a personal guarantee looks like.

7 I've seen it in writing.

8 Q. And when you committed yourself to do it, you said

9 it was a moral obligation?

10 A. Yes.

11 Q. That's what you -- and, yet, when you wrote a check

12 to Ms. Griffith -- and let me show you exactly where that

13 was. Let me have you turn to Tab 5, ISL 0257.

14 A. 257?

15 Q. So I read that as Check No. 1092, November 5, 2013.

16 So that was an interest payment to Amanda for $6,000. Is

17 that accurate?

18 A. Yes.

19 Q. Okay. So on November 5th of 2013, you wrote a check

20 to Amanda. And what did you then -- for $6,000 for interest

21 on her -- on the 12 percent interest on her $200,000 loan.

22 Did you then mail that check to her?

23 A. I don't recall how it got to her, but if it was a

24 check, it went by mail or I handed it to her. I don't know

25 that I would have been in Charleston at the time, so one or

1 another.

2 Q. You probably heard her testimony earlier that you

3 and she had discussed that, that check at some point around

4 that time and before or after. And do you recall having

5 spoken with her about the terms of cashing that check?

6 A. When she testified to that, it did refresh my

7 memory, yes. There was some discussion of that.

8 Q. So the way I read this on page 257, that's a

9 negative $13,350.93 balance?

10 A. Correct.

11 Q. So how did you intend to fund that $6,000?

12 A. We were expecting some money into the account that

13 was supposed to be -- some money that Adam had come up with

14 from somewhere. And I don't remember what it was. It was

15 like $50,000. And it just never materialized.

16 Q. So --

17 A. That's why I asked her to hold it until we got it

18 there.

19 Q. How long did you want her to hold it?

20 A. I don't remember. I heard her testify until after

21 1st of the year. And that's probably right. I don't recall

22 specifically.

23 Q. Did you recall contacting her later on that year

24 saying, you are good to go, go ahead and deposit it, or what?

25 A. I don't recall --

1 Q. So --

2 A. -- what I did or didn't do.

3 Q. As far as you know, she relied on that, and she went

4 and presented it to her bank for deposit in January. And

5 were you aware that it bounced?

6 A. Yes.

7 Q. All right. And how did you become aware that it

8 bounced?

9 A. I'm sure we got insufficient funds notice.

10 Q. And what did you do at that time? Did you try to

11 call Amanda?

12 A. I know that I had conversations with her after that

13 date, but I don't remember if I rushed to the phone and

14 called her. I don't -- I don't --

15 Q. At least at that point, as of November 5th, 2013,

16 you wrote that check to her for 6,000, you intended to have

17 ISL honor that, pay her interest at that point, right?

18 A. Yes.

19 Q. But at some point after that, maybe after the first

20 of the year, you no longer felt obligated to honor that

21 obligation?

22 A. Adam had not raised the money that we needed to keep

23 ISL afloat. So there was no money to pay her.

24 Q. Was that the time -- when that check bounced, was

25 that when you first decided, I am not going to personally

1 guarantee this after all?
2 A. No, no. I -- I didn't have that thought process.
3 Q. All right. What was your thought process?
4 A. You know, I would have to speculate, because I don't
5 remember what my thought process was that many years ago.
6 But I know that I was continuing to look to Adam to raise
7 funds. And he was still attempting to do so. And if he had
8 done it, then she would have been paid.
9 Q. At any point during the lapse of time from January
10 16th of 2013, until that check bounced in January '14, at any
11 point along that line, did you communicate to Amanda, by the
12 way, remember I said I'm going to personally guarantee it, I
13 am not going to?
14 A. No, I didn't.
15 Q. Just for the record, exhibits or Tab 6, that stack
16 of documents, these were from your records produced in
17 litigation. And I just wanted you to identify that, if you
18 recognize that as your bank records?
19 A. These are the bank records for ISL Development, yes.
20 Q. Turn to page ISL 65 towards the end of that.
21 MR. BARR: What's the number?
22 MR. FLYNN: ISL 0065.
23 MR. BARR: What tab? Oh, that's right. They are
24 upside-down.
25 THE WITNESS: I see ISL 430 and 422.

1 MR. FLYNN: It's not you.
2 MR. BARR: They are not arranged chronologically.
3 MR. FLYNN: It stops and restarts. I beg your
4 pardon, Your Honor.
5 THE COURT: I'm on it.
6 MR. FLYNN: 65 there.
7 BY MR. FLYNN:
8 Q. I have a question about that. So do you recognize
9 that page?
10 A. Yes.
11 Q. What is that page?
12 A. That is an account statement that we would have
13 gotten whatever date this is. And it shows a series of
14 bounced checks as well as some checks that cleared.
15 Q. Okay. Look at date 1/16. And it says, Check 1092
16 for $6,000.
17 A. Okay.
18 Q. Then it says under that, overdraft transfer from
19 credit card, or something like that line, $100. But then it
20 shows a check reversal. What is a check reversal? I am not
21 familiar with that term. Thought you might be.
22 A. I don't guess I'm familiar with those either. I
23 guess those would be the checks that bounce, but second they
24 talk about return charge, they charge $25 per check. That's
25 my best guess.

1 Q. So all of the return check fees, it looks like might
2 have been $25 apiece, did ISL pay those to the bank?
3 A. Whenever -- yeah, they would have gone back to the
4 bank. We didn't close the account with a zero balance, with
5 a negative balance, if that's what you are suggesting.
6 Q. Yeah. So, I mean, there's no litigation? You
7 honored the commitments to the bank?
8 A. Yes.
9 Q. Did you have to pay personally out of your pocket to
10 make the bank whole for any of those fees or anything else?
11 It looks like to me you ran out of money?
12 A. I'm looking in the subsequent ones. And there
13 was -- any balance on 2/28 was 00. So there was no money
14 left in the account.
15 Q. By the way, so do you think you personally opened
16 this account on behalf of ISL? You signed the application?
17 A. Adam and I did it jointly.
18 Q. I bet that application had a personal guarantee in
19 there. Do you recall?
20 A. I don't think that it did.
21 Q. Okay. So if there had been a negative balance in
22 your account and there was, basically, no more funds for ISL,
23 the bank would have said, oh, well, we are going to write
24 that one off? They wouldn't have come looking to you?
25 A. Well, they didn't come looking for me, so --

1 Q. But you said that it was zeroed out, right, to your
2 knowledge?
3 A. In a statement a month or two ahead of this one, it
4 was zeroed out.
5 Q. At some point, there was some -- on page 65, it
6 shows a zero balance, ending balance on 1/31 is 0, 1/31 of
7 '14.
8 A. Okay.
9 Q. Then it said -- next page, 66, I guess, I just want
10 to see if there was any further charges after that. Because
11 I'm looking at page -- look at page 67. And on that it says
12 ending balance, 1/31, 100.
13 Q. $100?
14 Q. So bottom line is, there was no money to honor the
15 check for Amanda's $6,000 interest?
16 A. That's true.
17 Q. And when was this account closed by ISL?
18 A. I don't recall the exact date, but it was -- we've
19 got statements through April 1st -- through April period,
20 April 1st through 30th that I see here.
21 Q. So how did ISL payoff its Visa if -- were there any
22 charges on the Visa after, say, January?
23 A. I don't -- I don't -- I don't know of any.
24 Q. Who would have paid it off if there was no money in
25 the account and/or is there --

1 A. If there was money owing, either Adam would have
2 paid it or I would have paid it.
3 Q. Out of your pockets?
4 A. And I don't have a recollection of doing it, so I
5 don't know.
6 Q. That's something you would have been prepared to do?
7 A. I would have been prepared to pay it?
8 Q. You would have been prepared to pay it out of your
9 pocket to the bank?
10 A. If I needed to pay it, I would have found some way
11 to pay it.
12 Q. Okay.
13 A. Because it wasn't a huge amount. If it was $100,000
14 or something, I wouldn't have done that.
15 Q. You didn't feel bad about Amanda's money, though?
16 A. Pardon me?
17 Q. You didn't feel that way about Amanda's money?
18 A. I didn't feel what?
19 Q. You didn't feel any personal obligation to repay
20 Amanda's money like you would have the bank?
21 A. I felt an obligation to try to get her repaid. And
22 as she said, the plan was to pay her out of future
23 projects.
24 Q. And let me -- I may not have asked this. Let me
25 clarify it for the record. What is your understanding as to

1 the term "personal guarantee", or "I will personally
2 guarantee" as you wrote it down in the sentence in that
3 earlier e-mail? What does that mean from a -- from somebody
4 who's been in business for 40 years, what does that mean to
5 you?
6 A. That I will come up with some way of paying if I
7 can.
8 Q. And what's the consequence if you can't?
9 A. Then it doesn't get paid.
10 Q. Have you spoken with any -- well, no. Withdraw that
11 question. Let me have you turn to Tab 7. Do you recall that
12 letter?
13 A. Yes.
14 Q. And then Tab 8, do you recall writing that letter?
15 A. Yes.
16 Q. So you say: Needless to say, I was disappointed to
17 receive a letter containing so many falsehoods about the
18 investment made by Ms. Griffith in the Whittier project and
19 my role in that investment.
20 What falsehoods were in that letter in Tab 7?
21 A. Let me take a look.
22 Q. Take a look. Whenever you are ready.
23 A. I think I was disagreeing with the notion that I was
24 going to be personally responsible for it.
25 Q. Just so I'm clear, you wrote on there, I'm

1 disappointed I received a letter with so many falsehoods. So
2 you are saying now there's really just one falsehood, which
3 is that you are personally guaranteeing?
4 A. Sitting her right now, that's what I see in it, yes.
5 Q. And I'm sorry, you said that you thought it was
6 inaccurate to say that you personally guaranteed it?
7 A. I never signed a document saying I would personally
8 guarantee it.
9 Q. Did you ever indicate to Amanda that you would
10 personally guarantee in any way?
11 A. In the e-mail that we've already examined, it does
12 say that I would make a personal guarantee. But as I said to
13 you, I felt like that was a moral obligation and that I was
14 going to make my best efforts based upon what Adam was doing
15 to get her repaid.
16 Q. And I better make sure the record is clear on this
17 too. What do you mean by a "moral obligation"?
18 A. I felt like it was ethically the right thing to do
19 to try to get her repaid. Does that help?
20 Q. And so -- but it was not a moral obligation for you
21 to pay it out of your own pocket?
22 A. It was not an absolute obligation of me to pay it
23 out of my pocket, no.
24 Q. That's not what the term "personal guarantee" means
25 to you?

1 A. No. I've already told you what it means to me.
2 Q. Okay. 40 years of this business, you signed a lot
3 of personal guarantees, haven't you?
4 A. I have not signed one.
5 Q. Okay. All right. Were you a licensed general
6 contractor?
7 A. Yes.
8 Q. Were you bonded?
9 A. Yes.
10 Q. So you had a performance bond?
11 A. Not in the way you are thinking about. The bonds
12 that I was required to post were in Texas and when I was a
13 contractor there. And they were just a minor little $3,000
14 bond. It wasn't a performance bond in favor of a bank, a
15 lending institution.
16 Q. But you would have, there was some surety that you
17 got, that piece of paper from saying that your bond will
18 guarantee that $3,000?
19 A. Whatever the amount was, yes.
20 Q. But that would not have --
21 A. Actually, it was insurance policy. It was not -- it
22 was a bond posted by a surety company. I paid them a premium
23 for it. And that's what it was.
24 Q. And so you are standing by what you said, 40 years,
25 almost, you never had to sign a personal guarantee for

1 anything in your life?

2 A. No.

3 Q. Okay. So let me continue on with Tab 8.

4 A. If you don't mind, I just want to make sure that I'm

5 understanding you completely.

6 Q. Yes, sir.

7 A. You say I never had to sign a personal guarantee in

8 my life. I have signed mortgage documents, but they were

9 secured by the property. They were not secured by other

10 assets that I may have. When I was building houses, I would

11 secure the construction loan with the property.

12 Q. Have you ever been personally sued before this

13 lawsuit?

14 A. Yes.

15 Q. Under what circumstances?

16 A. There was a lawsuit relating to a project that I was

17 the developer on, Rancho Cucamonga, with Spirit of the Sage.

18 Rancho Cucamonga is the name of a city in San Bernardino,

19 California. It's actually a real place. And Spirit of the

20 Sage is an environmental group. And they were not happy with

21 the approvals that I got. And they sued me over them.

22 Q. Okay. Have you ever had any lawsuit in which

23 someone was suing you to collect money from you personally?

