7-28-2014

# Ellmaker v. Tabor Appellant's Brief Dckt. 41846

# IN THE IDAHO SUPREME COURT OF THE STATE OF IDAHO

MARJORIE LOIS ELLMAKER,
a single woman,

Plaintiff/Appellant,

vs.

CALVIN TABOR and KEITH TURNER
and A1 REAL ESTATE, an Idaho
Limited Liability Company,

Defendants/Respondents

Supreme Court No. 41846.

## APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District
for Canyon County.

Honorable George A. Southworth, District Judge

Kenneth F. Stringfield
Residing at Caldwell, Idaho, for Appellant.

David E. Kerrick
Residing at Caldwell, Idaho, for Respondent.

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

Plaintiff Marjorie Ellmaker appeals the district court's granting of Defendant Calvin Tabor's motion to dismiss and motion for summary judgment on all counts.

### B. Course of the Proceedings

Marjorie initially filed this action on April 21, 2010 (R., Vol. I, pp. 5-17) and filed an Amended Complaint on May 25, 2010. (R., Vol. I, pp. 26-47). Tabor thereafter filed his Motion for Summary Judgment (R., Vol. I, pp. 55-57), Motion to Dismiss for Lack of Standing (R., Vol. I, pp. 58-60), and related memorandum and affidavit on June 7, 2013 (R., Vol. I, pp. 61-68). Following briefing by the parties and oral argument thereon held on October 24, 2013, the Court issued its Order Granting Defendant Tabor's Motion for Summary Judgment on December 27, 2013 and entered Judgment the same day. (R., Vol. II, p. 290-301). The Order is divided into a two-pronged ruling, with the first section finding that Marjorie does not have standing (R., Vol. II, pp. 293-295), and the second section finding that Tabor is entitled to summary judgment on all four counts asserted (R., Vol. II, pp. 295-298). On February 7, 2014, Marjorie filed her Appeal. (R., Vol. II, pp. 302-204).

### C. Concise Statement of the Facts

#### 1. Marjorie's Kinship, Friendship, and Assistance to Martha.

Sarah Martha Chitwood ("Martha") was a longtime resident of McCall, Idaho

who had been a former school teacher and who was well known and adored. (R., Vol. II, pp. 175, 258). She was born on [redacted] and died a widow with no living children on July 25, 2007 in Notus, Idaho. (R., Vol. I, pp. 112, 136). Martha's mother was Blanche Bessecker (R., Vol. II, p. 136), and her grandfather was James Bessecker (R., Vol. II, p. 246).

Marjorie Lois Ellmaker ("Marjorie") is a resident of Notus, Idaho (R., Vol. I, p. 107), and a single woman (R., Vol. I, p. 5) who formerly worked in a bank and has sold real estate (R., Vol. II, p. 219). Marjorie's mother was the granddaughter of James Bessecker (R., Vol. II, pp. 246, 265), making Marjorie and Martha first cousins once removed. In addition to a blood relationship, Martha and Marjorie were friends (R., Vol. I, p. 5), and Marjorie was also Martha's helper (R., Vol. II, p. 258).

In 2003, when Martha was 85 years old, the two ladies engaged an elder law and estate-planning attorney, Steven Scanlin, to draft a Power of Attorney on behalf of Martha (naming Marjorie as Attorney in Fact) and to draft Martha's Will. (R., Vol. I, pp. 103-104, Vol. II, p. 258). The Power of Attorney gave Marjorie the power of an absolute owner over Martha's assets and liabilities, including the authority to purchase and sell real and personal property, sign written instruments, participate in legal proceedings, and nominated Marjorie as guardian of Martha's estate. (R., Vol. I, pp. 107-111). In her Will, after devising a few tangible items (and her cats) to several friends, Martha directs, "I give . . . all of the rest, residue, and remainder of my property, real, personal, and mixed . . . absolutely and forever to my friend, Marjorie J. Ellmaker." (R., Vol. I, p. 112).

Martha also named Marjorie as the Personal Representative for her estate. (R., Vol. I, p. 112).

When Martha passed away in 2007, Steven Scanlin drafted an Affidavit of Non-Probate of the Estate of Sarah Martha Chitwood, transferring real property located in McCall, ID to Marjorie, in accordance with the desires set out in Martha's Will. (R., Vol. I, pp. 104-105). Steven Scanlin subsequently drafted a second Affidavit of Non-Probate of Marjorie Ellmaker ("Non-Probate Affidavit"), transferring to Marjorie the interests formerly held by Martha in other personal property, including a promissory note ("the Note") on a $150,000 loan to Calvin Tabor ("Tabor") and A1 Real Estate, LLC ("the LLC"). (R., Vol. I, pp. 104-105, 115-116, 120-121). Both affidavits were recorded at the Valley County Court House. (R., Vol. I, pp. 115, 120). Based on her attorney's advice and the recording of these affidavits, despite the absence of a probate court proceeding, Marjorie has openly claimed and possessed the real and personal property since the death of Martha. (R., Vol. I, p. 70).

**2. Calvin Tabor Helps Martha And Marjorie And Becomes A Friend.**

Two years before she died, in 2005, Martha wanted to sell real property in McCall, Idaho but did not want a McCall realtor involved, and Marjorie, who held Power of Attorney at that time and was helping Martha with the sale, tracked down someone she trusted to assist with the sale, Gary Vizzoso. (R., Vol. I, pp. 7, 28, Vol. II, pp. 138, 142-145). Gary Vizzoso referred the ladies to Calvin Tabor of Caldwell, Idaho. (R., Vol. I, pp. 6, 28).

Calvin Tabor ("Tabor"), owner of Tabor Construction (R., Vol. II, p. 212), and a member of the member-managed A1 Real Estate, LLC ("A1") (R., Vol. I, p. 6, Vol. II, p. 236) began to spend a lot of time with Martha and Marjorie, gaining the trust of the ladies and earning their friendship to the degree where he would later attend Martha's funeral. (R., Vol. I, p. 7, Vol. II, pp. 138, 216, 221). Upon meeting Martha and Marjorie, Tabor began to help them with the sale, including researching and identifying the value of the property, contacting and putting together a group of investors to purchase the property, and delivering the proposal to the ladies. (R., Vol. I, p. 19, Vol. II, p. 175).

During the period where Tabor helped Martha and Marjorie sell the McCall property, he informed them that he and an unnamed/unidentified business partner (Keith Turner), were in the business of purchasing and restoring homes for re-sale. (R., Vol. I, pp. 6, 7). Tabor also informed the Marjorie that he in fact *was* part of the group who would purchase and develop Martha's property. (R., Vol. II, p. 138). During closing of the McCall sale, Tabor asked Martha in Marjorie's presence if she would be willing to lend him and his partner some money for their business. (R., Vol. II, pp. 138, 259). Although Tabor protests to the contrary, Marjorie has alleged that neither she nor Martha understood the borrower to be a business entity, but rather Tabor and his partner. (R., Vol. II, p. 138). Because she trusted Tabor, Martha would agree to loan him the money. (R., Vol. II, p. 138).

### 3. Martha's $150,000 Loan to Tabor.

At some point during the time when Tabor was working with Marjorie and

Martha, he had spoken with his partner and together they determined Tabor should ask for a $227,000 loan from Martha, in order to continue buying and flipping houses. (R., Vol. II, pp. 214-215). As Tabor has acknowledged in deposition, $227,000 is a substantial loan, and he made no initial attempt to obtain that loan from a bank because his business was a new company and the bank would have wanted to secure the loan with assets. (R., Vol. II, p. 217).

On May 4, 2005, six days before closing on the property, Martha, Marjorie, and Tabor signed an Agreement for Purchase and Sale of Real Estate (R., Vol. II, pp. 157-163) which included and incorporated the terms of Addendum #1 Special Clauses ("the Addendum") (R., Vol. II, pp. 164-165). The Addendum provides that Martha will finance a portion of the property' sale, and that for $227,000, Martha shall issue two promissory notes, one already paid and not at issue here for $77,000 due May 1, 2007, and the ote at issue for $150,000 at 6% interest due May 1, 2006. (R., Vol. II, p. 164). These paragraphs further require that both notes are to be secured by A1. (R., Vol. II, p. 164).

