No. 17-3534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EILEEN L. ZELL
Plaintiff-Appellant,

v.

Katherine M. KLINGELHAFER, ESQ.; FROST BROWN TODD, LLC; Patricia D. LAUB, ESQ.; Shannah J. MORRIS, ESQ.; Joseph J. DEHNER, ESQ.; Douglas A. BOZELL, ESQ.; Jeffrey G. RUPERT, ESQ.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

SEPARATE APPENDIX OF PLAINTIFF-APPELLANT

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***** Note Regarding Item No. VI (Plaintiff's Trial Exhibit P-263)

Trial Exhibit P-263 was mistakenly called P-264 at the trial. This can be seen from reading the description of that exhibit in the trial transcript. *See* Transcript (RE 218, Page ID # 5485). The district court's *Exhibit and Witness List* shows that Trial Exhibit P-264 was admitted into evidence. (RE 199, Page ID # 4456.) But, because of the misnaming error, Trial Exhibit P-263 was actually the exhibit that was admitted.

VII	Plaintiff's Trial Exhibit P-90 (Jonathan Zell's and Appellee Jeffrey Rupert's E-mails of 8/8-9/2011)	RE 199, Page ID # 4462	174
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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
Plaintiffs,	:	Case No.: 10 CV-10-14965
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
Defendant/Third-Party Plaintiff,	:	
v.	:	
David Dale Suttle, et al.,	:	
Third-Party Defendants	:	

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2011 JUL 19 PM 4:33
CLERK OF COURTS

DEFENDANT/THIRD-PARTY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW

Defendant/Third-Party Plaintiff, Eileen Zell, by and through her attorney, Jonathan R. Zell, hereby submits her Motion for Summary Judgment pursuant to Civ. R. 56. Incorporated by reference herein are Defendant/Third-Party Plaintiff's (1) Memorandum in Opposition to the Motion for Summary Judgment filed by Plaintiff Michael Mindlin, Plaintiff Elizabeth Kurila, and Third-Party Defendant David Suttle and (2) Memorandum in Opposition to Third-Party Defendant David Suttle's Motion for Relief from Default Judgment.

Judgment should be entered in favor of the Defendant/Third-Party Plaintiff Eileen Zell against both the Plaintiffs and the Third-Party Defendants because the material facts of this case

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are undisputed and, regardless of any disputed facts, Defendant/Third-Party Plaintiff is entitled to judgment as a matter of law.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Simultaneously with this present Motion for Summary Judgment, counsel for Mrs. Zell has filed a 30-page Memorandum of Law addressing the statute-of-limitations issue raised in the Motion for Summary Judgment filed by Plaintiff Michael Mindlin (hereinafter, "Mr. Mindlin"), Plaintiff Elizabeth Kurila (hereinafter, "Ms. Kurila"), and Third-Party Defendant David Suttle (hereinafter, "Mr. Suttle"). That Memorandum is hereby incorporated by reference herein. It will not be discussed except to say that it took 30 pages just to list all of the reasons that the claimed statute of limitation does ***not*** apply.

That leaves just two other issues in this case. The first is the calculation of the principal and interest owed to date under the Note. To accomplish this task requires the proper application of the formula set out in the Note and a computer program for computing interest. In other words, it is a straight mathematical or accounting problem. This means that there is no genuine issue as to any material fact. Therefore, Mrs. Zell is entitled to judgment as a matter of law on this issue. As shown in the attached spreadsheet, the debtors currently owe approximately $90,000, the same amount as they borrowed, because their payments have only covered the accrued interest. (*See* Exhibit E to Mrs. Zell's Affidavit, attached hereto as Exhibit 1. Exhibit 1 will be referred to throughout this Motion as "Mrs. Zell's Affidavit.")

The second issue is to determine if the Plaintiffs and Third-Party Defendants have a valid offset against the money they owe to Mrs. Zell based on what they claim to be Mrs. Zell's agreement to forgive $6,935.13. Normally, such an issue would involve a disputed set of facts and could not, therefore, be disposed of by a Motion for Summary Judgment. However, in this

case, there is no disputed issue of material fact because the other side has presented no evidence. No facts. Not even a legally-cognizable argument.

II. APPLICABLE LAW

Pursuant to the Ohio Rules of Civil Procedure:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civ.R. 56(C).

A party moving for summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. Once the moving party meets its burden, the nonmovant must then produce competent evidence showing that there is a genuine issue for trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111.

III. ALLEGED CONTRACT BY INACTION

Counsel for Mrs. Zell has previously filed a Memorandum in Opposition to Third-Party Defendant David Suttle's Motion for Relief from Default Judgment, hereby incorporated by reference herein, in which it was shown at pps. 7-10 that neither the Plaintiffs nor Third-Party Defendants has presented any significant operative facts -- let alone evidence -- to support the offset they claim. Indeed, from their pleadings, they do not even seem to know the basic details of the events they allege occurred. For example, asserting that the $6,935.13 offset was his

"meritorious claim," Mr. Suttle described it thusly: "[T]he Plaintiff had several communications with the Defendant that are believed to have modified the terms of the loans [sic] repayment." (Motion for Relief from Default Judgment at 4.) What was said in those "communications"? Who "believed" them? And how were the terms of the loans "modified"? We aren't told. Why not? Does the other side even know this information and, if so, why are they holding back?

Thus far, the only evidence that the Plaintiffs or Mr. Suttle has submitted on any issue in this case are the Note, a few responses (albeit mostly general denials) to Mrs. Zell's requests for admissions, and a bare-bones Affidavit from Mr. Mindlin merely concerning the LOCATIONS of the drafting of the Note and remittance of the loan funds. In contrast, with every motion or memorandum that Mrs. Zell files, she submits longer and more detailed Affidavits (*see, e.g.*, Exhibit 1 attached hereto) concerning all the relevant facts of the case -- including the alleged offset -- together with numerous supporting documents. Yet, whereas Mrs. Zell is trying to prove a negative -- that there was no agreement to forgive $6,935.13 -- the other side has the much easier task of trying to prove that there was. Considering that the Plaintiffs are refusing to comply with the vast majority of Mrs. Zell's discovery requests and even filed a protective order seeking to limit all information to the lawyers, it is very ironic that Mrs. Zell is the one who is submitting all of the evidence in this case.

And now we finally know why.

The Plaintiffs have alleged in their Complaint that "[t]he parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005 and half of 2006" (see Complaint at ¶ 19) and that the Plaintiffs

have calculated the interest that would have accrued during this 30-month period as being "in the amount of $6,935.13" (see Complaint at ¶ 30(f)).

However, looking at these allegations more closely, one sees that the Plaintiffs have never actually claimed that the parties' so-called agreement to suspend the accumulation of interest was made verbally (that is, orally or in writing). Instead, the Plaintiffs have argued that this agreement was "evidenced by their [the parties'] behavior" (see Complaint at ¶ 30(f)). In another part of their Complaint, the Plaintiffs are even more explicit, stating: "On many occasions the Defendant accepted payments clearly reflecting the modified repayment terms and the suspension of the accumulation of interest" (see Complaint at ¶ 17).

As Mrs. Zell has explained (*see* Mrs. Zell's Affidavit at ¶ 10, 13, 14, 19-21), the payments that she ***received*** (which is a more-accurate term than ***accepted*** because she would never turn down an offered payment) were only the payments that the debtors were willing to send to her. Therefore, one fails to see how her not receiving payments -- which just means that the debtors did not send her any payments -- could show that she had agreed to modify the repayment terms or suspend the interest on the loan. For, under the Plaintiffs' logic, every time the debtors decide not to send Mrs. Zell a payment, Mrs. Zell is agreeing to modify the repayment terms of the loan and to suspend the accumulation of interest. This is "contract by inaction," which does not exist in the law.

Although the Plaintiffs have been careful so far not to allege that the so-called agreement between the parties to suspend the interest on the loan was a verbal (i.e., oral or written) agreement, Mrs. Zell has categorically denied that she ever made any such agreement to suspend the accumulation of interest for any period of time during the loan (as the term "agreement" is

normally used to mean a meeting of the minds through oral or written communication as opposed to by the debtors' own actions in not sending her payments). (*See* Mrs. Zell's Affidavit at ¶ 13-14, 21). In any event, "contract by inaction" is not even a legally-cognizable argument. This demonstrates that there is no genuine issue as to any material fact. Therefore, Mrs. Zell is entitled to judgment as a matter of law on this issue.

IV. CALCULATION OF PRINCIPAL AND INTEREST DUE ON THE NOTE

On January 30, 2001, Defendant Eileen Zell loaned the sum of $90,000 at five percent (5%) interest per year to her nephew, Plaintiff Michael Mindlin; to Michael Mindlin's wife, Plaintiff Elizabeth Kurila; to Michael Mindlin's business partner, Third-Party Defendant David Dale Suttle; and to Michael Mindlin and David Dale Suttle's company, Third-Party Defendant Suttle Mindlin, LLC (hereinafter collectively referred to as "the debtors").

The debtors executed a Promissory Note in favor of Mrs. Zell (Exhibit D to Mrs. Zell's Affidavit). The Note provides that the debtors are to be "jointly and severally" liable to Mrs. Zell. According to the terms of the Note, the loan was to have been paid back by December 31, 2001. The debtors failed to make any payments from the date of the execution of the Note on January 30, 2001 through December 31, 2001 (when the Note was due) and, indeed, for the next six months (through June 24, 2002). Finally, in the latter part of 2002, the debtors made payments to Mrs. Zell totaling $10,000. However, in 2003, no payments were made. (*See* Mrs. Zell's Affidavit at ¶ 8-9.)

The debtors continued to make no payments on their loan in all of 2004, 2005 and 2006. In 2007, the debtors made payments totaling only $700. In 2008, the debtors' payments totaled $10,500. In 2009, their payments totaled $19,800. In 2010, their payments totaled $10,800.

(*See* Mrs. Zell's Affidavit at ¶ 25, 27, 28, 33.) This brings the grand total paid at present to $51,800. From this, the unpaid balance of the loan can be calculated using a computer program for calculating interest. According to the spreadsheet produced by this kind of computer program (*see* Exhibit E to Mrs. Zell's Affidavit), the debtors still owe Mrs. Zell approximately $90,000. However, this amount will continue to increase at five percent (5%) per year up until the judgment in the instant case is rendered.

The Promissory Note states that "All payments on this Promissory Note shall be applied first to the payment of accrued interest and the balance shall be applied to principal" (*see* Exhibit D to Mrs. Zell's Affidavit). However, the Plaintiffs have calculated the accrued interest as if the Plaintiffs' payments were to be applied first to principal and only secondarily to interest. For example, in the Plaintiffs' Complaint at ¶ 20, the Plaintiffs noted that their calculations were based on "the reduction of the principal by the yearly payments." But this is the opposite of what is prescribed in the Note. For the Note states explicitly: "All payments on this Promissory Note shall be applied first to the payment of accrued interest and the balance shall be applied to principal." Thus, the Plaintiffs' computation of the accrued interest on the Note is in error and, thus, so too is their computation of the outstanding balance owed on the Note.

IV. CONCLUSION

For the reasons set forth above, this Court should grant Mrs. Zell's Motion for Summary Judgment and enter Orders declaring that the Promissory Note is an enforceable agreement, declaring that Plaintiff Michael Mindlin, Plaintiff Elizabeth Kurila, Third-Party Defendant David Dale Suttle, and Third-Party defendant Suttle Mindlin LLC are jointly and severally liable to Mrs. Zell under the Promissory Note for the sum of $90,000, requiring the Plaintiffs to pay the

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Defendant's expenses and reasonable attorneys' fees, and for such other actions as are consistent with justice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via regular U.S. Mail, postage pre-paid, this 19 day of July, 2011, upon:

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Peterson Ellis Fergus & Peer, LLP
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Counsel for Plaintiff

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Third-Party Defendant

Jonathan R. Zell

Jonathan R. Zell (0036831)

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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
	:	
Plaintiffs,	:	Case No.: 10 CV-10-14965
	:	
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
David Dale Suttle, et al.,	:	
	:	
Third-Party Defendants	:	

AFFIDAVIT OF DEFENDANT/THIRD-PARTY PLAINTIFF EILEEN ZELL

State of Ohio :

:ss

Franklin County :

Now comes the affiant, Defendant/Third-Party Plaintiff Eileen Zell, first being duly cautioned and sworn according to law, and deposes and says that the following is true to the best of her personal knowledge:

1. My name is Eileen Zell and I am 82 years of age.

2. In early December 2000, my nephew Michael Mindlin (hereinafter, "Mr. Mindlin") called me on the telephone several times to discuss his request that I loan him $90,000 at a five percent (5%) annual interest rate for one year to help finance his architectural firm, Suttle Mindlin LLC. When we spoke, I was in Columbus, Ohio, where I lived at that time. Mr. Mindlin was in St. Louis, Missouri, where he lived and still lives and where Suttle Mindlin LLC

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was located. Some of the issues we discussed were whether the money would be loaned only to Mr. Mindlin personally; to his company, Suttle Mindlin LLC.; or to Mr. Mindlin, his business partner David Suttle, and their wives.

3. On December 12, 2000, Mr. Mindlin prepared and then sent to me by fax a letter-contract (a true and accurate copy of which is attached hereto as Exhibit A), written on Suttle Mindlin corporate stationery, dated December 12, 2000, and signed by Mr. Mindlin on behalf of Suttle Mindlin LLC. The letter, which stated that it was to be superseded later by a second "more comprehensive agreement," gave some details about the loan.

4. On December 11, 2000 and then again on January 3, 2001, I faxed two letters (true and accurate copies of which are attached hereto as Exhibit B), to the Wire Transfer Department, in Indianapolis, Indiana, of The Charles Schwab Corporation, my brokerage firm. In each of these letters, I authorized the transfer of $45,000 (for a combined total of $90,000) to the Missouri bank account of Suttle Mindlin LLC, as Mr. Mindlin had requested.

5. In early December 2000, I contacted an attorney, Roger T. Whitaker, to prepare some sample promissory notes (hereinafter, "sample notes") for me to give to Mr. Mindlin to help him in creating our more comprehensive loan agreement. The sample notes that Mr. Whitaker gave to me, which I faxed to Mr. Mindlin, were for $45,000 each. In addition, they came in sets of two, one of which was dated "December ___, 2000" and the other of which was dated "January ____, 2001." Furthermore, because Mr. Mindlin and I had not yet decided who was going to sign for the loan, each set of sample notes differed in the signature lines they contained. Some were to be signed by only Mr. Mindlin, while others were to be signed by Messrs. Mindlin and Suttle as well as their wives.

6. On January 4, 2001, while Mr. Mindlin and I were still negotiating the language that would be used in the loan agreement, I flew to Florida where I was going to be spending part of the winter. I took Southwest Airline's flight #1492 from Columbus to West Palm Beach.

7. As can be seen from the envelope in which it was mailed (a true and accurate copy of which is attached hereto as Exhibit C), while I was still in Florida I received in the mail from Mr. Mindlin one Promissory Note (hereinafter, "the Note") dated January 30, 2001 for $90,000 at a five percent (5%) annual interest rate. This Note (a true and accurate copy of which is attached hereto as Exhibit D) had been signed by Mr. Mindlin, Mr. Mindlin's wife (Elizabeth Kurila), and Mr. Suttle (hereinafter, collectively referred to as "the debtors").

a. From looking at the Note, it was apparent that this was not the same document as any of the sample notes that Mr. Whitaker had prepared. However, the Note was similar to the samples in so many respects that it was clear that the Note had been based on the samples. Accordingly, Mr. Mindlin (or his agent) must have drafted and typed the Note in Missouri.

b. In the Note, the debtors promised to use their "best efforts to pay 50% of the principal by June 30, 2001 and 75% of the principal by September 30, 2001" or, in any event, to repay all of the the interest and principal by December 31, 2001. There were several other important terms set out in the Note, but I will deal with them later.

8. However, the deadline of December 31, 2001 for full repayment passed without the debtors having paid me any money, without having contacted me to say that they were going to miss the deadline, and without having made any other arrangements to pay me the money. Furthermore, although the loan was supposed to have been repaid within eleven months, today -- over ten years later -- it still remains unpaid. The debtors have barely kept up with the interest payments. As shown in the attached spreadsheet (see Exhibit E), the amount presently due is approximately $90,000, the same as the original amount borrowed.

9. On June 25, 2002, the debtors sent me their first payment of $5,000. On December 23, 2002, I received another $5,000. The debtors mailed these two payments to me in Ohio. However, I received no further payments until October 2007.

10. Because Mr. Mindlin was my nephew, I was hesitant to foreclose on his and the other debtors' loan. However, since there was no repayment schedule set out in the Note after December 31, 2001 (when the Note became due), I had no power to compel the debtors to make payments of any particular size or even any payments at all. Instead, I was forced to wait until the debtors chose to pay me. Since just waiting for payments was not an effective strategy, I had to come up with my own informal collection method. This was to call or write to the debtors and complain about their lack of payments. Accordingly, on May 22, 2003, I mailed a letter (a true and accurate copy of which is attached hereto as Exhibit F) addressed to Messrs. Mindlin and Suttle, stating in part: "You made no payments on this loan on or before December 31, 2001. During all of 2002, you made only two payments of $5,000 each, totaling $10,000. So far, in 2003, you have made no payments at all." I then asked them to send me a payment plan, noting that on several occasions during the past year or more Mr. Mindlin had promised to send me one, but never did. However, Messrs. Mindlin and Suttle ignored my letter.

11. Since my phone calls and now, even my letter, were having no effect on the debtors, I needed to try something stronger. However, the only power that I had over the debtors was to foreclosure on their loan. But I was unwilling to take such drastic action against my nephew. So, instead, I decided just to threaten to take such action. So, on January 5, 2004, I mailed another letter (a true and accurate copy of which is attached hereto as Exhibit G), this time addressed only to Mr. Mindlin. I repeated some of the same things I had said in my earlier letter. However, this time I added: "[I]f you continue to ignore this matter, then I will have no alternative but to refer this debt to an outside collection agency." Of course, I did not really intend to foreclose on the loan and it bothered me greatly even to threaten it. But I felt that I simply had to do something to get Mr. Mindlin's attention.

12. However, later that same month, I learned that Mr. Mindlin had recently been diagnosed with skin cancer. Of course, I immediately regretted having threatened to refer his debt to a collection agency. So I put my informal collection efforts on hold, deciding that I would not pester Mr. Mindlin for payments while he was ill. Of course, the debtors had not made any payments to me for over a year before Mr. Mindlin's diagnosis. Thus, I certainly did not expect to receive any payments from them while Mr. Mindlin was ill. And, while I would have welcomed payments at any time, I did not want to be in the position of trying to coerce them with threats of foreclosure until Mr. Mindlin got better. For I did not want the threat of foreclosure to hang over Mr. Mindlin's head while he was battling cancer. After all, I was still

his aunt and the same affection I had for him that led me to make him this loan in the first place, made me not want to exacerbate his illness.

13. I am aware that the Plaintiffs have alleged in their Complaint that "[t]he parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005 and half of 2006" (*see* Complaint at ¶ 19) and that the Plaintiffs have calculated the interest that would have accrued during this 30-month period as being "in the amount of $6,935.13" (*see* Complaint at ¶ 30(f)). However, I do not understand how the Plaintiffs could have thought this. My only desire was not to put an extra strain on Mr. Mindlin with threats of foreclosure while he was ill. I never intended to stop him from making any payments on the loan that he might want to make (and he certainly needed no help from me with that). I was just going to stop pestering him about the payments he was not making. Also, I would never have considered suspending the accumulation of interest on a non-performing loan since this would only give the debtor an additional incentive to avoid making any payments.

14. As far as I can recall, the first time that I ever heard the allegation that I had supposedly made an agreement to modify the repayment terms of the loan or to suspend the accumulation of interest on it while Mr. Mindlin was ill was in the Plaintiffs' Complaint. Since it is true that I did not expect or require Mr. Mindlin to make any payments on the loan while he was ill (although that is a far cry from actually modifying the contract), I will just focus here on the issue of the interest. I categorically deny that I ever agreed to waive any of the interest that accrued on the loan during Mr. Mindlin's illness or at any other time.

15. In none of the correspondence between Mr. Mindlin (or any of the other debtors) and myself during the over ten years since the loan was made, was there ever any mention of my alleged agreement to waive any of the interest that accrued on the loan.

16. Whenever Mr. Mindlin mentioned the subject of interest in his e-mails to me, it was always to ask me to agree to waive interest because he was in financial need, not because we had any prior agreement. For example, in his e-mail to me of April 24, 2010 (a true and accurate copy of which is attached hereto as Exhibit H), he asked me to waive all of the accrued interest. And, in his e-mail to me of August 18, 2009 (a true and accurate copy of which is attached hereto as Exhibit I), he asked me to agree to reduce the future interest on the loan.

17. On the other hand, whenever I mentioned the subject of interest in my correspondence to Mr. Mindlin, it would have been for one of two reasons. The first reason would be to point out that the money that the debtors owed to me was increasing, rather than decreasing, over time because their repayments were not keeping up with the accrued interest. For example, on December 29, 2007, I sent Mr. Mindlin an e-mail (a true and accurate copy of which is attached hereto as Exhibit J), stating: "Due to interest charges, this loan has substantially increased in size in the seven years since it was made." If it were true that I had promised to waive two and one-half years' worth of interest (as the debtors now claim), then I would not have stated that the money that the debtors owed was increasing due to accrued interest or, if I did, then Mr. Mindlin would have corrected me. But he never did.

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18. The second reason that I would have mentioned the subject of interest in my correspondence to Mr. Mindlin would have been to complain that Mr. Mindlin was continually asking me to waive some or all of the interest that had accrued on the loan. For example, on April 28, 2010, I sent Mr. Mindlin an e-mail (a true and accurate copy of which is attached hereto as Exhibit K), stating: "I gave you a $90,000 unsecured loan at a low 5% interest rate and then waited patiently for 9 1/2 years even though your repayments never even covered the amount of interest owed.... [Y]ou continually demand that I change our agreement and forgive larger and larger amounts of the money you owe.... [Y]ou continually ask for what, in essence, are gifts of money, and then you complain bitterly when I refuse." If it were true that I had promised to waive two and one-half years' worth of interest (as the debtors now claim), then I would not have stated that the interest that Mr. Mindlin was asking me to waive was a "gift" or, if I did, then Mr. Mindlin would have corrected me. But he never did.

19. However, I think that I might be over-analyzing the allegations in the Plaintiffs' Complaint. For, looking at these allegations more closely, I see that the Plaintiffs have never actually claimed that the parties' so-called agreement to suspend the accumulation of interest was made verbally (that is, orally or in writing). Instead, the Plaintiffs have argued that this agreement was "evidenced by their [the parties'] behavior" (*see* Complaint at ¶ 30(f)). In another part of their Complaint they are even more explicit, stating: "On many occasions the Defendant accepted payments clearly reflecting the modified repayment terms and the suspension of the accumulation of interest" (*see* Complaint at ¶ 17).

20. As I have previously stated, the payments that I *received* (which is a more-accurate term than *accepted* because I would never turn down an offered payment) were only the payments that the debtors were willing to send to me. Therefore, I fail to see how my not receiving payments -- which just means that the debtors did not send me any payments -- could show that I had agreed to modify the repayment terms or suspend the interest on the loan. For, under the Plaintiffs' logic, every time the debtors decide not to send me a payment, I am agreeing to modify the repayment terms of the loan and to suspend the accumulation of interest.

21. Although the Plaintiffs have been careful so far not to allege that the so-called agreement between the parties to suspend the interest on the loan was a verbal (i.e., oral or written) agreement, I categorically deny that I ever made any such agreement to suspend the accumulation of interest for any period of time during the loan (as the term "agreement" is normally used to mean a meeting of the minds through oral or written communication as opposed to by the debtors' own actions in not sending me payments).

22. In 2005, I formally changed my domicile from Ohio to Florida. I filed a Declaration of Domicile with the Palm Beach County (Florida) Clerk & Comptroller's Office, I registered to vote and obtained a Voter Card in Florida, and I registered for and obtained a Florida Driver's License. I have spent very little time in Ohio during the past few years and I only visit Ohio occasionally to see my son (Jonathan R. Zell) and daughter-in-law. For example, I spent only twenty-three (23) days in Ohio in 2009 and seventy-three (73) days in Ohio in 2010.

23. When I moved to Florida in 2005, I went to live with my recently-widowed older sister, Fayette Mindlin (who is Plaintiff Michael Mindlin's mother). Although the debtors had

not made any payments to me since 2002, I informed Mr. Mindlin of my new address of 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. This was so that the debtors would know the correct address to send their payments. It was also in accordance with a provision in the Note, stating that I could change the location of the payments at any time.

24. Although it was never executed, the proposed refinancing agreement that Mr. Mindlin drafted and sent to me in his e-mail of August 9, 2009 (a true and accurate copy of which is attached hereto as Exhibit L) shows that Mr. Mindlin knew that the place of payment on the Note had now changed to his mother's Florida condominium. For Mr. Mindlin's proposed refinancing agreement contained the following provision: "Place of Payment: All payments due under this note shall be made to Eileen Zell, 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408."

25. As previously stated, I had received only two payments totaling $10,000 (both sent to Ohio in 2002) before I changed the location of repayment to Florida and, thereafter, I received no payments at all for a period of five years. The payments then resumed when the debtors sent me a third payment -- for $200 -- on October 18, 2007, followed by a fourth payment -- for $500 -- on December 15, 2007. With these payments, the debtors now began sending their payments to me in Florida. The only exceptions to this were the few occasions when I was visiting family in Ohio, typically during the summers. As a result, the vast majority of the forty-one payments (totaling $41,800) that the debtors made to me from October 18, 2007 to September 13, 2010 were all mailed to me in Florida, compared with the only two payments (totaling $10,000) that were sent to me in Ohio prior to October 18, 2007.

26. On December 29, 2007, I sent Mr. Mindlin an e-mail (*see* Exhibit J), thanking him for having resumed making payments. However, noting that the loan bore "interest at a rate of five percent per year," I stated: "[Y]ou have now repaid a total of $10,700, leaving due principal in the amount of $79,300 plus interest." Concerned that the debtors' payments "do not even cover the accruing interest charges," I added: "I cannot allow this loan to linger indefinitely, let alone become larger due to ballooning interest charges."

27. In 2008, I received payments totaling $10,500. Concerned that a lot of time had passed without the Note being paid, in early 2009 I looked into what the statute of limitations was on the Note. I then found out that the Note was governed by Missouri law and that Missouri's ten-year statute of limitations was going to expire on December 31, 2011. When I investigated what alternatives I had, I learned that I could either foreclose on the loan or, if I wanted to give the debtors more time, I could refinance it. Since I still did not want to foreclose on the loan, I chose the latter option and hired someone to draft a refinancing agreement.

28. In 2009, I received payments totaling $19,800. On May 26, 2009, I mailed Mr. Mindlin a letter enclosing my proposed refinancing agreement (a true and accurate copy of which is attached hereto as Exhibit M). I sent this refinancing agreement to Mr. Mindlin because, throughout the entire existence of the loan, Mr. Mindlin was the only one of the debtors to deal with me regarding the loan. In my cover letter, I stated: "[M]y purpose is to give you more time to pay off the loan. However, ... in order to give you more time it is necessary for me to refinance your loan so as to avoid running afoul of the applicable statute of limitations."

I also noted: "This new agreement ... computes the outstanding balance now due on the loan based on your past payments and the accrued interest up to June 1, 2009." Further, as the computational worksheets attached to the refinancing agreement showed, simple interest was calculated at five percent (5%) per year from January 30, 2001 to June 1, 2009 without any time gaps.

29. In his e-mail to me dated August 3, 2009 (a true and accurate copy of which is attached hereto as Exhibit N), Mr. Mindlin discussed coming up with a payment schedule where I would be "paid back the full amount of the loan" within five years. No mention was made of deducting the interest charges that had accrued when he was ill.

30. On August 9, 2009, Mr. Mindlin e-mailed me the debtors' proposed refinancing agreement (*see* Exhibit L). This e-mail contained two attachments. One of these attachments was Mr. Mindlin's proposed refinancing agreement, whose distinguishing feature was a provision to divide the repayment obligations of the loan 50:50 between Mr. Suttle on the one hand and Mr. Mindlin and Ms. Kurila on the other. The second attachment, "Eileen Zell Loan Assumptions and Schedules.pdf," consisted of a two-page "Summary Explanation" of the refinancing agreement.

a. This "Summary Explanation" showed that, like under my proposed refinancing agreement, under Mr. Mindlin's proposed refinancing agreement there also were no gaps in time in computing the interest that had accrued on the loan since its commencement on January 30, 2001. Under section "d.1." of the "Summary Explanation," Mr. Mindlin stated: "Original loan to earn full interest at 5% over last 102 months."

b. Moreover, the "Summary Explanation" specifically pointed out that the interest that accrued during what it termed Mr. Mindlin's "disability" had been included in the computation of the total amount owed. Under section "c" of the "Summary Explanation," Mr. Mindlin stated: "I included all interest earned during my 18 months disability."

c. Finally, based on a requested reduction of future interest from 5% to 2% for the next five years, Mr. Mindlin stated in the "Summary Explanation" that the debtors proposed to pay me a total of $83,039.00.

31. Mr. Mindlin and I corresponded by e-mail throughout the rest of 2009 and 2010. But, because Mr. Mindlin and I were each interested in something different, no agreements were made. I was interested in getting the debtors to refinance their loan before the statute of limitations expired. In contrast, Mr. Mindlin and his wife Ms. Kurila were interested in severing their responsibilities for the loan 50:50 with Mr. Suttle or, if that were not possible, in trying to get me to waive some or all of the interest that had accrued on the loan.

32. For example, on August 18, 2009, Mr. Mindlin sent me an e-mail (*see* Exhibit I) in which he complained bitterly about having to be jointly and severally liable for the entire loan, stating: "You would not enter into that agreement and we shouldn't be put at that risk either." Yet, those were precisely the terms of the Promissory Note that Mr. Mindlin had previously signed. He added: "[I]n no way am I, individually, going to pay off this entire loan nor expose

myself to this liability. That is not financially possible ... nor fair ... nor a valid legal position" [original ellipses]. Thus, Mr. Mindlin was essentially disavowing the Note that he had signed since that Note specifically stated that the signees "jointly and severally promise to pay" the entire amount of the Note.

33. In 2010, I received payments of $10,800. On April 24, 2010, Mr. Mindlin sent me an e-mail (*see* Exhibit H), stating that he had changed his mind and no longer wanted to refinance the Note. In his e-mail, Mr. Mindlin stated, in effect, that it was premature for the parties to refinance the loan. Mr. Mindlin explained that his attorney had informed him that the Missouri statute of limitations, which applied to the Note, was not going to expire yet for some time: "At some expense, I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding."

Instead of refinancing, Mr. Mindlin stated that he wanted to pay off just the principal of the loan with no interest whatsoever. Mr. Mindlin explained that this was because that was all that they could afford: "I am making application to my bank for a loan to pay off this debt.... But, it is clear in preliminary conversations with my bank that I can not get a loan that will cover principal and interest on this loan. I simple do not have the equity to cover the full amount. So, I am proposing that I pay you back all the principal due, but no interest."