24 A. They were trying to get money --

25 MR. BARR: Excuse me. I object to the relevance of

1 this line of questioning. Whether he's been sued or not has
2 nothing to do with the --
3 MR. FLYNN: He put it in the record that he doesn't
4 understand what personal guarantee means. And he's then
5 said, I've never signed a personal guarantee. And then he
6 said, well, wait a minute, let me make sure I understand what
7 you are talking about personal guarantee. So I'm just trying
8 to explore whether he's ever been obligated to repay a debt
9 out of his own pocket.
10 THE WITNESS: The answer to the question is no.
11 THE COURT: We can rephrase it. I'm not sure what
12 litigation would have to necessarily do with that. If you
13 want to rephrase it.
14 MR. FLYNN: That's fine.
15 BY MR. FLYNN:
16 Q. So has any other person or entity in your
17 professional life or personal life sued -- not sued you, but
18 demanded that you repay something personally which was a debt
19 of one of your businesses?
20 A. No.
21 Q. Okay. All right. Let me go back to Exhibit 8,
22 which is your letter to me. And so you said there's really
23 only that one falsehood. So you said, "Since you offered not
24 a shred of evidence to support the accusations made in that
25 letter," what are the accusations?

1 A. That I had agreed to pay it personally.
2 Q. Okay. "I can only conclude that either Ms. Griffith
3 has intentionally misled you or you are attempting to extort
4 payment on a debt from someone that you know has no liability
5 for that debt."
6 Which was it then? I mean, you said Ms. Griffith
7 intentionally misled you. Had she misled me in some way,
8 shape or form in reading these e-mails?
9 A. She may have led you to believe that I did, in fact,
10 guarantee it personally. And my opinion is that I did not.
11 Q. Okay. All right. Next paragraph, "Ms. Griffith was
12 asked to make a loan to pay project costs for a proposed
13 assisted living project in Whittier, California."
14 Skip down one more sentence. "At no time did I or
15 anyone else offer to guarantee that debt." You still stand
16 by that statement?
17 A. At the time I wrote this, I had not -- I did not
18 have and did not recall the e-mail that is kind of the
19 subject of this. And so I'm very sorry about that. So I can
20 understand your question.
21 Q. Right now -- so right now, are you withdrawing that
22 statement that "at no time did I or anyone else offer to
23 guarantee that debt?" Is that no longer an accurate
24 statement?
25 A. Not in an absolute sense.

1 Q. What do you mean by that?

2 A. I don't think that I made an absolute guarantee to

3 Amanda.

4 Q. Okay.

5 A. So if that's what you are getting at, then that's

6 the answer.

7 Q. What did you mean by, "offer to guarantee that

8 debt"? It's your writing.

9 A. Pardon me?

10 Q. You wrote it. So I'm just asking, what did you mean

11 when you wrote "to guarantee that debt"? "At no time, did I

12 or anyone else offer to guarantee that debt," I just want to

13 find out what you meant by "guarantee that debt".

14 A. I guess, I mean personally pay it back.

15 Q. Okay. All right. And you say you haven't made that

16 offer?

17 A. I have not.

18 Q. All right. Do you dispute that you have the use of

19 this $200,000 beyond March 31, 2012?

20 A. Sure. Yes. No, I don't dispute it. I'm sorry.

21 Q. So did you ever go -- did you ever attempt to repay

22 that entire debt at any point to Amanda?

23 A. No.

24 Q. Okay. And you had use of that money, you and ISL

25 had use of 200,000 until you ran out, correct?

1 A. I would say that ISL had use of that money until Isl
2 ran out.
3 Q. You personally benefited from that money, because
4 without that 200,000, ISL wouldn't have been able to pay you
5 $15,000 a month in salary, right?
6 A. That's correct.
7 Q. That was a personal benefit to you?
8 A. That was a personal benefit to me.
9 Q. And. Is that why you would have made that statement
10 that, sure, yeah, Amanda, I will agree to personally
11 guarantee that debt, so that you could continue to have use
12 of that money?
13 A. No. The reason I gave was that I would do my best
14 to get repaid from funds that Adam was attempting to raise.
15 Q. Okay. If you had said in that e-mail, sorry,
16 Amanda, I am not personally guaranteeing your debt, what's
17 your assumption of what would happen at that point? What was
18 your calculation in your mind? And I'm referring back to,
19 I'm sorry, the January 16th, 2013, e-mail exchange.
20 A. I don't think I made a calculation as to what you
21 are discussing. What I was thinking about was that I would
22 make best efforts to raise the money to pay her back. I
23 wasn't contemplating other alternatives.
24 Q. All right. And you think if you had said, no, I am
25 not going to, I don't know what you mean by personal

1 guarantee, but I am not going to do it, Amanda, do you think
2 she would have let you continue to use that money?
3 A. Since she already had given us the money and it was
4 essentially already gone, I don't know what she could have
5 done at that point.
6 Q. And so -- I'm sorry. I should have been added to my
7 question. You think that she would have let you -- let ISL
8 and you, personally benefit from that 200,000 after March 31,
9 2012?
10 A. Since the note wasn't due until March 31st, I simply
11 don't understand what she could have done to -- we had the
12 money. I don't know what she could have done to stop us from
13 using it as it was intended for. Maybe I'm misunderstanding
14 your question.
15 Q. I'm sorry. It was probably a poorly phrased
16 question. So if you had told Amanda on January 16th when she
17 said, I need you to personally guarantee it, if you had said,
18 no, do you believe then that she would have continued to let
19 you use whatever money was left after March 31, or do you
20 believe it would have all become due on March 31 of 2012 --
21 2013? I'm sorry.
22 A. I didn't really contemplate that.
23 Q. All right. And you said a few minutes ago, well,
24 money was just about all gone by that time anyway?
25 A. Yeah.

1 Q. By when? By January 16th when you wrote that?
2 A. I wrote a lot of checks around January the 16th, few
3 days. And so a substantial amount of it was gone.
4 Q. All right. Was it probably learned that after March
5 31, starting on April 1 of 2013, that you wrote checks to
6 yourself and to Henderson Family Trust from ISL, that same
7 account, that after April 1st, you paid yourself over
8 $120,000, you and the Henderson Family Trust? Would that
9 surprise you?
10 A. After?
11 Q. After April 1st of 2013, after the original due date
12 came and went? Let me -- I asked you if it would surprise
13 you. Let me just refer you back to Exhibit 5, if we can go
14 through that quickly here. Your Honor, I'm almost done. All
15 right.
16 Tab 5, ISL 251, are you there?
17 A. I'm there.
18 Q. I see Check 1074, April 1, 2013, check to you for
19 your salary.
20 A. Yes.
21 Q. 15,000. All right. Next page, 1077 to you, 15,000?
22 A. Yes.
23 Q. Next page, check to you, 1080, 15,000.
24 Next page, to you, 15,000, Check 1083.
25 Next page, Check 1086, $620. That was check 1086.

1 Next page, Check 1089, Henderson Family Trust paid
2 1305.
3 A. That wasn't through me. That was through the
4 Henderson Family Trust.
5 Q. Okay. For your wife's family trust. What happened
6 to that money when you paid that 13,500? Did your wife have
7 personal access to run the household, for example, through
8 that 13,500?
9 A. That went back into the family trust account.
10 Q. Is that family trust account so restrictive that
11 your wife didn't have access to that -- those funds for her
12 personal living expenses?
13 A. That's true, she did not.
14 Q. All right. Next under that, 1090, it looks like you
15 dropped your salary to 13,500.
16 A. That's what it looks like.
17 Q. And then, of course, we get to page 257, when you
18 wrote the check to Amanda for 6,000. So, basically, it's
19 your testimony that starting on page 257, there were no more
20 checks that were ever honored?
21 A. That's true.
22 Q. All right. So does that refresh your recollection
23 whether all the money was gone by January 16th?
24 A. All the money was not gone by January 16th.
25 Q. And you derived substantial personal benefit from

1 Amanda's $200,000 in this account, what remained of it, after
2 April 1st, correct?
3 A. Yes.
4 Q. Do you dispute that Amanda is entitled to 12 percent
5 interest on the balance of her loan, on the 200,000? Do you
6 dispute that?
7 A. That's what the interest rate on the note was.
8 Q. Okay. And after the due date, you, on behalf of
9 ISL, you continued to honor that as 12 percent annual monthly
10 interest payments, right?
11 A. Monthly or semi-monthly, whatever it was.
12 Q. So you are okay with the 12 percent? That's what
13 she was owed?
14 A. That's what she was told.
15 Q. And you understand that in the promissory note, that
16 if ISL defaults, then she's entitled to attorney fees in the
17 collection of the note?
18 A. Yes.
19 MR. FLYNN: Can we maybe take a five-minute break
20 and then I will wrap up. I may not have any more questions.
21 THE COURT: You can step down. Just don't discuss
22 the case, please.
23 (Whereupon, a recess transpired.)
24 MR. FLYNN: If I could clarify two quick points.
25 THE COURT: Sure.

1 BY MR. FLYNN:

2 Q. Mr. Stewart, my co-counsel just pointed out that at

3 some point in my questioning, I may have confused my March

4 31, called it March 31, 2012, and should have been March 31,

5 2013. You understand that the original due date, promissory

6 note was March 31, 2013?

7 A. Yes, I do.

8 Q. Okay. So if I misspoke, does that change any of

9 your answers?

10 A. No. I didn't catch it.

11 Q. Okay. And is it your testimony here today that ISL

12 Development, LLC owes this money to Amanda, 200,000 plus

13 interest?

14 A. Yes.

15 Q. So is ISL Development, LLC in default?

16 A. Yes.

17 MR. FLYNN: Those are all the questions I have, Your

18 Honor.

19 THE COURT: Thank you.

20 Mr. Barr.

21 MR. BARR: May it please the Court. Your Honor, I

22 was trying to go through what Mr. Flynn has already

23 developed. He's already developed a great deal of what my

24 direct would have been. So I will try not to be too

25 repetitious, but just a couple of fine points.

1 THE COURT: Okay.

2 CROSS-EXAMINATION

3 BY MR. BARR:

4 Q. By inference, I think this has been answered, but

5 you are married, Mr. Stewart?

6 A. Yes.

7 Q. What's your wife's name?

8 A. Mary Caroline Stewart.

9 Q. What is your age?

10 A. My age?

11 Q. Yes.

12 A. 65.

13 Q. Is your wife employed?

14 A. Yes.

15 Q. What does she do?

16 A. She's a state regulatory veterinarian.

17 Q. And do you have children?

18 A. Yes, we do.

19 Q. How many children do you have?

20 A. Two daughters.

21 Q. How old are they?

22 A. 36 and 34.

23 Q. And you and your family -- I guess your children are

24 emancipated. You and your wife live at 60 Montague?

25 A. Yes, we had.

1 Q. You already told the Court when you acquired that.
2 Let's go back to the beginning of the formation of this idea
3 of the development, of the creation of ISL and the property
4 at Whittier. Do you remember what came first? Was the idea
5 to create ISL before you actually identified Whittier, the
6 property at Whittier?
7 A. We had agreed that we would create an entity, but we
8 didn't create it until we identified Whittier.
9 Q. Okay. And, fundamentally, what was ISL's intended
10 role?
11 A. It was initially going to be the entity that would
12 acquire property, title it, get it permit-ready, which is
13 more than entitling it. And then it would be passed off to
14 another entity which would be the owner of the property. And
15 that would be a -- and ISL could be one of the owners of the
16 property or not.
17 Q. Or I think Ms. Griffith testified ISL would simply
18 sell the entitled property for a profit?
19 A. That's right. That's why I said -- yes.
20 Q. Yeah. And I asked Ms. Griffith this question, but
21 what is your -- when we refer to the term "entitlements",
22 what does that mean to you as a land developer?
23 A. It means all of the required paperwork and approvals
24 to gain, in this case, a conditional use permit, which is an
25 agreement between you and the City, they will allow you to

1 build the facility you described.

2 Q. And what were the various bodies in the case of the

3 Whittier project, which was your first ISL project, what were

4 the bodies that were required that you acquired to apply to

5 to obtain these permits, these authorities?

6 A. The only entity that we really had to deal with was

7 the city of Whittier.

8 Q. Did the city of Whittier then have several layers of

9 approvals you had to obtain?

10 A. The approvals were all through the city of Whittier.

11 And they were sometimes staff approvals. And they were

12 sometimes administerial approvals through the city council or

13 planning commission.

14 Q. I know, for example, here in the City of Charleston,

15 to do something like this, you often have to go to the

16 planning commission, the board of zoning appeals, BAR, and/or

17 the city council. Is that a similar context in Whittier,

18 California?

19 A. It is similar, yes.

20 Q. And let's be specific then. In the case of this

21 Whittier property, which of those comparable entities did you

22 have to obtain approval from in Whittier?