Five days later, on May 9, 2005, Tabor presented Martha with a typed document he had either prepared or obtained, titled "Promissory Note" ("the Note"). (R., Vol. II, pp. 166-167). Unlike the terms set forth in the Addendum, the Note offered no security for the loan. (R., Vol. II, pp. 164, 166). The Note lists the borrower as "A1 Real Estate LLC"), bears the initials "C.T." on each page, and at the end of the document is executed by "Calvin Tabor as member of A1 Real Estate." At this time, neither Martha and Marjorie, who were 87 and 72 years old respectively (R., Vol. I, p. 119, Vol. II, p.

218), had been in the business of loaning large sums of money, nor had either woman become familiar with limited liability companies (R., Vol. II, pp. 187-188). Until the lawsuit, Marjorie had never heard of limited liability companies. (R., Vol. II, pp. 187-188). Yet, despite his relationship with the ladies and his knowledge of their apparent trust in him, Tabor, knowing he signed the Note as a member and was borrowing the money only as an agent of the LLC, failed to discuss this essential fact. (R., Vol. II, p. 218).

On that same day, a Seller's Closing Statement was prepared and signed by Martha. (R., Vol. II, p. 252). The closing statement shows that Martha's property was sold for $927,000, with a deposit of $65,000, financing via two unsecured notes totaling $227,000, and a balance due of $626,118.44. (R., Vol. II, p. 252). Thus far, Tabor has not been able to satisfactorily account for the money lent from Martha. (R., Vol. I, p. 20, Vol. II, pp. 214-218). In his Answer, Tabor claimed that Martha's loan was invested in a real estate investment that went bad. (R., Vol. I, p. 20). In deposition, Tabor did not know if the LLC got actual money as a result of taking out the notes, but claimed that the intent behind asking for the loan was to procure operating capital with which to buy other properties. (R., Vol. II, p. 215). Further, Tabor could not explain the seller's closing statement and why it appeared as if the two notes were given as a portion of the purchase price. (R., Vol. II, p. 215). If the LLC had received actual money on these notes, Tabor has acknowledged that it should be reflected in a bank deposit statement; however, despite requests at deposition and during discovery, no bank statements for 2005 have been produced. (R., Vol. II, pp. 217-218).

The following April 2006, some interest was paid on the Note, and Tabor, realizing that neither he nor his business could repay the Note on the following month, told Marjorie they must renew; to which and Marjorie agreed and signed as Martha's attorney in fact. (R., Vol. I, pp. 8-9, Vol. II, p. 218). The Note's due date was extended by handwritten modification to May 1, 2007, a date that passed without further payment from Tabor or the LLC. (R., Vol. II, p. 260). But on June 6, 2007, Tabor again negotiated the defaulted Note (R., Vol. II, p. 220), and extended the Note's due date via a replacement promissory note until December 25, 2007. (R., Vol. II, p. 261).

After Martha's death, and the Note's second default, Marjorie hired Tabor to provide cleaning and repair for her home in Notus after it flooded in Spring 2008. (R., Vol. I, p. 10, Vol. II, p. 189). On numerous occasions at her home, Tabor reaffirmed that he owed the debt to Marjorie; but he later told her that his partner had told him not to repay, although he nonetheless he told her that he would pay her, but it might take time. (R., Vol. I, p. 10). During the several occasions when Marjorie met with Tabor and he reaffirmed the debt, Marjorie postponed bringing legal action because of his reassurances to repay. (R., Vol. II, p. 261).

By fall or early winter 2008, the Note remaining unpaid, Marjorie, attempting to mitigate the situation, asked Tabor if he would perform remodel work on the property she inherited from Martha in order to work off his debt. (R., Vol. I, p. 10). Tabor contacted either an architect or designer, began to get bids from sub-contractors, and spoke to a father-son team already working on the house about helping Tabor later on

during the remodel. (R., Vol. II, p. 222). In July 2009, Marjorie and Tabor had a meeting set up to discuss bids Tabor had received, but Tabor skipped the meeting and stopped communicating with Marjorie. (R., Vol. I, p. 11). Marjorie mailed demand letters to the defendants on September 20, 2009, November 5, 2009 (Tabor responded and denied the debt was in his name or personally guaranteed by him), and February 8, 2010. (R., Vol. I, p. 11).

A1 was administratively dissolved June 5, 2008 for failure to file an annual report. (R., Vol. II, pp. 220, 241, 261).

**4. Administrative Practices of A1 Real Estate, LLC, Tabor's Management Role and A1's Tax Records.**

A1 was formed March 19, 2004 by Keith Turner and Calvin Tabor as members. (R., Vol. II, p. 236), and it was in the business of buying and fixing up houses and land to resell for profit (R., Vol. II, p. 175). Prior to forming A1, in January 2001 Tabor had formed another limited liability company, Perks Company, LLC, which was administratively dissolved the month before A1 formed. (R., Vol. II, p. 223). Tabor organized another limited liability company, Central Park LLC (R., Vol. II, p. 227), signing and filing the paperwork on December 4, 2007. Additionally, Tabor has a separate business entity, MNT Incorporated, involving a plane in which he owns a one-third interest (R., Vol. II, p. 214) and a pilot who gives flying lessons, and this business appears to offer the limitations on liability provided by corporate structure. (R., Vol. II, p.

212). During his deposition, Tabor lacked recollection of his involvement with any limited liability company other than A1. (R., Vol. II, p. 212)

Tabor testified that when he and Turner created A1, he understood that the purpose of choosing that form of organization was the personal protection it would offer him. (R., Vol. II, p. 212). Tabor took the time to research limited liability companies and become educated about them. (R., Vol. II, p. 213). In deposition he agreed that it was probably true that when he selected the limited liability form for A1, one of his thoughts was to protect his own assets should the business fail. (R., Vol. II, p. 213). Despite his superior knowledge on the subject of limited liability companies, and despite being placed in a position of trust where he was helping another elderly lady sell her property, Tabor avoided any discussion with Martha or Marjorie concerning their familiarity or lack thereof regarding limited liability companies or the risk of making an unsecured loan to such (R. Vol. I, p. 19, Vol. II, pp. 259-260).

While Tabor managed the construction aspect for the LLC, Turner managed the finances (R., Vol. II, p. 176), bookwork and papers, got a real estate license, and did the research involved with buying and selling homes (R., Vol. II, p. 212). Turner filed the Secretary of State paperwork organizing the LLC (R., Vol. II, p. 212), engaged a CPA to file the LLC's tax returns (R., Vol. I, p. 176), and appears to have kept possession and control of at least some of the LLC's financial records (R., Vol. II, pp. 217-218). The record implies that aside from construction and remodel work, Tabor's only other activity for A1 was the negotiation and procurement of the loan from Martha, and negotiation for

its subsequent extensions – activities that appear to be out of character given the general division of labor in the enterprise. Tabor did not recall who appeared to represent the LLC at the closing of the McCall purchase, and his testimony suggests that while he handled the initial phase of offer and agreement for the loan, his involvement did not extend to the particulars of the transaction and what was actually exchanged between Martha and the LLC (R., Vol. II, pp. 215-217).

Tabor's lack knowledge or memory regarding the LLC's operations, transactions, solvency, and history is reflected throughout his testimony. (R., Vol. II, pp. 212-222). He could not recall whose idea it was to form the LLC as opposed to a partnership (R., Vol. II, p. 212), the first property purchase made by the LLC (R., Vol. II. p. 213), the specifics on any property purchased with the loan from Martha (R., Vol. II, p. 215), details of, or witnesses to, his discussions with Turner about borrowing the loan (R., Vol. II, p. 216), or the money or credit available to the LLC with which to buy houses (R., Vol. II, p. 219). He claimed to be unaware of the business situation prior to the LLC's first administrative dissolution in 2007 (R., Vol. II, p. 220), did not discuss preventative practices with his partner to avoid a subsequent administrative dissolution (R., Vol. II, p. 221), did not talk to his partner about, nor know how his partner chose, how to handle the LLC's creditors at the 2008 dissolution (R., Vol. II, p. 221).