34. In response, I sent Mr. Mindlin an e-mail dated April 28, 2010 (*see* Exhibit K) in which I refused to waive all of the interest due and indicated that I was still desirous of refinancing the Note. Agreeing with Mr. Mindlin's statement that Missouri's statute of limitations had not yet expired, I added that it was just a matter of time before it would expire. From Mr. Mindlin's statement, I understood Mr. Mindlin to be agreeing with me that the law of Missouri applied to our Note. In addition, since my $90,000 Note would be unenforceable under Ohio law, I interpreted the debtors' continued payments as confirmation of my agreement with Mr. Mindlin that Missouri law governed the Note.

35. The debtors continued to send me payments until September 13, 2010, after which the Plaintiffs commenced the present litigation. Between April 24, 2010 (when Mr. Mindlin acknowledged in writing that the Note was governed by Missouri law) and September 13, 2010, the debtors mailed ten payments to me.

36. On September 25, 2010, Mr. Mindlin traveled from his home in Missouri to my residence in Florida because he wanted to tell me in person the amount that he was going to offer me in settlement of the loan. As Mr. Mindlin later described it in his e-mail to me of September 29, 2010 (a true and accurate copy of which is attached hereto as Exhibit O), Mr. Mindlin offered me "a total principal and interest payment of $110,000 minus all payments made up to time of final payment." Since the debtors had then paid me only $51,800, Mr. Mindlin was offering to pay me an additional $58,200 ($110,000 - $51,800 = $58,200).

37. As far as I can recall, even in our meeting on September 25, 2010, Mr. Mindlin never brought up the allegation that I had agreed to suspend the accumulation of interest on the loan while he was ill. Instead, as he had done in his previous e-mails to me, Mr. Mindlin asserted that

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he could not afford to pay me any more than he was offering and that this amount was somehow "fair." He then stated that, if I did not accept his offer, he would "ruin" my relationship with his mother (Fayette Mindlin, my older sister). And he did.

38. When I refused Mr. Mindlin's requests that I waive the interests payments on the loan, in an e-mail dated September 28, 2010 (a true and accurate copy of which is attached hereto as Exhibit P), Mr. Mindlin accused me of being "intent on refinancing this loan and maximizing interest payments." Then, he added: "You ... expect well over $50,000 in interest. We find this very troubling and unreasonable."

Further the affiant sayeth naught.

Dated: July 19, 2011

Eileen Zell, Affiant

Sworn to and subscribed in my presence, a notary public, in and for said county and state the 19th day of July, 2011.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

Sally L. Kapcar
Notary Public, State of Ohio
My Commission Expires 02-21-2016

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
	:	
Plaintiffs.	:	Case No.: 10 CV-10-14965
	:	
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
	:	
Defendant/Third-Party Plaintiff.	:	
	:	
v.	:	
	:	
David Dale Suttle, et al..	:	
	:	
Third-Party Defendants	:	

DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND THIRD-PARTY DEFENDANT DAVID SUTTLE'S MOTION FOR SUMMARY JUDGMENT

SUMMARY

Defendant/Third-Party Plaintiff Eileen Zell (hereinafter, "Mrs. Zell") respectfully submits this Memorandum in Opposition to the Motion for Summary Judgment filed by Plaintiffs Michael Mindlin (hereinafter, "Mr. Mindlin") and Elizabeth Kurila (hereinafter, "Ms. Kurila") as well as Third-Party Defendant David Suttle (hereinafter, "Mr. Suttle"). At the heart of this dispute is Mr. Mindlin, who is trying to take advantage of the generosity of Mrs. Zell, his 82-year-old aunt.

In December 2000, Mr. Mindlin used his family relationship to ask Mrs. Zell for a loan of $90,000, which Mr. Mindlin then promised to repay with interest within eleven months, for the stated purpose of helping to finance Mr. Mindlin's architectural business, Suttle Mindlin LLC.

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At that time, Mr. Mindlin lived and still lives in Missouri; at the time of the loan, Mrs. Zell lived in Ohio, but subsequently moved to Florida; and Suttle Mindlin LLC is a Missouri for-profit corporation. Mr. Mindlin initially proposed that the loan be made only to Suttle Mindlin LLC. However, ultimately the Promissory Note (hereinafter, "the Note") was signed by Mr. Mindlin, Mr. Mindlin's wife (Ms. Kurila), and Mr. Mindlin's business partner (Mr. Suttle) in their individual capacities as well as by Messrs. Mindlin and Suttle on behalf of Suttle Mindlin LLC (hereinafter, collectively referred to as "the debtors"). Although the loan was supposed to have been repaid within eleven months, over ten years later it remains unpaid. The debtors barely kept up with the interest payments and owe approximately $90,000, the same amount they borrowed.

In his Motion for Summary Judgment, opposing counsel seeks to release the debtors from their obligation of having to repay their loan to Mrs. Zell, claiming that Ohio law governs the Note. Since the six-year statute of limitations in Ohio on such notes would have expired on December 31, 2007, counsel argues that the Note is therefore unenforceable. Mrs. Zell vigorously disputes opposing counsel's claim, presenting numerous reasons that Missouri's ten-year (or more) statute of limitations, which has not yet expired, governs the loan instead.

The first and most important reason that Missouri law applies to the loan is that the parties themselves had previously agreed to this. Where the parties have made an effective choice of law, that will typically determine which state's law will apply. *See* Restatement of the Law 2d, Conflict of Laws Section 187. Admittedly, the Note that the debtors gave to Mrs. Zell did not, within its four corners, specify by which state's law it would be governed. However, e-mails later exchanged between Mrs. Zell and Mr. Mindlin demonstrated that both parties were

advised by their respective attorneys about the choice of law and that both parties then expressly agreed between themselves that the law of Missouri applied to the Note. Moreover, based on this understanding, the debtors continued to send payments to Mrs. Zell until September 13, 2010, which is completely inconsistent with opposing counsel's present argument that the Note became unenforceable on December 31, 2007. Since the parties made an effective choice of law, that law choice will apply. As further evidence that both parties had intended that Missouri law would apply, when the parties were attempting to refinance the loan in 2009 both of them submitted proposed refinancing agreements containing a choice of law provision specifying that the Note would be governed by Missouri law.

However, even if the parties did not agreed that Missouri's law applies, Missouri law would still apply under the factor-driven test set forth in the "Restatement of the Law 2d" due to the numerous contacts involving that state. However, both opposing counsel in his Motion for Summary Judgment and Mr. Mindlin in his Affidavit made many misstatements of fact regarding these contacts. For example, they misstated who drafted the Note, the state in which the Note was drafted, the state from which the loan funds were transferred, the location for the payments specified in the Note, the location to which the vast majority of the payments were mailed, and thus the location where the breach occurred. When the contacts are identified correctly, however, it is apparent that the law of Missouri -- not Ohio -- applies to the Note.

Recent Ohio Supreme Court cases have adopted the multiple-factor test set forth in the Restatement of the Law 2d, Conflict of Laws Section 188. *See Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 287, 473 N.E.2d 807, 810; *In Ohayon v. Safeco Ins. Co. of*

Illinois (2001), 91 Ohio St.3d 474, 477, 747 N.E.2d 206, 209. *See also Mickel v. Raymond Lovelady Builders Aids, Inc.* (Ohio 6th Dist., Aug. 31, 1984) C.A. No. L-83-415, 1984 WL 7954. The multiple-factor test was designed to replace the single-factor tests that had been enunciated in the older case law. The major problem of using a single-factor test, of course, is that no single factor seems overly important by itself. As a result, different courts at different times chose different factors, resulting in inconsistent case law.

Restatement of the Law 2d, Conflict of Laws Section 188, states at 575 that, in the absence of an effective choice of law by the parties, the contacts to be taken into account include the place of contracting, the place of negotiations of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.

To begin with, there were actually two loan agreements and they were both drafted by Mr. Mindlin (or his agent) in Missouri. The first loan agreement (hereinafter, "the initial agreement") consisted of a letter-contract written on the corporate stationery of Suttle Mindlin LLC (a Missouri corporation). Mr. Mindlin (or his agent) in Missouri drafted, typed, signed, and faxed this agreement to Mrs. Zell in Ohio. Mrs. Zell faxed to Mr. Mindlin some sample promissory notes (hereinafter, "sample notes") that her attorney had prepared for Mr. Mindlin's consideration. Mr. Mindlin (or his agent) then drafted, typed, and (together with the other debtors) signed a new agreement in Missouri based on Mrs. Zell's attorney's suggestions. This new agreement, which was designed to supersede the earlier agreement, is the "Note" referred to above. Thus, the "place of contracting" was St. Louis, Missouri, where both loan agreements

were drafted, typed, and signed. Also evidencing where the contract was made was the notation "St. Louis, Missouri" in the top right-hand corner of the Note.

For the "place of negotiations," the parties negotiated on the telephone. At all times during the negotiations, Mr. Mindlin was in Missouri. However, while Mrs. Zell was in Ohio when the negotiations began in December 2000, she left for Florida on January 4, 2001 and, thus, was in Florida when the negotiations ended. Indeed, Mr. Mindlin even mailed the signed Note (dated January 30, 2001) to Mrs. Zell in Florida.

For the "place of performance," there were only temporary and very minimal contacts in Ohio. This is because the location of repayment was changed from Ohio to Florida after only two payments (totaling $10,000) had been made. By then, Mrs. Zell had permanently relocated to Florida, having formally established Florida as her official domicile. As a result, the vast majority of the repayments in both amount and quantity were sent from Missouri to Florida.

The loan funds or "subject matter of the contract" did not involve the state of Ohio at all. To wire the $90,000 to the Missouri bank account of Suttle Mindlin LLC, Mrs. Zell contacted the Wire Transfer Department, located in Indiana, of her San Francisco-based brokerage firm.

With regard to the "domicile, residence, nationality, place of incorporation and place of business of the parties," Mrs. Zell was a resident of Ohio at the time the contract was made, but subsequently changed her legal domicile to Florida in 2005. On the other hand, Mr. Mindlin, Ms. Kurila, and Mr. Suttle, all of whom signed the Note in their individual capacities, lived in St. Louis, Missouri at the time and still live in St. Louis, Missouri. In addition, Messrs. Mindlin and Suttle also signed the Note in their corporate capacities as the partners of Suttle Mindlin, LLC, a Missouri for-profit corporation. Because so many of these contacts involve the state of Missouri

and the only contact that involved Ohio (Mrs. Zell's residence) was a temporary one, the law of Missouri -- not Ohio -- applies to the Note under the Restatement rules.

In his Motion for Summary Judgment, opposing counsel argues in favor of using one of the single-factor tests that had been enunciated in the older case law. However, counsel was very selective. For example, in *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 143, 135 N.E. 2d 896 (citing 17 Corpus Juris Secundum, 338, Section 12c; Restatement of the Law of Conflict of Laws, 408, Section 332), it was held: "The general rule is that a contract is governed by the law of the place where it was made or entered into." However, since this particular single-factor test would not give counsel the result he desired, counsel has instead cited four cases, decided between 1892 and 1915 as well as one in 1950, in support of a single-factor test more to his liking: the place-of-performance test.

The 1950 case is *Meekison v. Groschner* (1950) 153 Ohio St. 301, 91 N.E. 2d 680, 41 OO 298. While the Court in *Meekison* did use the place-of-performance test to determine choice of law, this case stands for a very different proposition. First, the Court observed that "there is collected a large number of authorities on both sides of the [choice-of-law] proposition involved." 153 Ohio St. at 306. Then, the Court stated its "philosophy to be in favor of not barring an action ... unless the statutes of limitation unequivocally require it." *Id.* at 309. Finally, the Court chose a test where "a person who has received full and complete consideration for the making of a contract ... [was] compelled to execute her part of it." *Id.* at 311. The Court concluded: "There is much to be said for the philosophy ..., 'They hired the money, didn't they?'" *Id.* at 311.

Similarly, in the instant case, the debtors "hired" the $90,000 that they borrowed from Mrs. Zell, then took advantage of Mrs. Zell's generosity in giving the debtors more and more time in which to repay the money, and now are trying to use that generosity against Mrs. Zell in a callous attempt to avoid having to pay back the money they borrowed. So, especially considering that the single-factor choice-of-law rules are so inconsistent and ever-changing, it would be unjust for this Court to choose a rule, out of the many conflicting rules that exist, that would allow the Plaintiffs and Third-Party Defendant to evade their just debt to Mrs. Zell.

Finally, besides the factual and case-law deficiencies in opposing counsel's motion, opposing counsel also erroneously claims that ORC 1321.17 means that the Note is governed by Ohio law. However, ORC 1321.17, which falls under Ohio's Small Loans Act (ORC 1321.01-1321.99), "only applies to small loan companies doing business in Ohio," not to individuals like Mrs. Zell. *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 143. In any event, ORC 1321.17 would not apply to the $90,000 loan involved in the instant case because, under ORC 1321.02, the maximum amount of the loan governed by this statute is $5,000.

ARGUMENT

I. THE PARTIES MADE AN EFFECTIVE CHOICE OF LAW OF MISSOURI

As opposing counsel notes in his Motion for Summary Judgment at pps. 3-4, where the parties have made an effective choice of law, that will determine which state's law will apply (citing Restatement of the Law 2d, Conflict of Laws Section 187). However, counsel also notes that "even if not explicitly and expressly written, a court may apply a specific [state's] law through 'persuasive evidence' that the contracting parties wish to have the law of a particular state applied" (citing Comment (a) to Restatement (Second) of Conflict of Laws 187).

Admittedly, the $90,000 Promissory Note that the debtors gave to Mrs. Zell did not, within its four corners, specify by which state's law it would be governed. Nevertheless, as will be shown below, the parties' later statements and conduct demonstrate that the parties had agreed between themselves that the Note was governed by Missouri law.

Concerned that a lot of time had passed without the loan being paid, in early 2009 Mrs. Zell looked into when the statute of limitations would expire on the Note. Mrs. Zell found out that the Note was governed by Missouri law and that Missouri's ten-year statute of limitations would expire on December 31, 2011. When Mrs. Zell investigated what alternatives she had if the debtors did not repay the loan by then, Mrs. Zell learned that she could either foreclose on the loan or, if she wanted to give the debtors more time to repay it, she could refinance the loan. Mrs. Zell then chose the latter option and hired someone to draft a refinancing agreement. (*See* Mrs. Zell's Affidavit at ¶ 27, attached hereto as Exhibit 1. Exhibit 1 will be referred to throughout this Memorandum as "Mrs. Zell's Affidavit.")

On May 26, 2009, Mrs. Zell mailed Mr. Mindlin a letter enclosing her proposed refinancing agreement (*see* Exhibit M to Mrs. Zell's Affidavit). Mrs. Zell sent this to Mr. Mindlin because, throughout the entire existence of the loan, Mr. Mindlin was the only one of the debtors to deal with Mrs. Zell regarding the loan. (*See* Mrs. Zell's Affidavit at ¶ 28). In the cover letter containing Mrs. Zell's proposal, she stated:

> [M]y purpose is to give you more time to pay off the loan. However, according to my attorney, in order to give you more time it is necessary for me to refinance your loan so as to avoid running afoul of the applicable statute of limitations.

In response, on August 9, 2009, Mr. Mindlin e-mailed Mrs. Zell the debtors' proposed refinancing agreement (*see* Exhibit L to Mrs. Zell's Affidavit). However, Mr. Mindlin eventually

changed his mind. On April 24, 2010, Mr. Mindlin sent Mrs. Zell an e-mail stating, in effect, that it was premature for the parties to refinance the loan. Mr. Mindlin explained that his attorney had informed him that the Missouri statute of limitations, which applied to the Note, was not going to expire yet for some time:

> At some expense, I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding.

(*See* Exhibit H to Mrs. Zell's Affidavit.) *See also* Plaintiffs' Response to First Request for Admissions at p. 3 ("Plaintiffs admit the language quoted above is reflected in the indentified [sic] email..."). Mr. Mindlin then added that a refinancing agreement was not needed because: "I am making application to my bank for a loan to pay off .... all the principal due, but no interest" on the Note (*see* Exhibit H to Mrs. Zell's Affidavit).

In response, Mrs. Zell sent Mr. Mindlin an e-mail dated April 28, 2010 in which she refused to waive all of the interest due and indicated that she was still interested in refinancing the Note. Agreeing with Mr. Mindlin's statement that Missouri's statute of limitations had not yet expired, Mrs. Zell added that it was just a matter of time before it would expire, stating:

> I am sorry that you have recently had to waste money on a lawyer to tell you that you still have to pay back this loan. But, as your lawyer has now told you, you do. And, yes, your lawyer is also correct that there is still some time left on our original agreement. But it will not last indefinitely.

(*See* Exhibit K to Mrs. Zell's Affidavit.)

Thus, as these written exchanges demonstrate, after being advised by their respective attorneys, the parties both expressly agreed between themselves that the law of Missouri applied to their Note. (*See* Mrs. Zell's Affidavit at ¶ 34.) Since the parties made an effective choice of

law, that choice will apply. Furthermore, based on this understanding, the debtors continued to send payments to Mrs. Zell until September 13, 2010, after which the Plaintiffs commenced the present litigation. Between April 24, 2010 (when Mr. Mindlin acknowledged that the Note was governed by Missouri law) and September 13, 2010, the debtors mailed ten payments to Mrs. Zell. (*See* Mrs. Zell's Affidavit at ¶ 35.) These ten payments are completely inconsistent with opposing counsel's present argument that the Note became unenforceable on December 31, 2007.

Although neither Mrs. Zell's nor Mr. Mindlin's proposed refinancing agreements were ever executed, these proposals provide further evidence that both parties agreed that Missouri law applied to their Note. For both Mrs. Zell's and Mr. Mindlin's respective refinancing agreements contained a choice of law provision specifying that the Note was governed by Missouri law. Mrs. Zell's provision stated: "This Note will be governed by and construed in accordance with the laws of the State of Missouri." (*See* Exhibit M at p. 3 to Mrs. Zell's Affidavit.) Similarly, Mr. Mindlin's provision stated: "Choice of Law: All terms and conditions of this Note shall be interpreted under the laws of the State of Missouri." (*See* Exhibit I. at pps. 2-3 to Mrs. Zell's Affidavit.)

Taken together, all of the above meets the "persuasive evidence" test of the Restatement 2d of Laws, quoted approvingly by opposing counsel, for showing which state's laws the contracting parties wished to have apply to their agreement. As previously stated, after being advised by an attorney, Mr. Mindlin wrote to Mrs. Zell that he had "determine[d] that the current agreement is binding under Missouri law and .... a Missouri court will hold that ... [it] is ... binding." Of course, typically the parties to a note would have indicated their choice of law long before the statute of limitations had expired in one of the states potentially available for the

choice-of-law decision. However, what is so unusual about the instant case is that Mr. Mindlin agreed with Mrs. Zell that the Note that he and the other debtors had given to Mrs. Zell was governed by Missouri law ***over two years after Ohio's statute of limitations would have made that Note unenforceable***. And Mr. Mindlin even said so on the advice of counsel! Accordingly, there is every reason for this Court to apply the parties' choice of law of Missouri.

II. EVEN IF THE PARTIES DID NOT MAKE AN EFFECTIVE CHOICE OF LAW, MISSOURI LAW STILL APPLIES DUE TO THE MANY CONTACTS INVOLVING MISSOURI

A. Opposing Counsel's Motion for Summary Judgment and Mr. Mindlin's Affidavit Misstate the Contacts Involving Missouri

In his Motion for Summary Judgment at p. 6, opposing counsel states:

> The undisputed facts clearly support application of Ohio law to the Promissory Note. The agreement was drafted by Defendant or her agent, in Ohio. [See Numbered Paragraph 2 of Affidavit of Michael Mindlin ("The Promissory Note ... that is the subject of this action was drafted in Ohio by Eileen Zell, or someone acting on her behalf")]. The funds were transferred to the Defendant from an Ohio financial institution. [See Numbered Paragraph 6 of Affidavit of Michael Mindlin ("The funds were transferred from an Ohio financial institution to us in Missouri")]. The payments, as expressly directed in the agreement, were sent to Ohio. [See Numbered Paragraph 7 of Affidavit of Michael Mindlin ("The place of performance, ie. payment, never changed from Ohio during the term specifically set forth in the note")]. Any breach of the agreement for failure to pay would arise in the State of Ohio. All of the facts and circumstances surrounding the creation of debt, its repayment and alleged breach all occurred in Ohio and should be determined through the application of Ohio law.

The only problem with this is that opposing counsel has misstated virtually all of the facts. As will be shown below, counsel has misstated who drafted the Note, the state in which the Note was drafted, the state from which the loan funds were transferred, the location for the payments specified in the Note, the location to which the vast majority of the payments were in fact mailed, and thus the location where the breach occurred.

1. **The Note Was Drafted by Mr. Mindlin in Missouri**

Although both Mr. Mindlin and his counsel have stated that (to quote Mr. Mindlin's Affidavit) the loan agreement "was drafted in Ohio by Eileen Zell, or someone acting on her behalf," there were actually two loan agreements and they were both drafted by Mr. Mindlin (or his agent) in Missouri. The parties' initial agreement was a letter-contract written on Suttle Mindlin corporate stationery and dated December 12, 2000 (*see* Exhibit A to Mrs. Zell's Affidavit). This agreement was drafted, typed, and signed by Mr. Mindlin (or his agent) in Missouri and then faxed from Missouri to Mrs. Zell in Ohio. (*See* Mrs. Zell' Affidavit at ¶ 3.) The agreement began by stating:

> This letter will confirm the basic terms of our loan agreement, which will be finalized with a more comprehensive agreement, written by your attorney. This letter will give you a legal document and the assurances necessary to permit the immediate wire transfer of funds.
>
> You have graciously agreed to loan me a total of $90.000 in two equal payments made this month and next. I have agreed to pay a simple interest rate of 5% on all unpaid balances. Furthermore, I have agreed to be personally responsible for this loan, which is to be paid in full no later than one year from this date.

As indicated in the initial agreement, this agreement was to be superseded later by a second "more comprehensive agreement." That second agreement is the "Note" dated January 30, 2001 for $90,000, which was signed by Mr. Mindlin, Ms. Kurila, and Mr. Suttle (*see* Exhibit D to Mrs. Zell's Affidavit). However, this Note was also drafted and typed by Mr. Mindlin (or his agent) in Missouri and was then mailed by him to Mrs. Zell in Florida. (*See* Mrs. Zell's Affidavit at ¶ 7 & 7(a).)

At the time, Mrs. Zell was being represented by attorney Roger T. Whitaker. (*See* Mr. Whitaker's Affidavit at ¶ 3, attached hereto as Exhibit 2. Exhibit 2 will be referred to throughout

this Memorandum as "Mr. Whitaker's Affidavit.") Mr. Whitaker prepared for Mrs. Zell two sets of two sample promissory notes (hereinafter, "sample notes") for $45,000 each. (*See* Mr. Whitaker's Affidavitat at ¶ 3-5.) Within each set, one sample note was dated "December ____, 2000" and the other one was dated "January ____, 2001." (*See* Exhibits B and C to Mr. Whitaker's Affidavit.) However, as Mr. Whitaker has made clear, his firm did ***not*** prepare the $90,000 Promissory Note dated January 30, 2001 signed by Suttle Mindlin, L.L.C., Michael Mindlin, Elizabeth [Kurila] Mindlin and David Suttle. (*See* Mr. Whitaker's Affidavit at ¶ 8.)

Mrs. Zell then faxed these sample $45,000 Notes to Mr. Mindlin. From these samples, Mr. Mindlin (or his agent) then created the Promissory Note that forms the parties' current agreement. (*See* Mrs. Zell's Affidavit at ¶ 7(a).) This Note differed from Mr. Whitaker's samples in several respects, both material and trivial. First, the amount of the Note was $90,000 (rather than $45,000). Second, the date on the Note was January 30, 2001 (instead of "December ___ 2000" or "January ___ 2001"). Third, the spacing of the samples and the Note were slightly different. And, finally, the Note contained a typographical error ("pat" instead of "part") in the beginning of the second-to-the-last line.

Accordingly, contrary to both Mr. Mindlin's Affidavit and his counsel's Motion for Summary Judgment, Mr. Mindlin (or his agent) drafted and typed both the initial loan agreement and the Note, and Mr. Mindlin (or his agent) did this in Missouri.

2. **<u>The Loan Funds Were Not Sent from Ohio</u>**

Although both Mr. Mindlin and his counsel have stated that (to quote Mr. Mindlin's Affidavit) the loan funds "were transferred from an Ohio financial institution," they were in fact transferred by The Charles Schwab Corporation, a national brokerage firm that is headquartered

in San Francisco, California. *See* http://www.aboutschwab.com/about/contact/. On December 11, 2000 and January 3, 2001, Mrs. Zell faxed to Schwab two letters authorizing wire transfers to the debtors totaling $90,000 (*see* Exhibit B to Mrs. Zell's Affidavit). As can be seen from these letters, Mrs. Zell contacted Schwab's Wire Fund Department in Indianapolis, Indiana. Accordingly, no part of the transfer of the loan funds involved the state of Ohio. Thus, the representation of opposing counsel that "the facts and circumstances surrounding the creation of [the] debt ... all occurred in Ohio" is false.

3. The Location for the Payments Specified in the Note, the Location Where the Vast Majority of the Payments Were Mailed, and thus the Location Where the Breach Occurred Ended Up Not Being in Ohio

As previously stated, Mr. Mindlin claimed in his Affidavit that "The place of performance, ie. payment, never changed from Ohio during the term specifically set forth in the note," while opposing counsel claimed in his Motion for Summary Judgment that "The payments, as expressly directed in the agreement, were sent to Ohio."

In analyzing these two similar claims, the first question is, What is "the term specifically set forth in the note"? At first glance, that would appear to be the time between the commencement of the Note on January 30, 2001 and December 31, 2001, the date that the Note was due. However, the Note also states: "All persons now or hereafter liable for the payment of the principal or interest due on this Promissory Note, or any part thereof, ... agree that the time for the payment or payments of any pa[r]t of this note may be extended without releasing or otherwise affecting their liability on this note" (*see* Exhibit D to Mrs. Zell's Affidavit). Since the Note has not yet been paid, the term of the Note covers the period January 30, 2001 to the present.

The next question is, Where is the "place of performance" of the Note during this period? To begin with, the Note states that payment was to be made "to the order of Eileen Zell, at 5953 Rockhill Road, Columbus, Ohio 43213, or such other location as the holder hereof may specify from time to time..." (*see* Exhibit D to Mrs. Zell's Affidavit). At the time that the Note was made, Mrs. Zell lived in Ohio. Although the Note was supposed to have been paid in full within one year (or by December 31, 2001), the debtors made no payments until 2002. The debtors mailed Mrs. Zell $5,000 on June 25, 2002 and another $5,000 on December 23, 2002 (totaling $10,000) to her residence in Columbus, Ohio. Thereafter, no further payments were made until October 2007. (*See* Mrs. Zell's Affidavit at ¶ 9.)

Beginning in 2005, Mrs. Zell moved to Florida, formally changed her legal domicile to Florida, and typically remained in Florida for all but the summer months of the year. (See Mrs. Zell's Affidavit at ¶ 22 & 25.) Mrs. Zell then informed the debtors to start sending their payments to her Florida address, which was: 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. (See Mrs. Zell's Affidavit at ¶ 23.) Although it was never executed, the proposed refinancing agreement that Mr. Mindlin drafted and sent to Mrs. Zell on August 9, 2009 is evidence that Mr. Mindlin knew that the place of payment had now changed to 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. For Mr. Mindlin's proposed refinancing agreement contained the following provision: "Place of Payment: All payments due under this note shall be made to Eileen Zell, 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408." (*See* Exhibit L, pps. 2-3, to Mrs. Zell's Affidavit.)

The next time that the Plaintiffs mailed a payment to Mrs. Zell was on October 18, 2007. By then, of course, Mrs. Zell was living in Florida. Accordingly, the debtors sent this payment to

Mrs. Zell's Florida address. The debtors then continued to send all of Mrs. Zell's subsequent payments to her in Florida. The only exceptions to this were the few occasions in which the debtors sent payments to Mrs. Zell during the summers, when she was visiting family in Ohio. As a result, the vast majority of the forty-one payments (totaling $41,800) that the debtors made to Mrs. Zell from October 18, 2007 to September 13, 2010 were all mailed to Mrs. Zell in Florida, compared with the only two payments (totaling $10,000) that were sent to Mrs. Zell in Ohio prior to October 18, 2007. (*See* Mrs. Zell's Affidavit at ¶ 25.)

From the above it can be established that, during the term of the Note, the place of performance (i.e., payment) of the Note became Mrs. Zell's address in Florida. Accordingly, opposing counsel's claim that "[t]he payments, as expressly directed in the agreement, were sent to Ohio" is false on two points. First, the agreement provided for a change in the location of the payments and that change was then made. Second, as a result of that change, the vast majority of all the payments made were sent to Mrs. Zell's Florida address. Thus, for the same reason, counsel's allegation that the breach of the Note occurred in Ohio is also false.

With regard to the initial loan agreement, it did not specify the location for the payments.

B. If Ambiguity Exists, the Court Must Construe the Terms Against the Debtors

In his Motion for Summary Judgment at p. 4, opposing counsel states: "The mention of both Ohio and Missouri in the Promissory note are unclear and ambiguous." Specifically, "[t]he notation 'St. Louis, Missouri' and the specific location for payment in Ohio are at best inconsistent and ambiguous." *Id.* at p. 5.

To begin with, there is nothing inconsistent about this information. On the one hand, writing "St. Louis, Missouri" in the top right-hand corner of the Note tells where the Note was

made for the purpose of determining which state's law would govern it. On the other hand, providing Mrs. Zell's address and then stating that Mrs. Zell could designate another location to which she wanted her payments sent informed the debtors where to send their payments.

In his Motion for Summary Judgment at p. 4, opposing counsel goes on to state: "Where ambiguity exists ... we must strictly construe those terms against the party who drafted the terms (citation omitted)." However, counsel also stated erroneously that "the Defendant ... was responsible for drafting the agreement." *Id.* at 5. Counsel, therefore, concluded (also erroneously) that "construing the ambiguity against the Defendant" is what the Court must do. *Id.*

Since both the initial agreement and the Note were drafted by Mr. Mindlin (or his agent) (*see* Mr. Whitaker's Affidavit at ¶ 8), according to opposing counsel's own words whatever ambiguity exists in those documents should be resolved against Mr. Mindlin. Therefore, if the Note is unclear or ambiguous as to which state's law should apply, then according to opposing counsel this Court should find that the law of Missouri applies. Mrs. Zell's counsel concurs.