23 A. We had to make our submittals to the city staff.

24 And they would include all the reports and documents that

25 were produced relevant to the project. City staff would

1 review it and either accept it and deem it complete and
2 endorse it, or not. If they would send it back, we would
3 have to make changes. Once we got through that process, we
4 were then sent on to planning commission. Planning
5 commission would then approve the project. And then we went
6 to city council.
7 Q. And that was actually done in this instance?
8 A. Yes, it was.
9 Q. I've taken liberty of going through all of the
10 documents that -- not only these that we have in these
11 notebooks, because as counsel knows, there are many more. I
12 want to ask you to identify several entities I've identified
13 through. I think all of these are in. Manatt, Phelps &
14 Phillips, who is that?
15 A. A law firm in Orange County, California.
16 Q. What services did they provide, if any, to the
17 Whittier project?
18 A. They acted in an advisory capacity regarding EB-5.
19 Q. Hogle-Ireland?
20 A. It's a planning consultant firm in Riverside,
21 California.
22 Q. Okay. And that's land planning?
23 A. Land planning, yes.
24 Q. Associated Transportation Engineers?
25 A. That is a firm that provides traffic studies and

1 parking studies for projects kind of throughout the year.
2 They are based in a little town called Victorville, I
3 think.
4 Q. Next one has already been mentioned, Hochhauser
5 Blatter.
6 A. That's an architectural firm in Santa Barbara,
7 California that provides principal architectural work.
8 Q. United Engineering Group?
9 A. Civil engineer surveying company.
10 Q. Surveying?
11 A. Yes.
12 Q. EEI Geotech and Environmental?
13 A. Is that what it says? They do geotechnical, seismic
14 evaluations and whatever and as well as biological studies.
15 Q. You also mentioned this from Jarrard, Nowell &
16 Russell. They were Charleston CPAs?
17 A. Yes.
18 Q. And Steinfeld Associates?
19 A. It was a consulting fellow who did a -- I'm trying
20 to remember the name of the study. It was a feasibility
21 study, basically. He was based out of Santa Barbara,
22 actually officed with Hochhauser Blatter.
23 Q. Did all of the entities that I've just named provide
24 services to ISL?
25 A. Yes, they did.

1 Q. And did all of that predate your dealings with the
2 plaintiff in this case?
3 A. Yes.
4 Q. How do you recall first meeting Ms. Griffith?
5 A. I met her, as she described, socially with a mutual
6 friend for drinks at Moe's Crosstown.
7 Q. And how did it come to be that you and she had a
8 conversation about her investing in ISL?
9 A. Gino Kollar was our mutual friend. And Gino was
10 aware, because I saw him socially as well by himself, that I
11 was looking for some additional funding for ISL. And he
12 suggested to me that Amanda might be interested in that. And
13 I don't recall exactly what the mechanism was that got us
14 together, but we got together and met and discussed it.
15 Q. Okay. And do you remember how many times you met
16 prior to the December signings of the documents; that is to
17 say, that you met in the context of ISL with Amanda?
18 A. At least twice.
19 Q. Now, did she ever -- did she express interest in it?
20 A. Yes, she did.
21 Q. Did she tell you how much she had available to
22 invest?
23 A. Yes, she did.
24 Q. What was that sum?
25 A. She thought she had about $750,000 available to

1 invest.

2 Q. Okay. Now, at the time that you had these

3 conversations with Amanda then, you had the permits and you

4 had -- what was the status of the land transaction? It

5 wasn't closed, obviously. But was it a contract that you had

6 or --

7 A. We had a contract, purchase contract.

8 Q. So how did it come to be that, to your recollection,

9 that the transaction was between ISL and Ms. Griffith led

10 into a promissory note and a memorandum of understanding

11 rather than immediately some comprehensive agreement? What's

12 your recollection how that evolved?

13 A. There was a, as I think we both accept, some urgency

14 about getting some money in so that I could pay the final

15 round of bills for consultants that we didn't have enough

16 money to pay.

17 Q. And would that be to some or all of those names I

18 just had you identify?

19 A. Yes, yes, and to continue paying my salary.

20 Q. Right. Now, you've been questioned extensively then

21 about the January 16th exchange, which is in tab -- what's

22 that tab, Tab 3, page 121.

23 A. Tab 3?

24 Q. Yeah. Tell me when you are there. I think you were

25 having trouble finding that one, I think.

1 A. Yeah, I was. It looks like Amanda Griffith 97 is
2 buried kind of in the middle of this.
3 Q. Beg your pardon?
4 A. I found 121.
5 Q. Actually, it goes over to 122.
6 A. Yes.
7 Q. Did Amanda communicate to you anything more than
8 what we are looking at on page 122 in this exchange? And
9 what I'm talking about is her line that reads: I'm happy to
10 lend the $200,000 to you if you will personally guarantee the
11 loan.
12 MR. FLYNN: And, Your Honor, I would also object to
13 the extent it talks about parol evidence. What's good for
14 the goose is good for the gander.
15 MR. BARR: Okay. I will withdraw that. I will
16 withdraw that.
17 THE COURT: Thank you.
18 BY MR. BARR:
19 Q. In return for your statement in here, of course, "I
20 will personally guarantee the $200,000," did you receive any
21 benefit?
22 A. None was offered and I received none.
23 Q. Now, let's go to some exhibits that we haven't
24 discussed yet. And this begins with Tab 11. Tell me when
25 you are there.

1 A. I'm there.
2 Q. Okay. Can you identify Tab 11? What is that
3 document we are looking at?
4 A. Confidentiality noncircumvent agreement.
5 Q. For the record, this is dated November 29th of 2012.
6 And what is the context of this document? What does it
7 represent? I notice it's signed by Adam Salis for ISL, but
8 what is the purpose and context of this document or document
9 like this?
10 A. This was part of Adam's marketing effort to try to
11 raise capital. So he would make disclosures to whoever he
12 was speaking to about it. And it was an agreement that they
13 wouldn't use that information to get us out or -- they
14 wouldn't interfere with our contractors.
15 Q. Do you happen to know who Oxbow Investment Holdings
16 is?
17 A. I don't know who they are.
18 Q. Let's go to Tab 12. And it's somewhat the same
19 question. But Tab 12 on its face to publish is -- it looks
20 like an identical letter, but addressed to Mr. Ken Berry at
21 Hacienda Senior Living dated September 4th, 2012. Same
22 purpose?
23 A. Yes.
24 Q. Now, at the time that you and Ms. Griffith
25 communicated in December of 2012, and more specifically, when

1 you signed the promissory note and she signed the memorandum,
2 y'all signed the memorandum of understanding, what was the
3 status of these two inquiries, these two prospects, I will
4 call them, that we see in Tabs 11 and 12?
5 A. They were still being negotiated and considered.
6 Q. Okay. So they were pending at that time?
7 A. They were pending.
8 Q. Answer's probably self-evident, but did they ever
9 pan out?
10 A. No, sir.
11 Q. Let's look then at Tab 13. So after the $200,000
12 loan was made, Tab 13 on its face is dated January the 4th of
13 2013. What is that?
14 A. This is a letter to Artisan Business Group and it
15 has to do with EB-5 marketing of the property as another
16 avenue for raising funds.
17 Q. May I correct you? I think you said a letter to.
18 It's an e-mail from.
19 A. I'm sorry. You are right.
20 Q. So it's an e-mail from Artisan Business Group to
21 Adam Salis; is that correct?
22 A. That's correct.
23 Q. And do you know -- I guess brochure is self-evident.
24 But what was the purpose of this communication by Artisan
25 Business Group to Adam as a representative of ISL?

1 A. Artisan Business Group was wanting to help us gather
2 eligible EB-5 contributors in China, primarily.
3 Q. Now, Mr. Flynn has already questioned you about the
4 EB-5, but in a nutshell, what happened with EB-5 program
5 there in California at this point in time?
6 A. It happened nationally. It was a matter of how
7 the -- actually, in California, the State was the overall
8 sponsor of the EB-5 program. It was done state by state.
9 And so each state could set their own rules for how it was to
10 be administered. And the State of California decided in
11 early 2013 that they were going to change the rules for how
12 you could determine whether your property was located in or
13 near an area of high unemployment.
14 Q. How did that affect the Whittier project?
15 A. It made us ineligible.
16 Q. Let's then go to Tab 14. To publish it, that's an
17 e-mail from Amari Nicolo to Adam Salis and Stewart dated
18 January 15th of 2013. What does this represent?
19 A. Nicolo Amari was an operator with Serenity and/or
20 Seniority, excuse me, Seniority. And this was after I had a
21 visit with him to try to get some consulting services from
22 him and then perhaps have him be the operator of the project
23 in Whittier. And it was just about consulting services and
24 how they would be done.
25 Q. During the time period of -- I think we've

1 established the first deposit and the check was, like, in
2 March of 2012. During the time period from March of 2012
3 until, say, the end of 2013, of course, you were living in
4 Charleston?
5 A. Yes.
6 Q. With what frequency did you go to California during
7 that year-and-almost-two-year period?
8 A. Oh, I was out there more than 50 percent of the
9 time.
10 Q. More than 60 percent of the time?
11 A. I said more than 50 percent of the time.
12 Q. More than 50 percent of the time. And for what
13 purpose?
14 A. For entitling the property and work related to
15 that.
16 Q. For this property or were there others?
17 A. Well, I'm sorry, I may have not listened carefully
18 enough to your question. You are saying after 2013. I was
19 there for another year.
20 Q. I didn't ask you about after 2013.
21 A. I'm sorry.
22 Q. I asked you from during 2012 and 2013, with what
23 frequency were you in California, let me be more specific,
24 with respect to the Whittier project?
25 A. I was out there at least 50 percent of the time.

1 Q. Okay. And we've already talked about Tab 14. Let's
2 go to Tab 15 then. Are you there? We published that.
3 That's at the top called confidential private placement
4 memorandum, dated April 11th of 2013. Can you describe what,
5 generically, what is a -- if you know, what is a private
6 placement memorandum?
7 A. This is part of an investor package that is
8 submitted either directly to investors or to a broker that is
9 managing the investments or considering investments on their
10 behalf.
11 Q. And who would have prepared this?
12 A. Adam Salis would have prepared this.
13 Q. And are there certain requirements by regulatory
14 investment, regulatory authorities that certain information
15 be disclosed?
16 A. Yes.
17 Q. Is that the purpose of this?
18 A. Yes.
19 Q. And what did -- what was done with this project
20 placement memorandum?
21 A. It was distributed to interested investors.
22 Q. Okay.
23 A. Either directly or indirectly.
24 Q. This was in April of 2013, correct?
25 A. Yes.

1 Q. Let me invite your attention over to Bates page ISL
2 580. There's a paragraph there under the heading security
3 ownership of administrative manager and its affiliates.
4 A. Okay.
5 Q. More specifically making reference to ISL
6 Development, LLC. What was the purpose of that provision in
7 the placement memorandum?
8 A. To establish the interest that would be accrued to
9 ISL Development.
10 Q. And would that be a source of capital for ISL if it
11 had been funded? If this --
12 A. It would have been. Yeah, it would have been
13 considered our equity in the project.
14 Q. Let's go to -- I'm going to skip 16. Let's go to
15 Tab 17. And Ms. Griffith earlier describes maybe something,
16 if not this, something similar. To publish it, this looks
17 like a brochure that's entitled Summer Terrace at Whittier.
18 And it's dated May 10th of 2013. What was the purpose of
19 this?
20 A. Part of the marketing effort that would have gone
21 along with that other documents we've been discussing. It
22 would have been sent to potential investors or their
23 agents.
24 Q. And who would have prepared this?
25 A. These are photo reductions of some of the plans that

1 were prepared by Hochhauser Blatter. And the aerial stuff is
2 probably off of Google. Adam would have put this together.
3 Q. And what is the relationship, if there is one,
4 between that and the placement memorandum? They have
5 different dates. Is there a relationship between the two?
6 A. They would have been used together. It was just a
7 slightly updated version probably.
8 Q. Let me invite your attention to -- let me invite
9 your attention under Tab 17 to Bates page 710, which really
10 may be unrelated to the brochure. Do you see it? It's the
11 last page under Tab 17.
12 A. Yes, I've got it.
13 Q. To publish that, it's an e-mail from Dawn Ambrose to
14 Adam Salis dated May 17th of 2013 entitled -- subject is
15 possible EB-5 client. And what's happening in that
16 communication?
17 A. It's just an e-mail letter back to Adam. He
18 apparently had met with Don Ambrose. Don Ambrose is a
19 capital source, capital broker. And so he would have been
20 another one that Adam was in contact with.
21 Q. There's a reference in the first paragraph of this
22 e-mail to a person named Janine with a phone number. What is
23 the significance of the name Janine?
24 A. Janine is a person who we were introduced to by Don
25 Ambrose that wanted us to help her provide EB-5 funding for a