Although these documents are not part of the record (despite counsel's attempts to initially procure as part of the discovery related documents and subsequently request at Tabor's deposition) it appears that A1 had a substantial amount of documents

pertaining to its financial dealings, including time books, billing records and receipts (R., Vol. II, p. 212), bank statements going back to at least 2005 (R., Vol. II, p. 217), and the buyer's closing statement from the McCall purchase (R., Vol. II, p. 218). Additionally, the LLC has journal entries, general ledgers, and bank account transaction statements mentioned in the CPA Gregory Braun's October 2013 letter to Turner. (R., Vol. II, p. 255). Tabor has produced bank statements from 2006-2008, but none for 2005 (R., Vol. II, p. 217), and tax records for 2008 alone (R., Vol. II, pp. 202-210).

From the narrow picture presented in the financial documents produced by Tabor, it appears that the LLC did not always behave according to its traditionally recognized form, as it disregarded its corporate structure for federal tax purposes, electing instead to identify itself as, and be treated as, a domestic general partnership (R., Vol. II, pp. 203, 205, 207). Nor did all of the LLC's activities fall within the ordinary course of its home-flipping business, such as when it made a non-business loan to Jeff Gardner by borrowing on its business's line of credit (R., Vol. II, pp. 249, 281) when it was not in the business of loaning out money (R., Vol. II, p. 222).

The loan from the LLC to Jeff Gardner is recorded on a promissory note almost identical to the Note at issue here. (R., Vol. II, pp. 180-181). The terms of the loan require payment of the $50,000 principal, plus a 10% fee, on or before July 5, 2007. (R., Vol. II, p. 180). It was drafted on June 5, 2007, and signed by Gardner on June 6, 2007, which, coincidentally, is the same day that Tabor signed the replacement note extending the due date on the loan until December 25, 2007. (R., Vol. II, pp. 168-169,

180-181). Although Tabor initially denied recollection of the LLC's loan to a third party and that third party's subsequent bankruptcy filing, he recovered a portion of his memory upon further questioning (that he went to the bankruptcy proceeding) at his April 2013 deposition (R., Vol. II, p. 222), and then fully recollected the details in his November 2013 Affidavit (R., Vol. II, pp. 176-177).

The $50,000 June 6, 2007 loan to Gardner appears in the LLC's 2008 tax record. (R., Vol. II, p. 208). The record indicates that the loan was acquired on December 31, 2007, sold on December 31, 2008, and cost was $58,432. (R., Vol. II, p. 208).

The 2008 tax records also show that the LLC made distributions to Tabor and Turner (R., Vol. II, pp. 205-206, 209-210), although Tabor's Affidavit and a letter from CPA Gregory Braun attempt to clarify that the distributions shown were actually how the company converted outstanding debts to paper "income". (R., Vol. II, pp. 182-183, 250). Tabor's Affidavit admits that the LLC did pay back its internal creditors (himself) a $100,000 loan, in addition to disbursing payroll funds to Tabor. (R., Vol. II, p. 250).

## II. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred when determining that Marjorie Ellmaker lacks standing to sue on the unpaid note where Martha's will was never probated?

2. Whether the district court erred when granting Tabor's Motion for

Summary Judgment on all counts of the Complaint where Tabor's signature on the note indicates he was agent for A1 Real Estate?

3. Whether Marjorie should be awarded attorney fees, should she prevail, pursuant to Idaho Appellate Rule 41?

## IV. STANDARD OF REVIEW

**Motion to Dismiss** – In reviewing a trial court's order granting a motion to dismiss, this Court's standard of review is the same as its summary judgment standard. *Hagy v. State of Idaho*, 137 Idaho 618, 621 (Ct. App. 2002); *Rim View Trout Co. v. Idaho Dep't of Water Res.,* 119 Idaho 676, 677 (1991). The standard of review on appeal from an order granting summary judgment is the same standard that is used by the district court in ruling on the motion. *Gibson v. Ada County*, 142 Idaho 746, 751 (2006); *Baxter v. Craney,* 135 Idaho 166, 170 (2000).

**Motion for Summary Judgment** – Appeals from an order of summary judgment are reviewed de novo. *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394 (2008) (citations and internal quotations omitted). Under this standard, "disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Curlee*, 148 Idaho at 394. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Taylor v. McNichols*, 149 Idaho 826, 832 (2010) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672-73 (2008).

The motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and it reasonable people might reach different conclusions. *Pro Indiviso v. Mid-Mile Holding*, 131 Idaho 741, 745 (1998); *Farmers National Bank v. Shirey*, 126 Idaho 63, 67-68 (1994).

## VI. ARGUMENT

### A. The District Court Erred in Dismissing Marjorie Ellmaker's Complaint Because She Has A Legally Protectable Interest In The Note And Therefore Has Standing To Sue On Its Default.

Standing is a preliminary question to be determined by the Court before reaching the merits of the case. *Miles v. Idaho Power*, 116 Idaho 635, 637 (1989); *Young v. City of Ketchum*, 137 Idaho 102, 104 (2002). This Court has noted that the doctrine of standing is imprecise and difficult to apply. *Miles*, 116 Idaho at 641.

In *Miles v. Idaho Power Co.*, this Court stated three basic propositions concerning standing: (1) [t]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated; (2) to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury; (3) a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction. *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375 (1996) (quoting *Miles*, 116 Idaho 635, 641 (1989)) (internal quotations omitted); *Thomson v.*

*City of Lewiston*, 137 Idaho 473, 476-77 (2002); *In re Jerome County Bd. Of Com'rs*, 153 Idaho 298, 281 (2012)

**1. Injury In Fact**

The first element of standing, injury in fact, has been defined as "an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotations omitted). This type of required interest has also been termed a "judicially cognizable interest" and a "distinct palpable injury." *In re Jerome County Bd. Of Com'rs*, at 1086; *Young v. City of Ketchum*, 137 Idaho 102, 104 (2002).

In *Lujan*, the U.S. Supreme Court restated a ruling that the desire to use or observe animal species, even for purely aesthetic purposes was undeniably a cognizable interest for purpose of standing. *Lujan*, 504 U.S. at 562. This court has also recognized that standing may be predicated on intangible, nonmonetary interests, such as the maintenance of recreational and aesthetic value (*In re Jerome County Bd. Of Com'rs*, at 1086), in addition to protection of property or ownership interests and pecuniary interests (*Ashton Urban Renewal Agency v. Ashton Mem'l, Inc.*, 155 Idaho 309 (Idaho 2013)).

In *Ashton Urban Renewal Agency*, the respondent, Ashton Memorial, a business providing care and nursing facilities, alleged lack of standing in the Ashton Urban Renewal Agency's (AURA) challenge to the Idaho Board of Tax Appeal's (BTA)

determination of respondent's tax exemption status. Ashton Memorial held real and personal property located within AURA's geographical revenue allocation area that would have provided AURA with an additional $43,477 in revenue collected for fiscal year 2011, but for the BTA's grant of tax exemption. Ashton Memorial argued that AURA lacked standing because it only possessed a property interest in taxes that were "actually levied" and thus could not appeal the taxing authority's decision on the grounds that it was deprived of "expected funds." *Id.*

This court rejected respondent's argument, stating that it amounted to the claim that, to have standing, AURA must have already acquired the property or be entitled to it by statute. *Id.* at 733. Instead, the court determined that its precedent did not require such a high standard for establishing standing to appeal decisions by the County Board of equalization. *Id.* Rather, AURA needed only to show a pecuniary interest, and the loss of $43,477 to its revenue stream amounted to a real and concrete loss. *Id.*

Standing does not require that a party prove its case before the commencement of trial. *Pro Indiviso v. Mid-Mile Holding*, 131 Idaho 741, 746 (1998). In *Pro Indiviso*, appellants Dean and Betty Bowles argued that plaintiff-respondent Pro Indiviso did not have standing to bring an action for ejectment after it purchased property at a tax sale which the Bowles had previously conveyed into trust. The Bowles contended that Pro Indiviso could not prove its ownership as it had not quieted titled on the contested property. The court disagreed. *Id.*

Noting that Pro Indiviso did present evidence that it possessed a deed granted by the I.R.S., the Court said, "[t]o require every land owner who wants to eject someone from their property to first prove ownership through a quiet title action would be unreasonable and go beyond the requirements of standing." *Id.* at 747.