C. Missouri Law Applies Due to the Many Contacts Involving Missouri

1. <u>The Proper Test is the One Set Forth in the Restatement of the Law 2d</u>

When the locations where the relevant contacts took place are identified correctly, it is apparent that the law of Missouri -- not Ohio -- applies to the Note. This is based on recent Ohio Supreme Court cases, which adopt the multiple-factor test set forth in the Restatement of the Law 2d, Conflict of Laws Section 188. *See Gries Sports Enterprises, Inc. v. Modell* (1984), 15 Ohio St.3d 284, 287, 473 N.E.2d 807, 810; *In Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 477, 747 N.E.2d 206, 209. In *Mickel v. Raymond Lovelady Builders Aids, Inc.* (Ohio 6th Dist., Aug. 31, 1984) C.A. No. L-83-415, 1984 WL 7954, the Court noted that the

modern trend is away from the rigid adherence to the traditional rules and toward following the Restatement rules. Thus, modern cases cite to the Restatement of the Law 2d, Conflict of Laws, while older cases rely on traditional tests and generalizations.

On the one hand, some of those traditional tests are persuasive. An example of this can be found in *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 143, 135 N.E. 2d 896 (citing 17 Corpus Juris Secundum, 338, Section 12c; Restatement of the Law of Conflict of Laws, 408, Section 332), which held: "The general rule is that a contract is governed by the law of the place where it was made or entered into." This, of course, would be Missouri, where the Note was drafted, typed, and signed. On the other hand, the traditional tests are inconsistent, especially when looking at very old cases. An example of this are the 1892, 1897, 1904, 1915, and 1950 cases cited in opposing counsel's Motion for Summary Judgment at pps. 5-6 for the rule that the place of performance decides which state's law is to be applied. Therefore, to establish consistency, the modern trend is to use the multiple-factor test set forth in the Restatement.

Restatement of the Law 2d, Conflict of Laws Section 188, states in pertinent part at 575:

> (2) In the absence of an effective choice of law by the parties (see Section 187), the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiations of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties....

2. **Missouri Law Applies Under the Test Set Forth in the Restatement of the Law**

In the instant case, the "place of contracting" was St. Louis, Missouri, where both loan agreements were drafted, typed, and signed. Also evidencing where the contract was made was the notation "St. Louis, Missouri" in the top right-hand corner of the Note. (*See* Mr. Whitaker's Affidavit at ¶ 6.)

For the "place of negotiations," the parties negotiated on the telephone. At all times during the negotiations, Mr. Mindlin was in Missouri. However, while Mrs. Zell was in Ohio when the negotiations began in December 2000, she left for Florida on January 4, 2001 and, thus, was in Florida when the negotiations ended. (*See* Mrs. Zell's Affidavit at ¶ 6.) Indeed, as can be seen from the envelope in which it was mailed (*see* Exhibit C to Mrs. Zell's Affidavit), Mr. Mindlin mailed the signed Note (dated January 30, 2001) to Mrs. Zell in Florida.

The "place of performance" could be looked at either from whence the loan funds were coming (a San-Francisco-based brokerage firm) or where they were going (Suttle Mindlin LLC, a Missouri corporation located in St. Louis). Or the "place of performance" could perhaps be the location where repayment of the loan funds was to be made or was in fact made. On this issue, the facts show that the location of repayment was changed from Ohio to Florida after only two payments totaling $10,000 had been made. As a result, the vast majority of the forty-three (43) repayments (totaling $51,800) that the debtors made to Mrs. Zell were sent from Missouri to Florida. (*See* Mrs. Zell's Affidavit at ¶ 25.)

The "subject matter of the contract" was money, which was wired to the debtors' Missouri bank from Mrs. Zell's San Francisco-based brokerage firm. The money was going to be used to help finance Suttle Mindlin LLC, a Missouri corporation. *See* Plaintiffs' Complaint at

¶ 5 ("The purpose of the Promissory Note was to assist Plaintiff Michael Mindlin and David Suttle in the operation of their struggling architecture firm that had been created in 1995, Suttle Mindlin, LLC"). Under the initial agreement (*see* Exhibit A to Mrs. Zell's Affidavit), the money was originally loaned to Suttle Mindlin LLC only.

Finally, with regard to the "domicile, residence, nationality, place of incorporation and place of business of the parties," all of the individual debtors -- Mr. Mindlin, Ms. Kurila, and Mr. Suttle -- lived in St. Louis, Missouri at the time of contracting and still live there. Furthermore, their former business -- Suttle Mindlin LLC -- was a Missouri for-profit corporation. (*See* Mrs. Zell's Affidavit at ¶ 2.) While Mrs. Zell was a resident of Ohio at the time the contract was made, she subsequently moved to Florida and formally changed her legal domicile to Florida. (*See* Mrs. Zell's Affidavit at ¶ 22.) As previously stated, Mr. Mindlin even mailed the signed Note to Mrs. Zell in Florida. (*See* Exhibit C to Mrs. Zell's Affidavit.)

Accordingly, under both the traditional test of where the contract was made followed by *Standard Agencies, Inc. v. Russell* (1954), 100 Ohio App. 140, 143, 135 N.E. 2d 896 or the more expansive modern trend following the Restatement rules, it is apparent that the law of Missouri -- not Ohio -- applies to the Note. Virtually every factor important under the Restatement rules involved the state of Missouri. On the other hand, the only involvement with Ohio was Mrs. Zell's temporary residence there. However, she left Ohio halfway through the contract negotiations, later moved permanently away from Ohio and changed her domicile to another state, changed the place of payment under the Note from Ohio to another state as specifically authorized by the Note, and as a result the debtors mailed the vast majority of their payments (in both quantity and size) to Mrs. Zell outside of Ohio.

3. Even Under the Cases Using the Place-of-Performance Rule Cited by Opposing Counsel, Ohio Law Would Still Not Apply

In his Motion for Summary Judgment at pps. 5-6, opposing counsel has cited four cases decided between 1892 and 1915 and one case decided in 1950 for the proposition that "the place of performance decides which state's law is [to] be applied in interpreting the terms of a promissory note." As previously stated, these old cases follow the former practice of using a single factor to determine the choice of law, a practice that has now been replaced (in Ohio and elsewhere) by the multiple-factor test set forth in the Restatement of the Law 2d. Also, even under the former practice, a more recent one-test-fits-all rule in Ohio was the test followed in *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 135 N.E. 2d 896. There, the Court held: "The general rule is that a contract is governed by the law of the place where it was made or entered into." 100 Ohio App. at 143. Thus, as previously pointed out, under the test enunciated in either *Standard Agencies* or the Restatement, Missouri law applies to the Note in the instant case. However, what will be shown next is that even the old cases cited by opposing counsel that use the place-of-performance test do not support the application of Ohio law to the instant case.

a. The Place of Performance Was Changed from Ohio to Florida

To begin with, the Note states that payment was to be made "to the order of Eileen Zell, at 5953 Rockhill Road, Columbus, Ohio 43213, or such other location as the holder hereof may specify from time to time..." (*see* Exhibit D to Mrs. Zell's Affidavit). At the time that the Note was made, Mrs. Zell was spending most of the year in Ohio and the rest of the year in Florida. Accordingly, the debtors mailed their first two payments (totaling $10,000) to her in Ohio.

However, while the terms of the loan were being negotiated, Mrs. Zell went to Florida and, thus, the debtors mailed the signed Note to her there. (*See* Mrs. Zell's Affidavit at ¶ 6-7.)

Then, in 2005, Mrs. Zell permanently moved to Florida and formally changed her legal domicile to Florida. (*See* Mrs. Zell's Affidavit at ¶ 22.) Accordingly, Mrs. Zell then informed the debtors to start sending their payments to her at her Florida address, which was: 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. (*See* Mrs. Zell's Affidavit at ¶ 23.) Although it was never executed, the proposed refinancing agreement that Mr. Mindlin drafted and sent to Mrs. Zell on August 9, 2009 is evidence that Mr. Mindlin knew that the place of payment had now changed to 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. For Mr. Mindlin's proposed refinancing agreement contained the following provision: "Place of Payment: All payments due under this note shall be made to Eileen Zell, 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408." (*See* Exhibit L, pps. 2-3, to Mrs. Zell's Affidavit.)

With their third payment, the debtors started sending their payments to Mrs. Zell in Florida. The only exceptions to this were the few occasions in which the debtors sent payments to Mrs. Zell during the summers, when she was visiting family in Ohio. As a result, the vast majority of the forty-one payments (totaling $41,800) that the debtors made to Mrs. Zell from October 18, 2007 to September 13, 2010 were all mailed to Mrs. Zell in Florida, compared with the two payments (totaling $10.000) that were sent to Mrs. Zell in Ohio prior to October 18, 2007. (*See* Mrs. Zell's Affidavit at ¶ 25.)

Accordingly, the evidence clearly shows that the place of performance was changed from Ohio to Florida. First, the Note specifically allowed for a change in the location of the payments

and that change was then made. Second, as a result of that change, the vast majority of the total payments made were sent to Mrs. Zell's Florida address. Thus, even under the old place-of-performance rule, Ohio law would not apply to the Note.

b. The Place-of-Performance Test Is Not Applicable Where Opposing Counsel Has Argued There Was No Default

As previously stated, the most-recent case cited by opposing counsel on behalf of the place-of-performance test is *Meekison v. Groschner* (1950) 153 Ohio St. 301, 91 N.E. 2d 680, 41 OO 298. As counsel noted in his Motion for Summary Judgment, *Meekison* was based on *Drake v. Found Treasure Mining Co.* (1892) 53 F. 474. However, as the Courts in both *Meekison* and *Drake* have explained, what is meant by "place of performance" is actually "place of default." For example, opposing counsel has quoted with approval the *Meekison* Court as holding:

> When the note was executed in Michigan and made payable six months after date at Napoleon, Ohio, no cause of action had arisen on it. It must be assumed that it was expected that the note would be paid and therefore there could be no cause of action until there was a default. Where was that default? The Heaths were obligated to pay the note at Napoleon, Ohio. If it was not paid at Napoleon on its due date, a default would occur at Napoleon and a cause of action would arise for the first time because of the default at Napoleon. It seems to us unassailable that the cause of action arose where the default occurred.

153 Ohio St. at 307. To arrive at this conclusion, the *Meekison* Court quoted *Drake* as holding:

> The note, although executed in California, was made payable in the state of Nevada. The cause of action arose in this state ***upon the default of defendant to pay the note***, and the remedy for the collection of the amount due thereon is to be controlled by the laws of this state, where the contract was to be performed.

Id. at 306 (emphasis added).

Now, let us consider in which state "the default of ... [the debtor] to pay the note" occurred in the instant case. First, where do the Plaintiffs and Third-Party Defendant David Suttle allege the default occurred? Answer: nowhere. That is, both the Plaintiffs and the Third-Party

Defendant categorically deny that any "default" has yet occurred at all. To understand how this could be, one must first review the terms of the Note. As shown in Exhibit D to Mrs. Zell's Affidavit, the Note in the instant case states in pertinent part:

> FOR VALUE RECEIVED, the undersigned, jointly and severally promise to pay to the order of Eileen Zell, at 5953 Rockhill Road, Columbus, Ohio 43213, **or such other location as the holder hereof may specify from time to time**, on or before **December 31, 2001**, the principal sum of Ninety Thousand Dollars ($90,000), together with interest thereon, **from the date hereof until paid**, at the rate of five percent (5%) per annum.
>
> * * *
>
> All persons now or hereafter liable for the payment of the principal or interest due on this Promissory Note, or any part thereof, ... agree that **the time for the payment or payments of any pa[r]t of this note may be extended** without releasing or otherwise affecting their liability on this note. (Emphasis added.)

The most important term in the Note for these purposes is the due date of "December 31, 2001." However, regarding this due date, the Plaintiffs stated in their Complaint at ¶ 30 (f): "[T]he parties amended the terms of the ***original*** promissory note to allow for the delay in principal payments..." (emphasis added). Similarly, in the Third-Party Defendant's Motion for Relief from Default Judgment at p. 2, he stated: "**During the repayment period of the loan**, the parties mutually agreed to modify the repayment terms..." (emphasis added).

If the above is somewhat ambiguous, the Plaintiffs have made their position that no default has yet occurred crystal clear in other parts of their many court filings. Take, for example, the Plaintiffs' Answers to Mrs. Zell's Counterclaim:

Counterclaim at ¶ 7: "The Plaintiffs failed to make any payments to Mrs. Zell in 2001, 2003, 2004, 2005 and 2006."

Answer at ¶ 7: "Plaintiffs admit the averments contained in Paragraph Seven (7) of Defendant's Counterclaim to the extent that no payments were made during the referenced period of time, however, Plaintiffs deny they 'failed' to make payments as the payment obligation had been modified by the parties."

Counterclaim at ¶ 6: "The Plaintiffs were required to pay back the Note by December 31, 2001, which they failed to do. As such, the Plaintiffs have been in default of the Note since December 31, 2001."

Answer to at ¶ 6: "Plaintiffs deny averments contained in Paragraph Six (6) of Defendant's Counterclaim."

Counterclaim at ¶ 8: "Plaintiffs defaulted on the loan on December 31, 2001 without having made any payments to Mrs. Zell up to that time."

Answer at ¶ 8: "Plaintiffs deny the averments contained in Paragraph Eight (8) of the Defendant's Counterclaim."

Now, look at the Plaintiffs' Response to Mrs. Zell's First Requests for Admissions:

Requests for Admissions at ¶ 14: "Admit that Mrs. Zell had not agreed to modify the terms of the Note as of the Note's due date of December 31, 2001."

RESPONSE: "Deny."

Requests for Admissions at ¶ 15: "Admit that you did not make any payments on the Note on or before December 31, 2001."

RESPONSE: "Admit."

Requests for Admissions at ¶ 16: "Because you did not pay off the Note by December 31, 2001, admit that you defaulted on the Note as of December 31, 2001."

RESPONSE: "Deny."

Thus, according to the Plaintiffs and the Third-Party Defendant, they have not yet defaulted on the Note because, as they have stated, "during the repayment period of the loan" the due date of December 31, 2001 specified in the Note was "amended ... to allow for the delay in principal payments." However, if there has been no "default," then it cannot be said that the

default occurred in Ohio. And, if the default did not occur in Ohio, then even under *Meekison* and *Drake* the law of Ohio would not apply to the Note.

c. The Place-of-Performance Test Should Be Used to Permit, Not to Bar, an Action Under the Statutes of Limitation

There is still another reason that, even under the *Meekison* and *Drake* cases cited by opposing counsel, the choice-of-law rules for Ohio would still not apply to the Note in the instant case. This reason has to do with the very principles underlying those rules. As the *Meekison* court itself stated: "This court, in two recent cases, has shown its philosophy to be in favor of not barring an action which has accrued to an Ohio citizen unless the statutes of limitation unequivocally require it." *Meekison v. Groschner* (1950) 153 Ohio St. at 309 (citing *Commonwealth Loan Co., Inc. v. Firestine*, 148 Ohio St. 133, 73 N.E. 2d, 501; *Couts v. Rose*, 152 Ohio St. 458).

In other words, the choice-of-law rules were never intended to be used for the purpose to which opposing counsel is attempting to use them here -- to completely extinguish the rights of a creditor who, in good faith, loaned a substantial sum of money to a group of debtors who, in bad faith, then failed to repay what they rightfully owed. For it is one thing for a court to make a choice of law between two or more otherwise fair and equitable options in which neither party will be unduly prejudiced or harmed -- which is the underlying goal of the choice-of-law rules. Yet it is quite another thing for a court to make a choice of law where one of the parties will be completely emasculated and his or her rights summarily extinguished. For the purpose behind the choice-of-law rules as well as all other rules of law is to avoid injustice -- not to cause it.

Especially considering that the choice-of-law rules are so inconsistent and ever-changing, the choice of law made by the court should never be one that, by itself, strips one of the parties of

all of his or her rights -- at least not where there exists another logical and rational choice that would leave both parties with their rights intact. As the *Meekison* Court concluded:

> Statutes of limitation are statutes of repose and when they are not applicable it is not unjust that a person who has received full and complete consideration for the making of a contract should be compelled to execute her part of it. There is much to be said for the philosophy ..., "They hired the money, didn't they?"

Similarly, in the instant case, the debtors "hired" the $90,000 that they borrowed from Mrs. Zell. Then, the debtors took advantage of Mrs. Zell's generosity in having given them more and more time in which to repay the money. And. now, the debtors are trying to use that generosity against Mrs. Zell in a callous attempt to avoid having to pay back the money that they borrowed. As the most-recently decided case cited by opposing counsel in support of the place-of-performance test (*Meekison*) makes clear, the purpose of the courts is to enforce both sides of a contract -- not to allow one side to enjoy the fruits of a contract and then evade his or her responsibilities under it.

In a word, the application of Ohio's statute of limitations to the instant case would be manifestly "unjust." While many other reasons have been given here to urge this Court to apply Missouri law instead, avoiding an injustice is among the most important.

III. OPPOSING COUNSEL MISAPPLIED OHIO LAW

In his Motion for Summary Judgment at p. 6, opposing counsel states: "Ohio Revised Code Section 1321.17 expressly provides the Promissory Note is governed by Ohio law regardless of any statement in the note to the contrary." Then, after quoting a portion of ORC 1321.17, opposing counsel concludes: "Eileen Zell was a resident of Ohio at the time the Promissory Note was executed. In fact, her specific address was provided as the location for payment. No further analysis is necessary and Ohio law should be applied."

ORC 1321.17, which falls under Ohio's Small Loans Act (ORC 1321.01-1321.99), "only applies to small loan companies doing business in Ohio." *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 143, 135 N.E. 2d 896. In other words, ORC 1321.17, which calls itself a "regulatory loan law," is part of a consumer-protection statute. Also, under ORC 1321.02, the maximum amount of the loan governed by this statute is $5,000.

This is all set out in 9-52 OH Transaction Guide: Business & Comm Law & Forms § 52.60, which states in pertinent part:

> The small loan provisions of the Ohio Revised Code Annotated [Ohio Rev. Code Ann. §§ 1321.01-1321.99; see Ohio Admin. Code 1301:8-2], referred to in this chapter as the Small Loans Act, govern certain lenders who make loans in amounts of $5,000 or less [Ohio Rev. Code Ann. §§ 1321.01-1321.211], lenders who make second mortgage loans [Ohio Rev. Code Ann. §§ 1321.51-1321.60], and insurance premium finance companies [Ohio Rev. Code Ann. §§ 1321.71-1321.83]. The provisions also regulate assignments of wages [see Ohio Rev. Code Ann. §§ 1321.31-1321.33]. Violation of the provisions may result in fine or imprisonment[see Ohio Rev. Code Ann. § 1321.99].

Thus, the purpose of ORC 1321.17 is to protect Ohio borrowers who do business with small lenders. However, Mrs. Zell -- who, at the time of the loan only, was a resident of Ohio -- was the lender in this case -- not the borrower -- and all of the borrowers were residents of Missouri. Thus, ORC 1321.17 does not apply to the instant case.

IV. MISSOURI'S STATUTE OF LIMITATIONS HAS NOT YET EXPIRED

Under Missouri law, the statute of limitations for a promissory (term) note is ten (10) years. *See* Section 516.110 R.S.Mo. Furthermore, the statute of limitations does not begin to run until the last payment is due. *See* Section 516.100 R.S.Mo.. *In re Hall*, Case No. 00-43421-13, U.S. Bankruptcy Court for the Western District of Missouri, 265 B.R. 435 (2001), *Sabine v. Leonard*, 322 S.W.2d 831 (1959), and *Hemar Insurance Corp. of America v. Ryerson*, 200 S.W. 3d 170 (2006).

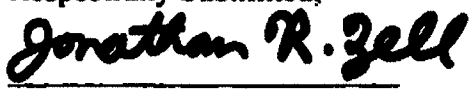
However, courts have tolled the statute of limitations when the party originally obligated on the note continues to make payments beyond the note's stated term. *See Corrales v. Murwood, Inc.*, 232 S.W.3d 609 (2007).

If we apply these two statutes and four cases to the facts surrounding the Note in the instant case, it is clear that the holder may at a minimum bring suit against any or all four makers (Third-Party Defendant Suttle Mindlin, L.L.C., Plaintiff Michael Mindlin, Plaintiff Elizabeth Kurila, and/or Third-Party Defendant David Dale Suttle) until December 31, 2011, ten (10) years after the due date stated in the Note of December 31, 2001. In addition, the statute of limitations may have been tolled for the parties who have been making payments through 2010 (meaning that the statute will actually run for those parties in 2020).

V. CONCLUSION

For the reasons stated above, Mrs. Zell respectfully requests that the Court deny the Plaintiffs' and Third-Party Defendant's Motion for Summary Judgment.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via regular U.S. Mail, postage pre-paid, this 19 day of July, 2011, upon:

Gregory S. Peterson, Esq.
Peterson Ellis Fergus & Peer, LLP
250 Civic Center Drive, Suite 650
Columbus, Ohio 43215
Counsel for Plaintiff and Third-Party Defendant David Suttle

David Dale Suttle
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Villa Ridge, Missouri 63089
Third-Party Defendant

Mindlin Suttle, LLC
345 Marshall Avenue, Suite 102
St. Louis, Missouri 63119
Third-Party Defendant

Jonathan R. Zell

Jonathan R. Zell (0036831)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
	:	
Plaintiffs,	:	Case No.: 10 CV-10-14965
	:	
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
David Dale Suttle, et al.,	:	
	:	
Third-Party Defendants	:	

AFFIDAVIT OF DEFENDANT/THIRD-PARTY PLAINTIFF EILEEN ZELL

State of Ohio :

:ss

Franklin County :

Now comes the affiant, Defendant/Third-Party Plaintiff Eileen Zell, first being duly cautioned and sworn according to law, and deposes and says that the following is true to the best of her personal knowledge:

1. My name is Eileen Zell and I am 82 years of age.

2. In early December 2000, my nephew Michael Mindlin (hereinafter, "Mr. Mindlin") called me on the telephone several times to discuss his request that I loan him $90,000 at a five percent (5%) annual interest rate for one year to help finance his architectural firm, Suttle Mindlin LLC. When we spoke, I was in Columbus, Ohio, where I lived at that time. Mr. Mindlin was in St. Louis, Missouri, where he lived and still lives and where Suttle Mindlin LLC

was located. Some of the issues we discussed were whether the money would be loaned only to Mr. Mindlin personally; to his company, Suttle Mindlin LLC.; or to Mr. Mindlin, his business partner David Suttle, and their wives.

3. On December 12, 2000, Mr. Mindlin prepared and then sent to me by fax a letter-contract (a true and accurate copy of which is attached hereto as Exhibit A), written on Suttle Mindlin corporate stationery, dated December 12, 2000, and signed by Mr. Mindlin on behalf of Suttle Mindlin LLC. The letter, which stated that it was to be superseded later by a second "more comprehensive agreement," gave some details about the loan.

4. On December 11, 2000 and then again on January 3, 2001, I faxed two letters (true and accurate copies of which are attached hereto as Exhibit B), to the Wire Transfer Department, in Indianapolis, Indiana, of The Charles Schwab Corporation, my brokerage firm. In each of these letters, I authorized the transfer of $45,000 (for a combined total of $90,000) to the Missouri bank account of Suttle Mindlin LLC, as Mr. Mindlin had requested.

5. In early December 2000, I contacted an attorney, Roger T. Whitaker, to prepare some sample promissory notes (hereinafter, "sample notes") for me to give to Mr. Mindlin to help him in creating our more comprehensive loan agreement. The sample notes that Mr. Whitaker gave to me, which I faxed to Mr. Mindlin, were for $45,000 each. In addition, they came in sets of two, one of which was dated "December ___ , 2000" and the other of which was dated "January ____ , 2001." Furthermore, because Mr. Mindlin and I had not yet decided who was going to sign for the loan, each set of sample notes differed in the signature lines they contained. Some were to be signed by only Mr. Mindlin, while others were to be signed by Messrs. Mindlin and Suttle as well as their wives.

6. On January 4, 2001, while Mr. Mindlin and I were still negotiating the language that would be used in the loan agreement, I flew to Florida where I was going to be spending part of the winter. I took Southwest Airline's flight #1492 from Columbus to West Palm Beach.

7. As can be seen from the envelope in which it was mailed (a true and accurate copy of which is attached hereto as Exhibit C), while I was still in Florida I received in the mail from Mr. Mindlin one Promissory Note (hereinafter, "the Note") dated January 30, 2001 for $90,000 at a five percent (5%) annual interest rate. This Note (a true and accurate copy of which is attached hereto as Exhibit D) had been signed by Mr. Mindlin, Mr. Mindlin's wife (Elizabeth Kurila), and Mr. Suttle (hereinafter, collectively referred to as "the debtors").

a. From looking at the Note, it was apparent that this was not the same document as any of the sample notes that Mr. Whitaker had prepared. However, the Note was similar to the samples in so many respects that it was clear that the Note had been based on the samples. Accordingly, Mr. Mindlin (or his agent) must have drafted and typed the Note in Missouri.

b. In the Note, the debtors promised to use their "best efforts to pay 50% of the principal by June 30, 2001 and 75% of the principal by September 30, 2001" or, in any event, to repay all of the the interest and principal by December 31, 2001. There were several other important terms set out in the Note, but I will deal with them later.

8. However, the deadline of December 31, 2001 for full repayment passed without the debtors having paid me any money, without having contacted me to say that they were going to miss the deadline, and without having made any other arrangements to pay me the money. Furthermore, although the loan was supposed to have been repaid within eleven months, today -- over ten years later -- it still remains unpaid. The debtors have barely kept up with the interest payments. As shown in the attached spreadsheet (see Exhibit E), the amount presently due is approximately $90,000, the same as the original amount borrowed.

9. On June 25, 2002, the debtors sent me their first payment of $5,000. On December 23, 2002, I received another $5,000. The debtors mailed these two payments to me in Ohio. However, I received no further payments until October 2007.

10. Because Mr. Mindlin was my nephew, I was hesitant to foreclose on his and the other debtors' loan. However, since there was no repayment schedule set out in the Note after December 31, 2001 (when the Note became due), I had no power to compel the debtors to make payments of any particular size or even any payments at all. Instead, I was forced to wait until the debtors chose to pay me. Since just waiting for payments was not an effective strategy, I had to come up with my own informal collection method. This was to call or write to the debtors and complain about their lack of payments. Accordingly, on May 22, 2003, I mailed a letter (a true and accurate copy of which is attached hereto as Exhibit F) addressed to Messrs. Mindlin and Suttle, stating in part: "You made no payments on this loan on or before December 31, 2001. During all of 2002, you made only two payments of $5,000 each, totaling $10,000. So far, in 2003, you have made no payments at all." I then asked them to send me a payment plan, noting that on several occasions during the past year or more Mr. Mindlin had promised to send me one, but never did. However, Messrs. Mindlin and Suttle ignored my letter.

11. Since my phone calls and now, even my letter, were having no effect on the debtors, I needed to try something stronger. However, the only power that I had over the debtors was to foreclosure on their loan. But I was unwilling to take such drastic action against my nephew. So, instead, I decided just to threaten to take such action. So, on January 5, 2004, I mailed another letter (a true and accurate copy of which is attached hereto as Exhibit G), this time addressed only to Mr. Mindlin. I repeated some of the same things I had said in my earlier letter. However, this time I added: "[I]f you continue to ignore this matter, then I will have no alternative but to refer this debt to an outside collection agency." Of course, I did not really intend to foreclose on the loan and it bothered me greatly even to threaten it. But I felt that I simply had to do something to get Mr. Mindlin's attention.

12. However, later that same month, I learned that Mr. Mindlin had recently been diagnosed with skin cancer. Of course, I immediately regretted having threatened to refer his debt to a collection agency. So I put my informal collection efforts on hold, deciding that I would not pester Mr. Mindlin for payments while he was ill. Of course, the debtors had not made any payments to me for over a year before Mr. Mindlin's diagnosis. Thus, I certainly did not expect to receive any payments from them while Mr. Mindlin was ill. And, while I would have welcomed payments at any time, I did not want to be in the position of trying to coerce them with threats of foreclosure until Mr. Mindlin got better. For I did not want the threat of foreclosure to hang over Mr. Mindlin's head while he was battling cancer. After all, I was still

his aunt and the same affection I had for him that led me to make him this loan in the first place, made me not want to exacerbate his illness.

13. I am aware that the Plaintiffs have alleged in their Complaint that "[t]he parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005 and half of 2006" (*see* Complaint at ¶ 19) and that the Plaintiffs have calculated the interest that would have accrued during this 30-month period as being "in the amount of $6,935.13" (*see* Complaint at ¶ 30(f)). However, I do not understand how the Plaintiffs could have thought this. My only desire was not to put an extra strain on Mr. Mindlin with threats of foreclosure while he was ill. I never intended to stop him from making any payments on the loan that he might want to make (and he certainly needed no help from me with that). I was just going to stop pestering him about the payments he was not making. Also, I would never have considered suspending the accumulation of interest on a non-performing loan since this would only give the debtor an additional incentive to avoid making any payments.

14. As far as I can recall, the first time that I ever heard the allegation that I had supposedly made an agreement to modify the repayment terms of the loan or to suspend the accumulation of interest on it while Mr. Mindlin was ill was in the Plaintiffs' Complaint. Since it is true that I did not expect or require Mr. Mindlin to make any payments on the loan while he was ill (although that is a far cry from actually modifying the contract), I will just focus here on the issue of the interest. I categorically deny that I ever agreed to waive any of the interest that accrued on the loan during Mr. Mindlin's illness or at any other time.

15. In none of the correspondence between Mr. Mindlin (or any of the other debtors) and myself during the over ten years since the loan was made, was there ever any mention of my alleged agreement to waive any of the interest that accrued on the loan.

16. Whenever Mr. Mindlin mentioned the subject of interest in his e-mails to me, it was always to ask me to agree to waive interest because he was in financial need, not because we had any prior agreement. For example, in his e-mail to me of April 24, 2010 (a true and accurate copy of which is attached hereto as Exhibit H), he asked me to waive all of the accrued interest. And, in his e-mail to me of August 18, 2009 (a true and accurate copy of which is attached hereto as Exhibit I), he asked me to agree to reduce the future interest on the loan.

17. On the other hand, whenever I mentioned the subject of interest in my correspondence to Mr. Mindlin, it would have been for one of two reasons. The first reason would be to point out that the money that the debtors owed to me was increasing, rather than decreasing, over time because their repayments were not keeping up with the accrued interest. For example, on December 29, 2007, I sent Mr. Mindlin an e-mail (a true and accurate copy of which is attached hereto as Exhibit J), stating: "Due to interest charges, this loan has substantially increased in size in the seven years since it was made." If it were true that I had promised to waive two and one-half years' worth of interest (as the debtors now claim), then I would not have stated that the money that the debtors owed was increasing due to accrued interest or, if I did, then Mr. Mindlin would have corrected me. But he never did.

18. The second reason that I would have mentioned the subject of interest in my correspondence to Mr. Mindlin would have been to complain that Mr. Mindlin was continually asking me to waive some or all of the interest that had accrued on the loan. For example, on April 28, 2010, I sent Mr. Mindlin an e-mail (a true and accurate copy of which is attached hereto as Exhibit K), stating: "I gave you a $90,000 unsecured loan at a low 5% interest rate and then waited patiently for 9 1/2 years even though your repayments never even covered the amount of interest owed..... [Y]ou continually demand that I change our agreement and forgive larger and larger amounts of the money you owe.... [Y]ou continually ask for what, in essence, are gifts of money, and then you complain bitterly when I refuse." If it were true that I had promised to waive two and one-half years' worth of interest (as the debtors now claim), then I would not have stated that the interest that Mr. Mindlin was asking me to waive was a "gift" or, if I did, then Mr. Mindlin would have corrected me. But he never did.