1 project she proposed to build in the high desert above LA, a
2 place called Apple Valley. And Adam and I met with her
3 subsequent to this, I guess.
4 Q. Let's turn to Bates page -- I'm sorry, to Tab 18
5 then. And to publish that, it is an e-mail from Janine
6 Paterson dated May 23rd of 2013. What's happening in this
7 communication from Janine Paterson to Adam Salis?
8 A. She's just describing what it was that she wanted us
9 to consider helping her with up in the high desert, in Apple
10 Valley area.
11 Q. Now, was there ever a time when Janine Paterson
12 became interested in ISL's project?
13 A. Yes. We had a subsequent meeting. This was -- this
14 letter was written in response to a phone call that
15 apparently Janine had with Adam. And then there was
16 subsequent meeting at Adam's office that we had. And she
17 more fully detailed what she had in mind for the project that
18 she wanted to do in Apple Valley. And we talked very frankly
19 to her. And she was -- I'm trying to think of the best way
20 to say it. We told her very nicely and gently that we didn't
21 think she had done enough research and it was probably not
22 going to be very feasible to do that project in that area
23 with the demographics they had.
24 So she then wanted to know what else we might have
25 going on. And so we told her about Whittier. We told her

1 about the projects that we were looking at.
2 Q. Let me invite your attention then to Tab 20 then.
3 And to publish that, that seems to be an LLC, limited
4 liability company agreement of Summerin Senior Living, LLC.
5 This is a draft, obviously. But the draft states that it's
6 made as of September 10th of 2013. And with respect to that,
7 let me invite your attention over to the last page of that
8 tab, which is Bates page ISL 521. And do you see there the
9 name Janine Paterson?
10 A. Yes.
11 Q. So is this Summerlin Senior Living idea to be an ISL
12 project?
13 A. This was a replacement entity for ISL.
14 Q. But would ISL have received any funds from it?
15 A. Yes. There's a provision in here where Janine was
16 going to allow us to use some of the funds that she was going
17 to put into the company for the purposes of repaying
18 obligations that ISL had left over.
19 Q. Okay. Would that have included Amanda Griffith?
20 A. Yes, it would have.
21 Q. And how much money was this Janine Paterson
22 contemplating putting in?
23 A. $5,000,000.
24 Q. Whatever became of that?
25 A. It's been absorbed to some extent by attorneys,

1 because there was an identity fraud case that came out of all
2 of this that she didn't have anything to do with, but she had
3 to clear herself and other expenses. And some of it is still
4 being held by Bank of America.
5 Q. All right. So this is September of '13. And I
6 think we saw, looking at the bank statements earlier, that
7 ISL's checkbook at least was dry by, I'm going to say, fall
8 of 2013; is that correct?
9 A. That's true.
10 Q. And we know that ISL was not able to repay Amanda
11 Griffith. Has ISL repaid Henderson Family Trust?
12 A. No.
13 Q. Henderson Family Trust wasn't repaid anything?
14 A. Not any more than just interest that they had.
15 Q. What amount of principal that was in this same
16 Whittier project?
17 A. Well, there was the amount of $450,000. And my wife
18 tells me that she's got a copy of the receipts for something
19 over $500,000 worth of money she put into it total.
20 Q. Now, you told Mr. Flynn, when he was examining you,
21 that you felt a moral obligation to Amanda which was a part
22 why you replied to that e-mail on January 16th. Do you feel
23 there's a legal obligation for you to repay her?
24 A. No.
25 Q. Is that something, is that a position that makes you

1 comfortable? Do you feel comfortable about that? Do you
2 still feel moral reservations?
3 A. That's fair to say.
4 MR. BARR: No further questions, Your Honor.
5 THE COURT: Thank you.
6 MR. FLYNN: Your Honor, I don't have any questions
7 in redirect.
8 THE COURT: You are happy to stay. Do the attorneys
9 wish to make any brief closing arguments? I'm obviously
10 going to -- I don't think it's a surprise that I'm going to
11 take the matter under advisement. There's a lot of documents
12 that have been admitted into evidence that we haven't gone
13 through verbatim, obviously. So I would like to take a
14 little bit of time at least to go through these a little bit
15 more slowly and carefully.
16 MR. BARR: Would you like proposed hearing
17 memorandum from us?
18 THE COURT: It's really up to y'all. You know,
19 however you would like to do it. If you want to send legal
20 briefs, you can do that, or I'm happy to hear arguments now
21 or you can do both --
22 MR. FLYNN: Your Honor, I have copies of all of the
23 California law.
24 THE COURT: That you are relying upon?
25 MR. FLYNN: It's in my trial briefs.

1 THE COURT: The cases, statutes that you cited in
2 your brief, I'm happy to take copies of those.
3 MR. FLYNN: And I have copies for counsel too. I
4 should have probably given them to you in the beginning.
5 THE COURT: That's okay. Y'all tell me what you
6 want to do.
7 MR. BARR: What would help you?
8 THE COURT: If you want to give me just kind of a
9 brief highlights right now, and then -- we don't need to redo
10 the case law. I can read on my own time and go through it.
11 But if you want to give some high points you want to hit me
12 with now.
13 MR. BARR: I would like to supplement my brief. I
14 notice that my friend was up until 12:27 this morning. I'm
15 sure your clerk was waiting for it at 27 minutes after
16 midnight.
17 THE COURT: Of course.
18 MR. BARR: But I would like to respond particularly
19 on the California authorities.
20 THE COURT: Sure, sure. And in terms of order, I
21 guess we will stick with -- we will let you go first and you
22 can respond.
23 MR. FLYNN: I will be very brief. And I really -- I
24 was up until midnight doing this because I wanted to make it
25 a substantive road map for my positions at trial. And so

1 that referring to my plaintiff's trial brief, I did put in
2 there that it's clear that the promissory note does say that
3 California law applies to the enforcement and operation of
4 that promissory note. And so that's why I include citations
5 to the relevant California statutes and case law.
6 And, Your Honor, I also basically anticipated the
7 defenses of Mr. Barr. And I know -- assumed he was going to
8 say, well, there's no consideration, this was a gratuitous
9 promise on Steve's part. And I apologize, in my brief that I
10 used Steve and Amanda. Felt right. But, anyway, I think,
11 clearly, this is not a -- was not a gratuitous promise.
12 Clearly, there was consideration passed. And the
13 consideration, obviously, although Mr. Stewart never answered
14 it directly, was that had he said, no, I am not going to
15 personally guarantee this, then Amanda would have said, okay,
16 well, I will just live by the terms of the promissory note
17 and I will take whatever I can get on March 31, 2013. He
18 didn't take that route. Instead, he decided to, what I would
19 say, lure, encourage, misrepresent himself to Amanda on
20 January 16th by saying, no, I will personally guarantee it,
21 when it's clear he had no intention ever honoring that.
22 Because I don't buy his credibility of his testimony that he
23 doesn't understand what a personal guarantee is, and never
24 could understand exactly why he felt he had a moral
25 obligation but he doesn't have to pay.

1 So, Your Honor, I think clearly he received
2 consideration because had he not made that offer, if she
3 accepted the offer of a personal guarantee, then he would not
4 have had access to those funds, whatever was arranged, which
5 was considerable, after March 31 of 2013. And he, indeed,
6 paid himself. As a matter of fact, after that, as soon as
7 those funds were put in that account, he was the first one to
8 get paid. So he continued to get a salary. I think that
9 it's clear that that was a personal, and he even admitted, it
10 was a personal pecuniary benefit to him.
11 The other was, I anticipated that Mr. Barr was going
12 to say that there's a problem with the statute of
13 limitations. Now, and I also referenced briefly in my trial
14 brief, that when there's a choice of law, conflict of law
15 issue in a case, the procedural aspects are governed by South
16 Carolina's law. But the substantive aspects are governed by
17 the law of the chosen forum, which would be California. And
18 so in this case, the South Carolina statute of limitations
19 quits after three years, from the day that she knew or should
20 have known she had a problem. It's clear, Your Honor, that
21 they modified this loan agreement on January 16th by
22 agreement. They had meeting of the minds. He never intended
23 to honor it, but they at least he understood what he was
24 doing when he made that argument, when he made that offer to
25 personally guarantee it.

1 He continued to make payments to her consistent with
2 what Amanda's understanding was, that she was going to not
3 call the note on March 31st but, instead, was going to
4 continue and let him use it. She hoped they were successful.
5 And so she was going to basically make the payment on the --
6 she even said in her testimony, he will pay me when this
7 project makes some money and that's when I will call the
8 note. But she also was wise enough to put in her e-mails
9 that if that doesn't happen, she wants this personal
10 guarantee.
11 So it's clear from her e-mail that she was very well
12 aware of the risks. Steve was very well aware of the risks.
13 So it was clear that was a material part of this continuation
14 to Amanda. So the consideration was she continues to get
15 paid interest and she gets a personal guarantee. He gets
16 continued use of the money until he doesn't need it anymore.
17 And so it was a classic offer/acceptance consideration.
18 November 5th of 2013, he wrote that last check to
19 her from an equitable estoppel standpoint, if nothing else,
20 and says, please hold off on it until after the first of the
21 year, I want you to pay this. He testified, yes, he intended
22 to pay her that interest. It wasn't until January of 2014
23 when she realized, hey, this check bounced and Steve wasn't
24 calling anymore. She realized then that she had a claim
25 against Steve as to the personal guarantee.

1 Under South Carolina statute of limitations for
2 three years, she had brought the lawsuit on October 27th of
3 2016, which is less than three years past November 5th of
4 2013.
5 And, lastly, Your Honor, the statute of frauds, I
6 anticipate that Capers will make an argument as to whether
7 that would be -- this was a sufficient written agreement. He
8 had mentioned -- Mr. Barr and Mr. Stewart mentioned that the
9 promissory note does indicate that it's not to be amended
10 without a written document. But this, I think, is where it
11 shifts into the substantive aspect of this case. And that's
12 why I cited all of that California authority.
13 And, Your Honor, I believe that the relevant
14 authority in California is the *Michael Distributing Company*
15 *v. Tobin*, in which -- that was from way back in 1964. I
16 Shepardized it probably about 11:45 last night. So I know
17 it's still good law. It was when a promisor provides a
18 guarantee for his own pecuniary or business advantage. That
19 guarantee is deem an original obligation of the promisor and
20 need not be in writing. So it's clear that that's one of the
21 exceptions to the statute of frauds in California.
22 And, Your Honor, I sort of got -- your head can
23 start swimming with going back and forth between South
24 Carolina and California law. But I honestly believe that
25 there is a basis if the Court, for example, were to find that

1 the substance of law in South Carolina would apply, I believe
2 that there is an identical basis to support the enforcement
3 of this as a personal guarantee, an amendment to this loan
4 agreement.
5 And so under either California law or the *Tobin* case
6 or under South Carolina authority, there is an equal
7 enforceability of that obligation against Mr. Stewart
8 personally.
9 And with that, Your Honor, we are seeking, as I
10 mentioned, it will be $200,000, plus 120,000, which is rough
11 approximation. I know we didn't get to the days. But that's
12 what was, as far as the interest on a 365-day basis. But
13 that's a rough approximation, $320,000 in principal, plus
14 interest, plus the attorney's fees and cost associated with
15 the enforcement of this obligation.
16 Mr. Stewart admitted as a managing member of ISL
17 that ISL is in default and that he, although he didn't admit
18 it, the evidence and the law is clear that he has personally
19 guaranteed that.
20 And with that, unless the Court has any questions --
21 THE COURT: Not at this time.
22 Happy to hear from you, Mr. Barr.
23 MR. BARR: Your Honor, first, I enjoyed hearing
24 before you.
25 THE COURT: You too.