In its Order in this case, the district court found it persuasive that Martha's will was not probated, and thereby determined Marjorie lacked standing to bring this lawsuit, as "there was no evidence in the record . . . [of Plaintiff's] . . . ownership of the promissory note and a right to pursue a claim in her own name. (R., Vol. II, p. 295). Additionally, the district court stated, "Plaintiff has offered no explanation as to why the will was not probated." (R., Vol. II, p. 295).

This finding fails to take into account significant portions of the record that do provide explanation as to why the will was not probated (R., Vol. I, pp. 70, 75-76 p. 28 ln. 1 to p. 31 ln. 6, 104-105, Vol. II, 139-140, 267) and fails to acknowledge Marjorie's pecuniary, if not property, interest in the note as an intestate heir to Martha's estate.

Here, Marjorie has alleged that she is a blood relative of Martha; she is Martha's first cousin once removed.[1] (R., Vol. II, p. 265). Even if one must assume, for the purpose of argument, that Martha's will is invalid and Marjorie cannot receive property from the estate by way of devise, the Defendant has not produced one iota of evidence

[1] The district court initially characterized Marjorie as Martha's "friend" and later bypassed discussion of Marjorie's position as a collateral heir and corresponding interest in Martha's estate under Idaho's intestacy statutes.

to defeat the claim that Marjorie is eligible to inherit from Martha's estate under Idaho's intestacy statutes.

Like the appellants in *Pro Indiviso*, and the respondent in *Ashton Memorial*, Defendant would have the Court believe that standing requires entitlement to property, and force Marjorie to prove her ownership interest in that property before she is allowed to bring an action on the promissory note. This is not the case. As either residuary beneficiary under the will or intestate heir, Marjorie, similar to the petitioner in *Ashton Urban Renewal Agency* who faced a loss in revenue stream, can show a distinct palpable injury in light of the loss of $170,096.49 to Martha's estate due to nonpayment of the note. (R., Vol. I, p. 11)

Because Marjorie has provided evidence that she possesses a legally protected interest that has been economically harmed, she can satisfy the first element of injury in fact.

**2. <u>Causation</u>**

Causation, the second element of standing, requires a fairly traceable causal connection between the claimed injury and the challenged conduct. *Young*, 137 Idaho 102, 104 (2002); *Miles*, 116 Idaho 635, 639 (1989). Although not precedent in this Court, in the Ninth Circuit, the burden of proving causation has been stated thus, "the 'reasonable probability' of the challenged action's threat to [plaintiff's] concrete interest." *Idaho Conservation League v. U.S. Forest Serv.*, No. 2:12-CV-00004-RE, at 8 (D. Idaho. March 10, 2014) (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001); *see*

*also Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171-72 (9th Cir. 2011). Causation does not need to be established with the degree of certainty that would be required for . . . [success] on the merits . . . of a tort claim. *Idaho Conservation League*, at 8.

In the present action, Defendant Tabor has acknowledged that he first became connected with Martha and Marjorie because they were looking for someone to help them sell property. (R., Vol. I, p. 19). Marjorie testified that were specifically looking for a realtor outside the McCall area. (R., Vol. II, p. 138). Defendant Tabor has acknowledged that Marjorie appeared to trust him, and that he was the one who presented the idea the ladies that a loan be provided to finance the purchase of the property on or very near the time of closing. (R., Vol. II, p. 222, Tabor Deposition p. 102, ln 7-8). Marjorie has testified she and Martha placed their trust and confidence in Tabor, that they were unfamiliar with Tabor's partner (did not even know his name or that he was a real estate agent (R., Vol. II, p. 138)), and that it was the position of trust and friendship they felt they had with Tabor that led to the agreement to make a $150,000 unsecured loan (R., Vol. II, pp. 188-189).

Likewise, Marjorie has presented evidence that while she and Martha believed Tabor was helping them with the sale, Tabor knew that he was essentially acting as a self-dealing agent, as he testified that when he signed the note, he knew that he was acting as an agent for a limited liability company, and he failed to discuss that with the 85 year-old Martha and 72 year-old Marjorie. (R., Vol. II, p, 218, Tabor Deposition p.

88., ln. 7-19). As far as Martha and Marjorie were concerned, Tabor was A1. (R., Vol. II, p. 189). Tabor was the driving force between the genesis of Martha's loan and A1's debt. Tabor negotiated the original note (R., Vol. II, p. 216, Tabor Deposition p. 63, ln. 8-18), then negotiated the renewal note when it became clear that the first note would likely default (R., Vol. II, p. 218, Tabor Deposition p. 89, ln. 6-15), and again negotiated the extension of the due date for the second note (R., Vol. II, p. 220, Tabor Deposition p. 95, ln. 4-13).

To find that Tabor is a necessary component of the harm to Martha's estate and Marjorie's injury is not to make a too attenuated stretch. There is sufficient evidence in the record demonstrating that but for Tabor and his relationship with Martha and Marjorie, the loan would not have been made. Moreover, but for Tabor's negotiations and finally his subsequent agreement to pay back the loan, a lawsuit would likely have been filed before A1 became insolvent.

Thus, the entirety of Tabor's conduct alleged in the pleadings, motions, and exhibits, displays a readily identifiable connection between the Defendant and Marjorie's injury.

**3. <u>Redressability</u>**

The final element of redressability looks at whether "there is a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Boundary Backpackers,* 128 Idaho at 375; *Miles*, 116 Idaho at 641; *In re Jerome County Bd. Of Com'rs*, 281 P.3d at 1086.

Here, the claimed injury is the nonpayment of the note by Calvin Tabor and his business A1 Real Estate. (R., Vol. I, p. 11). Both Tabor and A1 are parties to this action and will be bound by the district court's judgment. (R., Vol. I, p. 6). Hence, the district court is free to fashion relief against both parties in a manner that will certainly redress the claimed injury.

On the whole, the evidence in the record confirms that Marjorie Ellmaker is a proper plaintiff to bring this action, and the district court erred when it found she lacked standing. Therefore, this Court should reverse the district court's dismissal.

### B. The District Court Erred In Granting Summary Judgment Because It Failed To Construe Disputed Facts In Marjorie's Favor.

Tabor's summary judgment motion on each count was based on the argument that the $150,000 loan was not to him and that he did not personally guarantee payment by A1. The District Court ruled that even if Marjorie established her standing, it would grant Mr. Tabor's Motion for Summary Judgment on all four counts. (R., Vol. II, p. 295.) Marjorie L. Ellmaker respectfully disagrees and contends that she pled and established sufficient facts to create factual issues as to each count alleged in her complaint and each theory of relief.

#### 1. Count I –Oral Contract. The District Court erred when it found there was no valid oral agreement by Tabor to pay back the loan.

Marjorie alleges that Tabor is responsible to repay the $150,000. In its Order, the court only addressed the time period when the Note was past due. The court did not explicitly determine that there were no factual issues. The court ruled that Marjorie did

not have a valid legal claim against Tabor and therefore, there was no consideration for her to put off a claim against him. (R., Vol. II, pp. 295, 296.) The ruling implies that there was no valid oral agreement requiring Tabor to pay the loan and that there is no possible cause of action that Marjorie gave up or delayed. The other side of this coin is that if there was any potential valid claim, then there was consideration.

Initially, the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it. I. C. § 29-104. Some consideration must be provided; but, with some exceptions the court will not examine whether it is adequate. *See*, *e.g.*, *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 780 (2009). *See also*, *Quayle v. Mackert*, 92 Idaho 563 (1968); (Courts will not inquire into the adequacy or sufficiency of consideration, except as it might reflect on a party's competence or consciousness of action.)