19. However, I think that I might be over-analyzing the allegations in the Plaintiffs' Complaint. For, looking at these allegations more closely, I see that the Plaintiffs have never actually claimed that the parties' so-called agreement to suspend the accumulation of interest was made verbally (that is, orally or in writing). Instead, the Plaintiffs have argued that this agreement was "evidenced by their [the parties'] behavior" (*see* Complaint at ¶ 30(f)). In another part of their Complaint they are even more explicit, stating: "On many occasions the Defendant accepted payments clearly reflecting the modified repayment terms and the suspension of the accumulation of interest" (*see* Complaint at ¶ 17).

20. As I have previously stated, the payments that I *received* (which is a more-accurate term than *accepted* because I would never turn down an offered payment) were only the payments that the debtors were willing to send to me. Therefore, I fail to see how my not receiving payments – which just means that the debtors did not send me any payments – could show that I had agreed to modify the repayment terms or suspend the interest on the loan. For, under the Plaintiffs' logic, every time the debtors decide not to send me a payment, I am agreeing to modify the repayment terms of the loan and to suspend the accumulation of interest.

21. Although the Plaintiffs have been careful so far not to allege that the so-called agreement between the parties to suspend the interest on the loan was a verbal (i.e., oral or written) agreement, I categorically deny that I ever made any such agreement to suspend the accumulation of interest for any period of time during the loan (as the term "agreement" is normally used to mean a meeting of the minds through oral or written communication as opposed to by the debtors' own actions in not sending me payments).

22. In 2005, I formally changed my domicile from Ohio to Florida. I filed a Declaration of Domicile with the Palm Beach County (Florida) Clerk & Comptroller's Office, I registered to vote and obtained a Voter Card in Florida, and I registered for and obtained a Florida Driver's License. I have spent very little time in Ohio during the past few years and I only visit Ohio occasionally to see my son (Jonathan R. Zell) and daughter-in-law. For example, I spent only twenty-three (23) days in Ohio in 2009 and seventy-three (73) days in Ohio in 2010.

23. When I moved to Florida in 2005, I went to live with my recently-widowed older sister, Fayette Mindlin (who is Plaintiff Michael Mindlin's mother). Although the debtors had

not made any payments to me since 2002, I informed Mr. Mindlin of my new address of 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408. This was so that the debtors would know the correct address to send their payments. It was also in accordance with a provision in the Note, stating that I could change the location of the payments at any time.

24. Although it was never executed, the proposed refinancing agreement that Mr. Mindlin drafted and sent to me in his e-mail of August 9, 2009 (a true and accurate copy of which is attached hereto as Exhibit L) shows that Mr. Mindlin knew that the place of payment on the Note had now changed to his mother's Florida condominium. For Mr. Mindlin's proposed refinancing agreement contained the following provision: "Place of Payment: All payments due under this note shall be made to Eileen Zell, 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408."

25. As previously stated, I had received only two payments totaling $10,000 (both sent to Ohio in 2002) before I changed the location of repayment to Florida and, thereafter, I received no payments at all for a period of five years. The payments then resumed when the debtors sent me a third payment -- for $200 -- on October 18, 2007, followed by a fourth payment -- for $500 -- on December 15, 2007. With these payments, the debtors now began sending their payments to me in Florida. The only exceptions to this were the few occasions when I was visiting family in Ohio, typically during the summers. As a result, the vast majority of the forty-one payments (totaling $41,800) that the debtors made to me from October 18, 2007 to September 13, 2010 were all mailed to me in Florida, compared with the only two payments (totaling $10,000) that were sent to me in Ohio prior to October 18, 2007.

26. On December 29, 2007, I sent Mr. Mindlin an e-mail (*see* Exhibit J), thanking him for having resumed making payments. However, noting that the loan bore "interest at a rate of five percent per year," I stated: "[Y]ou have now repaid a total of $10,700, leaving due principal in the amount of $79,300 plus interest." Concerned that the debtors' payments "do not even cover the accruing interest charges," I added: "I cannot allow this loan to linger indefinitely, let alone become larger due to ballooning interest charges."

27. In 2008, I received payments totaling $10,500. Concerned that a lot of time had passed without the Note being paid, in early 2009 I looked into what the statute of limitations was on the Note. I then found out that the Note was governed by Missouri law and that Missouri's ten-year statute of limitations was going to expire on December 31, 2011. When I investigated what alternatives I had, I learned that I could either foreclose on the loan or, if I wanted to give the debtors more time, I could refinance it. Since I still did not want to foreclose on the loan, I chose the latter option and hired someone to draft a refinancing agreement.

28. In 2009, I received payments totaling $19,800. On May 26, 2009, I mailed Mr. Mindlin a letter enclosing my proposed refinancing agreement (a true and accurate copy of which is attached hereto as Exhibit M). I sent this refinancing agreement to Mr. Mindlin because, throughout the entire existence of the loan, Mr. Mindlin was the only one of the debtors to deal with me regarding the loan. In my cover letter, I stated: "[M]y purpose is to give you more time to pay off the loan. However, ... in order to give you more time it is necessary for me to refinance your loan so as to avoid running afoul of the applicable statute of limitations."

I also noted: "This new agreement ... computes the outstanding balance now due on the loan based on your past payments and the accrued interest up to June 1, 2009." Further, as the computational worksheets attached to the refinancing agreement showed, simple interest was calculated at five percent (5%) per year from January 30, 2001 to June 1, 2009 without any time gaps.

29. In his e-mail to me dated August 3, 2009 (a true and accurate copy of which is attached hereto as Exhibit N), Mr. Mindlin discussed coming up with a payment schedule where I would be "paid back the full amount of the loan" within five years. No mention was made of deducting the interest charges that had accrued when he was ill.

30. On August 9, 2009, Mr. Mindlin e-mailed me the debtors' proposed refinancing agreement (*see* Exhibit L). This e-mail contained two attachments. One of these attachments was Mr. Mindlin's proposed refinancing agreement, whose distinguishing feature was a provision to divide the repayment obligations of the loan 50:50 between Mr. Suttle on the one hand and Mr. Mindlin and Ms. Kurila on the other. The second attachment, "Eileen Zell Loan Assumptions and Schedules.pdf," consisted of a two-page "Summary Explanation" of the refinancing agreement.

a. This "Summary Explanation" showed that, like under my proposed refinancing agreement, under Mr. Mindlin's proposed refinancing agreement there also were no gaps in time in computing the interest that had accrued on the loan since its commencement on January 30, 2001. Under section "d.1." of the "Summary Explanation," Mr. Mindlin stated: "Original loan to earn full interest at 5% over last 102 months."

b. Moreover, the "Summary Explanation" specifically pointed out that the interest that accrued during what it termed Mr. Mindlin's "disability" had been included in the computation of the total amount owed. Under section "c" of the "Summary Explanation," Mr. Mindlin stated: "I included all interest earned during my 18 months disability."

c. Finally, based on a requested reduction of future interest from 5% to 2% for the next five years, Mr. Mindlin stated in the "Summary Explanation" that the debtors proposed to pay me a total of $83,039.00.

31. Mr. Mindlin and I corresponded by e-mail throughout the rest of 2009 and 2010. But, because Mr. Mindlin and I were each interested in something different, no agreements were made. I was interested in getting the debtors to refinance their loan before the statute of limitations expired. In contrast, Mr. Mindlin and his wife Ms. Kurila were interested in severing their responsibilities for the loan 50:50 with Mr. Suttle or, if that were not possible, in trying to get me to waive some or all of the interest that had accrued on the loan.

32. For example, on August 18, 2009, Mr. Mindlin sent me an e-mail (*see* Exhibit I) in which he complained bitterly about having to be jointly and severally liable for the entire loan, stating: "You would not enter into that agreement and we shouldn't be put at that risk either." Yet, those were precisely the terms of the Promissory Note that Mr. Mindlin had previously signed. He added: "[I]n no way am I, individually, going to pay off this entire loan nor expose

myself to this liability. That is not financially possible ... nor fair ... nor a valid legal position" [original ellipses]. Thus, Mr. Mindlin was essentially disavowing the Note that he had signed since that Note specifically stated that the signees "jointly and severally promise to pay" the entire amount of the Note.

33. In 2010, I received payments of $10,800. On April 24, 2010, Mr. Mindlin sent me an e-mail (*see* Exhibit H), stating that he had changed his mind and no longer wanted to refinance the Note. In his e-mail, Mr. Mindlin stated, in effect, that it was premature for the parties to refinance the loan. Mr. Mindlin explained that his attorney had informed him that the Missouri statute of limitations, which applied to the Note, was not going to expire yet for some time: "At some expense, I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding."

Instead of refinancing, Mr. Mindlin stated that he wanted to pay off just the principal of the loan with no interest whatsoever. Mr. Mindlin explained that this was because that was all that they could afford: "I am making application to my bank for a loan to pay off this debt.... But, it is clear in preliminary conversations with my bank that I can not get a loan that will cover principal and interest on this loan. I simple do not have the equity to cover the full amount. So, I am proposing that I pay you back all the principal due, but no interest."

34. In response, I sent Mr. Mindlin an e-mail dated April 28, 2010 (*see* Exhibit K) in which I refused to waive all of the interest due and indicated that I was still desirous of refinancing the Note. Agreeing with Mr. Mindlin's statement that Missouri's statute of limitations had not yet expired, I added that it was just a matter of time before it would expire. From Mr. Mindlin's statement, I understood Mr. Mindlin to be agreeing with me that the law of Missouri applied to our Note. In addition, since my $90,000 Note would be unenforceable under Ohio law, I interpreted the debtors' continued payments as confirmation of my agreement with Mr. Mindlin that Missouri law governed the Note.

35. The debtors continued to send me payments until September 13, 2010, after which the Plaintiffs commenced the present litigation. Between April 24, 2010 (when Mr. Mindlin acknowledged in writing that the Note was governed by Missouri law) and September 13, 2010, the debtors mailed ten payments to me.

36. On September 25, 2010, Mr. Mindlin traveled from his home in Missouri to my residence in Florida because he wanted to tell me in person the amount that he was going to offer me in settlement of the loan. As Mr. Mindlin later described it in his e-mail to me of September 29, 2010 (a true and accurate copy of which is attached hereto as Exhibit O), Mr. Mindlin offered me "a total principal and interest payment of $110,000 minus all payments made up to time of final payment." Since the debtors had then paid me only $51,800, Mr. Mindlin was offering to pay me an additional $58,200 ($110,000 - $51,800 = $58,200).

37. As far as I can recall, even in our meeting on September 25, 2010, Mr. Mindlin never brought up the allegation that I had agreed to suspend the accumulation of interest on the loan while he was ill. Instead, as he had done in his previous e-mails to me, Mr. Mindlin asserted that

he could not afford to pay me any more than he was offering and that this amount was somehow "fair." He then stated that, if I did not accept his offer, he would "ruin" my relationship with his mother (Fayette Mindlin, my older sister). And he did.

38. When I refused Mr. Mindlin's requests that I waive the interests payments on the loan, in an e-mail dated September 28, 2010 (a true and accurate copy of which is attached hereto as Exhibit P), Mr. Mindlin accused me of being "intent on refinancing this loan and maximizing interest payments." Then, he added: "You ... expect well over $50,000 in interest. We find this very troubling and unreasonable."

Further the affiant sayeth naught.

Dated: July 19, 2011

Eileen Zell, Affiant

Sworn to and subscribed in my presence, a notary public, in and for said county and state the 19th day of July, 2011.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

Sally L. Kapcar
Notary Public, State of Ohio
My Commission Expires 02-21-2016

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
	:	
Plaintiffs,	:	Case No.: 10 CV-10-14965
	:	
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
	:	
Defendant/Third-Party Plaintiff.	:	
	:	
v.	:	
	:	
David Dale Suttle, et al.,	:	
	:	
Third-Party Defendants	:	

DEFENDANT'S AMENDED REPLY BRIEF TO PLAINTIFFS' MEMORANDUM CONTRA DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant/Third-Party Plaintiff Eileen Zell (hereinafter, "Mrs. Zell") respectfully submits her AMENDED Reply Brief. This amendment was necessary in order to reply to "Plaintiffs' and Third Party Defendant's Memorandum Contra Defendant's Motion for Summary Judgment" (hereinafter, "Plaintiff's Memorandum Contra"), which Mrs. Zell did not have the opportunity to see before filing her previous Reply Brief.

ISSUES

The Plaintiffs made three claims in their Complaint: (1) that the Promissory Note is unenforceable due to the statute of limitations; (2) that the interest should be computed on the Note in such a way as to minimize the amount owed; and (3) that the parties had an unwritten -- but nonetheless enforceable -- side agreement involving $6,935.13 of interest that modified the Note.

SUMMARY

Mrs. Zell, who is now 82 years old, loaned $90,000 to her nephew, Plaintiff Michael Mindlin; his wife, Plaintiff Elizabeth Kurila; his business partner, Third-Party Defendant David Suttle; and their business, Third-Party Defendant Suttle Mindlin LLC (hereinafter, collectively referred to as "the debtors"). Mrs. Zell then relied on the debtors' repeated assurances that they would repay her. Instead, during the past nine years, the debtors have made every attempt to avoid paying what they owe, including filing this present action against Mrs. Zell. As will be shown below, there is no basis in law or fact for the debtors' claims in this lawsuit.

Regarding the statute-of-limitation issue: (1) As a result of the parties' Promissory Note having the words "St. Louis, Missouri" printed prominently at its top as well as its having been written and signed by the debtors in their home state of Missouri and that of their corporation,

the parties agreed that Missouri law would govern the Note and, after consulting with their respective attorneys, reaffirmed this with each other in their subsequent written correspondence; (2) these reaffirmations did not constitute a subsequent modification of the Note and, even if they did, they were supported by separate consideration; (3) even if the parties did not make an effective choice of law, Missouri law would still govern due to the numerous Missouri contacts and the only Ohio contact being Mrs. Zell's temporary residence and domicile in Ohio during the beginning portion only of the relevant times involved in the agreement; (4) accordingly, the Note is governed by Missouri law and the applicable Missouri statute of limitations has not yet expired; (5) even if the Note were barred by Ohio's statute of limitations, (a) the debtors' written promises, made after the statute of limitations had expired, to pay their time-barred debt are enforceable without the need for separate consideration and (b) the debtors' promises to repay their debt, made before the statute of limitations had expired, are enforceable under promissory estoppel.

Regarding the alleged oral side agreement involving a ***mere*** $6,935.13 of interest, based on the Plaintiffs' newly-submitted Affidavits: (1) This does not represent a genuine issue as to any material fact; (2) the words that the debtors allege that Mrs. Zell said to Mr. Mindlin -- that Mr. Mindlin was "not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as [he] was ill and recovering" -- which they claim constituted a binding contract to waive the $6,935.13 in interest that accumulated on the loan from January 1, 2004 to June 30, 2006 -- falls far short of showing the elements of a contract: definiteness, an intent by the parties to be bound, a meeting of the minds, a bargained-for exchange, or consideration supporting modification of the Note; (3) the alleged side agreement is barred by the Statute of Fraud's one-year rule; and (4) even if the alleged side agreement were binding, it was binding

with regard to Mr. Mindlin only and not to either Ms. Kurila or Mr. Suttle.

Finally, the debtors have dropped their dispute concerning the method of calculating interest on the Note and, thus, must be deemed to have accepted Mrs. Zell's calculation of the amount due on the Note. Therefore, Mrs. Zell is entitled to summary judgment as a matter of law.

ARGUMENT

I. THE DEBTORS' PROMISES TO PAY THE DEBT ARE ENFORCEABLE UNDER OHIO LAW FOLLOWING RESTATEMENT (SECOND) SECTIONS 86 AND 90

As will be demonstrated in Section II of this brief, Missouri law governs the Note and Missouri's ten-year statute of limitations has not yet expired. However, even if this Court should hold that Ohio's six-year statute of limitations (which would have expired on December 31, 2007) does apply, the debtors' written promises to repay the time-barred debt made both before and after the Ohio statute of limitations had expired are enforceable.

A. The Debtors' Written Promises to Pay a Time-Barred Debt are Enforceable

After Ohio's statute of limitations would have expired on December 31, 2007, both Mr. Mindlin and Ms. Kurila made express written promises to Mrs. Zell stating that they would repay their allegedly time-barred debt to her. Also, Mr. Mindlin, Ms. Kurila, and Mr. Suttle made the same kind of implied promises to Mrs. Zell after December 31, 2007 in the form of numerous voluntary transfers of negotiable instruments as partial payment for their debt.

For example, in an e-mail dated March 10, 2010 (*see* Exhibit 1 F), Mr. Mindlin stated:

> I have always said I will protect your interests. And, I will. I have created jobs for both David [Suttle] and me such that we both can meet this obligation. But should David ultimately fail to meet his obligations, I will protect you.... But whatever David doesnt [sic] repay, I will pay you.... In the event David fails to perform, I will continue to make monthly payments to you until this entire loan is paid off as quickly as possible. If putting this long standing personal obligation into some form of reasonable written agreement is acceptable, then I

> will certainly do so. Of course, we will continue paying per our current repayment agreement until this is resolved. (Original emphasis.)

Further, in an e-mail dated July 5, 2010 (*see* Exhibit 1 G), Mr. Mindlin told Mrs. Zell: "I have offered to take full responsibility for all the parties and pay you off, personally. This goes beyond my legal obligations."

Next, in a signed letter dated Sept. 14, 2009 (*see* Exhibit 1 H), Ms. Kurila told Mrs. Zell:

> Our interest is not only to repay the loan but to maintain the relationship that we have as a family.... My hope is that we can move through this uncomfortable time and repay the loan without jeopardizing our relationship.... Michael and I have every intention of paying you back and intend to hold David [Suttle] accountable for his interest as well. You must trust us when we tell you that David will keep his end of the agreement.

Attached to Ms. Kurila's letter were a $600 check signed by her and a $600 cashier's check printed with Mr. Suttle's name on it. (*See* Exhibit 1 H.) These represent two of the 39 checks that Mr. Mindlin, Ms. Kurila, and Mr. Suttle had sent to Mrs. Zell after December 31, 2007. Of the 39 checks sent after December 31, 2007, 13 were written on the checking account of Suttle Mindlin LLC and were typically signed by Mr. Mindlin, 13 were written on the checking account of Elizabeth Kurila and Michael Mindlin and were typically signed by Ms. Kurila, and 13 were cashier's checks printed with Mr. Suttle's name on them. For comparison purposes, the debtors combined had sent a total of only four checks to Mrs. Zell before December 31, 2007. (*See* Mrs. Zell's Affidavit at ¶ 19, attached hereto as Exhibit 1. Exhibit 1 will be referred to throughout this brief as "Mrs. Zell's Affidavit.")

Finally, as recently as May 3, 2011, the Plaintiffs represented to this Court that they have always intended to repay their debt to Mrs. Zell and that they are not pleading the statute of limitations as a defense: "Plaintiffs do not now, nor have they ever, attempted to avoid repayment

of the loan. They are simply seeking a determination from the Court as to what the repayment amount should be." ("Plaintiffs' Motion for 'Attorney's Eyes Only' Protective Order and for Disqualification of Defendant's Co-Counsel," hereinafter "Plaintiffs' Motion for Protective Order," at p. 2.) Considering that the Plaintiffs have also argued to this Court that the statute of limitations expired on December 31, 2007, this is yet another acknowledgement of the Plaintiffs' promises to pay what they consider to be their time-barred debt to Mrs. Zell.

"It is universally held that a past debt that has been barred by the statute of limitations is a sufficient basis for a new promise." 1A A. Corbin, *Corbin on Contracts* § 211, at 278 (1963). For example, section 86(1) and (2) of the Restatement (Second) of Contracts provides that "[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice" unless "the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched." "The second restaters describe the effort culminating in Section 89A [the predecessor to Section 86] not as an attempt to state a rule in relation to majority or minority positions, but as one to 'capture' a 'principle' from cases comprising a 'wide variety of miscellany.'" S. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 Virginia L. R. 1115, 1176 (1971)(citing 42 ALI Proceeding 273-74 (1965)). Even earlier, "[t]he First Restatement's famous list of promises that are binding without consideration began not with Section 90, but with debtors' promises to pay debts barred by the statute of limitations." S. Thel & E. Yorio, *The Promissory Basis of Past Consideration*, 78 Virginia L.R. 1045, 1092, 1092 n. 223 (1992) (citing Restatement of Contracts § 86 (1932)).

Ohio Jurisprudence § 53 cites to the Restatement Second on this point:

> [A] moral obligation arising from what was once a legal liability that has become suspended or barred by the operation of a positive rule of law may furnish consideration for a subsequent executory promise. Under the Restatement Second, Contracts, a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.

In *W.B. Saunders Co. v. Galbraith*, 40 Ohio App. 155, 159, 11 Ohio L. Abs. 34, 178 N.E. 34, 35 (8th Dist. Cuyahoga County 1931), the Court noted:

> While it is well understood as an elementary principle of the law of contracts that a consideration must exist to render a promise enforceable, there are several varieties of obligations that have long been held to be valid in which it is difficult to see any consideration. Among these are new promises to pay debts extinguished by a discharge in bankruptcy, or barred by the statute of limitations.... When those responsible for the new monumental Restatement of the Law of Contracts approached this problem, they swept away the ingenious efforts to locate and define the consideration underlying such obligations, and laid down the broad proposition that no consideration was required in such obligations.

Similarly, in *Hill v. Henry*, 1848 WL 74, 3 (Ohio) (December Term 1848), it was stated:

> The question is not whether the acknowledgment of a subsisting indebtedness upon a note, already barred by the statute of limitations, and a promise to pay the same, constitutes a contract which can be enforced, for of this we suppose there can be no doubt. Although a note may be barred by a statute of limitations, still a moral obligation rests upon the maker to pay, and this moral obligation would constitute a sufficient consideration for a new promise.

The comments to the Restatement explain that there are two rationales for this rule: (1) to enforce promises and (2) to provide restitution. Under the former, it has said that there is "moral consideration" for the promise to pay the now-barred debt. However, because this is unlike the traditional concept of consideration, the comments go on to state that the preferred explanation is to protect those who have conferred a substantial benefit on others and thereby to prevent unjust enrichment. As long as the claim is neither false, stale nor previously litigated, "a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against

unjust enrichment then prevails." Restatement (Second) of Contracts § 86, Comment b (1979).

As some leading commentators have explained:

> This situation frequently arises in connection with promises to pay debts barred by the statute of limitations.... Such promises have long been binding even when not supported by consideration. When the promise is to pay the amount of the debt, expectation damages may serve both promissory and restitutionary goals: the promisor is held to his promise and the creditor gets .... the amount the debtor originally promised to pay for the benefit.

S. Thel & E. Yorio, *The Promissory Basis of Past Consideration*, 78 Virginia L.R. 1045, 1092, 1092 n. 223 (1992)(citing, *inter alia*, J. Murray Jr., *Murray on Contracts*, § 67(A)(1), at 291 (3d ed. 1990)(discussing past acts as consideration); J. Calamari & J. Perillo, *The Law of Contracts*, §§ 5-5, 5-7 (3d ed. 1987)(discussing effect of and rationale behind rule concerning promises to pay barred debts); 1A A. Corbin, *Corbin on Contracts* §§ 214-219 (1963)(discussing enforcement of new promises to pay antecedent debts and revival of remedies based on partial payments); E. Farnsworth, *Contracts*, § 2.8 (2d ed. 1990)(discussing moral obligations exception to bargain rule); 1 S. Williston, *The Law of Contracts* §§ 160-178 (1920)(outlining the early law and modern rule governing the enforceability of a promise to pay past indebtedness)).

Thel & Yorio continued by saying this about the cases that follow the Restatement:

> The cases may simply show that courts are willing to enforce serious, well-considered promises, but not rash and ill-considered promises.... Performance by the promisor, particularly over a long period, confirms that the promise was well-considered.... [Also relevant are] powerful reasons for making a serious promise... [such as whether the promisor had] derived substantial benefit ... [while the promisee had] incurred substantial detriment from the underlying act. *Id.* at 1072.

While following the Restatement rule, most states require that the promise to pay a debt barred by the statute of limitations must be a signed writing to be enforceable. For example, O.R.C. 2305.08 provides: "If ... a promise to pay it [any demand founded on a contract] has been

made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such ... promise." However, in other contexts Ohio courts have found e-mail to be a sufficient signed writing. *See, e.g., Norris, L.L.C. v. Daney* (Oct. 21, 2010), Cuyahoga Co. No. 94437, 2010 WL 4149350, 2.

The promise to pay a time-barred debt may be express or implied. An express promise would be "[a] voluntary acknowledgement to the obligee, admitting the present existence of the antecedent indebtedness" or "[a] statement to the obligee that the statute of limitations will not be pleaded as a defense." Restatement (Second) of Contracts § 82(1) and (2)(a) and (c)(1979). On the other hand, an implied promise would be "[a] voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or payment of or collateral security for the antecedent indebtedness." *Id.* § 82(2)(b).

The previously-described correspondence and payments from the Plaintiffs and Third-Party Defendant to Mrs. Zell after December 31, 2007, when Ohio's statute of limitations would have expired, constitute both express and implied promises by the debtors to repay their allegedly time-barred debt. Mr. Mindlin's promises could not have been made any more explicit, for he wrote: "I have always said I will protect your interests. And, I will"; "whatever David doesnt [sic] repay, I will pay you"; "Of course, we will continue paying per our current repayment agreement"; and "I have offered to take full responsibility for all the parties and pay you off, personally." Similarly, Ms. Kurila wrote: "Michael and I have every intention of paying you back.... You must trust us...." Mr. Mindlin even acknowledged: "This goes beyond my legal obligations." For his part, Mr. Suttle joined with Mr. Mindlin and Ms. Kurila in sending Mrs. Zell numerous checks after December 31, 2007 in repayment of his debt. Accordingly, the

Plaintiffs and Third-Party Defendant have made serious, well-considered written promises to repay their allegedly time-barred debt and have performed on these promises for a long period of time. This makes those promises enforceable without the need for separate consideration.

The next issue to be addressed is, What were the terms of the debtors' promises? For, while a promise to pay a time-barred debt is enforceable, it does not revive the original cause of action. Instead, the promise creates its own obligation and that new obligation is defined by the terms of the promise. As Thel & Yorio, *supra* at 1085-1093, have stated:

> [C]ourts typically award expectation damages measured by the value of the promise, indicating that the promise is what matters and that the underlying moral obligation is important only as a screen for identifying important promises to enforce.... [Thus,] [w]hen the debtor promises to pay less than the amount of the barred debt, ... courts consistently respond to promise by enforcing the promise according to its terms rather than reviving the debt.

This rule was followed in *Hill v. Henry*, 1848 WL 74, 3 (Ohio) (December Term 1848), where it was stated: "[U]nder the limitation laws of this state, the acknowledgment and promise to pay a debt which is barred by the statute does not revive the original cause of action, but if a creditor would enforce collection, he must do it by suit on the subsequent promise."

In the instant case, whenever Mr. Mindlin and Ms. Kurila promised to pay off the debt, they made it clear that they intended to honor the original terms of the loan agreement. For example, in Mr. Mindlin's e-mail of March 10, 2010, he promised to "pay ... per our current repayment agreement" and to pay off "the entire loan" (original emphasis). "[W]hatever David [Suttle] doesnt [sic] repay, I will pay you." Even in response to Mrs. Zell's offer to waive $5,000, reduce future interest and extend the term of the loan, Mr. Mindlin replied: "I appreciate your offer.... [But] I am not anxious to change the terms, nor do I want to extend the repayment period." Similarly, in her letter of September 14, 2009, Ms. Kurila promised, without conditions

or qualifications of any kind, that they would "repay the loan."

While the record does contain other e-mails in which Mr. Mindlin can be seen trying to persuade Mrs. Zell to accept a reduced amount in settlement of the debt, the settlement e-mails were of a completely different nature and character than the e-mails and other correspondence promising repayment. As will be discussed below, the purpose behind the promises to repay the debt was to delay repayment -- perhaps indefinitely -- without provoking Mrs. Zell's ire. Therefore, in these promises, the debtors sought to reassure Mrs. Zell by emphasizing full repayment. Indeed, in his e-mail of March 10, 2010, Mr. Mindlin literally emphasized his promise to make payments "until this entire loan is paid off" (original emphasis) by underlining it in the text.

B. The Debtors' Promises are Enforceable under Promissory Estoppel

As Mr. Mindlin alluded to with the words "I have always said I will protect your interests" in his e-mail of March 10, 2010 (*see* Exhibit 1 F), the Plaintiffs' both written and oral promises to Mrs. Zell date back well before Ohio's statute of limitations would have expired on December 31, 2007. Whenever Mrs. Zell would grow concerned about the unpaid debt and the increasing passage of time, usually Mr. Mindlin, but occasionally Ms. Kurila, would always assure Mrs. Zell that, if Mrs. Zell just waited long enough, the debtors would fully repay her. (*See* Mrs. Zell's Affidavit at ¶ 4.)

For example, on August 27, 2003, Mr. Mindlin sent an e-mail to Mrs. Zell (*see* Exhibit 1 A), stating:

> Elizabeth is helping us to structure a full repayment schedule of all the company debt, including my obligations to you. My goal is to restructure my bank debt to take advantage of current interest rates and pay down non-bank debt, like yours.... I will keep my obligations to you. And, I thank you for all your patience. I know I can't ask any more of you. You have already done more than I had a right to ask.

Then, on January 12, 2004, Mr. Mindlin sent another e-mail to Mrs. Zell (*see* Exhibit 1 C), stating:

> It was apparent from our last conversation that there is a lot of misunderstanding between us and I bear some of the responsibility for this lack of communication. With regard to us ... you and me ... it seems you have a decision to make. You have know [sic] me all my life and you must decide if I am capable of lying to you, or capable of dishonesty. So ... here's the situation. My business is (barely alive) today thanks to you. (Original ellipses.)
>
> * * *
>
> However, I have major commissions pending ... work we expected last year, but now is eminent with the upturn in the economy. However, my cancer and the operation will keep me from the office for some time and I don't know what will happen in my absence. Right now, all I can do is prepare for the surgery and the last couple of months have consumed me emotionally and taken all my energy. You're not the only person I simply haven't had the emotional strength to talk to. Two things will likely happen. The office will survive without me and the commissions will finally make it possible to pay you back. Or my illness will force me to close the office, in which case, I will take a job and pay you back out of my salary. In either case, I will pay you back. The essential issue remains the same. You must decide who I am ... and I will understand whatever your [sic] decide. (Original ellipsis.)