1 MR. BARR: I hope we have occasion to have other
2 matters before you in the future. And I've enjoyed working
3 with Pat. He's always a good colleague to work with and --
4 MR. FLYNN: Same here, long time.
5 MR. BARR: I remember saying way back when I was
6 younger, old lawyers would teach me to say, they will say,
7 when you have a case that's bad or weak on facts, you try it
8 on the law. When you have a case that's bad on law, you try
9 it on the facts. I say that only because this is an
10 uncomfortable case for Steve Stewart to be in. You can tell
11 he was uncomfortable from the start. He didn't want Amanda
12 Griffith to lose money. I mean, everybody, like most
13 marriages of this nature, you don't intend for there to be a
14 divorce. You look only to the honeymoon. And that was the
15 way that this project evolved.
16 And they had put an enormous amount of effort in
17 creating and packaging these entitlements. And Amanda was
18 candid, and as was Steve, that they needed some money by the
19 end of the year in 2012 to pay these past dues. Amanda
20 understood that.
21 Now, had she gone to a lawyer earlier, would the
22 outcome have been different? I don't know. Had she gone to
23 a financial advisor? I don't know.
24 I do know this. Mr. Flynn makes an issue of the
25 fact that when he asked Mrs. Stewart what would have happened

1 if he had told Amanda "no" on this personal guarantee and
2 then tries to argue that A, B or C would have happened, it's
3 interesting to me that he didn't ask Amanda that. And I
4 think that would have been a fair question. Amanda, if Steve
5 had told you "no", if he had refused to sign that personal
6 guarantee, what would you have done? That was a fair
7 question. And she never answered it. Because I think her
8 answer, her candid answer, honest would have been, probably
9 would have made no difference.
10 But we are five years downstream and everybody has
11 lost their money now. And we are in a sticky position. So
12 it's an uncomfortable question, equitably -- it's an
13 uncomfortable case equitably and factually. But that is why
14 the statue of Lady Justice wears a blindfold and holds a set
15 of scales to balance all of the above.
16 So we are met really apropos my observations about
17 trying the case on the law, several challenging, perhaps,
18 legal questions. And I think the most seminal legal question
19 is the one of consideration, because we have classically an
20 agreement that is made by an exchange of promises. So we
21 have an e-mail here. And the supposed promise from Ms.
22 Griffith is, I am happy to lend the 2,000 -- the $200,000 to
23 you. Well, stop right there. The loan had been made on
24 December the 28th of 2012. This is January the 16th. It
25 wasn't due until March 13th. What did she mean? What was

1 intended? How do you interpret those words? And I suggest
2 that they are meaningless.
3 Then she says, if you will personally guarantee.
4 There's no question but that Steve promised to personally
5 guarantee it. Those are the words of the e-mail.
6 So to the extent that an agreement consists of an
7 exchange of promise for promise, we've got a one-sided
8 promise here. Amanda hasn't promised a thing. The fact that
9 ISL did not pay it on March the 31st is no great surprise,
10 because we know, looking at retroactively, they just didn't
11 have the money. They tried to do what was right, because out
12 of the money they had, they continued to pay interest to
13 Amanda as long as they could.
14 And, of course, they paid to Steve. But what was
15 Steve and Adam Salis doing? If you see from those final
16 exhibits, they were still out there beating the bushes until
17 September when they had this operating agreement. You will
18 see in there that was some effort put in preparing that
19 thing. And Janine, I don't remember her last name, was going
20 to put $5 million into that deal, which would have funded
21 money back to ISL, which would have repaid Amanda. And it
22 would have been repaid Henderson Family Trust. Because
23 Amanda is not the only one who has lost here.
24 The California law of consideration is very
25 interesting. And I would like to brief Your Honor on this

1 supplementary. And I will take a look at Pat's trial brief
2 prepared 27 minutes after midnight. But I didn't get to read
3 it until like 7:30 or 8 this morning. And I was more focused
4 on preparing this for you.
5 California's definition of consideration is
6 statutorily defined in the California Civil Codes, Section
7 1605, which I think is an old, old section enacted in 1872.
8 It has interesting terms. It begins in capital letters,
9 "Good consideration, what?" That's how they start it. But
10 says, any benefits conferred or agreed to be conferred upon
11 the promisor or by any other person to which the promisor is
12 not lawfully entitled or any prejudice suffered or agreed to
13 be suffered by such person other than such as he is at the
14 time of consent lawfully bound to suffer as an inducement of
15 the promisor is a good consideration for promise.
16 And you probably couldn't follow a thing I read
17 about that because it's written in the vernacular of 1872.
18 But what do the California cases say about it? And I found a
19 couple, I will cite these in a memo to you, Your Honor, the
20 case of *Steiner v. Thexton*, 48 Ca. 4th, page 411, a 2010
21 decision, restates that code section that I just read to you.
22 And then the Court in that case says: Thus, there are two
23 requirements in order to find consideration. The promisee
24 must confer or agree to confer a benefit or must suffer or
25 agree to suffer prejudice.

1 So the promisee here being Amanda must confer a
2 benefit to the promisor or she must suffer or agree to suffer
3 prejudice. And we are talking about suffering prejudice from
4 what? From Steve's offer to personally guarantee the note,
5 sort of upsidedown, because we don't see a promise from that
6 matter. So based on Steve's promise to apparently guarantee
7 the note, what benefit is converted? Well, obviously, I
8 guess it would be a benefit to her, but what's flowing?
9 What's the prejudice?
10 But then the Court goes on to say in this same
11 *Steiner* case, it is not enough, however, to confer a benefit
12 or suffer prejudice for there to be consideration. The
13 second requirement is that the benefit or prejudice "must
14 actually be bargained for as the exchange for the promise."
15 Put another way, the benefit or prejudice must have induced
16 the promisor's promise.
17 The fact that the promisee relies on the promise,
18 Amanda, to her injury, well, the promisor gains some
19 advantage therefrom, does not establish consideration without
20 the element of bargain or agreed exchange.
21 And that's what's lacking here. We don't have -- we
22 don't have an agreed exchange. There's not an exchange on
23 January the 16th, as Mr. Flynn very creatively argues now.
24 The agreement was for an extension on the note. I just think
25 there was no agreement for an extension on the note. And the

1 circumstances of paying interest, that was legal obligation
2 of ISL to pay the interest. They had that legal obligation.
3 They are doing what they were legally obligated to do.
4 That's not evidence of an extension of the note.
5 The *Steiner* case was cited in an August 2018
6 California decision as well. And that case is *Property*
7 *California, et al, vs. Leamy*. It doesn't even have a Cal.
8 Reporter cite yet. But it's 18 California Daily Opinion
9 Service at page 7939. That's actually an interesting -- it's
10 a legal malpractice case. But it addresses this same
11 consideration. Consideration is present when the promisee
12 confers a benefit or suffers a prejudice. And that's as a
13 result of a promise.
14 So what benefit did Amanda Griffith confer to Steve
15 Stewart? Not ISL, to Steve -- well, maybe ISL, to ISL or
16 Steve Stewart. What prejudice did she suffer, though,
17 because of the promise? And there is none.
18 And, again, I mentioned the Property of California
19 case, again, because it closes in citing *Steiner* that, the
20 fact that the promisee relies on the promise to his injury,
21 or the promisor gains some advantage therefrom, does not
22 establish consideration without the element of bargain or
23 agreed exchange.
24 And that's simply what's lacking here. There's no
25 bargain. There's no exchange. I look forward to

1 supplementing my brief. And thank you for your time and
2 patience.
3 THE COURT: Yeah. Absolutely. You each did an
4 excellent job conveying your points through the witness
5 testimony and the arguments. So I look forward to looking
6 into this a little bit more carefully. This is a good time
7 to have a bench trial. Next week is a chambers week. So I
8 will have time in the very near future to look over this. I
9 don't expect it taking more than two or three weeks for me to
10 reach a decision. If we do get to damages, there's a damage
11 portion, we would reconvene for another hearing at that point
12 in time. I think that would be very much appropriate.
13 Initially, I have to review those to see if we get there at
14 that point.
15 MR. BARR: Could I have about 10 days to send
16 something in supplemental?
17 THE COURT: Sure. Put the ball in your court first.
18 Give you 10 days if you want to send something. If you need
19 an extension, of course, just ask. That's fine. Keep us
20 apprised.
21 MR. FLYNN: May I ask the scope what you intend
22 to -- what do you intend to do within 10 days?
23 MR. BARR: Oh, I'm going to file a supplement to my
24 brief, which is really responsive to yours. But it will be
25 just -- it will address the issues of consideration, statute

1 of frauds and legal issues here.

2 MR. FLYNN: Okay.

3 THE COURT: You need a chance to respond?

4 MR. FLYNN: No.

5 THE COURT: Obviously, we can go back and forth. I

6 tried to say two times each. Anything past that, I think

7 gets a little bit --

8 MR. FLYNN: I don't have anything else.

9 THE COURT: Sure. So if you want to -- he said he

10 will go first within 10 days. You will have a chance. And

11 again, I'm flexible on extension of time. This is important

12 to the parties as well as their attorneys. So I want to give

13 you time to brief. Those are the cases you brought today?

14 Sure. You can bring them up at any time.

15 (Whereupon, the proceedings are adjourned.)

16

17

18

19

20

21

22

23

24

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) Court of Common Pleas
) Case No. 2016-CP-10-5773
3 AMANDA GRIFFITH,)
4 Plaintiff,)
5 vs.) Transcript of Record
6 ISL DEVELOPMENT LLC, et al,)
7 Defendant.) DATE: January 25, 2019
8
9
10
11 B E F O R E:
12 THE HONORABLE JENNIFER B. MCCOY
13
14 A P P E A R A N C E:
15 R. PATRICK FLYNN
16 Attorney for the Plaintiff
17 CAPERS G. BARR, III
Attorney for the Defendant
18
19
20 Original transcript ordered by:
Barr Unger McIntosh
21
22 Karen V. Andersen, RMR, CRR
Circuit Court Reporter
23
24
25

1 THE COURT: Good morning.
2 MR. FLYNN: I'm Pat Flynn for the plaintiff.
3 MR. BARR: Capers Barr.
4 THE COURT: We are on the record. The case is
5 Amanda Griffith v. ISL Development, Steven Stewart
6 individually. This is part two of a bench trial. This is
7 the damages portion. We have bifurcated this trial. I did
8 find in favor of the plaintiff after the first part of the
9 trial. And we are here to take up the issue of damages
10 today.
11 And I just ask the attorneys to state their names
12 for the court reporter's benefit of the record.
13 Mr. Flynn, happy to hear from you first as well.
14 MR. FLYNN: Patrick Flynn here for the plaintiff.
15 THE COURT: All right. And Capers Barr is here for
16 the defendants. Thank you very much, Mr. Barr.
17 Mr. Flynn, I'm happy to hear from you.
18 MR. FLYNN: Your Honor, I think in lieu of an
19 opening, I will just go ahead and call my client to the
20 stand.
21 THE COURT: That would be fine.
22 Yes, ma'am, take the stand, much as you did in the
23 first part of the trial. And I can swear you in and/or April
24 will.
25

1 AMANDA GRIFFITH,
2 having been duly sworn, testifies as follows:
3 THE CLERK: State your full name and spell your last
4 for the record.
5 THE WITNESS: Amanda Edwards Griffith,
6 G-r-i-f-f-i-t-h.
7 DIRECT EXAMINATION
8 BY MR. FLYNN:
9 Q. Good morning, Ms. Griffith. I have here a brief
10 which I've submitted to the Court. And I know you've had a
11 chance to take a look at that. So I've broken it up into the
12 brief and then the four different exhibits. And what I was
13 going to do is briefly go through this with you. And
14 shouldn't take too long.
15 MR. FLYNN: Your Honor, do you have a paper copy?
16 THE COURT: I do, indeed.
17 MR. BARR: Excuse me. Is it the brief you handed to
18 the witness?
19 MR. FLYNN: Yes. I got the exhibits for you.
20 MR. BARR: That's okay. I've got my notes here.
21 BY MR. FLYNN:
22 Q. Okay. And you recall that we are here to determine
23 the measure of damages in connection with the lawsuit which
24 we had previously filed, correct?
25 A. Correct.

1 Q. And this is the damages phase following the
2 determination of liability on behalf of the defendants.
3 Please take a look at the first page of the brief.
4 And what I will do, just again, to save time, is to ask you
5 to take a quick look at that. And let me know if you had a
6 chance to review that, and if you agree?
7 A. I did, and I agree.
8 Q. All right. So on page 2 of my brief, number one,
9 about the middle of the page, says defendant Stewart's
10 liability in the amount of $200,000, representing the
11 principal balance of the promissory note; is that your
12 understanding?
13 A. Yes.
14 Q. No. 2, right underneath that, have you been able to
15 determine how I calculated the interest?
16 A. Yes.
17 Q. Okay. Can you briefly describe that for the Court?
18 A. It was 12 percent per annum per year.
19 Q. And starting --
20 MR. BARR: Your Honor, for the record, we don't
21 dispute the mathematical calculation, that that interest is
22 one third of $130,000. And we've been given credit for the
23 $14,000 about which the testimony was tendered.
24 MR. FLYNN: I will move on, Your Honor.
25 THE COURT: Sounds good.