Consideration will have passed between them if Marjorie suffered any loss, or Tabor received any gain, "however trifling." *Mickelsen Construction, Inc., v. Horrocks*, 154 Idaho 398, 402, 403 (2013) *quoting*, *Vincent v. Larson*, 1 Idaho 241, 248 (1869). The Court cites *Vincent* approval,

> "To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction."

*Violett v. Patton*, 9 U.S. (5 Cranch) 142, 150, 3 L.Ed. 61 (1809). Marjorie has claimed that Tabor agreed pay the loan. *See*, I. C. §9-506(2). When Tabor first defaulted,

Marjorie did not bring an action because of Tabor's promises to pay, and because his actions were consistent with his words. Regardless, Marjorie had other grounds to bring a suit that included, claims against Tabor, Turner, A1, or any combination of them: (1) for mistake, misrepresentation or fraud, reformation, rescission, or unjust enrichment; and (2) for enforcement of valid agreements between the defendants and Martha (and later Marjorie). She also had the ability to file a lien against the McCall property to the extent of the loan and A1's interest in it. Had Marjorie filed a lawsuit against A1, then A1 and Tabor's assets would have been affected.

Because there was consideration based on valid potential claims, the district court should not have granted summary judgment on Count I. Moreover, there is a factual dispute whether Tabor agreed to pay the Note from May, 2005 until shortly before this suit was filed in 2010.

There is a factual dispute, therefore a jury issue, whether Tabor agreed to pay the debt. That was a basis of the request for relief. The oral contract alleged in Count I was formed when Martha agreed to loan him money on May 5, 2005. Tabor reaffirmed that he was responsible for the debt many times between May 2005 and July 2009.

Tabor's position is that the purchase and sale agreement and Note control the loan agreement, that the loan was to A1, and thus A1 is responsible for repayment. The purchase and sale agreement and the Note was provided by Tabor at the closing. Marjorie acknowledges that the Purchase and Sale Agreement and the Notes are in the

name of A1. But, neither the Purchase and Sale Agreement, nor the Note(s) were necessary for the loan.

Formation of a contract is generally a question of fact for the trier of fact to resolve. *Inland Title Co. v. Comstock,* 116 Idaho 701, 702 (1989). A valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to contract. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238 (2007). In a dispute over contract formation, the [party attempting to establish an enforceable agreement][2] has to prove a distinct and common understanding between the parties. *Id.*; *Inland Title Co. v. Comstock*, 116 Idaho 701 (1989). The essential terms of a contract include the parties to the contract, the subject matter thereof, the price or consideration, a description of the property and all the essential terms and conditions of the agreement. *Hoffman v. SV Co., Inc.*, 102 Idaho 187 (1981) (citations omitted).

"It is true that one party to a contract cannot alter its terms without the assent of the other and that the minds of the parties must meet as to any proposed modification. [However the] fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in

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[2] The word replaced by the bracketed phrase is "plaintiff." The language comes from the case, *Johnson v Albert*, 67 Idaho 44 (1946). *Johnson* involved a dispute over contract formation, where the plaintiff was trying to prove the existence of a valid contract to deed her a home. Here Marjorie is trying to prove that there was an agreement; but the parties to the agreement are not set out in the writing.

accordance with the terms of the change proposed by the other." *Scott v. Castle*, 104 Idaho 719 (Ct. App.1983).

Marjorie acknowledges that the Agreement and the Note support Tabor's position when they are isolated from the relationship and trust between Tabor and Martha and Marjorie. However, the Court needs to consider that without the relationship and the trust, there would be no loan. The following facts show Tabor's "course of conduct" allowing a fact-finder to determine the agreement's existence and Tabor's assent.

Tabor asked Martha for two loans totaling $227,000.00 on May 4, 2005, days before the closing took place on Martha's McCall property. (R., Vol. II, p. 138 (¶7); and R. Vol. II, pp. 199, 199A (¶ 9); and R. Vol. II, p. 214 (Tr. p. 69, Lns. 11 – 21).) The alleged purpose of the loans was to help him and his partner (R., Vol. II, p. 138, (¶8).) Tabor never identified his partner. (R., Vol. II, p. 138, (¶9).) Because of Martha and Marjorie's relationship with, and trust in Tabor, Martha intended to make the loans to Tabor, or Tabor and his partner. (R., Vol. II, p. 138 (¶¶ 6 and 7); and R. Vol. II, p. 188 (¶5).) In either case, Tabor's overall words and actions were clear from May 2005 through July 2009, that he, not A1, was the responsible.

Marjorie stated that "Martha agreed to loan Tabor the money because she trusted Tabor based on the relationship that he had developed with us." (R., Vol. II, p. 189 (¶7).) This trust extended to the point Marjorie expected that he would have told her and Martha about the "significance and dangers of loaning [money] to an LLC," or at

least recommend that they consult a lawyer. (R., Vol. II, p. 188 (¶5)) She said that their trust in Tabor allowed them to be deceived about "who the loan was to...." (R., Vol. II, p. 189 (¶7) In other words, they trusted that Tabor would have let them know that A1 was a separate entity, like a corporation, and that it was not a general partnership. In fact, Marjorie and Martha believed that there was no difference between "Calvin Tabor and A1 Real Estate LLC." (R., Vol. II, p. 189 (¶6))

Even though Tabor attempted to minimize the relationship during his deposition (R., Vol. II, p. 216 (Tr. p. 62, Lns. 5 – 17).), the size of the loan he requested and received, and the terms show how much trust he had developed between himself and Martha and Marjorie. Tabor's knowledge of the size of the loans, and that he would not get a loan like this from a bank, and the lack of a writing committing himself to personal liability, support the argument that Tabor was aware of, and took advantage of, Martha and Marjorie. Further, he asked Martha for the loan at a time when he had "arranged for a large amount of money to be transferred to Martha; [and they] were pleased and happy with what he had done and how the sale had worked out and had no reason to distrust" him. (R., Vol. II, p. 188 (¶5)) He likely knew.

The first time that Tabor said that the loan was not his was four years after the closing. (R., Vol. II, p. 189 (¶8)) Marjorie had a number of conversations with Tabor where he told her "not to worry that he (not someone else) would pay back the loan." (R., Vol. II, p. 189 (¶8)). In Spring 2008 when Tabor came to work at Marjorie's home, they discussed the debt "almost every time." (R., Vol. II, pp. 189, 190 (¶9)). Tabor had

many opportunities to tell Marjorie that the debt was not his; he did not. This acted to Marjorie's detriment as she would have filed an action sooner, when A1 still had assets. (R., Vol. II, p. 190 (¶9)). In the fall of 2008, Tabor told Marjorie that he had the money to pay the debt, but was concerned that his partner would use the money if he put it in the bank. Marjorie suggested a plan that would help avoid that problem. Her plan was not followed and the Jeff Gardner loan ensued. (R., Vol. II, p. 190 (¶¶10 and 11)).

Some of Tabor's post default statements to Marjorie reassured her that he was trustworthy and would pay her back. For example, in the winter of 2008/2009, Tabor told [Marjorie] that he had spoken to his partner about his need to repay the loan and his partner told him to simply declare bankruptcy; Tabor told Marjorie that he told his partner, 'You do not know her like I do, I can't do that...;' he also told her much about his family. (R., Vol. II, p. 191 (¶12)). Another example of reassurance occurred just before Tabor stopped communicating with Marjorie. In 2009, Marjorie asked Tabor if he would consider working off part of the debt by working on the restoration of the McCall home that [Marjorie] inherited from Martha; Mr. Tabor told [her] that he had been thinking the same thing. (R., Vol. II, p. 191 (¶15)).