The Plaintiffs' promises to repay Mrs. Zell, if she just waited long enough, were intended to, and did in fact, induce Mrs. Zell to refrain from foreclosing on the debtors' loan. (*See* Mrs. Zell's Affidavit at ¶ 8.) They also allowed the Plaintiffs to stay in Mrs. Zell's good graces for which they, their children, Mr. Mindlin's siblings, and Mr. Mindlin's mother were rewarded by continuing to receive thousands of dollars in cash every year for birthdays, anniversaries and/or holidays. (*See* Mrs. Zell's Affidavit at ¶ 8.)[1] However, although Mrs. Zell gave the Plaintiffs all

[1] As shown in Exhibit B, p. 3, to Plaintiffs' Motion for Protective Order, in a typical 19-month period (September 2005 to April 2007), Mrs. Zell gave $3,200 to Mr. Mindlin's and his brother's families. "During the period in question, no checks were written to Mindy Mindlin [Mr. Mindlin's sister] and her husband because, shortly before, Mindy's husband had refused to accept and had even returned a gift check that Mrs. Zell had sent to him. This was because Mindy's husband was upset that Mrs. Zell had refused Mindy's earlier request to waive all of the interest -- over 30-years' worth -- on a loan that Mrs. Zell and her late husband had made to Mindy and her husband to enable them to buy a house," which shows that Mrs. Zell treated Mr. Mindlin and his sister equally by refusing to waive the interest on both of their loans.

of the time they had asked for to repay their loan, the Plaintiffs failed to honor their promises to do so. Considering that the Plaintiffs have raised the statute of limitations as a defense to the re-payment of the loan in their Motion for Summary Judgment, the Plaintiffs do not intend to repay Mrs. Zell. Moreover, the Plaintiffs do not appear to have ever intended to repay Mrs. Zell as their nine-year claim of poverty is not credible. After Mrs. Zell made it clear that she was going to sue them in a Missouri court, the Plaintiffs filed suit in Ohio in an attempt to take advantage of Ohio's short statute of limitations. Due to a lack of consideration, the promises that the Plaintiffs made to Mrs. Zell do not constitute a contract. Yet, at the same time, these promises should be enforced to avoid injustice. Therefore, the doctrine of promissory estoppel comes into play.

Ohio courts have adopted the Restatement Section 90 on promissory estoppel. For example, in *Olympic Holding Co., L.L.C. v. ACE Ltd.* (2009), 122 Ohio St.3d 89, 96-97, 909 N.E.2d 93, 100-101, it was stated:

> An action for damages under promissory estoppel provides an adequate remedy for an unfulfilled or fraudulent promise. "The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice." *Doe v. Univision Television Group, Inc.* (Fla.App.1998), 717 So.2d 63, 65, citing Restatement of the Law 2d, Contracts (1981) Section 90; see also *Cohen v. Cowles Media Co.* (Minn.1992), 479 N.W. 2d 387, 389. We adopted promissory estoppel through the Restatement of the Law 2d, Contracts (1973), Section 90 in **101 *97 *Talley v. Teamsters, Chauffeurs, Warehousemen, & Helpers, Local No. 377* (1976), 48 Ohio St.2d 142, 146, 2 O.O.3d 297, 357 N.E.2d 44.

The Ohio courts apply a four-part test when analyzing a promissory-estoppel claim:

> Under Ohio law, the "elements of a promissory estoppel claim are (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise." *Sweitzer v. American Express Centurion Bank*, 554 F.Supp.2d 788, 796 (S.D.Ohio 2008) (Smith, J.) (quoting *Weiper v. W.A. Hill & Assoc.*, 104 Ohio App.3d 250, 661 N.E. 2d 796 (1st Dist.1995), appeal denied, 74 Ohio St.3d 1446, 656 N.E.2d 346

(1995) (internal punctuation omitted)). *See also Holt Company of Ohio v. Ohio Machinery Co.*, 2007-Ohio-5557, 2007 WL 3027084 (10th Dist.2007) (same).

Executone of Columbus, Inc. v. Inter-Tel, Inc. (2009), 665 F.Supp.2d 899, 915 (S.D. Ohio). "As a matter of law, Ohio does not recognize a cause of action for 'detrimental reliance.' Detrimental reliance arises as an element of various causes of action (e.g., promissory estoppel, misrepresentation) but is not a cause of action unto itself." *Dailey v. Craigmyle & Son Farms, L.L.C.* (2008), 894 N.E.2d 1301, 1306 (citations omitted).

The instant case meets this four-part test. First, the Plaintiffs' promises were clear and unambiguous. Mr. Mindlin wrote: "I will keep my obligations to you" and "In either case, I will pay you back." Second, these promises did in fact induce Mrs. Zell to refrain from foreclosing on the debtors' loan and to give the debtors more time to repay it. (*See* Mrs. Zell's Affidavit at ¶ 8.) Third, not only was Mrs. Zell's reliance on the Plaintiffs' promises that they would pay her back reasonable and foreseeable, but the Plaintiffs intended that Mrs. Zell would rely on these promises. Mr. Mindlin asked Mrs. Zell to give the debtors more time in which to repay their debt, promising that this extra time would then make it possible for the debtors to do so: "I thank you for all your patience"; "Elizabeth is helping us to structure a full repayment schedule of ... my obligations to you"; and "[future] commissions will finally make it possible to pay you back. Or ... I will take a job and pay you back out of my [future] salary. In either case, I will pay you back." Fourth, Mrs. Zell relied on the Plaintiffs' promises to her detriment because, if her claim is barred by the Ohio statute of limitations, then she might not be able to collect the money that the debtors owe to her.

As was seen above, promises made before the statute of limitations has expired have typically been decided under Section 90 of the Restatement (Second) of Contracts. On the other

hand, promises that were made after the statute of limitations has expired have usually been decided under Section 86 (or its equivalent). *See, e.g., Hill v. Henry*, 1848 WL 74, 3 (Ohio) (December Term 1848). However, according to Ohio Jurisprudence § 53, Section 86 can apply in either case: "[A] promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations." Similarly, it has been held that Section 90 can apply in both cases, too. For example, in *W.B. Saunders Co. v. Galbraith*, 40 Ohio App. 155, 159, 178 N.E. 34, 35 (Ohio App.1931), the Court enforced a promise to pay an existing debt made after the statute of limitations had expired under Section 90. While the *Saunders* Court also found that Section 86 would have applied, it chose to use Section 90 instead. Thus, Sections 86 and 90 have been used interchangeably to enforce a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor. Therefore, ultimately what is important is enforcing the promise, not the basis on which it is enforced.

II. THE APPLICABLE STATUTE OF LIMITATIONS HAS NOT EXPIRED

The Plaintiffs have devoted their entire Motion for Summary Judgment to arguing that "the statute of limitations has long since expired, [and] Plaintiffs are entitled to the declaration that the Promissory Note is unenforceable." ("Plaintiffs' Motion for Summary Judgment" at p. 7.) This is despite the fact that, as recently as May 3, 2011, the Plaintiffs represented to this Court that they have always intended to repay their debt to Mrs. Zell and that they are not pleading the statute of limitations as a defense: "Plaintiffs do not now, nor have they ever, attempted to avoid repayment of the loan. They are simply seeking a determination from the Court as to what the repayment amount should be." (Plaintiffs' Motion for Protective Order, at p. 2.) In any event,

as the Plaintiffs seem to acknowledge, the applicable statute of limitations has not yet expired.

A. Missouri -- Not Ohio -- Law Applies to the Promissory Note

In "Defendant's Memorandum in Opposition to Plaintiffs' and Third-Party Defendant David Suttle's Motion for Summary Judgment" (hereinafter, "Defendant's Memorandum Contra"), it was argued that, regardless of whether or not the Note contained an express choice-of-law provision, it was governed by Missouri law under the multiple-factor test set forth in the Restatement (Second) Conflict of Laws, which has been adopted in Ohio. The Restatement's choice-of-law factors are: "(a) the place of contracting, (b) the place of negotiations of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties...." Restatement (Second) of Conflict of Laws § 188, at 575.

According to the Restatement comments, the "place of negotiation .... is of less importance ... when [as in the instant case] the parties ... conduct their negotiations from separate states by mail or telephone." Restatement (Second) of Conflict of Laws § 188 Comment e. However, while the debtors conducted all of their phone negotiations in Missouri, Mrs. Zell left Ohio halfway through the contract negotiations. The Restatement comments also state that the "place of performance can bear little weight ... when [as in the instant case] performance by a party is to be divided more or less equally among two or more states." *Id.* For example, as expressly authorized by the Note, Mrs. Zell changed the place of payment under the Note from Ohio to another state. As a result, the debtors mailed the vast majority of their payments (in both quantity and size) to Mrs. Zell outside of Ohio. The "location of the subject matter of the contract" (money) also had little significance here because it was wired electronically from California to Missouri.

This leaves only the "place of contracting" and the "domicile, residence, nationality, place of incorporation and place of business of the parties" to determine the choice of the applicable law.

According to the Restatement comments, "the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect." Restatement (Second) of Conflict of Laws § 188, Comment e. In the instant case, the place of contracting was in Missouri. For, in their Reply Brief (at p. 2 n. 2), the Plaintiffs conceded that "Mr. Mindlin (or his agent) ... drafted, typed and (together with the other debtors) signed a new agreement in Missouri." The comments also state: "issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting." *Id.* This is consistent with Ohio's law prior to its formal adoption of the Restatement's rules. In *Standard Agencies, Inc. v. Russell* (1954), 2d Dist., 100 Ohio App. 140, 143, 135 N.E. 2d 896 (citing 17 Corpus Juris Secundum, 338, Section 12c; Restatement of the Law of Conflict of Laws, 408, Section 332), it was held: "The general rule is that a contract is governed by the law of the place where it was made or entered into."

The last factor is "domicile, residence, nationality, place of incorporation and place of business of the parties." The Plaintiffs and Third-Party Defendant David Suttle lived and did business in Missouri at all relevant times (and still do) and Third-Party Defendant Suttle Mindlin LLC, which received the loan funds and for whose benefit these funds were given, was a Missouri corporation. In contrast, Ohio was merely Mrs. Zell's domicile and residence during the beginning portion only of the relevant times involved in the agreement. Mrs. Zell later moved permanently away from Ohio and changed her domicile to another state. The Restatement comments state that "[t]he fact that one of the parties is domiciled or does business

in a particular state assumes greater importance when combined with other contacts, such as that this state is the place of contracting." Restatement (Second) of Conflict of Laws § 188, Comment e. Since Missouri was the state of contracting as well as the domicile and place of business of both Plaintiffs -- Mr. Mindlin and Ms. Kurila -- and both Third-Party Defendants -- Mr. Suttle and Suttle-Mindlin LLC -- Missouri's law governs.

In neither their Motion for Summary Judgment nor their Reply Brief, have the Plaintiffs cited any cases applying the Restatement's rules -- which is the correct legal standard -- that would lead to Ohio law applying. Instead, in their Motion for Summary Judgment, the Plaintiffs cited very-old cases using the wrong legal standard and, in their Reply Brief, the Plaintiffs noted only that Mrs. Zell resided in Ohio at certain times.

B. The Parties' Agreement that Missouri Law Applied Was Not A Modification of Note

In Defendant's Memorandum Contra, it was argued that the parties had made an effective choice of law that Missouri law would govern their agreement. In Plaintiffs' Reply Brief, the Plaintiffs disagreed, stating at p. 2: "[T]here was no ... choice of law provision at the time the contract was entered into" and, thus, the parties' agreement that Missouri law would apply was "[a] subsequent modification of that agreement," which "must be supported by new and sufficient consideration" in order to be binding. The main problem with this argument is the ***assumption*** it makes that the parties' agreement that Missouri law would apply was a "modification" of the original agreement. It was not.

As the location "St. Louis, Missouri" was prominently printed at the top of the Promissory Note, the Note was signed in St. Louis, Missouri and the Note was even drafted and typed in St. Louis, Missouri, it is apparent that the parties intended that Missouri law would apply.

Several years later, Mr. Mindlin and Mrs. Zell each verified with their own attorneys that Missouri law applied to the Note and that Missouri's statute of limitations had not yet expired. Mr. Mindlin and Mrs. Zell then sent e-mails to each other essentially repeating their respective attorneys' opinions. Mr. Mindlin cannot now argue that Missouri law does not apply because he admitted that it did apply in his e-mails to Mrs. Zell of April 24, 2010[2] and March 10, 2010.[3] Thus, the parties always intended that Missouri law would apply and this choice of law was ***not*** a modification of their original agreement.

However, even if one were to accept the Plaintiffs' argument that the choice-of-law of Missouri represented a modification of the original agreement, which then needed separate consideration, separate consideration ***did*** exist. Moreover, this separate consideration was mutual, that is, it inured to the benefit of both parties. The separate consideration that the parties received was an end to both parties' uncertainty as to which state's law would apply to their agreement -- together with all of the associated benefits of resolving that uncertainty. Such benefits included avoiding the expense of litigation to determine which state's law applied (such as the instant litigation in which the parties are currently involved) and the ability to make future financial and other decisions based on that information.

III. MRS. ZELL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

In their Complaint, the Plaintiffs argued that, if the applicable statute of limitations has not yet expired, then the amount remaining due on the loan should be reduced for two reasons.

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[2] "At some expense, I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding." (*See* Exhibit 1 G to "Defendant's Reply to Plaintiffs' Supplement to the Motion For Disqualification of Attorney Jonathan Zell.")

[3] "I would rather get it over now ... in a Missouri Court of Law before a jury where we discuss you, me, david ... and John's conduct ... in open court. I just can't believe that serves ***your*** interests. I can, however, recommend a really good hotel next to the court house where you and John can get a decent monthly rate." (Original ellipses.) (*See* Exhibit 1 K to "Defendant's Reply to Plaintiffs' Supplement to the Motion for Disqualification of Attorney Jonathan Zell.")

A. The Plaintiffs Have Abandoned Their Method of Calculating Interest

To begin with, in their Complaint the Plaintiffs proposed to use a method of calculating interest that minimizes the amount owed. Under this method, the past payments that the Plaintiffs had made on the loan would be applied first to principal and only secondarily to interest. However, as Mrs. Zell pointed out in her Motion for Summary Judgment, that is the exact opposite of the method set out in the Promissory Note, which states: "All payments on this Promissory Note shall be applied first to the payment of accrued interest and the balance shall be applied to principal." The proper method of calculating interest on the loan is so obviously controlled by the express language of the Note that the Plaintiffs never argued for their method of calculation in any of their subsequent court filings and, thus, must be deemed to have dropped this claim. Similarly, the Plaintiffs did not dispute the method of calculation in the spreadsheet that Mrs. Zell used to arrive at the figure of $90,000 as the total amount now owed on the loan. (*See* Exhibit 1 E to "Defendant's Motion for Summary Judgment.")

B. Alleged Side Agreement Does Not Represent Genuine Issue as to Any Material Fact

The Plaintiffs also claimed that the parties had an unwritten side agreement whereby they "agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005, and half of 2006." (*See* Complaint at ¶ 19.) The Plaintiffs further alleged that "the parties amended the terms of the original promissory note to allow for the delay in principal payments and suspension of the accumulation of interest [from January 1, 2004 to June 30, 2006] in the amount of $6,935.13." (*See* Complaint at ¶ 3(f).) For the first time, in the two Affidavits dated August 4, 2011 (which were attached to their Memorandum Contra) the Plaintiffs have -- well, actually only Mr. Mindlin has -- finally described this alleged $6,935.13 side agreement. In ¶ 3 of his Affidavit, Mr. Mindlin stated: "Upon hearing

of my illness, Eileen [Zell] called me directly and told me not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as I was ill and recovering."

In ¶ 9 of her Affidavit, Ms. Kurila stated that she "was well aware of the conversations back and forth between Michael and Eileen [Zell]." Ms. Kurila then went on to allege (using the language from ¶ 19 of the Complaint) that Mr. Mindlin and Mrs. Zell "agreed there would be no payments made and no interest accumulated during Michael's illness and resulting disability in 2004, 2005, and half of 2006." However, this allegation, which was based on information and belief, is inadmissible hearsay. According to *Downey v. 610 Morrison Road, LLC*, 2008 WL 2751214 (Ohio App. 10 Dist.) at ¶ 53, quoting *Ins. Co. of N. America v. Mall Builders, Inc.* (Oct. 28, 1982), Montgomery App. No. 7756: "[A]ffidavits to be used as evidence must consist of statements positively made, and not merely of statements made upon information and belief." Thus, the only averment concerning a conversation with Mrs. Zell that Ms. Kurila made in her Affidavit based on her own personal knowledge was at ¶¶ 11 and 13: "In January 2008 .... Eileen [Zell] told me ... 'not to worry, pay what you can.'" However, not only did this statement occur long after Mr. Mindlin's alleged period of illness and disability, but it had nothing to do with the suspension of $6,935.13 in interest, which is the issue involved in the alleged side agreement.

In his Affidavit, Mr. Mindlin does not give the date of the phone call in which he averred that Mrs. Zell told him "not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as [he] was ill and recovering." Instead, he says it occurred "[u]pon [Mrs. Zell's] hearing of my illness." However, in their Complaint, the Plaintiffs claimed that, based on the alleged side agreement, they were entitled to a suspension of interest on the loan beginning on January 1, 2004. This implies that Mrs. Zell's telephone call occurred on or before

January 1, 2004. However, this is contradicted by Mr. Mindlin's and Mrs. Zell's correspondence.

On January 5, 2004, Mrs. Zell mailed a letter to Mr. Mindlin (*see* Exhibit 1 B) from which it is clear that Mrs. Zell had not yet heard of Mr. Mindlin's illness, for she stated:

> I think that I have been overly generous in making this loan to you in the first place, remaining silent while you defaulted on the original loan repayment schedule specified in our agreement, and then waiting patiently for you to set up a new repayment plan.
>
> Frankly, I can think of no good reason that you cannot set up a new repayment plan specifying the monthly amounts that you and Mr. Suttle can afford to pay.
>
> Although I am your aunt, I do not think that our relationship relieves you of the obligation to treat this debt responsibly. That means ... setting up a repayment plan....
>
> In turn, I will try not to burden you unduely [sic] with high repayment amounts that you and Mr. Suttle cannot afford. But, if you continue to ignore this matter, then I will have no alternative but to refer this debt to an outside collection agency.

On January 12, 2004, Mr. Mindlin sent an e-mail to Mrs. Zell, telling her that his "cancer and the operation will keep [him] from the office for some time," and promising to pay her back after he recuperated. In response to Mrs. Zell's earlier threat to commence collection proceedings, Mr. Mindlin stated: "[I]t seems you have a decision to make. You have know [sic] me all my life and you must decide if I am capable of lying to you, or capable of dishonesty.... and I will understand whatever your [sic] decide." (*See* Exhibit 1 C.)

On January 18, 2004, Mrs. Zell sent Mr. Mindlin an e-mail (*see* Exhibit 1 D), stating that it was not until Mr. Mindlin's mother had telephoned Mrs. Zell a short time earlier to tell her about Mr. Mindlin's illness that Mrs. Zell had actually understood what Mr. Mindlin meant when he referred to his upcoming cancer operation. Mrs. Zell then added: "I am very sorry to hear about it and I wish you a speedy recovery. Everything between us will be on hold 'til then. Your

health takes precedent [sic] over everything."[4] As she explained in her Affidavit, by this Mrs. Zell "meant that the debtors did not have to worry about not being able to make payments during Mr. Mindlin's illness because I did not intend to foreclose on their loan while Mr. Mindlin was ill." (*See* Mrs. Zell's Affidavit at ¶ 9.) *See also* ¶ 12 of Mrs. Zell's Affidavit dated July 19, 2011 ("I immediately .... put my informal collection efforts on hold, deciding that I would not pester Mr. Mindlin for payments while he was ill.... I did not want to be in the position of trying to coerce them with threats of foreclosure until Mr. Mindlin got better")(*see* Exhibit 1 to "Defendant's Motion for Summary Judgment"). Of course, Mrs. Zell's explanation of what she meant is consistent with what Mrs. Zell had previously stated in her letter of January 5, 2004 to Mr. Mindlin ("I will try not to burden you unduely [sic] with high repayment amounts that you and Mr. Suttle cannot afford") and also with Mrs. Zell's actions during the entirety of the nine-year loan.

However, Mrs. Zell denies making the statement that Mr. Mindlin has averred in ¶ 3 of his Affidavit: "Eileen [Zell] ... told me not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as I was ill and recovering." Indeed, Mrs. Zell denies having telephoned Mr. Mindlin at any time while he was ill, having had any conversation with him between at least August 2003 and November 2005, or having had any communication with any of the debtors about waiving any interest on the loan due to Mr. Mindlin's illness. (*See* Mrs. Zell's Affidavit at ¶13.)

In ¶ 4 of his Affidavit, Mr. Mindlin also averred: "Eileen also called my mother, her sister, Faye Mindlin and expressed the same understanding." However, as Mrs. Zell has explained,

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[4] This appears to be the written documentation being referred to in ¶ 23 of "Plaintiffs' Response to Defendant's First Request for Admissions" where the Plaintiffs deny that they "do not have any written documentation to support the allegation ... that Mrs. Zell told Mr. Mindlin 'not to make any payments during his period of recovery.'" In contrast, in ¶ 26 the Plaintiffs had admitted that they "do not have any written documentation to support the allegation ... that Mrs. Zell and Mr. Mindlin 'mutually agreed to suspend ... the accumulation of interest' during Mr. Mindlin's recovery period."

the only thing that she would have told Mr. Mindlin's mother -- but this would have been after Mr. Mindlin's illness had ended -- was that, upon learning of Mr. Mindlin's illness, she had indicated to Mr. Mindlin that the debtors "did not have to make any payments while Mr. Mindlin was ill." But Mrs. Zell "never told either Mr. Mindlin or his mother that [she] was waiving any of the interest that would accrue on the loan." (See Mrs. Zell's Affidavit at ¶15.)

Thus, there is a factual dispute between Mrs. Zell and Mr. Mindlin. Mrs. Zell claims that she indicated to the debtors that they did not have to make any payments on their loan during Mr. Mindlin's illness, while Mr. Mindlin claims that Mrs. Zell told him that the debtors did not have to pay the interest that accumulated on the loan during his illness. Perhaps Mr. Mindlin thinks that his is a logical extension due to the perception that the debtors' not having made any payments on the loan while Mr. Mindlin was ill had, by itself, increased the interest that accrued on the loan. But it did not.

To begin with, when a loan calls for compound -- rather than simple -- interest, not making payments on the loan will increase the rate of interest because interest will then be charged on interest. However, in ¶ 8 of the Complaint, the Plaintiffs stated that the Promissory Note called for "5% simple interest" and, in Mrs. Zell's proposed refinancing agreement, she had also used simple interest in her calculations (*see* Exhibit 1 M to "Defendant's Motion for Summary Judgment"). Secondly, the Note stated that "[a]ll payments on this Promissory Note shall be applied first to the the payment of accrued interest and the balance shall be applied to principal." This means that 5% simple interest would be calculated annually on the original $90,000 principal unless more than 100% of the outstanding interest (and, ergo, some of the principal) had been paid. Accordingly, the accrual of interest would never be affected by the

payments the debtors made (or did not make) unless the debtors had already paid more than 100% of the outstanding interest, which they almost never did until the end of the nine-year life of the loan, when they paid only a token amount of principal. So, while it might seem that a delay in making payments would extend the life of the loan and thereby increase the total amount of interest charged, interest would continue to accrue until the loan was fully paid off. Moreover, unless the debtors had paid all of the outstanding interest due on the loan, the same amount of interest would accrue every year whether or not the debtors were making regular payments.

But, regardless of how this factual dispute started, as will be shown below, even if what Mr. Mindlin states were true, it still did not create a binding contract that could have modified the written Promissory Note. Therefore, this factual dispute does not represent a genuine issue as to any material fact and Mrs. Zell is entitled to judgment as a matter of law against all of the other parties. However, if ***arguendo*** what Mr. Mindlin states did create a binding contract, then that contract was binding with regard to Mr. Mindlin only. In that case, this factual dispute does not represent a genuine issue as to any material fact with regard to Ms. Kurila or Mr. Suttle, and Mrs. Zell is therefore entitled to judgment as a matter of law against those two parties only.

1. The Alleged Side Agreement Could Only Be Binding With Regard to Mr. Mindlin

The Promissory Note at issue in this case was signed by Mr. Mindlin, Ms. Kurila, and Mr. Suttle, all of whom are jointly and severally liable on the Note. Each of these three people claims that he or she is entitled to an offset for the interest that accumulated on the Note from January 1, 2004 to June 30, 2006, and each of them makes this claim based solely on what Mr. Mindlin has averred in ¶ 3 of his Affidavit: "Eileen [Zell] ... told me not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as I was ill and recovering."

Note that Mr. Mindlin has alleged that Mrs. Zell "told ***me*** not to worry about the loan...." (Emphasis added.) Mr. Mindlin did not allege that Mrs. Zell told him that Ms. Kurila and/or Mr. Suttle did not have "to worry about the loan...." Mr. Mindlin only alleged that Mrs. Zell told Mr. Mindlin that he himself did not have "to worry about the loan...." Accordingly, even if one were both to accept the truth of Mr. Mindlin's averment and to find that this resulted in a binding contract, then that contract applied only to Mr. Mindlin -- not to Ms. Kurila or Mr. Suttle. Thus, Mrs. Zell would still be entitled to judgment as a matter of law against Ms. Kurila and Mr. Suttle.

This conclusion is not changed by considering what Ms. Kurila and Mr. Suttle have told this Court. The only averment concerning a conversation with Mrs. Zell that Ms. Kurila made in her Affidavit based on her own personal knowledge was at ¶¶ 11 and 13: "In January 2008 .... Eileen [Zell] told me ... 'not to worry, pay what you can.'" However, not only did this statement occur long after Mr. Mindlin's alleged period of illness and disability, but it did not involve the suspension of $6,935.13 in interest, which is the issue involved in the alleged side agreement.

Although Mr. Suttle has not submitted any Affidavits in this case, at p. 5 of Mr. Suttle's "Motion for Relief from Default Judgment" Mr. Suttle's counsel stated:

> The Plaintiff in this action is identically situated as the Third-Party Defendant, David Suttle.... During the pendency of the repayment, the Plaintiff had several communications with the Defendant that are believed to have modified the terms of the loans [sic] repayment. These amendments would apply identically to the Plaintiff and the Third Party Defendant.

Since Mr. Suttle's counsel also represents the Plaintiffs, at the time that he drafted Mr. Suttle's motion he surely knew what Mr. Mindlin was going to allege that Mrs. Zell had said to him (Mr. Mindlin). Thus, if Mr. Mindlin were going to allege that Mrs. Zell had also told him that "neither Ms. Kurila nor Mr. Suttle had to worry about the loan..," then Mr. Suttle's counsel

would have said so in Mr. Suttle's motion. Instead, Mr. Suttle's counsel was much more vague, stating only that "the Plaintiff had several communications with the Defendant that are ***believed*** to have modified the terms of the loans [sic] repayment" (emphasis added). This suggests that either Mr. Suttle or his counsel or both were unaware of exactly what Mrs. Zell was alleged to have said to Mr. Mindlin. Furthermore, Mr. Suttle's counsel then stated that "[t]hese amendments would ***apply identically*** to the Plaintiff and the Third Party Defendant" (emphasis added). This clearly shows that Mr. Suttle and his counsel were assuming that, since "[t]he Plaintiff in this action is identically situated as the Third-Party Defendant," whatever contract that Mr. Mindlin had with Mrs. Zell "would apply identically to the Plaintiff and the Third-Party Defendant [Messrs. Mindlin and Suttle]." However, as we know, that is not how contracts work: If "A" has a contract with "B," then "A" does not ***ipso facto*** have a contract with "C" or with "D." According to Mr. Mindlin, Mrs. Zell had told Mr. Mindlin that only he himself did not have "to worry about the loan...." Therefore, whatever contract may have been created by the statement that Mrs. Zell is alleged to have made to Mr. Mindlin did not apply to Ms. Kurila or Mr. Suttle. (Of course, Mrs. Zell did not even make this statement to Mr. Mindlin. But that is another story.)

2. The Alleged Side Agreement Was Not Binding With Regard to *Any* of the Debtors

a. <u>Saying "Not to Worry" About the Promissory Note Would *Not* Modify that Note</u>

The statements attributed to Mrs. Zell in the Plaintiffs' Affidavits fall far short of showing the elements of a contract: definiteness, a meeting of the minds, an intent by the parties to be bound, a bargained-for exchange, or consideration supporting modification of the Note. Although Mr. Mindlin did not claim to be quoting Mrs. Zell and, in any event, had fabricated the

entire conversation, under the standards for evaluating a motion for summary judgment Mr. Mindlin's claim must be taken seriously and it must be assumed that he was being accurate.

i. The Alleged Modification is Void for Indefiniteness

Let us begin by looking at the first part of the statement that Mr. Mindlin claims that Mrs. Zell made to him. What does "not to worry about the loan, not to worry about payments" mean? Does it mean that the debtors did not have to make any payments on the loan while Mr. Mindlin was ill and, if so, what does that mean? Having already defaulted on the loan, the debtors were not obligated to follow any payment schedule and, indeed, had not made any payments on the loan for over a year before Mr. Mindlin's illness even began. So what would it mean to tell the debtors that they did not have to make any payments while Mr. Mindlin was ill other than that a failure to make payments during this time would not result in Mrs. Zell's foreclosing on the loan? Could it also mean that the missed payments did not have to be made back up? Not even the Plaintiffs make this claim. On the other hand, this is exactly what the Plaintiffs claim "not to worry [about] interest" means -- that the missed interest payments never had to be made up. As was previously discussed (*see* pp. 23-24, *supra),* under the terms of the Note there was no direct relationship between the debtors' payments and the accrual of interest. Therefore, the accrual of interest would not have even been affected by the payments the debtors made (or did not make) unless the debtors had previously paid 100% of the outstanding interest, which they almost never did. Thus, why should the phrases "not to worry about payments" and "not to worry [about] interest" be treated so differently? In any event, telling someone "not to worry" about something is only half of a thought. Left out is in what way is the person not supposed to worry. For example, if you tell a man not to worry about his job, does that mean that he is not to worry

about being fired and, if so, why not? Because he cannot be fired or because, if he does get fired, he will then be able to find a comparable job elsewhere? We don't know because the thought is incomplete. Next, consider the literal meaning of "not to worry." Is this a guarantee that something bad will not occur or, like the song "Don't Worry, Be Happy," just some advice in case something bad does occur?

Now, let us look at the second part of the statement. The words "as long as I was ill and recovering" also lack the specificity needed to understand what is being meant since both "ill" and "recovering" are vague, subjective, and indefinite. For example, would any illness suffice or only Mr. Mindlin's skin cancer? Assuming the latter, would the cancer have to be in complete remission before the illness or recovery could be said to have ended? If so, then what would have happened if Mrs. Zell had filed suit while Mr. Mindlin was still ill? Would a court have ruled that the debtors had no duty to pay anything until Mr. Mindlin had recovered? What if the statute of limitations then expired while Mr. Mindlin was ill or what if he died or just never recovered? Are we to assume that the debt would then have been cancelled?