1 BY MR. FLYNN:

2 Q. We will move right on to the attorney's fees, which

3 I believe is the only one there will be any contest here.

4 And that is on page 3 of the brief and also shown in Exhibit

5 D.

6 So what was the arrangement that you struck with me

7 as your counsel for this trial in terms of compensation?

8 A. That you would receive a third of what I prevailed

9 on.

10 Q. Have you also had a chance to review what is my

11 internal accounting of time and expenses for this trial?

12 A. I did not.

13 Q. Please take a look at that.

14 A. It's way to scary.

15 Q. All right. It's summarized there on the first

16 page?

17 A. Right.

18 Q. Do you see total legal fees is $66,286?

19 A. Right.

20 Q. Do you have any reason to dispute the volume of

21 detail?

22 A. No.

23 Q. Do you have any challenge to the reasonableness of

24 the one-third fee?

25 A. No.

1 Q. And do you right now wish to amend or modify our
2 agreement of a one-third contingency fee?
3 A. No.
4 MR. FLYNN: Your Honor, I believe those are all the
5 questions I have.
6 THE COURT: All right. Mr. Barr.
7 MR. BARR: Thank you, Your Honor.
8 CROSS-EXAMINATION
9 BY MR. BARR:
10 Q. Ms. Griffith, Mr. Flynn asked you about the exhibit
11 which includes his hourly billing records. Were they ever
12 disclosed to you prior to today?
13 A. They were at the first billing, but I haven't
14 received a second billing.
15 Q. And when was the first time billing submitted?
16 A. I don't recall.
17 Q. Years, months?
18 A. Last year.
19 Q. Beg your pardon?
20 A. Last year.
21 Q. Let me ask this. You are an architect by
22 profession; is that correct? Are you still practicing?
23 A. I am.
24 Q. What is your approximate annual income?
25 A. From my architectural --

1 Q. In total, from investments and architecture?
2 A. About 89,000.
3 Q. All right. And you own assets, correct?
4 A. Correct.
5 Q. How many pieces of property do you own?
6 A. Two.
7 Q. When you engaged Mr. Flynn, was there a discussion
8 about engaging on the basis of a contingency versus hourly?
9 A. Not initially, no.
10 Q. Beg your pardon?
11 A. Not initially.
12 Q. At some point, was there?
13 A. At a later date, yes.
14 Q. Were you able to compensate a lawyer to represent
15 you in this matter?
16 A. I have not been able to.
17 Q. All right. Now, you and Mr. Flynn had a prior
18 professional relationship; is that correct?
19 A. Correct.
20 Q. In which he had represented you before?
21 A. Correct.
22 Q. And in those other matters, were they on contingency
23 or hourly?
24 A. Hourly. It was a very small project, small -- it
25 was a small project that we worked out.

1 Q. Mr. Flynn's hourly rate in this matter as stated in
2 his accounting that he tendered to you in his text, his
3 memorandum, is $300 an hour. Is that consistent with what he
4 billed and the hourly basis --
5 A. Currently, yes.
6 Q. -- on the prior matter?
7 A. It's been many, many years, over 20 years.
8 Q. What is the extent of your current architectural
9 practice? In other words, how many projects are you working
10 on right now?
11 A. Two.
12 Q. And what is your average inventory of projects?
13 A. Usually less than that.
14 Q. All right. And is that by your choice?
15 A. Yes, I have some health restrictions.
16 Q. I beg your pardon.
17 A. I have some health restrictions, so, yes.
18 Q. So is it by choice or is it because of your
19 health?
20 A. Well, both.
21 Q. Okay.
22 A. By advice of my physician.
23 Q. All right. At one time, you had a significant
24 investment portfolio; is that correct?
25 A. Yes.

1 Q. I believe you sold some property with a substantial
2 gain several years ago?
3 A. Yes.
4 Q. What is the magnitude of that portfolio today?
5 A. As of yesterday, 935,000.
6 Q. And what is your age? I don't mean to --
7 A. I will be 65 next month.
8 Q. Thank you. Are you yet drawing Social Security?
9 A. I am.
10 MR. BARR: Thank you, Your Honor. That's all the
11 questions I have.
12 THE COURT: Okay. Any follow-up?
13 MR. FLYNN: If I may ask one or two in follow-up.
14 REDIRECT EXAMINATION
15 BY MR. FLYNN:
16 Q. You testified about the property that you had sold
17 recently with some gain. What was that property?
18 A. It was my property at Edisto Beach, which is my
19 primary residence. And it was at a substantial loss.
20 Q. And what was the reason why you had to sell that
21 property?
22 A. It was getting onerous with my health to travel that
23 far and live that far and come into town. And I couldn't pay
24 the mortgage anymore.
25 Q. Why is that?

1 A. My overall portfolio, which included this note, was
2 interest only, and it was inching up. So I had to either
3 refinance or sell it. And decided because of my health
4 reasons to go ahead and sell it.
5 Q. You consider that as a harm that you suffered as a
6 result of the failure to repay this note?
7 A. Yes.
8 MR. BARR: Objection, Your Honor.
9 THE COURT: Overruled.
10 MR. FLYNN: Those are all the questions I have.
11 MR. BARR: I have one follow-up.
12 CROSS-EXAMINATION
13 BY MR. BARR:
14 Q. Several years ago, didn't you sell some property
15 somewhere in East Cooper --
16 A. Yes.
17 Q. -- for a substantial -- several million dollars of
18 profit?
19 A. Yes.
20 Q. When was that?
21 A. 2003 or '04.
22 MR. BARR: That was the one I was referring to.
23 Thank you. I have nothing further.
24 THE COURT: Okay. All right. Ms. Griffith, you may
25 step down and return to the counsel table.

1 Mr. Flynn, do you have any other witnesses you wish
2 to call at this time?
3 MR. FLYNN: No, Your Honor.
4 THE COURT: And Mr. Barr?
5 MR. BARR: None from us.
6 THE COURT: Okay. I'm happy to hear from the
7 attorneys. Mr. Flynn, happy to hear from you first. And I
8 will allow Mr. Barr to respond.
9 MR. FLYNN: Thank you, Your Honor. I will be very
10 brief, Your Honor, because I think in order to save time,
11 it's really all contained in my brief.
12 THE COURT: Okay.
13 MR. FLYNN: Just to kind of summarize, on the last
14 page of my brief, I had listed -- it's actually page 14 and
15 15 of my brief. So under the conclusions, subparagraph, the
16 defendant Stewart's liability, $200,000 for the principal
17 balance of the promissory note. Item two is 130,000 in
18 interest, which is uncontested. Three is attorney's fees in
19 the amount of 110,000, based on 330 divided by 3 and a
20 one-third contingency. And then number four, that any
21 judgment would be subject to 9 1/2 judgment interest.
22 Your Honor, I actually couldn't find whether the
23 Supreme Court had written that order yet. But so I looked
24 online and saw the Wall Street Journal. If I'm incorrect
25 about that --

1 THE COURT: Is it 9 1/2, Capers?
2 MR. BARR: Ma'am? The judgment interest rate is 9
3 1/2.
4 THE COURT: That's what I thought too. Okay.
5 MR. FLYNN: And, Your Honor, I will stand by my
6 brief as to the arguments. I understand the Court wants to
7 read through everything and make a decision. So unless the
8 Court has any questions, I will rest.
9 THE COURT: Okay. Mr. Barr.
10 MR. BARR: Thank you, Your Honor. May it please the
11 Court. There is no authority, as we write in our brief, for
12 a Court awarding as a reasonable fee a contingency fee based
13 on the amount of recovery. There's simply none. And in
14 fact, the South Carolina law, as I cited in my brief, the
15 California law, as cited in my brief, is clear that the
16 lodestar method is preferred. And it's quite simple. It's
17 the reasonable hours expended by a reasonable hourly fee.
18 And I notice from Mr. Flynn's position, his hourly
19 rate is $300. I can't quarrel that that's unreasonable.
20 That's my rate. I can't quarrel that the associate's rate of
21 175 is unreasonable. I can argue and suggest to the Court,
22 though, that the combined rate of 475 is over the market.
23 And that's just my argument.
24 Counsel hadn't put up any evidence of what the
25 market is. Perhaps Your Honor can take some judicial notice

1 based on her own experience and exposure of these things and
2 recite that. But I do think that 475 is a bit high.
3 And then if you figure -- I can represent to the
4 Court that my own time billing accounted for 121.95 hours,
5 which was pretty close to Mr. Flynn's 126.8. I don't quarrel
6 with Mr. Allen's involvement, but if you took -- that's 277
7 lawyer hours being billed on this matter. And I think that
8 that's more than this case would justify. But that total is
9 $66,000.
10 And now counsel wants the Court to extrapolate and
11 add to that a bonus which would entitle the plaintiff to a
12 third or $100,000 or a third of their recovery, more or less.
13 Now, the case of *Maybank v. BB&T* that we cite was a
14 very, very complex stockholder fraud kind of case, bank fraud
15 kind of case. It resulted in a verdict of 3.1 million in
16 actual and 5 million in punitives. And in that case, the
17 Court -- actually, the Court reduced the attorney's fees and
18 awarded 2.6 million in costs of 245,000. That's a lot of
19 dough.
20 But in that case, the Court applied the lodestar
21 method. And in that case, the Court, based on the complex
22 nature of the case, imposed a 1.5 multiplier based on the
23 complexity of the case.
24 And in *Maybank*, the Court said -- the Court looks to
25 the factors set forth in *Jackson v. Speed*, which include the

1 nature, extent and difficulty of the case, time necessarily
2 devoted, to professional standing of counsel, the contingency
3 of compensation, and the beneficial results obtained, and
4 customary legal fees.
5 This was not a particularly complex case. The only
6 complexity was when we went into Westlaw, we had to research
7 not only South Carolina but California. But that was it.
8 The law is the law wherever we go. As lawyers, we can study
9 California cases and make the same analysis and conclusions
10 of what the California cases say as we can in South Carolina.
11 So I don't think that existence of California law makes the
12 case complex.
13 Factually, it was a very -- there was a very
14 interesting legal question involved here as to the issue of
15 consideration. And I know Your Honor weighed it very
16 carefully. You ruled how you ruled. Wish you hadn't, but
17 that's what brings us back here today.
18 So my very long-winded response is that this case
19 does not justify a multiplier, either in the California law
20 or under South Carolina law. The hourly fee itself is quite
21 large. Mine totals about 31,000. And theirs is, including
22 paralegal work, is $66,000. So it's probably awarding the
23 plaintiff a multiplier by awarding her every dime of the
24 hourly fee. But to then extrapolate that up to 100, I think
25 is not justified by the circumstances of the case.

1 So that would be our position with respect to
2 attorney fees. And I know counsel briefed my motion to alter
3 or amend. The time doesn't permit either counsel or the
4 Court to deal with that right now. So we will wait until a
5 final order.
6 THE COURT: I think that's appropriate. Yes, sir.
7 All right. Would you like to respond?
8 MR. FLYNN: Very briefly, Your Honor, a couple of
9 things. I'm not sure how counsel came to the combination of
10 $475 per hour. That's not accurate. There are two different
11 tiers of attorneys involved. And he indicated that the
12 hourly rate for each are reasonable. So to combine that into
13 one 475 is a little bit inflammatory and not accurate.
14 He also indicated that there was no evidence
15 presented that this was reasonable fee or within the market.
16 And I would argue that the evidence is in the detail which
17 the Court can review for judicial notice that is a
18 significant amount of work involved here.
19 And I will point out that from my standpoint, there
20 was a significant amount of documentation associated with
21 this California transaction, bank records and whatnot, which
22 did require some work by the associates. I know that
23 Mr. Barr may not have had to go through the same thing
24 because his client is already familiar with it. But at that
25 point, we weren't sure what was going to be involved in this.