Even assuming the loans were to A1, Tabor promised Marjorie that he would pay back the debt. Tabor's promise to Marjorie is an original promise and an oral agreement that is an exception to the Statute of Frauds. I. C. § 9-506. In *Dalby v. Kennedy*, 94 Idaho 72 (1971), the court held that a shareholder who told a creditor of the corporation that he would pay the original corporate account became obligated to pay that account

as an original obligation under § 9-506. The Court also held that, whether an oral promise constitutes a collateral or an original obligation, for the purposes of the statute of frauds, is generally a question for the finder of fact. *Dalby v. Kennedy*, 94 Idaho 72 (1971). *See also*, *Wright v. Wright*, 97 Idaho 439 (1976); *see also*, *M.T. Deaton & Co. v. Leibrock*, 114 Idaho 614 (Ct. App. 1988).

Here there is evidence that both before and after the note was in default, Mr. Tabor orally agreed that he was responsible for the debt and would pay it. (R., Vol. II, pp. 189, 190 (¶¶8, 9, 10, 11, 12, 13 and 15)). At the very least, whether Tabor, by his words and acts, agreed to pay the debt creates an issue of fact for a jury. Thus, the District Court erred in granting summary judgment on Count I.

**2. Count II – Good Faith and Fair Dealing. There Is A Factual Issue Whether Tabor, As A1's Manager, Acted In Good Faith And Fair Dealing In Obtaining And Repaying The Loan.**

Tabor as a manager of A1, had "the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto." I. C. § 53-621.[3] The district court found that Marjorie failed to show facts that support her Count II claim that Tabor violated the implied covenant of good faith and fair dealing (covenant of good faith) underlying all contracts. It determined that Marjorie's Count II claim was only based on Tabor's "fraud or undue influence" in the formation of the Note – not in the course of fulfilling the contract terms. (R., Vol. II, p. 296). Further, the district court

[3] The former statute is cited throughout this brief because it was in effect during the active life of A1 Real Estate.

mistakenly found that Marjorie did not provide any authority for her proposition that Tabor had a duty to notify Martha (and Marjorie) that he would not be personally responsible for the $150,000.00 loan. (R., Vol. II, p. 296). In fairness to the District Court, the brief written in opposition to summary judgment is confusing. The argument regarding the covenant of good faith follows a series of arguments based on an agency theory. (R., Vol. II, pp. 270-274). However, the brief pointed out that Tabor failed "to act in good faith as a member-manager of A1 Real Estate by allowing it to ignore its debt to Martha and Marjorie and loan money for non-business purposes and allowing distributions after the debt was due." (R., Vol. II, p.280-281).

Tabor did not perform his obligations in good faith. "The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract." *Idaho Power Co. v. Cogeneration, Inc.,* 134 Idaho 738, 750 (2000) (other citations omitted). "The covenant requires that the parties perform, in good faith, the obligations imposed by their agreement...." *Id.*

Assuming that the contract was between Martha and then Marjorie, and A1, Tabor, as A1's member-manager (R., Vol. II, pp. 236-240) was obliged to manage the LLC in a manner that demonstrated his good faith towards repaying the loan. There are disputed facts as to whether Tabor performed contractual obligations in good faith.

The first series of facts demonstrating Tabor's violation were discussed in length above. These are the number of times and the circumstances that Tabor told Marjorie the debt was his, for her to not worry about it, and that he would make sure it was paid.

If the debt was A1's, then was obliged to be honest to Marjorie. Rather than disguise and shield the debtor until it had no assets, he should have told her that A1 was responsible to repay the loan. Because of his mendacity, Marjorie missed an opportunity to bring a collection action against A1 when it had assets.

The second series of facts demonstrating Tabor's violation, surround his obligations, actions, and lack of action or communications, as an experienced LLC manager. A1 appears to be one of three member-managed LLCs of which Tabor was a member-manager between 2001 and 2013. (R., Vol. pp. 224-243). Tabor had formed Perks Company, LLC in 2001; he was its registered agent, and managed it. (R., Vol. II, p. 224). Tabor had also formed Central Park, LLC, was the registered agent, and managed it. (R., Vol. II, p. 228). Tabor filed Central Park's annual reports between 2007-2012 (R., Vol. II, pp. 230 – 234); it is unclear who filed the 2013 report. (R. Vol. II, p. 227).

Interestingly, during his April 26, 2013, deposition, Tabor, asked whether he had been "a member or a manager or a partner or where you had formed yourself or been part of a group that formed an LLC," answered, "I don't think so." (R., Vol. II, p. 213 (Tr. p. 31, L. 25 through p. 32, L.5)). This answer appears to be inconsistent with the Perks and Central Park secretary of state documents. Tabor was asked whether he ran one or two other LLCs. He answered, "At least one other." He gave the name as MNT. (R., Vol. II, p. 213 (Tr. p. 32, L. 6 through p. 33, L. 1)). Tabor was asked whether he had been either a member or manager in any LLCs other than MNT and A1. He answered, "I can't

recall any others, no." (R., Vol. II, p. 213 (Tr. p. 33, Lns. 2-5)). At the time of the answer, he was the registered agent, member-manager, and a person who formed Central Park LLC.

Also during deposition, Tabor was asked whether he had spoken to his partner about the June 8, 2007 dissolutions of A1. He said no, even though they were on speaking terms. (R., Vol. II, pp. 220, 221 (Tr. p. 96, L. 3 through p. 99, L. 1)). Tabor's responses are interesting because by 2007/2008 he was an experienced LLC manager. He would have known that administrative dissolution has a serious effect for an LLC, as it "continues its existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs ..."

Tabor was asked about the 2007 replacement note. He speculated that he "imagined" he discussed with his partner what should be done [since they could not pay off the Note]. (R., Vol. II, p. 220 (Tr. p. 94, L. 25 through p. 95, L. 3)). He claimed to have no idea why he chose December 27 [sic], 2007 as the due date, (R., Vol. II, p. 220 (Tr. p. 95, Lns. 4 - 10)). the same reason given regarding why he did not renew it for a year. (R., Vol. II, p. 220 (Tr. p. 95, Lns. 11 - 13).) Tabor was asked whether he had "any *realistic* hope of" repaying the Note. He answered yes. When asked what that *realistic* hope was based on; his response is interesting, "I'm just an optimistic person, hoping I can turn it around." (R., Vol. II, p. 220 (Tr. p. 95, Lns. 14 - 24)). He did not have a plan, he did not identify a source of funds, he did not identify a surety, a bank account, or a property that was going to be sold at a profit. So he was asked what he saw in the

market that gave him hope; his answer, "There is always hope." (R., Vol. II, p. 220 (Tr. p. 95, L. 25 through p. 96, L. 2)). He could give no reasons for his claimed hope.

The significance of this recital is to show that Tabor was an experienced LLC member-manager. He knew enough about LLCs to participate in their formation, and their dissolution. He likely knew that the law required a dissolved LLC to "wind up."

> "A limited liability company is dissolved and its affairs shall be wound up upon . . . "[a]dministrative dissolution"

I. C. § 53-642. (Emphasis added). As a member/manager of A1, when it was dissolved, Tabor was obliged to follow Idaho's LLC laws and "wind up" its affairs. I. C. § 53-642. The "winding up," unless the operating agreement provides differently, is governed by I. C. § 53-644. If Tabor had followed the law, once A1 was wound up, its assets were required to be distributed,

> Upon the winding up of a limited liability company, the assets shall be distributed as follows:
> (1) Payment, or adequate provision for payment, shall be made to creditors...
> (2) ... to members or former members in satisfaction of liabilities...; and
> (3) Unless otherwise provided . . . to members and former members...

I. C. § 53-646. (Emphasis added.) The priority implied by the statute is that creditors are to be paid before members.

In this case Tabor failed to act with good faith when he failed to wind up A1. Winding up meant that he had to pay A1's creditors or make provisions for their

payment. He did not even tell Marjorie that A1 had been dissolved in spite of his regular contact with her during 2008 and 2009. (R., Vol. II, p. 191 (¶13)). Until this lawsuit, [Marjorie] was never told or notified that as a creditor, she needed to make a claim against A1. (R., Vol. II, p. 191 (¶14)).