We do not know the answer to any of these questions. This is because the words given are too vague to provide the necessary "basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33(2).

ii. There Was No Meeting of the Minds

As previously discussed, the only thing that Mrs. Zell did upon learning of Mr. Mindlin's illness was to send Mr. Mindlin an e-mail indicating that she would voluntarily refrain from foreclosing on the debtors' loan while Mr. Mindlin was ill and would give the debtors more time in which to repay it. Mrs. Zell's e-mail was sent in response to an e-mail from Mr. Mindlin in

which he had asked for more time to repay the loan due to his illness. But Mrs. Zell's agreement to forebear on foreclosure is a far cry from agreeing to suspend the next 30 months' worth of interest on the loan, which Mr. Mindlin has averred in his Affidavit was his understanding of their agreement. Thus, there was no meeting of the minds between Mrs. Zell and Mr. Mindlin.

But, even if one accepts Mr. Mindlin's version of the agreement, there was still no meeting of the minds. Since the alleged conversation between Mr. Mindlin and Mrs. Zell occurred shortly after Mr. Mindlin was diagnosed with skin cancer, the parties could not have known at that time how long Mr. Mindlin was going to stay "ill and recovering" and, thus, how long the suspension of interest was going to last. Thus, the parties would have had no idea what they were agreeing to and, doubtless, each party would have thought something different. For example, in Mrs. Zell's mind the meaning of "ill and recovering" precludes being able to work. (*See* Mrs. Zell's Affidavit at ¶ 10.) However, in ¶ 30 of their "Response to Defendant's First Request for Admissions," the Plaintiffs admitted that Mr. Mindlin "worked some time from January 2004 - June 2006." But this was also the period of time that the Plaintiffs had claimed in their Complaint for Mr. Mindlin's "illness and resulting disability." In addition, Mr. Mindlin's mother wrote in an e-mail dated November 16, 2005 (*see* Exhibit 1 E) from Mrs. Zell's e-mail account (*see* Mrs. Zell's Affidavit at ¶ 11): "Michael [Mindlin] is in town for two days and is staying with us .... but we don't get to see much of him, because he is here on business" (original ellipsis). That Mr. Mindlin was working at the same time that the Plaintiffs claim he was "ill and recovering" shows that the parties would have had radically different expectations of what the alleged side agreement meant. Accordingly, there could not have been any meeting of the minds.

iii. There Was No Intent to Be Bound

Although Mr. Mindlin and Mrs. Zell had different interpretations of their side agreement, Mr. Mindlin's later statements show that he never considered Mrs. Zell to be bound to his version of this agreement. For, as Mrs. Zell pointed out in her Affidavit dated July 29, 2011 (*see* Exhibit 1 to "Defendant's Reply to Plaintiffs' Supplement to the Motion for Disqualification of Attorney Jonathan Zell"), prior to filing the Complaint Mr. Mindlin had never informed Mrs. Zell of his interpretation of this side agreement and had acted as if his interpretation never existed:

> 15. On October 12, 2010, the Plaintiffs filed the present Complaint.... where the Plaintiffs alleged -- ***for the first time*** -- the existence of an unwritten side agreement between Mr. Mindlin and myself...." (Original emphasis.)
>
> * * *
>
> 17. In none of Mr. Mindlin's e-mails to me, did Mr. Mindlin ever refer to the alleged side agreement or to any other agreement in which I was alleged to have agreed to waive any interest on the loan.
>
> 18. Similarly, in none of Mr. Mindlin's e-mails to me did Mr. Mindlin ever make any specific objections to the calculation of interest that I had sent to him with my proposed refinancing agreement even though that interest had been calculated without any gap from January 1, 2004 to June 30, 2006, the period of time when the Plaintiffs are now alleging that I had agreed to waive the interest that accrued on the loan.
>
> 19. Moreover, in the proposed refinancing agreement that Mr. Mindlin sent to me on August 9, 2009 (a true and accurate copy of which is attached hereto as Exhibit L), Mr. Mindlin had also calculated the interest that accrued on the loan without any gaps in time since the loan began on January 30, 2001. Under section "d.1." of the "Summary Explanation" to Mr. Mindlin's refinancing agreement, Mr. Mindlin stated: "Original loan to earn full interest at 5% over last 102 months." Also, under section "c" of the "Summary Explanation," Mr. Mindlin stated: "I included all interest earned during my 18 months disability."
>
> * * *
>
> 22. Although the Plaintiffs' Complaint accuses me of trying to obtain "exorbitant, excessive and unlawful interest" on the basis of a fictitious side agreement where I supposedly had agreed to waive $6,935.13 of interest, the Complaint ignores the fact that before I had even heard of this allegation I had already voluntarily offered to waive $10,000 of past-due interest.

iv. There was No Bargained-For Exchange or Consideration

With regard to the statute of limitations, the Plaintiffs stated in their Reply Brief at p. 2:

> There was an offer and acceptance of the Note's terms which did not include a choice of law provision. A subsequent modification of that agreement must be supported by new and sufficient consideration. *Bates v. Midland Title of Ashtabula County, Inc.* (2004) 2004-Ohio-6325. Thus, an oral agreement to modify a prior written agreement must be founded on a new consideration that is distinct from the consideration supporting the prior agreement; it cannot be supported on the supposition that it is founded on the continuation or extension of the consideration of the prior written contract that is complete in itself. *Pramco CV6 LLC v. Aset Copr.* (2010) 2010 WL 892086.

This argument completely eviscerates the claim that the parties had an unwritten -- but nonetheless enforceable -- side agreement that modified the parties' written agreement (the Promissory Note) by waiving 30 months' worth of interest that would have otherwise accrued. This is because even the Plaintiffs do not deny that the alleged side agreement was unsupported by any separate consideration. For the Plaintiffs alleged in both their Affidavits and Complaint that Mrs. Zell had waived this interest without receiving any legal consideration, but rather simply out of sympathy for the Plaintiffs' "personal and professional complications" (*see* Complaint at ¶ 11) and "struggles to cope with a life threatening illness" (*see* Complaint at ¶ 15) arising out of "Plaintiff Michael Mindlin ... [having been] diagnosed with [skin] cancer" (*see* Complaint at ¶ 12). (*See also* Elizabeth Kurila's Affidavit at ¶¶ 5, 8, and 10.) Hence, by arguing that "an oral agreement to modify a prior written agreement must be founded on a new consideration that is distinct from the consideration supporting the prior agreement," the Plaintiffs have refuted the claim that the alleged side agreement could ever be enforceable.

Even assuming, ***arguendo***, the truth of the Plaintiffs' allegation regarding what Mrs. Zell supposedly said to Mr. Mindlin, Mrs. Zell's statement represents nothing more than an unen-

forceable "gift promise." Even if Mrs. Zell expected to derive altruistic pleasure from making the gift, that is not sufficient to meet the "bargain" element required for a contract. While both of the Plaintiffs' Affidavits show Mrs. Zell's alleged statement to have been a gift promise, this was especially clear when Ms. Kurila stated in her Affidavit at ¶¶ 11 and 13: "In January 2008 .... Eileen told me ... 'not to worry, pay what you can.'" Even the Plaintiffs are not claiming that these words constitute a contract; otherwise, the Plaintiffs would never have to repay their loan.

b. <u>The Parties' Actions or Inactions Did Not Modify the Promissory Note</u>

Although the Plaintiffs have now alleged the existence of an actual conversation, they still feel the need to bolster that with the allegation that the "[a]ction or inaction of parties" is sufficient to constitute an agreement that the accumulation of interest was to be suspended. (Plaintiffs' Memorandum Contra at p. 4.) For, as pointed out in Defendant's Motion for Summary Judgment (at pps. 6-7):

> [Prior to filing their Memorandum Contra] the Plaintiffs have never actually claimed that the parties' so-called agreement to suspend the accumulation of interest was made verbally (that is, orally or in writing). Instead, the Plaintiffs have argued that this agreement was "evidenced by their behavior".... [meaning] by the debtors' own actions in not sending her [Mrs. Zell] payments.... "[C]ontract by inaction" is not even ... legally-cognizable.

However, Mrs. Zell had no control over the payments the Plaintiffs chose to send or not to send to her. Thus, the parties' actions or inactions regarding the making of payments could not legally modify their written agreement concerning the accrual of interest. Moreover, as was previously discussed (*see* pp. 23-24, *supra*), under the terms of the Note there was no direct relationship between the debtors' payments and the accrual of interest. Therefore, the accrual of interest would not have even been affected by the payments the debtors made (or did not make) unless the debtors had already paid 100% of the outstanding interest, which they almost never did.

c. The Alleged Modification of the Note Fails Due to the Statute of Frauds

In ¶ 19 of the Plaintiffs' Complaint, the Plaintiffs claimed that: "The parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005, and half of 2006." Furthermore, based on Mr. Mindlin's Affidavit, this alleged agreement seems to have occurred sometime in January 2004. If, according to the alleged agreement, no payments were to be made for the 30-month period from January 1, 2004 to June 30, 2006, but payments were going to resume on July 1, 2006, then that is a contract whose performance would be impossible to complete within a one-year period.

According to the Statute of Frauds, a contract that is not to be performed within one year from the making must be in writing. *See* Restatement 2d, § 198(1). In Ohio, the Statute of Frauds is codified at O.R.C 1335.05. Cases interpreting O.R.C 1335.05 have stated: "An alleged oral contract is unenforceable pursuant to the Statute of Frauds contained in R.C. 1335.05 where the agreement is not to be fully performed within a one-year period." *ZBS Industries, Inc. v. Anthony Cocca Videoland, Inc.* (1994), 93 Ohio App.3d 101, 105, 637 N.E.2d 956, N.E.2d 959 (citing *Shepherd v. Westlake* (1991), 76 Ohio App.3d 3, 600 N.E.2d 1095; *DeCavitch v. Thomas Steel Strip Corp.* (1990), 66 Ohio App.3d 568, 585 N.E.2d 879; *Pullar v. Upjohn Health Care Serv., Inc.* (1984), 21 Ohio App.3d 288, 21 OBR 433, 488 N.E.2d 486). Thus, the alleged side agreement for $6,935.13 was unenforceable because of the Statute of Frauds. This means that the original contract is left standing and the alleged side agreement is treated as if it never occurred. *See* Restatement 2d, § 223(2).

CONCLUSION

For the reasons set forth above, this Court should grant Mrs. Zell's Motion for Summary

Judgment and enter Orders declaring that the Promissory Note is an enforceable agreement, declaring that the Plaintiffs and Third-Party Defendants are jointly and severally liable to Mrs. Zell under the Promissory Note for the sum of $90,000, requiring the Plaintiffs and Third-Party Defendants to pay the Defendant's expenses and reasonable attorneys' fees, and for such other actions as are consistent with justice.

Respectfully Submitted,

Jonathan R. Zell

Jonathan R. Zell (0036831)
jonathan_zell@yahoo.com
5953 Rock Hill Road
Columbus, Ohio 43213-2127
Telephone: (614) 864-2292
Counsel for Defendant/Third-Party Plaintiff Eileen Zell

OF COUNSEL:
Jeffrey G. Rupert (0064906)
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 464-1211
Facsimile: (614) 464-1737
Email: jrupert@fbtlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via regular U.S. Mail, postage pre-paid, this 15th day of August, 2011, upon:

Gregory S. Peterson, Esq.
Peterson Ellis Fergus & Peer, LLP
250 Civic Center Drive, Suite 650
Columbus, Ohio 43215
Counsel for Plaintiffs and Third-Party Defendant David Suttle

Mindlin Suttle, LLC
345 Marshall Avenue, Suite 102
St. Louis, Missouri 63119
Third-Party Defendant

Jonathan R. Zell

Jonathan R. Zell (0036831)

EXHIBIT 1

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Michael Mindlin, et al.	:	
	:	
Plaintiffs,	:	Case No.: 10 CV-10-14965
	:	
v.	:	
	:	Judge: Richard R. Sheward
Eileen Zell,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
David Dale Suttle, et al.,	:	
	:	
Third-Party Defendants	:	

AFFIDAVIT OF DEFENDANT/THIRD-PARTY PLAINTIFF EILEEN ZELL

State of Ohio :

:ss

Franklin County :

Now comes the affiant, Defendant/Third-Party Plaintiff Eileen Zell, first being duly cautioned and sworn according to law, and deposes and says that the following is true to the best of her personal knowledge:

1. My name is Eileen Zell and I am 82 years of age.

2. On January 30, 2001, I loaned the sum of $90,000 at five percent (5%) interest per year to my nephew, Plaintiff Michael Mindlin; to Michael Mindlin's wife, Plaintiff Elizabeth Kurila; to Michael Mindlin's business partner, Third-Party Defendant David Dale Suttle; and to Michael Mindlin and David Dale Suttle's company, Third-Party Defendant Suttle Mindlin, LLC (hereinafter, collectively referred to as "the debtors").

3. Although the loan was supposed to have been paid back by December 31, 2001, the debtors made no payments to me until the latter part of 2002. At that time, they paid me $10,000 and then stopped making anymore payments until 2007.

4. Whenever I would grow concerned about the unpaid debt and the increasing passage of time, usually Mr. Mindlin, but occasionally Ms. Kurila, would always assure me that, if I just waited long enough, the debtors would fully repay me.

5. For example, on August 27, 2003, Mr. Mindlin sent me an e-mail (a true and accurate copy of which is attached hereto as Exhibit A), stating, in part: "Elizabeth [Kurila] is helping us to structure a full repayment schedule of all the company debt, including my obligations to you.... I will keep my obligations to you. And, I thank you for all your patience. I know I can't ask any more of you. You have already done more than I had a right to ask."

6. Because I had not received any repayment plan from Mr. Mindlin, on January 5, 2004 I mailed a letter to Mr. Mindlin (a true and accurate copy of which is attached hereto as Exhibit B), stating in part: "Although I am your aunt, I do not think that our relationship relieves you of the obligation to treat this debt responsibly. That means ... setting up a repayment plan.... In turn, I will try not to burden you unduely [sic] with high repayment amounts that you and Mr. Suttle cannot afford. But, if you continue to ignore this matter, then I will have no alternative but to refer this debt to an outside collection agency."

7. On January 12, 2004, Mr. Mindlin sent me e-mail (a true and accurate copy of which is attached hereto as Exhibit C), stating that his "cancer and the operation will keep [him] from the office for some time." However, he promised "I will pay you back" after he recuperated. In response to my earlier threat to commence collection proceedings, Mr. Mindlin stated: "[I]t seems you have a decision to make. You have know [sic] me all my life and you must decide if I am capable of lying to you, or capable of dishonesty.... and I will understand whatever your [sic] decide."

8. In reliance on Mr. Mindlin's e-mails of August 27, 2003 and January 12, 2004, I decided to give the debtors more time to repay their loan and not to foreclose on it. Also, believing Mr. Mindlin's and Ms. Kurila's promises that they would eventually repay me in full, I continued to give them and their children birthday, anniversary, and holiday gifts of cash. For example, in a typical 19-month period (September 2005 to April 2007), I gave Mr. Mindlin's and Ms. Kurila's immediate family $1,900.

9. On January 18, 2004, I sent Mr. Mindlin an e-mail (a true and accurate copy of which is attached hereto as Exhibit D), stating in part: "I am very sorry to hear about it [your cancer] and I wish you a speedy recovery. Everything between us will be on hold 'til then. Your health takes precedent [sic] over everything." By this, I meant that the debtors did not have to worry about not being able to make payments during Mr. Mindlin's illness because I did not intend to foreclose on their loan while Mr. Mindlin was ill.

10. I understand that the Plaintiffs have stated in ¶ 19 of their Complaint: "Plaintiff Michael Mindlin's illness and resulting disability [occurred] in 2004, 2005, and half of 2006."

Also, in Mr. Mindlin's Affidavit of August 4, 2011, Mr. Mindlin implied that he was "ill and recovering" from January 1, 2004 to June 30, 2006." In my mind, if someone has "illness and disability" or is "ill and recovering," that precludes the ability to work.

11. Mr. Mindlin's mother, Fayette Mindlin, is my sister. Mrs. Mindlin and I used to live together in Florida. On occasion and with my permission, Mrs. Mindlin would send e-mails to her children from my personal e-mail account (Eileen_Zell@yahoo.com). On November 16, 2005, Mrs. Mindlin sent an e-mail from my account to her son Matt and his wife Jacqueline (a true and accurate copy of which is attached hereto as Exhibit E). In this e-mail, Mrs. Mindlin stated in part: "Michael [Mindlin] is in town for two days and is staying with us....but we don't get to see much of him, because he is here on business" (original ellipsis).

12. I understand that Mr. Mindlin has submitted an Affidavit in which avers in ¶ 3: "Upon hearing of my illness, Eileen [Zell] called me directly and told me not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as I was ill and recovering."

13. I deny making the statement that Mr. Mindlin has averred in ¶ 3 of his Affidavit. Indeed, I deny having telephoned Mr. Mindlin at any time while he was ill, having had any conversation with him between at least August 2003 and November 2005, or having had any communication with any of the debtors about waiving any interest on the loan due to Mr. Mindlin's illness.

14. I also understand that Mr. Mindlin has averred in ¶ 4 of his Affidavit: "Eileen [Zell] also called my mother, her sister, Faye Mindlin and expressed the same understanding."

15. I deny making the statement that Mr. Mindlin has averred in ¶ 4 of his Affidavit to the extent that it implies that I had any communication with Fayette Mindlin about my waiving any interest on the loan due to Mr. Mindlin's illness. The only thing that I would have told Mrs. Mindlin -- but this would have been after Mr. Mindlin's illness had ended -- was that, upon learning of Mr. Mindlin's illness, I had indicated to Mr. Mindlin that the debtors did not have to make any payments while Mr. Mindlin was ill. But I never told either Mr. Mindlin or his mother that I was waiving any of the interest that would accrue on the loan.

16. Both Mr. Mindlin and Ms. Kurila continued to promise me that they would repay their loan in full. For example, in Mr. Mindlin's e-mail to me of March 10, 2010 (a true and accurate copy of which is attached hereto as Exhibit F), he stated: "I have always said I will protect your interests. And, I will." He then promised to "pay ... per our current repayment agreement" and to pay off "the entire loan." He added: "[W]hatever David [Suttle] doesnt [sic] repay, I will pay you." Even in response to my offer to waive $5,000, reduce future interest and extend the term of the loan, Mr. Mindlin replied: "I appreciate your offer.... [But] I am not anxious to change the terms, nor do I want to extend the repayment period."

17. Further, in an e-mail dated July 5, 2010 (a true and accurate copy of which is attached hereto as Exhibit G), Mr. Mindlin told me in part: "I have offered to take full

responsibility for all the parties and pay you off, personally. This goes beyond my legal obligations."

18. Similarly, in Ms. Kurila's signed letter to me of September 14, 2009 (a true and accurate copy of which is attached hereto as Exhibit H), Ms. Kurila promised, without conditions or qualifications of any kind, that she and the other debtors would "repay the loan," adding: "You must trust us."

19. Attached to Ms. Kurila's letter were a $600 check signed by her and a $600 cashier's check printed with Mr. Suttle's name on it. These represent two of the 39 checks that Mr. Mindlin, Ms. Kurila, and Mr. Suttle had sent to me after December 31, 2007. Of the 39 checks sent after December 31, 2007, 13 were written on the checking account of Suttle Mindlin LLC and were typically signed by Mr. Mindlin, 13 were written on the checking account of Elizabeth Kurila and Michael Mindlin and were typically signed by Ms. Kurila, and 13 were cashier's checks printed with Mr. Suttle's name on them. For comparison purposes, the debtors combined had sent to me a total of only four checks before December 31, 2007.

Further the affiant sayeth naught.

Dated: 8/15/11

Eileen Zell, Affiant

Sworn to and subscribed in my presence, a notary public, in and for said county and state the 15 day of ~~July~~ August, 2011.

NOTARY PUBLIC

NOTARIAL SEAL STATE OF OHIO

JEFFREY G. RUPERT, ATTORNEY AT LAW
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

EXHIBIT A

Hotmail® eileenzell@hotmail.com **Inbox | Previous Page**

From : "Mindlin, Michael" <mmindlin@suttle-mindlin.com>
To : "Eileen Zell" <eileenzell@hotmail.com>
Subject : RE: My unanswered letter
Date : Wed, 27 Aug 2003 23:13:56 -0500

Eileen,

We were hit by the internet virus weeks ago and lost many files. The virus is gone but when I checked for you letter, I found no trace. I'm sure if you sent it, we got it. However, it was probably lost with all the other files. Please resend. Having said all that... I owe you an update and I have been delaying only because I wanted to say something definite and conclusive. Since we last talked, our new accountants discovered that Mary Kay (our old office manager... fired some time ago) not only "lost" money, but "forgot" to pay withholding taxes to the IRS. We have been working all this year with the accountants and the IRS to resolve this issue. It started out to be a life threatening event... maybe as much as $300,000 in back taxes, interest, and penalties. We have worked out abatements of all interest and penalties... and are close to finalizing a repayment schedule that will allow us to keep our other obligations (yours). The remaining amount of money is manageable and dramatically less. Between that and a downturn in business... I have been just overwhelmed. We have worked our way out of much of these problems. We have commissions and a good backlog of contracts. The next couple of months are tight, but I am optimistic. Next year looks good. Elizabeth is helping us to structure a full repayment schedule of all the company debt, including my obligations to you. My goal is to restructure my bank debt to take advantage of current interest rates and pay down non-bank debt, like yours. My apologies for not calling or writing sooner. There is no excuses other than I was simply beyond my ability to cope with anything else... and I didn't know what I could do financially until we resolved the IRS issue. I did not forget or ignore this issue... I am reminded every night when I try to sleep. So, I need to get you some payments and I need to keep to a schedule. Every time I think I can do this... the ghost of Mary Kay reappears. However, we are now done with those goblins... and are dealing effectively with the aftermath. Lets talk soon. I will call. I will keep my obligations to you. And, I thank you for all your patience. I know I can't ask any more of you. You have already done more than I had a right to ask.

Michael

-----Original Message-----
From: Eileen Zell [mailto:eileenzell@hotmail.com]
Sent: Tuesday, August 19, 2003 6:14 PM
To: Mindlin, Michael
Subject: My unanswered letter

Dear Michael,

Did you receive my letter? If you did, why didn't you call me?

If you didn't receive my letter, tell me and I'll send it again by e-mail.

-- Eileen

EXHIBIT B

EILEEN L. ZELL
5953 Rock Hill Road
Columbus, Ohio 43213-2127
Tel. (614) 864-2292

January 5, 2004

Michael Mindlin
Suttle Mindlin, LLC
23 North Bemiston
St. Louis, MO 63105

Dear Michael:

To begin with, Happy New Year.

I recently reviewed my file on the $90,000 loan that I made to you and your partner David Suttle and have noticed a discrepancy, which I would like to bring to your attention.

As indicated in my letter to you and Mr. Suttle dated May 22, 2003, thus far you have made a total of $10,000 in payments on this loan: a $5,000 payment (check no. 3620) was made on June 13, 2002 and a $5,000 payment (check no. 3913) was made on December 20, 2002.

However, I recently noticed that the check stub for your second payment incorrectly states "3rd Loan payment" and also incorrectly states "new balance = $75,000."

Will you please correct your records to reflect that only two -- not three -- payments totaling $10,000 have been made and that the outstanding balance due on the loan is $80,000 plus 5% interest per year.

Also, as you know, you defaulted on your loan repayment over two years ago and I have been asking you for well over one year to set up a repayment plan. Each time, you promised to do it, but then never did.

I think that I have been overly generous in making this loan to you in the first place, remaining silent while you defaulted on the original loan repayment

schedule specified in our agreement, and then waiting patiently for you to set up a new repayment plan.

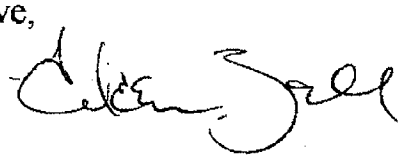
Frankly, I can think of no good reason that you cannot set up a new repayment plan specifying the monthly amounts that you and Mr. Suttle can afford to pay.

Although I am your aunt, I do not think that our relationship relieves you of the obligation to treat this debt responsibly. That means keeping accurate records of both the outstanding principal and interest due, setting up a repayment plan, and of course keeping to that repayment plan.

In turn, I will try not to burden you unduely with high repayment amounts that you and Mr. Suttle cannot afford. But, if you continue to ignore this matter, then I will have no alternative but to refer this debt to an outside collection agency.

As always, I wish you and your family all my best wishes in the coming New Year.

Love,



Enclosure: Copies of your check stubs numbers 3620 and 3913

SUTTLE MINDLIN, L.L.C.

Eileen Zell

	Eileen Zell	6/13/2002	3620
			5,000.00
Allegiant-Checking Acct			5,000.00

SUTTLE MINDLIN, L.L.C.

Eileen Zell

	3rd payment on Note Payable $80,000	12/20/2002	3913
			5,000.00
Allegiant-Checking Acct	3rd Loan payment; new balace = $75,000		5,000.00

EXHIBIT C

Reply | Reply All | Forward | Delete | Block | Junk | Put in Folder | Print View | Save Addre

From : Mindlin, Michael <mmindlin@suttle-mindlin.com> | | | Inbox
Sent : Monday, January 12, 2004 2:46 PM
To : <eileenzell@hotmail.com>

No one told me about your accident until just last week. I am sorry to hear this. Faye says you're fine and I hope so. I also know that Tom's condition has put demands on you and none of this is fair. I suspect you feel a bit abused and perhaps a bit resentful of all of us. I never would have expect that, at this point in my life, I could not take all the burden for my parents. I don't know if you can understand what that failure meants.

It was apparent from our last conversation that there is a lot of misunderstanding between us and I bear some of the responsibility for this lack of communication. With regard to us... you and me... it seems you have a decision to make. You have know me all my life and you must decide if I am capable of lying to you, or capable of dishonesty. So... here's the situation. My business is (barely) alive today thanks to you. But we have had a very difficult time in the downturn. We have laid off staff, deferred all expenditures, and are moving to cheaper office space. I don't pay myself or my partner regularly. Elizabeth and I have spent every penny we saved. My family is in a very precarious position.

However, I have major commissions pending... work we expected last year, but now is eminent with the upturn in the economy. However, my cancer and the operation will keep me from the office for some time and I don't know what will happen in my absence. Right now, all I can do is prepare for the surgery and the last couple of months have consumed me emotionally and taken all my energy. You're not the only person I simply haven't had the emotional strength to talk to. Two things will likely happen. The office will survive without me and the commissions will finally make it possible to pay you back. Or my illness will force me to close the office, in which case, I will take a job and pay you back out of my salary. In either case, I will pay you back. The essential issue remains the same. You must decide who I am... and I will understand whatever your decide.

| | | | | Inbox

EXHIBIT D

MSN Home | My MSN | Hotmail | Shopping | Money | People & Chat Sign Out Web Search:

MSN Hotmail [redacted] Today | Mail | Calendar | Contacts

eileenzell@hotmail.com

Send | Save Draft | Attach | | Tools | Cancel 1/18/04

To: mmindlin@suttle-mindlin.com

Cc:

Bcc:

Subject: RE: My unanswered letter

Dear Michael,
Your mom called me and explained about your cancer. That helps me understand what you were refering to in your letter. This was all news to me. I am very sorry to hear about it and I wish you a speedy recovery. Everything between us will be on hold 'til then. v Your health takes precedent over everything. I hope that you get thru this ordeal as quickly as possible.

Sincerely,
Eileen

----Original Message Follows----
From: "Mindlin, Michael" <mmindlin@suttle-mindlin.com>
To: "Eileen Zell" <eileenzell@hotmail.com>
Subject: RE: My unanswered letter
Date: Wed, 27 Aug 2003 23:13:56 -0500

Favorite Con
Bill Rees
carol lee
christiane edr
Faye Mindlin
Faye Mindlin
Faye Mindlin
Gary Brown
jonathan zell
Linda Zwellin
Matt Mindlin
Michael Mindl
peggy fried
Roger Whitak
Show All

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Get the latest updates from MSN

MSN Home | My MSN | Hotmail | Search | Shopping | Money | People & Chat

EXHIBIT E

Print - Close Window

Subject: photos
From: Eileen Zell (eileen_zell@yahoo.com)
To: jpw@013.net;
Date: Wed, 16 Nov 2005 11:11:46

Dear Jacqueline and Matt:
Thank you for the Photos. Did SteveGeiger take them and wasw he in Jeruslem recently? Eileen and I are planning to return to Florida after Thanksgiving. IHaving completed all the repairs in Eileen's home done by two Hungry
Racoons, I now find out that there has been water damage in my Condo. Not by the Hurricanes but a broken sewer pipe in the Kitchen caused damage all the way toi the master bedroom. The carpet in the bedroom has to be replace....but thew real concern is "?MOLD". So Eileen and I may have to go to a motel....just like we did in Columbus.
Michael is in town for two days and is staying with us....but we don't get to see much of him, because he is here on business. He told us how upset the children were over the death of Cody. The business is in tight straights and he has had to refinance his home.
I hope you are both OK and have some new prospects. Let me know if there is any thing more I can do.

Love you,
Mother

Mother

EXHIBIT F

Print - Close Window

Subject: Fwd: I hope to hear back from you very SOON
From: Michael Michael (michael4864@gmail.com)
To: eileenzell@yahoo.com;
Date: Wed, 10 Mar 2010 10:34:33

Eileen,

Here's my thought. While this is a business loan between you and Suttle Mindlin, I have always said I will protect your interests. And, I will. I have created jobs for both David and me such that we both can meet this obligation. But should David ultimately fail to meet his obligations, I will protect you. In the event he fails to perform, you have rights to seek a remedy. That possiblity needs to be in place to insure he continues to be modivated and you have reasonable rights. But whatever David doesn't repay, I will pay you. What I will not accept is the possibility that while we are making our payments to you in good faith... you would take legal action against us to recover David's payments. I am not going to put my wife thru four more years of that kind of uncertainty and fear. I would rather get it over now... in a Missouri Court of Law before a jury where we discuss you, me, david... and John's conduct... in open court. I just can't believe that serves your interests. I can, however, recommend a really good hotel next to the court house where you and John can get a decent monthly rate.

So...

In the event David fails to perform, I will continue to make montly payments to you until this entire loan is paid off as quickly as possible. If putting this long standing personal obligation into some form of reasonable written agreement is acceptable, then I will certainly do so. Of course, we will continue paying per our current repayment agreement until this is resolved.

I appreciate your offer of a reduction in interest and principal... and extension of term. I am not anxious to change the terms, nor do I want to extend the repayment period. I do feel we are paying too much interest on this loan. However, we first need to clarity the amount of monies paid to date and a manner in which we will calculate interest owed. It appears that we have paid more than we originally thought. Please send us your accounting of checks deposited. If this clarification of my personal commitement to you is agreeable we can have the attorneys hammer out a new legal agreement... and put this behind us. Please forward your lawyer's contact information to me and I will have both attorneys work out an agreement.