1 So we had to go through an exhaustive deep dive into the
2 documentation.
3 Counsel also cited the *Maybank v. BB&T* case, sort of
4 flipflopped back and forth between South Carolina and
5 California law. I am not certain that the South Carolina
6 case would be applicable, as this determination of attorney's
7 fees is not a procedural matter but a statute of limitations,
8 as the Court has indicated.
9 And, instead, I would rely upon the California case
10 as cited in my brief, which do indicate the lodestar method,
11 which is basically the same as South Carolina. It's not the
12 same as reflected in that BB&T case, but it's basically a
13 list of factors.
14 And counsel is correct, there's no case out there
15 that says, oh, it's fine to charge one-third. The cases say,
16 you go through the amount of fee, which is proposed to be
17 charged $110,000, and you go through each one of those
18 characteristics, which is in the lodestar method cited in my
19 brief, and if it's a reasonable sum within some degree of
20 reason, then it's okay by the Court.
21 And there's no evidence -- there is evidence here in
22 the detail of what I had done over the last two years. There
23 is no evidence on the other side that was unreasonable.
24 So, Your Honor, I think that all things considered,
25 also given the fact that this contingency fee would include

1 any post-trial briefing and any appeals and things like that,
2 I anticipate that the attorney's fees will continue. And so
3 that would account for the difference between 110,000 and the
4 nearly 70,000. Thank you, Your Honor.
5 THE COURT: And, Mr. Flynn, just to protect the
6 record, since you've attached this exhibit merely as an
7 invoice rather than affidavit of attorney's fees, do you
8 affirm that these are, in fact, the fees associated by your
9 firm with this case?
10 MR. FLYNN: I do, Your Honor. And I apologize, I
11 should have done that by affidavit.
12 THE COURT: That's okay. We got it clear for the
13 record. I just wanted to make sure.
14 MR. FLYNN: Thank you, Your Honor.
15 THE COURT: All right. Obviously, I need to go
16 through these briefs that we received this morning
17 extensively. And I will take a look at the cases that each
18 side has cited and weigh them adequately. And I don't
19 anticipate that this portion will take as long as the
20 portion -- the initial portion of this case.
21 Does anyone need any more time to respond to the
22 Court? We have a few more minutes, if there's anything else
23 anybody wants to say.
24 MR. BARR: Well, I agree with counsel that I did
25 focus only on the South Carolina law, but I attached to my

1 memorandum the California decision --
2 THE COURT: I did see that.
3 MR. BARR: -- in Cyers. I was looking at the
4 language. It recited the California consideration of the
5 escalator, I will call it, that is to say the consideration
6 of anything over lodestar. And very frankly, Your Honor, I
7 can't put my finger on the paragraph right now. So I won't
8 take Your Honor's time to try to search for it. But I don't
9 think that the California law justifies the multiplier
10 either.
11 THE COURT: I will certainly look at that closely to
12 review the case.
13 MR. FLYNN: I want to point out, to reassure the
14 Court, I have a 15-day brief, but I did put my damages and
15 the response to his motion in the same brief. And also, the
16 Court will notice that there's a lot of cutting and pasting
17 from previous, because the arguments are kind of the same.
18 So I didn't come up with a whole bunch -- didn't blaze a new
19 path, we will call it.
20 THE COURT: That's okay. It's very interesting. I
21 appreciate everybody's time this morning. And if there's
22 anything else you need from me, just e-mail me. As always,
23 happy to hear from you.
24 After this final order, I anticipate further we can
25 have another motion hearing at a later date. Thank you.

1 (Whereupon, proceedings are adjourned.)

2

3 CERTIFICATE OF REPORTER

4

5 I, Karen V. Andersen, Registered Merit Reporter,

6 Certified Realtime Reporter for the State of South Carolina

7 at Large, do hereby certify that the foregoing transcript is

8 a true, accurate and complete Transcript of Record of the

9 proceedings.

10 I further certify that I am neither related to nor

11 counsel for any party to the cause pending or interested in

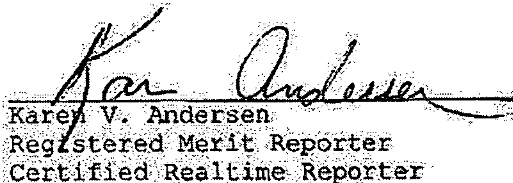
12 the events thereof.

13

14

15

16



17 Karen V. Andersen

18 Registered Merit Reporter
Certified Realtime Reporter

19

20

21

22

23

24

25

POPE FLYNN, LLC
1411 Gervais Street, Suite 300 (29201)
Box 11509
Columbia, S.C. 29211
Phone: 803.354.4900 Fax: 803.354.4899
www.popeflynn.com / Fed ID #26-1777302

CLIENT: **Ms. Amanda Griffith**
107 Bull Street
Charleston, SC 29401

Client # 02017
Matter # 160028
Billing through 1/25/2019

DESCRIPTION: Griffith/ ISL Development, LLC / Steven Stewart

Our File No. 2017.160028

Billing Summary

Total professional services	$66,286.00
Total expenses incurred	$1,874.54

Total Legal Fees and Expenses Through 1/25/2019: $68,160.54

Timekeeper	Hours	Rate	Amount
R. Patrick Flynn (PF) Member	126.8	$300.00	$38,040.00
Michael Allen (MA) Associate	150.8	$175.00	$26,390.00
Nina Rogers (NMR) Paralegal	23.2	$ 80.00	$ 1,856.00

TOTAL Legal Fees Through 1/25/2019: $66,286.00

PROFESSIONAL SERVICES RENDERED

06/01/2017	MA	Review production and send correspondence to Pat Flynn for case update	1.00	hrs
06/02/2017	PF	Review of file material and background documents; examine jurisdictional issues and California substantive law as to loans and investments; prepared status update report to Amanda	1.90	hrs

06/02/2017	NMR	Updated working file to reflect all pleadings and case status	0.30	hrs
06/05/2017	NMR	Receive and Review invoices from Process Service, Inc. and update expense report and file re same	0.20	hrs
06/26/2017	NMR	Update Net Docs file with all documents and create backup	0.40	hrs
08/16/2017	MA	Review status of production; conference with opposing counsel regarding outstanding discovery, case posture, potential resolution	1.10	hrs
08/17/2017	MA	Send Pat status update; prepare additional discovery requests; prepare proposed consent scheduling order	2.50	hrs
08/17/2017	NMR	Draft consent scheduling order	0.40	hrs
08/17/2017	NMR	Draft requests for production to Defendants and revise interrogatories	1.20	hrs
08/17/2017	NMR	Review of file and analyze current position re next steps	0.20	hrs
08/23/2017	MA	Finalize updated discovery requests and scheduling order; draft correspondence to opposing counsel regarding discovery and case status	1.20	hrs
08/23/2017	NMR	Draft correspondence to Capers Barr re discovery	0.20	hrs
08/23/2017	NMR	Revisions to interrogatories, consent scheduling order, and requests for production	2.80	hrs
08/24/2017	MA	Strategy discussion with Pat Flynn and review status correspondence sent to opposing counsel	0.50	hrs
08/25/2017	MA	Review correspondence from opposing counsel regarding outstanding discovery and proposed order	0.20	hrs
09/27/2017	MA	Draft discovery letter to opposing counsel; draft and send correspondence to opposing counsel regarding discovery and case status	1.00	hrs
10/02/2017	MA	Review correspondence from opposing counsel regarding outstanding discovery	0.20	hrs
10/18/2017	MA	Review file materials and draft follow-up correspondence to Capers regarding past-due discovery; begin preparing motion to compel	0.30	hrs
10/19/2017	MA	Review and revise draft of motion to compel	0.50	hrs
10/23/2017	MA	Review file status; call to office of opposing counsel regarding discovery; draft correspondence to opposing counsel regarding discovery; conference with office of opposing counsel regarding outstanding discovery; finish draft of motion to compel in anticipation of filing; review correspondence from opposing counsel regarding production; begin analysis of production from opposing counsel; draft status update to client	2.50	hrs
10/23/2017	NMR	Download files from dropbox and place into Netdocs	0.80	hrs
11/02/2017	MA	Conference with Capers Barr regarding production, discovery, scheduling order, and depositions; update and analyze case with latest information from Capers	0.60	hrs
11/03/2017	MA	Additional analysis of file materials; draft status update to client; review correspondence from client	0.70	hrs
11/09/2017	MA	Review correspondence from opposing counsel regarding discovery timing issues	0.10	hrs
11/13/2017	MA	Draft correspondence (x2) to client regarding deposition timing and strategy; review correspondence from client regarding discovery (x2)	0.30	hrs
11/13/2017	NMR	Draft Subpoena, exhibit A, NOD for Stewart and emails re same	0.70	hrs

11/14/2017	NMR	Draft NODs, Subpoena's with detailed lists of production for each defendant along with a detailed list of deposition topics for the corporate defendant	3.40	hrs
11/15/2017	MA	Review correspondence from client regarding deposition and update case file and strategy	0.10	hrs
11/17/2017	MA	Review and revise deposition subpoenas; draft correspondence to opposing counsel regarding depositions and discovery (x2); review correspondence from opposing counsel regarding depositions and discovery issues (x2); update case file and strategy	1.50	hrs
11/17/2017	NMR	Draft and revisions of NODs, Subpoenas, and detailed 30(b)(6) topics	1.60	hrs
11/28/2017	MA	Review correspondence from court regarding trial schedule; review file and draft status correspondence to Pat Flynn	0.20	hrs
11/28/2017	NMR	Review correspondence from court re roster and docket the same; email with court reporter re postponed deposition	0.40	hrs
11/29/2017	MA	Conference with opposing counsel regarding case status, facts, and plan moving forward; discussion with Patrick Flynn to discuss strategy update	1.00	hrs
12/14/2017	MA	Review correspondence from opposing counsel regarding production request; draft reply correspondence to opposing counsel regarding production requests and scheduling order	0.50	hrs
12/15/2017	NMR	Telephone call and email from Capers Barr re discovery and depositions	0.20	hrs
12/19/2017	MA	Review file materials and draft correspondence to opposing counsel regarding scheduling order	0.70	hrs
12/20/2017	MA	Meet with opposing counsel to discuss discovery, production, depositions, and scheduling order; review correspondence from opposing counsel regarding production and discovery directed at our client; initial review of defendants' discovery request	1.60	hrs
12/22/2017	MA	Continue review of file production of Defendants; review case schedule and draft proposed scheduling order for opposing counsel to review; draft correspondence to opposing counsel regarding proposed scheduling order	1.00	hrs
01/08/2018	MA	Review status of scheduling order; draft correspondence to opposing counsel regarding scheduling order; finalize scheduling order for filing; review correspondence from opposing counsel regarding court filing and case status	1.00	hrs
01/08/2018	NMR	Draft Motion Cover Sheet and Correspondence to Judge re consent scheduling order and file the same; emails with Michael Allen and Capers Barr re same	0.80	hrs
01/12/2018	PF	Participated in online Circuit Court Roster Meeting, re: docket for anticipated trial dates and pretrial motions and discovery requirements	1.00	hrs
01/18/2018	MA	Continue review of opposing party's production; draft status update to client	1.80	hrs
01/18/2018	NMR	Draft discovery responses and prepare documents for production	2.80	hrs

01/19/2018	MA	Continue comprehensive review of defendant's case materials; research into issues raised by discovery results	3.40	hrs
01/22/2018	MA	Continue review and analysis of defendant's production; continue compiling and reviewing discovery responses	2.90	hrs
01/24/2018	MA	Continue review of case materials from opposing counsel; additional research into other issues revealed in opposing counsel discovery	1.90	hrs
01/25/2018	MA	Additional review and analysis of defendant's production; additional review and compilation of production for opposing party	2.20	hrs
02/12/2018	MA	Continue analysis of defendant production and case strategy analysis	3.80	hrs
02/13/2018	MA	Continue analysis of defendant production; research other discovered companies for potential to pursue collection efforts; research relevant development information	2.90	hrs
02/14/2018	MA	Work on discovery review and production materials	1.30	hrs
02/15/2018	MA	Work on discovery review and production materials	2.90	hrs
02/16/2018	MA	Continue analysis of defendant production; continue preparation of plaintiff production; additional research into property ownership assets of defendant; provide status update	4.00	hrs
02/16/2018	NMR	Document production from Net Docs	2.00	hrs
02/19/2018	MA	Continue to analyze and review production and file material for important documents; continue to compile necessary production materials	5.40	hrs
02/19/2018	NMR	Document production from DropBox	3.20	hrs
02/20/2018	MA	Finish compiling discovery package for production to defendant; Review correspondence from opposing counsel regarding case status;	3.40	hrs
02/21/2018	MA	Review correspondence from opposing counsel regarding case status; draft follow-up correspondence to opposing counsel regarding case status and production materials; upload electronic production documents; meet with opposing counsel to discuss major issues of case and plan for moving forward	4.10	hrs
02/22/2018	MA	Draft and send status update to Amanda Griffith; review correspondence from Amanda Griffith	1.00	hrs
02/23/2018	MA	Review case status and strategy update with Pat Flynn	2.50	hrs
03/09/2018	MA	Revise draft of additional discovery to Defendants	1.10	hrs
03/09/2018	NMR	Draft Requests for Admissions	0.60	hrs
03/15/2018	MA	Review file materials and research evidence issues	1.10	hrs
03/16/2018	MA	Research evidence issues relating to email correspondence	1.00	hrs
03/19/2018	MA	Continue drafting additional discovery request	0.60	hrs
04/02/2018	MA	Review case status and additional discovery needs; review correspondence from client (x2); draft correspondence to opposing counsel (x2); draft correspondence to client (x2)	1.20	hrs
04/03/2018	MA	Review correspondence from client; coordinate mediation	0.30	hrs
04/04/2018	MA	Review and revise amended notice of deposition and deposition subpoena	0.40	hrs
04/04/2018	NMR	Draft deposition notices, subpoenas, certificate of service, and letter to Capers Barr re Defendants depositions	1.00	hrs