Tabor claims that they did not wind up the business because of debt – implying that A1 did not have assets for its creditors (R., Vol. II, p. 216 (Tr. p. 64, L. 18 through p. 65, L. 4)). This claim appears inconsistent with documents provided showing Tabor and his partner loaned money and took distributions after the Note was due.

Tabor, as a manager, could have made sure that the money went to Marjorie in a good faith attempt to fulfill his obligations. Instead, the money was loaned to Jeff Gardner after a time when the $150,000 Note had been in default. Tabor shows that he was not conducting his obligations as an A1 manager towards Marjorie, in good faith.

The argument is similar regarding the distributions that Tabor took and allowed his partner to take after the Note was in default. The tax documents show that the two managers received distributions of $150,967 in 2008. (R., Vol. II, p. 199 (¶7) and pp. 202-210). Even accepting the statements of the accountant as true (R., Vol. II, pp. 255, 256.), Mr. Tabor and his partner took $109,649.00 from A1's assets when the Note was in default. (Tabor's cash, $35,754.00; Turner's cash, $24,078.00 and Turner's property, $49,817.) With the other facts, allowing the transfers demonstrate Mr. Tabor's lack of good faith and fair dealing with Marjorie and the debt.

There is a factual issue where a jury could find that Mr. Tabor violated the implied covenant of good faith and fair dealing and should be individually responsible for repayment of the Note(s).

### 3. Count III – Promissory Note. There Is A Factual Issue Whether Tabor Incurred Liability Under Partially Disclosed Principal Doctrine

It is undisputed that A1 Real Estate failed to pay the Note for $150,000.00. Therefore, the District Court erred in dismissing Count III as it applies to A1 Real Estate. The District Court also erred when it dismissed Count III against Tabor for the reasons discussed under agent/principal liability.

The district court dismissed Marjorie's claims on the ground that the promissory note was clearly entered into between A1 Real Estate & Martha and is unambiguous; and "there is no evidence that Martha was misled in any way."

The court's determination that there is no evidence that Martha was misled in anyway is clearly erroneous. First, the summary judgment standard requires the court to weigh the facts in favor of the non-moving party. Marjorie's affidavit shows that Martha was misled. Another material fact is whether the Note is secured – the purchase and sale agreement say that it is, the closing documents say that it is not, and the Note is silent. However, Marjorie's main allegation is that Tabor breached his duties as an agent of A1, and based on the breach he is responsible to repay the note.

Underlying Marjorie's allegations and arguments are the principles that govern an agent who acts on behalf of another entity. At the time Tabor convinced Martha to loan

him $150,000, he was a member-manager and therefore A1's agent. I. C. § 53-616. Tabor was responsible to make sure the people with whom he was contracting knew that he was acting for a limited liability company. Because he did not clearly inform Martha or Marjorie that he was representing A1 and that A1 was a separate entity and a limited liability company, he is liable as a principal to the contract.

Agent-principal liability principles are not new. It is well-established that an agent, in order to avoid personal liability, must, at the time of contracting, disclose both the capacity in which he acts and the existence and identity of his principal. *Polk v. Haworth*, 95 N.E. 332, 333 (1911). The managing officer of a corporation, even though acting for the company, becomes liable as a principal where he deals with one ignorant of the company's existence and of his relation to it and fails to inform the latter of the facts. *Marco Distributing, Inc. v. Biehl,* 97 Idaho 853, 858 (1976); *McCluskey Commissary, Inc. v. Sullivan,* 96 Idaho 91, 93 (1974) It is a basic principle that an agent who enters into a contract on behalf of a corporation, but who neither discloses his agency nor the existence of the corporation to the third party, becomes personally liable to that third party. *McCluskey Commissary, Inc., supra* at 93; and *Interlode Constructors, Inc. v. Bryant*, 132 Idaho 443 (Ct.App.1999). Even though there is no Idaho case law on the matter, agent liability principles should apply to limited liability companies. Corporations and LLCs receive similar liability limiting protections from the government and both are separate entities from their owners: stockholders and

members. An unscrupulous person could use either one to incur liabilities and harm unsuspecting people.

The defendant agents in *McCluskey* incurred agent liability and were made principals to a contract because they failed to disclose that they represented a corporation, when they arranged for McCluskey to provide meat to a restaurant. They led McCluskey to believe they had an interest in the restaurant. One of the defendants told McCluskey that "we are opening a new restaurant," referring to himself and the other defendant. The meat was paid for in cash or charged to an account. The account contained the name of one of the individuals and the restaurant, "The Shah." Checks used to pay for the account were "The Shah" checks: they were signed by one of the defendants. Eventually they got behind on the account and McCluskey filed a collection suit against the defendants. They defended the suit saying that the restaurant was owned by a corporation. McCluskey had found out about the corporation after some of the account charges had occurred. The district court found that there had been no disclosure of the corporation to McCluskey until a demand was made on the account; and that McCluskey had prior good relationship with the defendants and was led to believe that The Shah was a partnership or joint venture. This Court affirmed.

The situation between Tabor and Marjorie is similar. After Tabor had received the loan in 2005, he referred to the loan as his, and his responsibility until the summer of 2009. During this time, Tabor never told Marjorie that it was not his loan to repay. Similarly, at least one of the *McCluskey* defendants told McCluskey that things were fine

"as long as I can get you" paid off, and "we owe you boys some money." There are some differences between the *McCluskey* defendants and Tabor. The *McCluskey* defendants had purchased meat from McCluskey in the past for another business. The relationship between Martha, Marjorie and Tabor was fairly short. But, in a short time the relationship had transformed into a friendship where Martha and Marjorie trusted Tabor to look out for their interests and they believed he had done so.[4] The *McCluskey* plaintiffs and defendants both had ran businesses and were likely fairly sophisticated. Tabor shared that degree of sophistication with the *McCluskey* parties; he operated his own business and formed two and managed four LLCs. Martha and Marjorie were not sophisticated. Also, a difference here is that the purchase and sale agreement and the Note partially identify A1[5] as the borrower. But, these documents contain no explanation of the significance of the name. While Tabor knew the significance of the LLC and how to sign the documents to try to avoid personal liability, he did not tell Martha and Marjorie. Situations like this, where the principal is partially disclosed, can shift liability to the agent.

In the typical "partially disclosed principal" case, the person in Marjorie's position knows that there is a principal, but does not know who it is. Even though Martha and Marjorie were on notice that A1 was the borrower on the Note, Tabor is still liable under

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[4] See facts argued in the Oral Contract argument.
[5] Notably, on the documents, the bottom of the "L" is hard to read. An elderly person could simply see I I C instead of LLC. However seeing the letters and knowing their significance are two separate things.

the partially disclosed principal theory. *Keller Lorenz Co. v. Insurance Assoc. Corp.*, 98 Idaho 678 (1977) (the plaintiff knew the defendant was acting as agent for some principal, but did not know which principal); Restatement (Second) of Agency § 4(2) (1957)). In the situation of a partially disclosed principal, the agent is party to the contract as a principal and liable under it. Restatement (Second) of Agency § 321 (1957). Under these principles, Tabor is a party to the note.

The corporate liability protections will not protect corporate agents where a principal is only partially disclosed. In *Western Seeds, Inc. v. Bartu*, 109 Idaho 70 (Ct.App.1985), Western Seeds knew that it was dealing with the Farmer's Feed and Seed, Inc. through its agent Bartu; but Bartu did not tell Western Seeds that Farmer's Feed was owned by his company, Pocatello Cold Storage Inc. This Court held that Bartu's partial disclosure of the principal was insufficient to relieve him from liability on the debt owed to Western Seeds. The same analysis should apply to LLCs even though there are no Idaho cases. LLC members and officers have been held personally liable under circumstances that include misrepresentation. *See*, *Ledy v. Wilson*, 831 N.Y.S.2d 61 (N.Y. A.D. 1 Dept. 2007) (recognizing potential personal liability of officers for LLC's breach of contract if officers acted on LLC's behalf and breach involved bad faith misrepresentations); and *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo.1998). (Two member/managers held personally liable on a contract under the common law partially disclosed principal doctrine. The LLC was identified only as P.I.I., but there was no indication of what P.I.I. meant or that it was a LLC. The court rejected

the argument that the constructive notice provisions of the Colorado LLC Act protected the defendants since they had failed to adequately identify the LLC principal).