Michael

On Thu, Mar 4, 2010 at 5:39 PM, Eileen Zell <eileenzell@yahoo.com> wrote:

> Dear Michael,
>
> I hope to hear back from you very ***SOON***, with an emphasis on the word SOON.
>
> Thanks,
> Eileen

EXHIBIT G

Print - Close Window

Subject: Re: THIRD NOTICE: loan
From: Elizabeth Kurila (ekurila@swbell.net)
To: eileenzell@yahoo.com;
Date: Mon, 05 Jul 2010 16:05:19

Eileen,

There are no tactics. What I have proposed to do is complicated for us and takes time. Per you questions:

1. Please resend the refinancing agreement that shows your calculation on interest. I don't have a copy, but suspect it may be out of date. As you recall, we informed you some time ago that our original accounting of payments made was wrong and asked you for your accounting of payments made and interest calculations to verify our records. I have previously offered to have an accountant review these records, at our cost.
2. I have offered to take full responsibility for all the parties and pay you off, personally. This goes beyond my legal obligations. We have applied for three different loans and have additional sources of income that will be coming to us shortly. We are waiting for a second appraisal on our house as the first one will not net us as much money as we hoped due to current home sales.
3. I have some additional income that is to be paid me early in September that would be the final part of our final payment to you.

In the meantime, we are continuing to make all our payments to you and are working to give you this second option.

Michael

EXHIBIT H

September 14, 2009

Eileen Zell
100 Lake Shore Blvd.
North Palm Beach, Fla 33408

Dear Eileen,

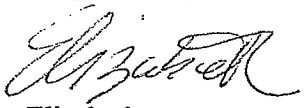
Today I reviewed the email exchange between you and Michael. Clearly, there have been many misunderstandings between the two of you and I regret that I was not involved when the loan was agreed upon almost nine years ago.

Our interest is not only to repay the loan but to maintain the relationship that we have as a family. Michael, the kids and I have enjoyed our relationship with you very much. I have always had a great deal of respect for you (and Barney) and have been extremely grateful for the trust you put in us. My hope is that we can move through this uncomfortable time and repay the loan without jeopardizing our relationship.

Nothing worked out as we anticipated with the company or with Michael's health. But, we have always had your interest at heart and never failed to make payments for our own self interest. When the business closed, we used the last of the cash to write the $15,000 check to you. I wished there were more. Michael did his best negotiating salaries for Michael and David so that we could be in a position to continue paying back. Michael and I have every intention of paying you back and intend to hold David accountable for his interest as well. You must trust us when we tell you that David will keep his end of the agreement.

I feel that we have lost your trust and thus we are using contracts and attorneys rather than talking directly and solving any issues. I would like you to consider a different kind of contract. One that protects all of our interests but helps us maintains a loving and respectful relationship with you. I am not sure exactly what the form of that contract should be, but I really want the three of us to think through how we move forward. The worst thing that could happen is three to five years from now the loan is paid off and we are no longer on speaking terms. I can't believe we would want that future.

Respectfully yours,



Elizabeth

THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK PRINTED ON THE BACK. THE FRONT OF THE DOCUMENT HAS A MICRO-PRINT BORDER. ABSENCE OF THESE FEATURES WILL INDICATE A COPY.

30266 (04/09)

usbank
Five Star Service Guaranteed

CASHIER'S CHECK No. 8397504461

93-38
929

DATE: SEPTEMBER 14, 2009

PAY SIX HUNDRED DOLLARS AND 00 CENTS

$ 600.00

TO THE ORDER OF: EILEEN ZELL

PURPOSE/REMITTER: DAVID D SUTTLE

Location: 8397 CLAYTON

U.S. Bank National Association
Minneapolis, MN 55480

Antoinette Payne
AUTHORIZED SIGNATURE

⑈8397504461⑈ ⑆091900383⑆150080235248⑈

2929

ELIZABETH A. KURILA 9-92
MICHAEL J. MINDLIN
33 PLANT AVE. 314-963-1836
ST. LOUIS, MO 63119-3042

18-1-1010

Date 9/15/09

Pay to the order of Eileen Zell $ 600.00

Six hundred dollars 00/100 Dollars

COMMERCE BANK
MEMBER FDIC

For Child Support Payment Elizabeth Kurila

⑆101000019⑆ 30758287 7⑈ 2929

IN THE COURT OF APPEALS TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

MICHAEL MINDLIN	)	COURT OF APPEALS
and	)	CASE NO. 11APE-11-983
ELIZABETH KURILA	)	
Plaintiffs-Appellees,	)	TRIAL COURT
vs.	)	CASE NO. 10CVH-14965
EILEEN ZELL,	)	REGULAR CALENDAR
Defendant/Third-Party Plaintiff-Appellant	)	
vs.	)	On Appeal from the
DAVID DALE SUTTLE	)	Court of Common Pleas
Third-Party Defendant-Appellee	)	of Franklin County, Ohio

BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF-APPELLANT EILEEN ZELL

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STATEMENT OF ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NOS. 1:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS-APPELLEES MICHAEL MINDLIN AND ELIZABETH KURILA AND THIRD-PARTY DEFENDANT-APPELLEE DAVID SUTTLE (Decision and Entry of October 12, 2011)

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THIRD-PARTY DEFENDANT-APPELLEE DAVID SUTTLE'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT (Decision and Entry of October 12, 2011)

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MRS. ZELL'S MOTION FOR SUMMARY JUDGMENT (Decision and Entry of October 12, 2011)

STATEMENT OF ISSUES PRESENTED

ISSUE NO. 1 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

O.R.C. § 1321.17, on which the trial court based its finding that the loan in the instant case was governed by Ohio law, does not apply to this case.

ISSUE NO. 2 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The choice-of-law factors point to Missouri, not Ohio as the trial court found.

ISSUE NO. 3 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The statute-of-limitations defense was waived by being first raised in a motion for summary judgment.

ISSUE NO. 4 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The statute of limitations was tolled while the appellees were out of Ohio.

ISSUE NO. 5 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The statute of limitations was tolled for the partial payments and written acknowledgments of debt.

ISSUE NO. 6 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The statute of limitations did not begin to run or was reset due to the agreements to suspend payments and extend the loan's due date.

ISSUE NO. 7 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

The parties' loan is subject to Missouri's statute of limitations, which has not expired.

ISSUE NO. 8 (AS TO ASSIGNMENT OF ERROR NOS. 1 - 3)

Ohio's statute of limitations has not expired on the loan.

ISSUE NO. 9 (AS TO ASSIGNMENT OF ERROR NO. 2)

The trial court erred in denying Mrs. Zell's Motion for Summary Judgment.

ISSUE NO. 10 (AS TO ASSIGNMENT OF ERROR NO. 3)

Third-Party Defendant-Appellee David Suttle did not demonstrate either a "meritorious defense" or "excusable neglect" to support his Motion for Relief from the Default Judgment.

STATEMENT OF FACTS

In December 2000, Michael Mindlin borrowed $90,000 at five percent annual interest from his now 82-year-old aunt, Eileen Zell. The stated purpose of the loan was to help fund Mr. Mindlin's St. Louis, Missouri architectural firm -- Suttle Mindlin, LLC -- which Mr. Mindlin owned together with his partner, David Suttle. To memorialize the loan agreement, Mr. Mindlin wrote and signed a letter in Missouri (where he then lived and still lives) to Mrs. Zell (who then lived in Ohio, but who subsequently changed her legal domicile to Florida). In this letter-agreement (Doc. No. 68 Exhibit 1A), Mr. Mindlin "agreed to be personally responsible for this loan." Later, also in Missouri, Mr. Mindlin wrote and signed a Promissory Note (Doc. No. 3 Exhibit A), which he then had co-signed by his wife, Elizabeth Kurila, and Mr. Suttle. (Messrs. Mindlin and Suttle signed the Note in both their personal capacities and on behalf of Suttle Mindlin, LLC.) All of the signees

were to be "jointly and severally" liable for the Note. Mr. Mindlin then mailed this Note in an envelope (Doc. No. 68 Exhibit 1D) to Mrs. Zell in Florida. (Doc. No. 68 Exhibit 1 at ¶¶ 2-7)

Mr. Mindlin never made any serious effort to repay the loan. No payments were made by the original due date of December 2001. After two payments were made in late 2002, none was made for the next five years. Although monthly payments were made for the next three years, they never covered much more than the interest. (Doc. No. 68 Exhibit 1 at ¶¶ 8, 9, 25-28, 33, 35) As a result, the present balance owed remains at $90,000. (Doc. No. 70 Exhibit 1E) Instead, Mr. Mindlin put most of his efforts into requesting extensions on the loan, once due to an illness in 2004. He then obtained these extensions by writing moving e-mails to Mrs. Zell in which he promised to repay the loan in full (Doc. No. 78 Exhibit 1 at ¶¶ 3-9) and by making just enough partial payments to make his false promises to repay the loan seem sincere. (*See* footnotes 8-9, *infra.*) But they were not. 1/

STATEMENT OF THE CASE

On 10/12/2010, Mr. Mindlin and Ms. Kurila filed a Complaint for Declaratory Relief (Doc. No. 3) against Mrs. Zell. Referring to the extension periods they were granted to repay the loan, they alleged that for one particular 30-month extension Mrs. Zell had promised to waive the interest charges. Accordingly, they claimed entitlement to an offset of $6,935.13 and asked the court to declare the amount that remained owing on the loan. Mrs. Zell specifically denied that the parties

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1 Over the years, Mr. Mindlin had obtained multiple extensions on the loan by reaffirming his commitment to take full responsibility for it and by promising to repay the loan in full. However, Mr. Mindlin eventually admitted that these had all been lies. On 8/9/2009, Mr. Mindlin sent Mrs. Zell two proposed refinancing agreements, dividing responsibility for the loan's repayment equally between Mr. Suttle on the one hand and Mr. Mindlin and his wife on the other. (Doc. No. 68 Exhibit 1L) Ignoring that he had agreed in the letter-agreement "to be personally responsible for this loan" and also that the Note had made him "jointly and severally" liable, Mr. Mindlin tried to force Mrs. Zell into allowing him to limit his liability to half of the loan, stating: "[I]n no way am I, individually, going to pay off this entire loan nor expose myself to this liability. That is not financially possible ... nor fair ... nor a valid legal position. *** You would not enter into that agreement and we shouldn't be put at that risk either." (Doc. No. 68 Exhibit 1 at ¶¶ 30-32 & Exhibit 1I) Thus, Mr. Mindlin was essentially disavowing the loan agreements that he had signed. Fearing that Mr. Suttle would not repay his portion of the debt, Mrs. Zell refused. So Mr. Mindlin's next strategy was to try to force Mrs. Zell into forgiving half of the loan. First, he threatened bankruptcy: "[I]t is possible that anyone could file for bankruptcy" and "[Y]ou have no guarantee that you will get paid in full ... if at all" (original ellipsis). (Doc. No. 72 Exhibit 1F) Then, Mr. Mindlin offered to pay off the loan immediately if Mrs. Zell would forgive all of the accrued interest on the loan (Doc. No. 72 Exhibit 1G), which he later said was "well over $50,000." When Mrs. Zell refused, Mr. Mindlin asked her to forgive $30,000. (Doc. No. 72 Exhibit 1 at ¶¶ 8, 11, 12 and Exhibits 1I & 1J) Mrs. Zell offered to forgive $10,000, but no more. (Doc. No. 72 Exhibits 1C & 1J) Mr. Mindlin rejected this offer and sued.

had ever discussed waiving the interest charges for any of the loan's extension periods, which she documented by providing copies of the parties' voluminous e-mail correspondence, adding that she had never even heard of this allegation before. Noting that her previous voluntary offer to forgive $10,000 of the loan far exceeded the claimed offset amount of $6,935.13 and that this offset was the entire basis of the appellees' Complaint, Mrs. Zell questioned the appellees' motives in bringing this action. (Doc. No. 68 Exhibit 1 at ¶¶ 13-21, 28-30, 36-38 and Exhibits 1L, 1M, 1N; Doc. No. 78 Exhibit 1 at ¶¶ 12-15; Doc. No. 72 Exhibit 1 at ¶¶ 3, 4, 7, 8, 13-24 and Exhibits 1B through 1L)

Mrs. Zell filed a motion to join Mr. Suttle and Suttle Mindlin, LLC. She then filed a Third-Party Complaint against them and Counterclaim against Mr. Mindlin and Ms. Kurila for repayment of the entire loan. (Doc. Nos. 33 & 34) The Third-Party Defendants did not respond and judgments were entered against them. (Doc. No. 41) Mr. Suttle then filed a Motion for Relief from the Judgment. (Doc. No. 56) The only defense that Mr. Suttle offered to Mrs. Zell's claim for repayment was "the Plaintiff had several communications with the Defendant that are believed to have modified the terms of the loan[']s repayment," which was a reference to the claimed offset of $6,935.13. Only Mrs. Zell requested discovery, asking for information on Mr. Mindlin's 2004 illness and his past and present finances in order to prove that Mr. Mindlin ***always had the ability to repay her, but simply chose not to do so without getting a huge discount***. But the appellees acted as if that were a state secret, refusing to comply without an "Attorney's Eyes Only" protective order barring Mrs. Zell from all designated "transcripts of oral testimony, and any exhibits referenced during such testimony, as well as the oral testimony itself." (Doc. Nos. 43 & 64) Mrs. Zell objected to this obvious ruse. (Doc. Nos. 49 & 72) But the court never ruled, effectively denying Mrs. Zell discovery.

All of the parties filed motions for summary judgment. (Doc. Nos. 63, 66, 70) In the appellees' motion (Doc. No. 63), they raised the statute of limitations (SOL) as a defense for the first

time, contrary to the Civil Rules. Without holding a hearing, the court granted Mr. Suttle's 60(B) motion. Although Mr. Suttle's motion never mentioned the SOL, the court found that Mr. Suttle had demonstrated its expiration as a "meritorious defense." Then, even though the SOL defense had been raised too late to be considered, the court granted summary judgment for Mr. Mindlin, Ms. Kurila, and Mr. Suttle based on the SOL having expired and denied Mrs. Zell's motion, finding that Ohio's Small Loans Act (ORC § 1321.17) applied to the parties' Promissory Note. (Doc. No. 83)

INTRODUCTION

Accordingly, this appeal is about the trial court's decision that the SOL has expired on the $90,000 loan that Mrs. Zell made to Mr. Mindlin. At p. 3 of the appellees' Reply Brief in support of their Motion for Summary Judgment, the appellees quoted a statement from *Lile v. Powers*, 8 Ohio Supp. 135, 24 O.O. 124 (C.P.1942), explaining the purpose behind the statute of limitations:

> They proceed on the sound policy of compelling either a vigilant and timely prosecution of the rights of the parties, or the sacrifice of those rights to the public repose. Their object is to suppress stale claims from springing up after long lapses of time when the evidence is lost or the facts have become obscure.

To call the instant case a "stale claim" is the furthest thing from the truth. On the contrary, the record contains voluminous correspondence over the years between the parties, showing Mr. Mindlin repeatedly asking for and receiving extensions of time on the loan. In fact, the central tenet of his Complaint was the claim that, during one of those periods of extension (from 1/1/2004 to 6/30/2006), Mrs. Zell had agreed to waive the $6,935.13 in interest that would have otherwise accrued on the loan. However, these extensions on the loan are inconsistent with a SOL defense since the extensions would toll or reset the SOL. To appear as if he intended to repay the loan and thereby continue to receive extensions, Mr. Mindlin repeatedly promised Mrs. Zell in writing up through 2010 that he would repay her in full and he also made a steady stream of partial payments

also up through 2010. Just like the extensions he received, both of these actions tolled the SOL.

Mrs. Zell was so concerned that the parties' agreements to extend the loan's due dates might later be misunderstood and used against her to argue that the SOL had expired that she wrote to Mr. Mindlin, asking him to refinance the loan. Mr. Mindlin wrote back, confirming that their loan was governed by Missouri law, that its SOL had not expired, and that a new agreement was therefore not needed. But, because Ohio has a much shorter SOL for term notes than Missouri, Mr. Mindlin later filed suit against Mrs. Zell in Ohio -- even though none of the parties lives in Ohio. However, if Mr. Mindlin wants Ohio law to apply to the loan, then Ohio's saving clause will toll the SOL for whatever time Mr. Mindlin was out of Ohio, which was the entire period of the loan.

Thus, this case is not about whether Mrs. Zell has sat on her rights. Instead, it is about whether Mr. Mindlin will be able to get away with asking Mrs. Zell for extensions on the loan and then using those extensions to claim that the SOL has expired, repeatedly promising in writing to repay Mrs. Zell and then reneging on those promises, agreeing that the loan is governed by Missouri law and then arguing otherwise, shopping for a forum in a state where the SOL is very short but then trying to avoid that state's savings clause, and otherwise using every trick in the book to try to get away without paying his elderly aunt what he rightfully owes -- which was his intention all along.

STANDARD OF REVIEW

"[T]he Ohio Supreme Court has stated that where the issue of statute of limitations has been raised in the trial court, an appellate court is not barred from considering the argument on appeal that a different statute of limitation applies." *Cincinnati Insurance Company v. Alcorn*, 91 Ohio App App.3d 165, 168, 631 N.E.2d 1125, 1126 (12th Dist.1993)(citing *Lawyers Cooperative Publishing Co. v. Muething*, 65 Ohio St.3d 273, 603 N.E.2d 969 (1992). *See Hidey v. Ohio State Highway Patrol*, 116 Ohio App.3d 744, 748, 689 N.E.2d 89, 91 (10th Dist.1996)("[A]s the Supreme Court in *Doe* made clear, it is immaterial what appellant pled in her amended complaint. We must determine

the true nature or subject matter of the acts giving rise to the complaint in order to determine the statute of limitations for appellant's invasion of privacy claim"). Another court found that the plaintiff "did raise the issue of tolling in his Brief in Opposition [to Summary Judgment] in a manner sufficient to preserve the issue for appeal....Kordel did not use the specific words ...but the substance of his argument was that the statute of limitations was tolled due to Occhipinti's periodic payments." *Kordel v. Occhipinti*, 11th Dist. No. 2007-L-163, 2008-Ohio-6770, 2008 WL 5329964, ¶ 17. 2/

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR APPELLEES

A. ORC § 1321.17 does not apply to this case

In its Decision and Entry dated October 12, 2011 (Doc. No. 83), the trial court held: "This Note is governed by Ohio law. See R.C. 1321.17." From the word "See" after the holding, it is clear that ORC § 1321.17 was the basis of the court's holding. Because the court found that Ohio law applied, it then concluded that Ohio's six-year SOL on negotiable term instruments -- *see* ORC ORC § 1303.16(A) -- barred enforcement of the $90,000 Note. Otherwise, Missouri law would have applied, and Missouri's 10-year SOLs on both term notes and written contracts had not yet expired at the time Mrs. Zell's Counterclaim was filed. Thus, the court's holding that the Note was governed by Ohio law, based on ORC § 1321.17, determined the entire outcome of this case.

ORC § 1321.17 is a provision of Ohio's Small Loans Act (ORC §§ 1321.01 to 1321.99), a consumer-protection statute regulating commercial lenders who make small loans to Ohio borrowers. Thus, to be covered under the Act, one must first "engage in the business of lending money,

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[2] It should be noted that Mrs. Zell was given no notice of the SOL issue until the appellees impermissibly raised it for the very first time in their Motion for Summary Judgment. However, "[t]he requirement that a defendant raise any applicable affirmative defenses in his answer is designed to ensure that the plaintiff has sufficient notice of the defendant's defenses to prepare a proper response." *Taylor v. Meridia Huron Hosp. of Cleveland Clinic Health Sys.*, 142 Ohio App.3d 155, 159, 754 N.E.2d 810, 813 (8th Dist.2000) (Blackmon, J., dissenting). Thus, because the appellees violated this requirement, Mrs. Zell had a limited ability to respond to the SOL issue before the trial court by amending her Counterclaim or otherwise. In addition, Mrs. Zell was further prejudiced in this regard by the trial court's failure to rule on the appellees' motion for a protective order, which the appellees had used to avoid complying with Mrs. Zell's Requests for Production of Documents and to avoid responding to her Interrogatories.

credit, or choses in action" (ORC § 1321.02) or be "a lender ... whose primary business consists of making loans" (ORC § 1321.17). *See Standard Agencies, Inc. v. Russell*, 100 Ohio App. 140, 143, 135 N.E. 2d 896 (2nd. Dist.1954)(the Act "only applies to small loan companies doing business"). Second, the commercial lender must be making a loan "in amounts of five thousand dollars or less." ORC §§ 1321.02 and 1321.17. *See* 9-52 OH Transaction Guide: Business & Comm Law & Forms § 52.60 ("the Small Loans Act govern[s] certain lenders who make loans in amounts of $5,000 or less"); *Ohio Neighborhood Fin., Inc. v. Adkins,* 7th Dist. No. 09-CO-38, 2010-Ohio-3164, 2010 WL 2676993 ("Small Loans Act governs loans of $5,000.00 or less"); *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 122, 2003-Ohio-2721, 789 N.E.2d 217, 219 n. 1. Third, the loan must be "made to a borrower residing in this state at the time the loan is made." ORC § 1321.17. *See Standard Agencies,* 100 Ohio App. at 143 (the Act only applies to loans made "in Ohio").

To help accomplish the purposes of the Act, ORC § 1321.02 sets up a licensing requirement for lenders; ORC § 1321.37(B)(2) requires that licensees must be found to be "financially sound" and to have "a net worth of not less than one hundred thousand dollars"; ORC § 1321.20 requires licensees to pay an annual fee; ORC § 1321.07 requires licensees to have their records inspected annually; and ORC § 1321.99 provides that some violations of the Act constitute felonies.

ORC § 1321.17 **3**/ (the section of the Act the court relied on to find that Mrs. Zell's $90,000 loan to her nephew was governed by Ohio law) is designed to regulate out-of-state loan companies, and its focus seems to be to prevent such companies from charging interest to Ohio borrowers at a

[3] ORC § 1321.17 states: "No loan made outside this state for which a greater rate of interest, consideration, or charges than is authorized by sections 1321.01 to 1321.19 of the Revised Code has been charged, contracted for, or received is enforceable in this state and every person participating therein in this state is subject to sections 1321.01 to 1321.19 of the Revised Code; provided that this section does not apply to loans legally made in any state under and in accordance with a regulatory loan law similar in principle to such sections. ***All loan contracts made with residents of this state are considered as made within this state and subject to the laws of this state, regardless of any statement in the contract or note to the contrary***, except as to licensing if the lender is licensed under and in accordance with a regulatory loan law similar in principle to such sections. A loan in an amount of five thousand dollars or less made to a borrower residing in this state at the time the loan is made by a lender whose office is located outside this state and whose primary business consists of making loans by mail is not enforceable in this state for a greater rate of interest, consideration, or charges than is authorized by sections 1321.01 to 1321.19 of the Revised Code." (Emphasis added.)

higher rate than is allowed to be charged by in-state loan companies. As with any state law that seeks to apply its provisions to out-of-state companies, there is the problem of bringing such companies under the state's jurisdiction. With regard to "short-term loans" (defined in the Act as being for $500 or less), this problem was addressed by forbidding out-of-state loan companies to "make a short-term loan to a borrower in Ohio from an office not located in Ohio." ORC § 1321.36 (B). However, in ORC § 1321.17, this problem is addressed by providing: "All loan contracts made with residents of this state are considered as made within this state and subject to the laws of this state, regardless of any statement in the contract or note to the contrary." This language also prevents out-of-state companies from evading Ohio's maximum rates by stating that another state's law applies.

However, clearly the Act does not mean that every single loan contract made with an Ohio resident is subject to the provisions of the Small Loans Act. Instead, this Act only applies to loans that fall within its parameters – e.g., "[a] loan in an amount of five thousand dollars or less," "made by a lender ... whose primary business consists of making loans," and "made to a borrower residing in this state." There was no evidence in the record that Mrs. Zell has ever been in the business of making loans (either large or small), has ever filed an application for a license under the Small Loans Act, or has ever taken any actions consistent with the provisions of the Small Loans Act. Thus, the Small Loans Act does ***not*** apply to the instant case because Mrs. Zell was not a loan company, the $90,000 loan well exceeded $5,000, and the loan was not made to borrowers residing in Ohio. Indeed, the Note in question was made by the appellees in Missouri and was sent to Mrs. Zell in Florida, bypassing Ohio completely. Even the loan funds were never inside Ohio.

Another reason that the Small Loans Act does not apply to the instant case is that its provisions have been found to be inconsistent with negotiable instruments. Since, in calculating the SOL for the loan, the trial court used the one for negotiable term instruments, it is clear that the

court found the Note in the instant case to be a negotiable instrument. However, in *Akron Auto Finance Co. v. Stonebraker*, 66 Ohio App. 507, 518-519, 35 N.E.2d 585, 590 (9th Dist.1941), the court stated: "[I]t is inconceivable that it was the intention of the Legislature to make the contracts with borrowers made in accordance with said law [the Small Loans Act], negotiable instruments." This is because certain provisions of the Act severely impair the instrument's negotiability. *See, e.g.*, ORC § 1321.14(D)("No licensee shall pledge or hypothecate any note or security given by any borrower except with a person residing or maintaining a place of business in this state.").

B. The choice-of-law factors point to Missouri, not Ohio as the trial court found

The court's decision (Doc. No. 83) that the parties' loan is governed by Ohio law seems to have been influenced by the contacts involving the loan. For example, the court found that the following were undisputed facts: "[1]The Note in question was drafted in Ohio; [2] the Defendant was a resident of Ohio; [3] payment was to be made in Ohio; [and 4] performance was always in Ohio." However, as the record shows, parts 1, 3, and 4 of the court's findings are factually false.

In part 1, the trial court declared: "The Note in question was drafted in Ohio." Since the Note was modeled after the letter-agreement that Mr. Mindlin sent to Mrs. Zell on December 12, 2000, the idea for the Note originated with the author of the letter-agreement (Mr. Mindlin) in Missouri. However, when Mr. Mindlin wrote the Note, he also had the benefit of some sample promissory notes that had been prepared by Mrs. Zell's attorney in Ohio. (Doc. No. 68 Exhibit 1 at ¶¶ 5& 7 and Exhibit 2) Therefore, the appellees were correct to the extent that they stated in their Reply Brief that part of the ***idea*** for the Note "originated in Ohio" as well as in Missouri. (Doc. No. 71 pp. 2-3, n. 2). But, as opposed to the origin of the ***idea*** on which the Note was based, it is undisputed that the Note itself was made in Missouri. Even the appellees have conceded that "Mr. Mindlin (or his agent) then drafted, typed, and (together with the other debtors) signed a new

agreement in Missouri based on Mrs. Zell's attorney's suggestions." *Id.* Moreover, both the letter-agreement (Doc. No. 68 Exhibit 1A) and the Note (Doc. No. 3 Exhibit A) were dated in St. Louis, Missouri. Accordingly, under no possible interpretation could the trial court have been correct when it stated that "[t]he Note in question was drafted in Ohio." For only the samples on which "[t]he Note in question" was modeled were drafted in Ohio -- but not what the court calls "[t]he Note in question." Accordingly, the first part of the trial court's findings is false.

In part 3, the court stated that "payment was to be made in Ohio" and, in part 4, it stated that "performance was always in Ohio." However, these allegations are incomplete and/or factually false. The Note states that payment was to be made "to the order of Eileen Zell, at 5953 Rockhill Road, Columbus, Ohio 43213, ***or such other location as the holder hereof may specify from time to time***." (Emphasis added.) Then, pursuant to this language in the Note, Mrs. Zell changed the payment location to Florida. In 2005, she permanently moved and formally changed her legal domicile to Florida. (Doc. No. 68 Exhibit 1 at ¶ 22) Accordingly, Mrs. Zell then informed the appellees to start sending their payments to her in Florida. (Doc. No. 68 Exhibit 1 at ¶ 23) As evidence that Mr. Mindlin knew this, the proposed refinancing agreement that he sent to Mrs. Zell contained the following provision: "Place of Payment: All payments due under this note shall be made to Eileen Zell, 100 Lakeshore Drive, Apartment 352, North Palm Beach, Florida 33408." (Doc. No. 68 Exhibit L, pps. 2-3) Thereafter, beginning with their third payment, the appellees sent all of their payments to Mrs. Zell in Florida. The only exceptions to this were the few occasions in which the appellees sent payments to Mrs. Zell during the summers, when she was visiting family in Ohio. As a result, approximately 41 (or over 95%) of the 43 payments that the appellees made to Mrs. Zell were all mailed to Mrs. Zell in Florida. (Doc. No. 68 Exhibit 1 at ¶ 25)

Thus, considering that "[t]he Note in question" was not drafted in Ohio; that, under the

terms of the Note, payment was changed from Ohio to another state; and that, as a result, over 95% of the payments were not made in Ohio, three of the four findings that appear to have influenced the trial court's decision that Ohio law governs the parties' loan are factually false. However, the court was not to blame as these three findings mirrored the initial factual allegations contained in the appellees' Motion for Summary Judgment. (Doc. No. 63) But, after Mrs. Zell had demonstrated the falsity of those allegations (Doc. No. 68), the appellees quietly dropped them. (Doc. No. 71)

C. SOL defense was waived by being first raised in motion for summary judgment

"[A] party's failure to raise an affirmative defense either by motion before pleading pursuant to Civ.R. 12(B), or affirmatively in a responsive pleading pursuant to Civ.R. 8(C), or by amendment made under Civ.R. 15, waives the party's right to subsequently raise the defense." *Marok v. Ohio State Univ.*, 10th Dist. No. 07AP-921, 2008-Ohio-3170, 2008 WL 2553055 (citing *Mills v. White-house Trucking Co.*, 40 Ohio St.2d 55, 320 N.E.2d 668 (1974)). Accordingly, "a violation of the statute of limitations .... cannot be asserted for the first time in a motion for summary judgment." *Id.* And, when a party tries to do this, the party "has waived its opportunity even to raise the statute of limitations as a defense in support of its motion for summary judgment." *Johnson v. Waterloo Coal Co.*, 184 Ohio App.3d 607, 609, 2009-Ohio-5318, 921 N.E.2d 1099, 1101 (4th Dist.). As in the instant case, in *Johnson* the appellant did not raise the issue of the waiver of the SOL at trial, but instead defended against the motion for summary judgment on the merits. *Id.* at 611, 921 N.E.2d at 1102 (Harsha, J., dissenting). However, this did not matter and the SOL was still waived.