04/12/2018	MA	Conference with opposing counsel to discuss case status; review file materials and provide update to Pat Flynn; research lis pendens issue	2.50	hrs
04/13/2018	MA	Review file materials; additional research on lis pendens issue	0.60	hrs
04/16/2018	MA	Review case status with Pat Flynn; draft correspondence to opposing counsel	0.80	hrs
04/17/2018	MA	Continue review of case status and mediation options	0.50	hrs
04/18/2018	MA	Review correspondence from court regarding case trial; review cases materials; draft correspondence to Pat Flynn	0.80	hrs
04/19/2018	MA	Research evidence issues; continue to analyze strategy for evidence and trial; discuss case strategy with Pat Flynn	2.10	hrs
04/20/2018	MA	Continue evidence research; review critical evidence; draft comprehensive evidence strategy update to Pat Flynn	2.50	hrs
04/23/2018	MA	Discuss evidence strategy with Pat Flynn; review file materials and continue compiling critical evidence	1.50	hrs
04/24/2018	MA	Review correspondence from opposing counsel regarding case status and pending discovery (x2); discuss case status with Pat Flynn; continue review of critical evidence; draft correspondence to opposing counsel (x2)	2.80	hrs
04/24/2018	PF	Review of ISL and Stewart documents, re: selection of documents for trial exhibits and preparation for mediation position; email status update memo to Amanda, re: deposition, mediation, and trial scheduling and demands to Stewart	3.30	hrs
04/25/2018	MA	Conferences with opposing counsel to discuss evidence issues and case status (x2); continue to review evidentiary issues and strategy for case resolution; review mediation status	3.20	hrs
04/26/2018	MA	Continue preparing file materials in preparation for mediation and possible trial	1.40	hrs
04/27/2018	MA	Review mediation status; draft correspondence to client with case update; discuss strategy with Pat Flynn	1.00	hrs
04/28/2018	MA	Review correspondence from client regarding mediation; draft correspondence to Pat Flynn	0.20	hrs
05/01/2018	MA	Conference with Mediator regarding upcoming mediation; draft correspondence to mediator and opposing counsel; review correspondence from mediator's office and opposing counsel	1.00	hrs
05/01/2018	PF	Analysis/Strategy Review/analyze. Review of ISL documents and Stewart's bank records, re: mediation position.	1.20	hrs
05/03/2018	MA	Conference with opposing counsel regarding status conference	0.30	hrs
05/04/2018	MA	Attend roster meeting regarding trial schedule; review case status with Pat Flynn	2.50	hrs
05/04/2018	PF	Analysis/Strategy Appear for/attend Participated in Circuit Court Roster Meeting, re: coordination of trial and meeting with Capers Barr, re: settlement status and mediation process	1.60	hrs
05/04/2018	PF	Analysis/Strategy Communicate (other external). email memo to Amanda, re: status and schedule	0.30	hrs
05/07/2018	MA	Prepare for mediation; review correspondence from opposing counsel regarding property sale	0.50	hrs

05/07/2018	PF	Analysis/Strategy Communicate (other external). email to Capers Barr, re: status of potential sale at auction	0.10	hrs
05/07/2018	PF	Review/analyze. Review of public documentation, re: auction of 60 Montagu; continued review of file materials, re: bank records of cash flow for Steve immediately following payments by Amanda.	1.80	hrs

05/08/2018	MA	Continue mediation preparations	1.90	hrs
05/08/2018	PF	Analysis/Strategy Review/analyze. Review of file material and background documents from Steve Stewart's files; legal research, re: California substantive legal issues and choice of law; all re: preparation for mediation.	8.30	hrs
05/09/2018	MA	Finish mediation preparation; Attend mediation	5.50	hrs
05/09/2018	PF	Analysis/Strategy: Preparation and Participated in mediation with Amanda at mediator Marvin Infinger' s office in Charleston	10.5	hrs
05/11/2018	PF	Analysis/Strategy Plan and prepare for. Preparation of release and dismissal documentation, re: formalizing settlement terms.	0.80	hrs
05/23/2018	MA	Review correspondence from opposing counsel regarding settlement	0.30	hrs
05/25/2018	PF	Prepared Final Settlement Agreement and Mutual Release form and Consent Stipulation of Dismissal with Prejudice form	1.00	hrs
05/29/2018	MA	Review settlement agreement drafts and correspondence with opposing counsel	0.90	hrs
05/30/2018	MA	Review correspondence from opposing counsel regarding payment update and settlement drafts	0.30	hrs
06/01/2018	MA	Review settlement payment status	0.30	hrs
06/20/2018	MA	Review case status and discuss resolution strategy with Pat Flynn; begin revising discovery stipulation strategy	1.00	hrs
07/09/2018	MA	Analyze status update and correspondence from Capers	0.20	hrs
07/10/2018	MA	Review/analyze settlement enforceability options; Review correspondence from court regarding trial; discuss case strategy with Pat Flynn	2.20	hrs
07/12/2018	MA	Continue case settlement strategy analysis; review case status and correspondence	1.30	hrs
08/01/2018	PF	Analysis/Strategy Communicate (other external) 7/12/18 Telephone conversation with Amanda, re: status of trial roster and option to move for enforcement of settlement agreement; email memorandum to Amanda confirming the plan of action outlined in phone conversation regarding trial of case; brief review of file material, re; exhibits anticipated for trial.	0.80	hrs

08/20/2018	MA	Review case status; draft correspondence (x2) to Capers regarding trial evidence; review correspondence from Capers re: trial evidence	0.40	hrs
08/22/2018	MA	Continue research and begin preparing trial exhibits	1.90	hrs
08/23/2018	MA	Trial preparation and review of exhibits	1.60	hrs
08/24/2018	MA	Attend roster meeting at Charleston County Courthouse; conference with opposing counsel regarding evidence issues; continue trial preparation; supplemental research into relevant case law	3.20	hrs
08/24/2018	PF	Analysis/Strategy Appear for/attend court roster meeting with Clerk of Court and Stewart's attorney Capers Barr; review of exhibit list and consent to admissibility of trial exhibits with Capers Barr.	1.10	hrs
08/24/2018	PF	Analysis/Strategy Review/analyze. Reviewed trial exhibits and prepared several emails to Amanda, re: preparation of documents for her review prior to trial date.	7.10	hrs
08/27/2018	MA	Continue trial preparations; draft correspondence to opposing counsel re: trial exhibits	0.80	hrs
08/28/2018	MA	Review correspondence from opposing counsel re: trial exhibits; analyze defense trial exhibits; prepare plaintiffs trial exhibits and continue comprehensive trial prep	7.80	hrs
08/28/2018	PF	Analysis/Strategy Communicate (other external). Email from Clerk of Court re: trial schedule.	0.10	hrs
08/28/2018	PF	Analysis/Strategy Review/analyze. Reviewed file and researched case law from California; review and preparation for legal arguments and exhibit questions.	8.90	hrs
08/28/2018	PF	Analysis/Strategy Plan and prepared Plaintiff's Trial Brief and prepared for direct and cross examinations.	11.00	hrs
08/29/2018	MA	Finish trial preparations; attend trial at Charleston County Courthouse	7.50	hrs
08/29/2018	PF	Analysis/Strategy Plan and prepare for final pretrial preparations; meeting with Client.	4.00	hrs
08/29/2018	PF	Analysis/Strategy Appear for/attended in Non-Jury Trial.	5.00	hrs
09/03/2018	PF	Legal Research of SC and California case law, re: preparation for post-trial briefing	8.00	hrs
09/07/2018	PF	Received and reviewed post-trial brief from Capers Barr; Continued legal research of SC and California case law, re: preparation for post-trial briefing	8.00	hrs
09/08/2018	PF	Review of trial transcript and exhibits, re: preparation for post-trial briefing	6.00	hrs
09/10/2018	MA	Analyze defendant's post-trial brief and hearing transcript; analyze strategy for response brief; review correspondence to and from court re: briefs and responses deadlines; review correspondence from opposing counsel re: case briefs	4.20	hrs
09/11/2018	MA	Review brief strategy with Pat Flynn; continue research for reply brief strategy	0.80	hrs
09/14/2018	MA	Review brief strategy with Pat Flynn; review final brief submittal to Court	2.00	hrs
09/24/2018	PF	Received and reviewed Defendants' Reply to Plaintiff's Supplemental Brief; review of case law and transcript references in preparation for response to this brief	6.00	hrs
09/24/2018	PF	Continued review of Defendants' Reply to Plaintiff's Supplemental Brief, exhibits, and previous briefs by Defendants; review of case law	7.00	hrs

		and transcript references and prepared and sent final responsive brief by email to Judge McCoy and Capers Barr		
09/24/2018	MA	Analyze defendant's supplemental post-trial brief; review brief and response rategy with Pat Flynn	1.20	hrs
10/03/2018	MA	Call with counsel for 60 Montagu buyer re: status of litigation	0.40	hrs
10/12/2018	MA	Review correspondence from counsel for 60 Montagu Buyer; send correspondence to Capers Barr re: purchaser correspondence	0.50	hrs
11/01/2018	MA	Review correspondence from court; review correspondence from opposing counsel; analyze order strategy with Pat Flynn and begin working on proposed order; telephone conversation with client re: judge's ruling	1.50	hrs
11/07/2018	MA	Review and revise draft order; discuss strategy and substance with Pat Flynn	2.00	hrs
11/08/2018	MA	Draft status update to client; continue to review and revise draft order	0.90	hrs
11/09/2018	MA	Confirm case research for final draft of order; draft update and discuss escrow strategy and status with Pat Flynn	2.50	hrs
11/12/2018	MA	Review correspondence and order opposition from opposing counsel; review correspondence from court re: order status and substance; conference with Pat Flynn re: proposed order	1.20	hrs
11/13/2018	MA	Review correspondence from court re: damages hearing; discuss case status and strategy with Pat Flynn	0.80	hrs
12/14/2018	PF	Received and reviewed Order of Court as to liability of defendant; review of transcript and trial exhibits, re: preparation for damages hearing.	2.00	hrs
12/21/2018	MA	Review status update with Pat Flynn and review correspondence to client re: damages hearing; review correspondence from opposing counsel re: motion to reconsider; initial review of motion to reconsider	1.90	hrs
12/21/2018	PF	Email to Amanda, re: status update and trial transcript in preparation for damages hearing; received and reviewed motion to alter or amend judgment from Capers Barr; review of case law cited in brief.	4.00	hrs
12/27/2018	MA	Review correspondence from court re: motion filed by opposing counsel	0.10	hrs
1/7/2018	PF	Coordinated by email with defendants' counsel and Judge McCoy's law clerk, re: damages hearing schedule; legal research and review of trial exhibits and briefs, re: preparation for Memo in Support of Damages and in opposition to motion to alter or amend.	5.00	hrs
1/23/2018	PF	Continued legal research and review of trial exhibits and briefs, re: drafting Memo in Support of Damages and in opposition to motion to alter or amend.	3.00	hrs
1/24/2018	PF	Finalized Memo in Support of Damages and in opposition to motion to alter or amend; review of all file material, trial exhibits, briefs, and case law; communications with Amanda; received supplemental brief by Defendants; completed preparations for Damages Hearing.	8.00	hrs

EXPENSES

05/01/2018	Process Service, Inc. Inv. LEX-2016002643 ISL Svc Date 11/1/2016	$30.00
05/01/2018	Process Service, Inc. Inv. LEX-2016002644 Stewart Svc Date 11/1/2016	$70.00
05/09/2018	Nexsen Pruet, LLC Inv. 535704800 (ID#047560-00140) - 05/09/2018 Mediation Services	$1,371.96
07/11/2018	Westlaw research, Inv. #838715257.	$12.25
08/28/2018	Westlaw research, Inv. #838886970.	$32.44
09/17/2018	Barr, Unger & Mcintosh, LLC - copy of 1/2 of transcript.	$105.00
09/30/2018	Thomson Reuters - Westlaw online research (month of September 2018).	$87.12
11/06/2018	Westlaw research. $165.77	
		$1,874.54