Here Tabor asked for a loan for he and his partner, without identifying any business by name, or explaining the business structure. (R., Vol. II, p. 189 (¶7)). The business name was first identified at the closing of the McCall sale, but it did not cause Marjorie to consider that the loan was to an entity separate from Mr. Tabor. (R., Vol. II, p. 188 (¶4)). Marjorie did not know that A1 was a LLC until this case was filed; (R., Vol. II, p. 139 (¶¶9 and 11) and p. 187 (¶2) and p. 188 (¶4) and p. 192 (¶16)). To her, A1's LLC designation meant nothing. She was not knowledgeable enough to know that LLC was the equivalent of INC. or CORP. for liability purposes. Marjorie could have better advised Martha had Tabor been forthright. At the least she would have insisted Martha maintain an interest in the property until the loans were paid. (R., Vol. II, p. 192 (¶16)).

Count III of the Complaint incorporates by reference all of the facts alleged in paragraphs 1 through 46 and adds four more paragraphs. The pleadings put Tabor on notice that there is an undisclosed or partially disclosed principal issue that could be tried. Marjorie has presented sufficient facts to establish a factual dispute.

### 4. Summary Judgment Was Improperly Granted On Count IV, The Unjust Enrichment Claim, Where Genuine Issues Of Material Fact Exist Regarding Whether Tabor Received A Benefit.

The District Court's reasoning in this section its Order is rather vague, confusing, and inaccurate in places. Its appears to read that because the debt to Martha first became due, and then the LLC was administratively dissolved when it was insolvent

and had no assets to distribute, then it could not follow the statutory requirements for dissolution under I.C. § [53-646]. (R., Vol. II, pp. 297-298). The Court also appears to be misinformed, because its Order states that A1 was administrative dissolved "for failure to file necessary reports, it failed to file those reports because it was insolvent." (R., Vol. II, p. 298). To clarify, A1 was administratively dissolved because it did not file its annual report on time or within the sixty day grace period, not because it was insolvent. I.C. §§ 53-613 and 53-643B. Finally, the Order's concluding paragraph, after leads the reader down the road towards a ruling in favor of Tabor, then the Court changed gears and stated "[p]laintiff is likewise entitled to summary judgment on Count IV of the complaint."[6] (R., Vol. II, p. 298).

What Counsel for Marjorie guesses is implied by the District Court's ruling on the unjust enrichment claim is that where the LLC had no assets, it was not guilty of inequitable retention of a benefit that required its return. Nonetheless, counsel respectfully disagrees; it seems the District Court failed to construe the facts here in a light most favorable to Marjorie.

Marjorie is pursuing multiple claims, one of which is breach of contract, and she can only sustain her claim for unjust enrichment if the Court finds that here is not an express contract covering the same subject matter, or if the Court finds that there is, but that the contract is unenforceable. *See, Thomas v. Thomas*, 150 Idaho 636, (2011); *see Wolford v. Tankersly*, 107 Idaho 1062, 1064 (1984). Thus, Marjorie reserves her

[6] Counsel wistfully confesses that he harbors no illusions regarding the Court's intent.

claim of unjust enrichment as an the alternative to a finding that there is an enforceable contract.

A prima facie case of unjust enrichment consists of three elements: (1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof. *Brewer v. Washington Rsa No. 8 Ltd.*, 145 Idaho 735 (2008) (quoting *Aberdeen-Springfield Canal Co. v. Peiper,* 133 Idaho 82, 88 (1999). The most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust. *See*, *Idaho Lumber Inc. v. Buck*, 109 Idaho 737, 745 (Ct. App. 1985).

In this case, Marjorie alleged that Tabor received, on behalf of A1, a sum certain of $150,000 as evidenced by the Note. (R., Vol. I, p. 41). Rather than foreclosing on the Note, Marjorie worked with Tabor to find solutions and alternatives to payment. Tabor benefitted because he was the able to continue the LLC business, to pay himself and his partner from the company's payroll, and to pay off himself as a creditor of A1. Despite the District Court's conclusion that A1 was insolvent when it was administratively dissolved, Tabor has not made that claim. Moreover, the 2008 tax records (R., Vol. II, pp. 202-210), the letter from CPA Gregory Braun (R., Vol. II, pp. 255-256), and Tabor's own admissions provide sufficient evidence to raise a genuine

issue of material fact as to what funds were available to the LLC to pay back even a portion of what it owed to its creditors. (R., Vol. II, pp. 249-250).

Marjorie admits that the monetary benefit received by Tabor and the LLC had its origins in Martha's pocketbook and possibly could then be traced to the LLC's bank account; however, but for Marjorie and Tabor, it is likely that the loan would never have made, or that it would have been foreclosed on upon its default. Tabor admitted that he went to Martha for the loan because he was unlikely to receive such a large, unsecured loan from a bank. (R., Vol. II, p. 217). Tabor further admitted that Marjorie was the one with whom he had most of the discussions and with whom he conducted negotiations and renewal of the Note (R., Vol. II, p. 216, Tabor Deposition p. 63 L. 8-16, p. 218, Tabor Deposition p. 89 L. 10-22); and she was the one he was able to persuade postponement of foreclosure or a lawsuit – to her detriment (R., Vol. II, p. 261).

Tabor, who was a member-manager of the LLC, and who had a friendship with Marjorie, was in the best position to see that creditors were paid off before making non-business loans and making distributions to himself and his business partner. It would be inequitable to allow him to further retain money that was loaned to him and expected to have been returned many years ago. Because there is a genuine dispute of fact regarding the benefit and to whom it inured, tied into who was the recipient of the loan, and the District Court did not draw the inferences in Marjorie's favor, the Court erred in granting summary judgment on Count IV.

### C. Marjorie is Entitled to Attorney Fees and Costs Because Tabor's Motion To Dismiss and Motion For Summary Judgment Are Without Foundation.

This Court is authorized to award reasonable attorneys to the prevailing party. I.A.R. 41, I. C. § 12-121. In a civil action to recover on a note, the prevailing party shall be allowed a reasonable attorney's fee. I. C. § 12-120. The Idaho Rules of Civil Procedure permit an award only when the court finds, from the facts presented to it, that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. I.R.C.P. 54(e)(1).

In addition to Marjorie's statutory right, the Note provides a contractual right to attorney fees for claims brought in its enforcement (R., Vol. I, p. 41), thus, should Marjorie prevail, she is entitled to an award of attorney fees.

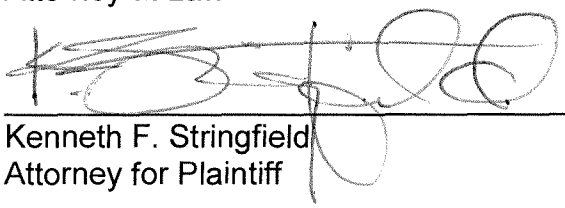
Finally, the District Court concluded its order granting Tabor summary judgment on all counts, with the statement that the plaintiff argued other theories of relief during the summary judgment hearing, but failed to provide relevant authority and failed to plead the theories in the complaint. The court did not identify these theories. "A complaint need only contain a concise statement of the facts constituting the cause of action and a demand for relief." *Clark v. Olsen,* 110 Idaho 323, 325 (1986). The Idaho Supreme Court has stated that the purpose of this rule is, in part, to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality. *Id.* cited in Hoots.

## VII. CONCLUSION

For the reasons stated above, the December 27, 2013 decision of the District Court granting summary judgment to Tabor, and, in turn, dismissing Marjorie's Complaint, should be reversed, and Marjorie should be awarded her costs and attorney fees on appeal.

RESPECTFULLY SUBMITTED THIS 28 day of July, 2014

KENNETH F. STRINGFIELD
Attorney at Law



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