In the instant case, the appellees did not assert the SOL defense in their Complaint, in their Answer to Mrs. Zell's Counterclaim, by amendment, or by motion before pleading. Nor did the appellees even specifically reserve the right to assert this defense. On the contrary, just to make certain that there would be no doubt that they were not raising the SOL as a defense, a full seven

months after the appellees filed their Complaint they filed a Motion for Protective Order (Doc. No. 43) stating in pertinent part: "Plaintiffs do not now, nor have they ever, attempted to avoid repayment of the loan. They are simply seeking a determination from the Court as to what the repayment amount should be." Accordingly, the trial court did not consider the SOL issue when it issued default judgments against Mr. Suttle and Suttle Mindlin, LLC. Similarly, when Mr. Suttle filed a Motion for Relief from Judgment, he did not mention the SOL issue. Yet, a default judgment would have been inconsistent with the SOL having expired. Nonetheless, when the appellees filed their Motion for Summary Judgment, nine months after they had filed their Complaint, they asserted the SOL as an affirmative defense for the very first time, alleging that the SOL began to run on 12/31/2001 and ended on 12/31/2007. Since the appellees raised the SOL defense too late, it is waived. **4/**

The appellees did not allege the expiration of the SOL in their pleadings because this allegation directly contradicted the theory of the case that they were putting forth in those pleadings. Despite having made no payments by the original one-year due date and only two payments totaling $10,000 in the first six and eight-tenths years of the loan, the appellees stated they had never "defaulted" on the loan or even "failed to make payments" because the loan's due date had been extended on various occasions. Indeed, during one 30-month extension, the appellees alleged, the parties had agreed not only to delay payments but also to waive the interest that would otherwise have accumulated on the loan. (*See* section I.F., *infra*.) For this reason, in their Complaint the appellees claimed an offset of $6,935.13 against what they owed. However, if the loan's due date was extended, then the SOL would not yet have begun to run or at least would have been reset for

[4] If this Court permits the appellees on remand to raise the affirmative defense of the SOL either by motion before pleading pursuant to Civ.R. 12(B), or affirmatively in a responsive pleading pursuant to Civ.R. 8(C) or by amendment made under Civ.R. 15, then Mrs. Zell respectfully requests that this Court instruct the trial court that she also be permitted on remand to raise any issue under those same rules that she could have raised before in a timely manner.

some of these periods of time. Nonetheless, the appellees later alleged (and the trial court found) that the SOL began on the original due date of the loan and was never reset. Since the appellees are still claiming this offset, their Motion for Summary Judgment represents an inconsistent pleading.

D. The statute of limitations was tolled while the appellees were out of Ohio

It has long been held that ORC § 2305.15 (the "saving clause"), which tolls the SOL during the time a person against whom a cause of action accrues is absent from Ohio, applies to actions based on notes as well as other contracts and, prior to *Bendix Autolite Corp. v. Midwesco Ents., Inc.*, 486 U.S. 888 (1988), there was little doubt that it also applied against nonresidents, such as the appellees. **5**/ However, in *Bendix* at 893-895, the U.S. Supreme Court determined that ORC § 2305.15 unconstitutionally burdened interstate commerce when applied to out-of-state corporations:

> The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense.... Ohio cannot justify its statute as a means of protecting its residents from corporations who become liable for acts done within the State ... for it is conceded by all parties that the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations.

Later, several Ohio courts found other applications of the savings clause unconstitutional as well. **6**/

Nonetheless, in *Crosby v. Beam*, 83 Ohio App.3d 501, 510, 615 N.E.2d 294, 300 (6th Dist. 1992), the savings clause was found to be constitutional when applied to majority shareholders of a closely-held corporation accused of breaching their fiduciary duties. The court's rationale was that

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[5] *See, e.g., Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950)(promissory note and nonresident); *Gamble v. Gamble*, 155 N.E.2d 266, (C.P.1957)(cognovit notes and nonresident); *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 269 N.E.2d 121 (1971)(non-resident); *Commonwealth Loan Co. v. Firestine*, 148 Ohio St. 133, 73 N.E.2d 501 (1947)(cognovit note and nonresident); *Couts v. Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950)(nonresident); 1950); *Gruhler v Hossafaus*, 195 N.E.2d 387 (Probate.1963)(promissory note and nonresident); *Cleveland Trust Co. v. Kolar*, 102 Ohio App. 367, 125 N.E.2d 196 (8th Dist.1955)(cognovit note and nonresident); *Moss v. Standard Drug Co.*, 94 Ohio App. 269, 115 N.E.2d 48, affirmed 159 Ohio St. 464, 112 N.E.2d 542 (8th Dist. 1952)(nonresident).

[6] *See*, e.g., *Grover v. Bartsch*, 170 Ohio App.3d 188, 866 N.E.2d 547 (2nd. Dist.2006)(individual who had never been an Ohio resident); *Tesar v. Hallas*, 738 F.Supp. 240 (N.D.Ohio 1990)(individual who moved from Ohio to take other employment in another state and over whom Ohio courts would have personal jurisdiction); *Hoagland v. Webb*, 2nd Dist. Nos. 14024 and 14061, 1994 WL 237504 (June 3, 1994)(both out-of-state corporations and persons who have moved from Ohio to begin employment in other states); *Ruble v. Ream*, 4th Dist. No. 03CA14, 2003-Ohio-5969, 2003 WL 22532858 (individual who has never been a resident of Ohio).

the defendants were not engaged in interstate commerce. Similarly, in *Johnson v. Rhodes*, 89 Ohio St.3d 540, 543, 733 N.E.2d 1132, 1134 (2000), the Ohio Supreme Court upheld the constitutionality of ORC § 2305.15 with respect to individuals who temporarily leave Ohio for nonbusiness reasons.

There are two great differences between the instant case and the cases finding the saving clause unconstitutional. The first lies at the very heart of savings clauses. As explained in 66 Ohio Jur. 3d Limitations and Laches § 115, savings clauses "creat[e] an exception, the object of which is to prevent the statute [of limitations] from running during the time the claimant is prevented, through no fault of his or her own, from suing so that he or she can have the full benefit of the time allowed him or her in which to bring the action." In *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 67, 269 N.E.2d 121, 126 (1971), the Ohio Supreme Court recognized that "the purposes to be served" by Ohio's savings clause were mainly to provide for "cases where suit cannot be instituted because the defendant is not amenable to process." Accordingly, in *Bendix* at 893, the Court used a balancing test under which it considered the state's interest in creating a tolling statute, stating: "The ability to execute service of process on foreign corporations and entities is an important factor to consider in assessing the local interest in subjecting out-of-state entities to requirements more onerous than those imposed on domestic parties." Thus, it remains an important exception to *Bendix* that, as stated in the headnote to *Gray v. Austin*, 75 Ohio App.3d 96, 598 N.E.2d 893 (2d Dist.1992), savings clauses are unconstitutional "absent any showing that methods of service available were inadequate to subject [defendant] ... to jurisdiction in Ohio during limitations period."

In the instant case, Mrs. Zell was prevented, through no fault of her own, from suing the appellees in Ohio. This was because, as a result of the appellees' limited contacts in Ohio, they could not be reached through Ohio's long-arm statute. Accordingly, under the balancing test used in *Bendix*, Ohio's savings clause can and should be used in the instant case to toll the SOL.

The second difference is that the cases finding the saving clause unconstitutional involved defendants who had been dragged unwillingly into an Ohio court. However, in the instant case, not only are all of the parties out-of-state residents, but the ones against whom the saving clause is sought to be applied are the parties who forum-shopped this case and chose to file it in Ohio despite its being the wrong venue. Thus, the appellees cannot complain of a statute that seeks to require nonresidents to "expose[] [themselves] to the general jurisdiction of Ohio courts," which was the objection in *Bendix,* since they have chosen to subject themselves to this state's jurisdiction to try to take advantage of Ohio's short SOL on term notes. Moreover, the appellees may not come into Ohio and ask this Court to use one part of Ohio's law -- its SOL -- but then refuse to let this Court apply another part of Ohio's law -- its savings clause. Clearly, the appellees cannot have it both ways.

According to the Complaint, Mr. Mindlin and Ms. Kurila "are a married couple living in St. Louis, Missouri." (Doc. No. 3 at ¶ 1) Mr. Suttle "live[s] in Missouri," too. (Doc. No. 64 Exhibit B p. 2) Also, from 1995 to 1/14/2010, Messrs. Mindlin and. Suttle were partners of Suttle Mindlin, LLC, a Missouri corporation. (Doc. No. 3 at ¶¶ 5 & 23) Accordingly, it is apparent that all of the appellees have been living outside of Ohio more or less continually since the loan in question was made in December 2000. Therefore, the SOL has been tolled for this same period of time.

E. SOL was tolled for the partial payments and written acknowledgments of debt

As stated on pp. 3-14 of Mrs. Zell's Amended Reply Brief, which is hereby incorporated by reference herein, Restatement (Second) of Contracts §§ 86 and 90 have long provided for equitable tolling of SOLs under the principles of unjust enrichment and promissory estoppel, respectively. For example, according to 1A A. Corbin, Corbin on Contracts § 211 at 278 (1963): "It is universally held that a past debt that has been barred by the statute of limitations is a sufficient basis for a new promise." Prior to Ohio's adoption of Article 3 of the U.C.C., equitable tolling applied to all written

and oral contracts, including negotiable (term) instruments payable at a definite time, such as the court found was involved in the instant case. As a result, a long line of Ohio cases stated that the SOL for term notes is tolled for partial payments and written acknowledgments of debt. 7/

However, after the adoption of the U.C.C., negotiable instruments now have their own SOLs (ORC § 1303.16(A) for term notes and § 1303.16(B) for demand notes) separate from the SOLs for written contracts (ORC § 2305.06) and oral contracts (§ 2305.07). Furthermore, ORC § 2305.08, the statute that tolls the SOL for partial payments and written acknowledgments of debt, now states:

> If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgment, or promise.

Thus, the question arises whether this kind of tolling still applies to term notes since § 2305.08 only cites §§ 2305.06 and 2305.07. According to 54 C.J.S. Limitations of Actions § 381, p. 439:

> The tolling of the statute of limitations based on partial payment is a judicially recognized basis for the tolling of the limitations period for actions upon contracts, obligations, or liabilities. Part payment ... may interrupt or toll the statute of limitations with regard to claims based on an account, an installment contract, a medical bill, a mortgage, or a note.

Because "partial payment is a judicially recognized basis for the tolling of the limitations period" for negotiable (term) instruments, there is every reason for Ohio's courts to continue to use such equitable tolling. Moreover, the reason that U.C.C. § 3-118(a) -- on which ORC § 1303.16(A) is based -- does not expressly state that the SOL is tolled for partial payments or written acknowledgments of debt is explained in Official Code Comment 1 to ORC § 1303.16, which states: "Section 3-118 does not attempt to state all rules with respect to a statute of limitations. For example, the circumstances under which the running of a limitations period may be tolled is left to other law

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7 See *Glick v. Crist*, 37 Ohio St. 388 (1881); *Hance v. Hair*, 25 Ohio St. 349 (1874); *Vore v. Woodford*, 29 Ohio St. 245 (1876); *Felt v. Lowe, Ex'x.*, 84 Ohio St. 479, 95 N.E. 1147 (1911), aff'd 12 Ohio Cir. Ct.R.N.S., 545; *Stephenson v. Line*, 54 Ohio St. 645, 47 N.E. 1118 (1896), aff'd 7 Ohio Cir.Ct.R. 147; *Friedly v. Schmidlin*, 75 Ohio App. 327, 62 N.E.2d 188 (6th Dist.1944).

pursuant to Section 1-103." Then, U.C.C. § 1-103(b) -- which is almost identical to ORC § 1301.103(B) -- states: "Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions." Accordingly, since ORC § 1303.16(A) does not contain any language that precludes equitable tolling of the SOL, this Court should be able to consider such tolling. Therefore, the six-year SOL found in 1303.16(A) can be tolled for the partial payments **8**/ and written acknowledgments of their debt **9**/ that the appellees made in both cases up through 2010. (This is also the law in Missouri. *See* section I.G.1, *infra*.)

F. The statute of limitations did not begin to run or was reset due to the agreements to suspend payments and extend the loan's due date

It is black-letter law that SOLs "to an action on a debt run from the date it becomes due." 66 Ohio Jur. 3d Limitations and Laches § 70. Thus, extending the due date on a debt sets the limitations period running anew. Under ORC § 1303.07(B)(4), the due date of a negotiable instrument may also be extended. *See New Concept Housing, Inc. v. United Department Stores*, 1st Dist. No. C-080504, 2009-Ohio-2259, 2009 WL 1362347. Also, while the extension agreements in the instant case were in writing, this is not necessary. "The modification of a contract in writing, not required to be so by statute, by parol agreement of the parties, which goes to a material part thereof,

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[8] The appellees' last payment was on 9/13/2010. Thirty-nine of their 43 payments occurred after 12/31/2007, the date that the trial court ruled the SOL had expired. Of these 39 checks, 13 were written on the checking account of Suttle Mindlin, LLC and were typically signed by Mr. Mindlin, 13 were written on the joint checking account of Ms. Kurila and Mr. Mindlin and were typically signed by Ms. Kurila, and 13 were cashier's checks printed with Mr. Suttle's name on them. (Doc. No. 78 Exhibits 1 ¶ 19 & 1H)

[9] Mr. Mindlin repeatedly wrote to Mrs. Zell, acknowledging his debt and promising to pay it in full. On 8/27/2003, Mr. Mindlin sent Mrs. Zell an e-mail stating: "I will keep my obligations to you. And, I thank you for all your patience. I know I can't ask any more of you. You have already done more than I had a right to ask." (Doc. No. 78 Exhibit 1A) On 1/12/2004, Mr. Mindlin wrote: "You have know[n] me all my life and you must decide if I am capable of lying to you, or capable of dishonesty.... Two things will likely happen. *** [T]he commissions will finally make it possible to pay you back. Or *** I will take a job and pay you back out of my salary. In either case, I will pay you back. The essential issue remains the same. You must decide who I am." (Doc. No. 78 Exhibit 1C) Finally, on 3/10/2010, Mr. Mindlin wrote: "I have always said I will protect your interests. And, I will. *** [W]hatever David [Suttle] doesn[']t repay, I will pay you. *** In the event David fails to perform, I will continue to make monthly payments to you until this entire loan is paid off as quickly as possible." (Original emphasis) (Doc. No. 78 Exhibit 1F)

should operate to reduce it to the status of a contract by parol, in determining the ... statutes of limitations." Annot., 3 A.L.R.2d 809, § 13. *See* 71 Ohio Jur. 3d Negotiable Instruments, etc. § 210 ("an extension of the time for the payment of a promissory note may be by parol" and "the ... extension may be either express or implied"). *See Osborn v. Low,* 40 Ohio St. 347, 351-352 (1883).

The appellees alleged that there were three distinct times when the parties extended the due date of the loan. The first time was when the original due date of 12/31/2001 was extended; the second time was when payments were suspended during Mr. Mindlin's bout with skin cancer (said to be from 1/1/2004 to 6/30/2006); and the third time was when payments were made conditional based on the appellees' ability to pay. However, the trial court ignored the evidence that the due date of the loan had been extended. Thus, as was held in a similar case: "Prejudicial error was therefore committed by the trial court in the ruling relating to evidence of extension of time." *Thomas v. Collinwood Shale Brick & Supply Co.*, 8th Dist. No. 12767, 1933 WL 1439 (May 1, 1933).

An agreement to extend the time of payment under any contract constitutes a new contract between the parties. Thus, all of the elements of a contract must be met. For example, "a binding agreement will be deemed to have been formed when the parties have had a meeting of the minds through the presentation of an offer by one side and the acceptance of the offer by the other." *Marshall v. Beach*, 143 Ohio App.3d 432, 436, 758 N.E.2d 247, 251 (11th Dist.2001)(internal quotation marks omitted). Also, "[a]s in the case of contracts generally, a contract for the extension of the time of payment must be based on a valuable consideration." 71 Ohio Jur. 3d Negotiable Instruments, etc. § 211. *See Bates v. Midland Title of Ashtabula County, Inc.*, 11th Dist. No. 2003-L-127, 2004-Ohio-6325, 2004 WL 2694923. The question of consideration will be dealt with for all three extension agreements together. Then, the question of whether there was a sufficient meeting of the minds to constitute a binding contract will be considered separately for the three extension agreements.

"Ordinarily, the consideration for an extension of time takes the form of payment of interest." 71 Ohio Jur. 3d Negotiable Instruments, etc. § 212. Typically, consideration will be the interest that the creditor will earn under the extension agreement. *Id.*

> It has long been the settled law in this state that an agreement between the payee of a note and the principal thereof before or after maturity to extend the time of payment for a fixed period is consideration of the same rate of interest as that named in the note is valid.... Such also is the provision of the negotiable instrument law.

Thomas v. Collinwood Shale Brick & Supply Co., 8th Dist. No. 12767, 1933 WL 1439 (May 1, 1933). *See Fawcett v. Freshwater*, 31 Ohio St. 637, 639 (1877)("a valid promise to pay interest on a note past due, for a definite future period, is a sufficient consideration for an agreement to forbear for that time")(quoting *Jones v. Brown*, 11 Ohio St. 601, 609 (1860)). "The fact that the interest agreed to be paid is the the same as the law gives in the absence of an agreement does not preclude the promise to pay it from being a consideration." 17 Ohio Jur. 3d Contracts §64 (citing *McComb v. Kittridge*, 14 Ohio 348 (1846)). With one exception, in the instant case it is undisputed that interest was to be charged on the loan at all times. Thus, this interest satisfied the consideration requirement. The one period of time for which the parties disagree about whether or not interest was to be charged was for the extension of the loan during Mr. Mindlin's illness (which was claimed to be from 1/1/2004 to 6/30/2006). However, because the appellees claimed an offset of $6,935.13 based on the agreement to delay payments during Mr. Mindlin's illness, the appellees have conceded that this extension agreement was binding, perhaps for one of the reasons discussed below.

Since the extension agreements were authorized by the language in the Note, they were part of the parties' original contract and, thus, needed no separate consideration. For the Note stated: "All persons now or hereafter liable for the payment of the principal or interest due on this Promissory Note, or any part thereof, ... agree that the time for the payment or payments of any pa[r]t of this note may be extended without releasing or otherwise affecting their liability on this note." This

seems somewhat analogous to the facts in *New Concept Housing, Inc. v. United Department Stores*, 1st Dist. No. C-080504, 2009-Ohio-2259, 2009 WL 1362347. There, a note stated that the obligations at issue were to "remain and continue as obligations of the Maker until such time as the property is sold on an arms-length basis, notwithstanding the due dates of the interest and principal described herein." In ruling that the SOL did not begin until the sale of the property, the court found that that the extension of time to pay the note was proper under ORC § 1303.07(B)(4), which states that a promise or order "payable at a definite time" may be subject to "[e]xtension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event." In this case the "specified event" was Mr. Mindlin's recovery -- both medical and financial.

Another reason that no consideration was needed to support the extension agreements is due to promissory estoppel as discussed at pp. 10-14 of Mrs. Zell's Amended Reply Brief (Doc. No. 78), which is hereby incorporated by reference herein. In order to induce Mrs. Zell's forbearance, Mr. Mindlin made clear and unambiguous written promises to repay his debt to Mrs. Zell if she extended the due date on his loan. In reliance on these promises, Mrs. Zell refrained from foreclosing on the loan and gave Mr. Mindlin the requested extensions. Then, after accepting these extensions, Mr. Mindlin refused to pay his debt without receiving large reductions -- which appears to have been his goal all along. Thus, Mr. Mindlin's promises should be enforced to avoid injustice. *See Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 96-97, 909 N.E.2d 93, 100-101 (2009).

1. Extending the original due date of December 31, 2001

The appellees repeatedly referred in their pleadings to the parties' agreement to extend the Note's original due date of 12/31/2001. For example, in ¶ 10 of the Complaint (Doc. No. 3), the appellees referred to the 12/31/2001 due date as the "original maturity date," explaining in ¶ 11 that "the parties mutually agreed to modify the repayment schedule." This explanation is repeated in ¶

16: "There is no question that the parties mutually agreed to suspend payments" on the loan. The Complaint then goes on, at ¶ 29, to mention the "subsequent modifications and amendments" to the Note and concludes in its prayer for relief by referring to "the amended Promissory Note." In ¶ 14 of their Response to Mrs. Zell's First Requests for Admissions, the appellees responded "Deny" to the request that they "Admit that Mrs. Zell had not agreed to modify the terms of the Note as of the Note's due date of December 31, 2001." Then, although the appellees had admitted in ¶ 15 that they "did not make any payments on the Note on or before December 31, 2001," they responded "Deny" to the following request: "Because you did not pay off the Note by December 31, 2001, admit that you defaulted on the Note as of December 31, 2001" (*see* Appendix). These same responses are essentially repeated in ¶¶ 6-8 of the appellees' Answer (Doc. No. 33) to the Counterclaim (Doc. No. 21). Yet, despite the appellees' statements that the loan did not become due on 12/31/2001, the trial court nonetheless held in its decision that "This Note was due December 31, 2001," that Ohio's six-year SOL on negotiable term instruments began on 12/31/2001, and that it ended on 12/31/2007. However, if the Note did not become due on 12/31/2001, then the SOL did not end on 12/31/2007.

2. Suspending payments on the loan during Mr. Mindlin's illness

In ¶ 3 of his Affidavit of 8/4/2011 (Doc. No. 80), Mr. Mindlin described a second agreement between the parties to extend the payment dates of the loan. According to Mr. Mindlin's Affidavit, the parties had agreed that the payments and interest on the loan were to be suspended "as long as I [Mr. Mindlin] was ill and recovering." This is repeated in ¶ 19 of the Complaint (Doc. No. 3), where it states: "The parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability." In addition, in ¶ 19 it also states that Mr. Mindlin's illness continued throughout all of "2004, 2005 and half of 2006." Thus, although the appellees state in ¶ 7 of their Answer (Doc. No. 33) to the Counterclaim (Doc. No. 21) that they

made no payments in 2001, 2003, 2004, 2005 and 2006, the appellees "deny they 'failed' to make payments as the payment obligation had been modified by the parties." In ¶ 30(f) of the Complaint, the appellees calculated the interest that accumulated during the period of Mr. Mindlin's illness as being $6,935.13 and requested an offset of that amount against what they still owed on the loan.

Although Mrs. Zell denied that the parties had ever agreed to suspend any interest on the loan, she confirmed that they had agreed to extend the due date on the loan until after Mr. Mindlin's recovery from skin cancer. (Doc. No. 78 p. 23 and Exhibit 1 at ¶ 9) Mrs. Zell submitted e-mails showing the presentation of an offer by Mr. Mindlin **10**/ and its acceptance by Mrs. Zell. **11**/

Thus, the record is replete with undisputed evidence showing that the parties had a written agreement under which the due date of the loan would be extended during Mr. Mindlin's illness. Although the Complaint states that Mr. Mindlin's illness lasted from 1/1/2004 to 6/30/2006, Mrs. Zell had no way to know this at the time. The only notice she had that Mr. Mindlin had recovered was when the appellees resumed making payments on 10/19/2007 after not having made any payments for almost five years (or since 12/23/2002). Therefore, the SOL would not begin to run until either 6/30/2006 (the actual date of Mr. Mindlin's recovery) or 10/19/2007 (when Mrs. Zell first discovered that Mr. Mindlin had recovered). Accordingly, even using six years for the SOL as the trial court did, the SOL would not expire until 2012 or 2013.

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10 **January 12, 2004 e-mail from Mr. Mindlin to Mrs. Zell**

"With regard to us ... you and me ... it seems you have a decision to make. You have know[n] me all my life and you must decide if I am capable of lying to you, or capable of dishonesty. So ... here's the situation. *** I have major commissions pending ... work we expected last year, but now is eminent with the upturn in the economy. However, my cancer and the operation will keep me from the office for some time and I don't know what will happen in my absence. *** Two things will likely happen. The office will survive without me and the commissions will finally make it possible to pay you back. Or my illness will force me to close the office, in which case, I will take a job and pay you back out of my salary. In either case, I will pay you back. The essential issue remains the same. You must decide who I am ... and I will understand whatever you decide." (Doc. No. 78 Exhibit 1C)

11 **January 18, 2004 e-mail from Mrs. Zell to Mr. Mindlin**

"Your mom called me and explained about your cancer. That helps me understand what you were refering [sic] in your letter. This was all news to me. I am very sorry to hear about it and I wish you a speedy recovery. Everything between us will be on hold 'til then. Your health takes precedent [sic] over everything." (Doc. No. 78 Exhibit 1D)

3. Making payments conditional on appellees' ability to pay

While Mr. Mindlin's medical recovery may have ended on 6/30/2006, the ***claimed*** financial effects of his illness lingered much longer. Accordingly, the parties extended the due date of the loan again, but this time they made the payments conditional based on the appellees' ability to pay. For example, as Ms. Kurila averred in ¶¶ 11-13 of her Affidavit of 8/4/2011 (Doc. No. 80): "In January 2008.... we [Ms. Kurila and Mrs. Zell] discussed the fact that we [the appellees] had been unable to make payments the four previous years.... Eileen told me, ***consistent with our previous agreements*** and the way the loan repayment was being handled, 'not to worry, pay what you can.'" (Emphasis added.) At that time, the appellees had just recently resumed making payments after a gap of almost five years and, for the next year, they would continue to send Mrs. Zell an average of $500 per month. Then, in September 2009, Mr. Mindlin informed Mrs. Zell that she would start receiving $1,200 per month (which she did for the next year). Referring to this as the parties' "current repayment agreement," Mr. Mindlin promised Mrs. Zell (Doc. No. 78 Exhibit 1F):

> I will continue to make montly [sic] payments to you until this entire loan is paid off as quickly as possible. If putting this long standing personal obligation into some form of reasonable written agreement is acceptable, then I will certainly do so. Of course, we will continue paying per our current repayment agreement until this is resolved. (Original emphasis.)

As explained in more detail in Section I.G.2, *infra*, the following month Mr. Mindlin sent Mrs. Zell another e-mail, reassuring her that their modified repayment agreement was still binding and that they did not need to sign a new agreement in order to avoid having the SOL run out on the loan.

"[G]iven the family relationship between the parties," it was not unusual that Mrs. Zell agreed to make the appellees' obligation to repay the loan "contingent, i.e., re-payment to be made 'when convenient.'" *See Knisley v. Benner*, 4th Dist. No. 1091, 1985 WL 11132 (May 9, 1985) The Tenth District Court of Appeals has sided with the majority in finding that "a promise to pay when

the promisor 'is able' (or a term of the same purport) is a conditional, and not an absolute, promise to pay." *North Market Ass'n v. Case,* 99 Ohio App. 187, 188, 132 N.E.2d 122 (10th Dist.1955) (quoting 12 Am. Jur. § 303). Furthermore, when the promise is conditional on the ability to pay, "the cause of action accrues thereon and the statute of limitations begins to run when the ability to pay arises." *In re Estate of Buckingham*, 9 Ohio App.2d 305, 307-308, 224 N.E.2d 383, 385 (2nd Dist.1967)(citing 34 Ohio Jur. 2d Limitation of Actions § 72; 34 Am. Jur. Limitation of Actions § 140; 28 A.L.R.2d 788). *See Knisley, supra* ("it is correct that a cause of action does not accrue and the statute of limitation begins to run only when the contingency is met." Accordingly, since the loan in the instant case was made contingent on the appellees' ability to pay, the question is not whether the SOL on the loan has expired. The question is whether the SOL has even begun to run.

G. The parties' loan is subject to Missouri's SOL, which has not expired

1. Missouri's statute of limitations has not expired

Under Missouri law, the SOL for both a written contract and a term note is 10 years. *See* § 516.110 R.S.Mo 2000. The SOL does not begin to run until the last payment is due. *See* § 516.100 R.S.Mo.; *In re Hall*, Case No. 00-43421-13, U.S. Banktcy Ct. W. Dist. of Missouri, 265 B.R. 435 (2001); *Sabine v. Leonard*, 322 S.W.2d 831 (1959); *Hemar Insurance Corp. of America v. Ryerson*, 200 S.W.3d 170 (2006). Also, courts have tolled the SOL when the party originally obligated on the note continues to make payments beyond its stated term. *See Corrales v. Murwood, Inc.*, 232 S.W. 3d 609, 612 (Mo.App. E.D., 2007); *Anderson v. Stanley*, 753 S.W.2d 98, 100 (Mo.App. E.D. 1988).

Accordingly, under the letter-agreement, Mrs. Zell may bring suit against Mr. Mindlin until 12/12/2011, 10 years after the due date of 12/12/2001 stated in that agreement. Similarly, under the Note, Mrs. Zell may bring suit against the four makers until 12/31/2011, 10 years after the due date of 12/31/2001 stated in the Note. In addition, based on the partial payments that Mr. Mindlin, Ms.

Kurila, and Mr. Suttle had made, the SOL will have been tolled through 2010 (the last date of their payments), meaning that the statute will actually run for all of them in 2020.

Since the parties' later extension agreements were in writing, they are also subject to the 10-year SOL on written contracts. On the other hand, if the extension agreements were deemed to be oral rather than written contracts, then they would be subject to the five-year SOL applying to oral contracts (*see* § 516.120 R.S.Mo 2000). However, this five-year SOL would then be tolled on the basis of the partial payments that Mrs. Zell had received up through 9/13/2010.

2. The parties agreed that Missouri law would apply

As the appellees noted at pp. 3-4 of their Motion for Summary Judgment (Doc. No. 63), according to Restatement (Second) of Conflict of Laws § 187(1) and comment a:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an *explicit* provision in their agreement directed to that issue.... [E]ven if not explicitly and expressly written, a court may apply a specific [state's] law through "persuasive evidence" that the contracting parties wish to have the law of a particular state applied.

(Internal quotation marks and citations omitted.) Although neither the letter-agreement nor the Promissory Note specified by which state's law the loan would be governed, the parties' later conduct and statements demonstrate that the parties had agreed that the loan -- and specifically the SOL to which it would be subject -- was governed by Missouri law. This agreement is therefore controlling.

On 5/26/2009, Mrs. Zell mailed Mr. Mindlin a letter enclosing her proposed refinancing agreement. In the cover letter containing Mrs. Zell's proposal, she asked the appellees to refinance the loan just in case the parties' side agreements to delay payments might later be misunderstood and then used against Mrs. Zell to argue that the SOL had expired:

> [M]y purpose is to give you more time to pay off the loan. However, according to my attorney, in order to give you more time it is necessary for me to refinance your loan so as to avoid running afoul of the applicable statute of limitations. (Doc. No. 68 Exhibit 1M)

In response, on 8/9/2009 Mr. Mindlin e-mailed Mrs. Zell his proposed refinancing agreement. (Doc. No. 68 Exhibit 1L) However, Mr. Mindlin eventually changed his mind. On 4/24/2010, Mr. Mindlin sent Mrs. Zell an e-mail stating that, according to his attorney, the parties' agreement was still binding under Missouri law and, thus, refinancing was unnecessary:

> I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding. (Doc. No. 68 Exhibit 1H)

Thus, after being advised by their respective attorneys, the parties both explicitly agreed between themselves that their loan was subject to Missouri's SOL. Furthermore, based on this understanding, the appellees continued to send payments to Mrs. Zell until 9/13/2010.

Although neither Mrs. Zell's nor Mr. Mindlin's proposed refinancing agreements were ever executed, these proposals provide further evidence that both parties had agreed that Missouri law applied to their loan. For both of their refinancing agreements contained a choice of law provision specifying that the loan was governed by Missouri law. Mrs. Zell's provision stated: "This Note will be governed by and construed in accordance with the laws of the State of Missouri." Similarly, Mr. Mindlin's provision stated: "Choice of Law: All terms and conditions of this Note shall be interpreted under the laws of the State of Missouri." (Doc. No. 68 Exhibits 1M and 1L)

3. The parties' loan is governed by the law of Missouri

The appellees stated in their Motion for Summary Judgment that, where the parties to a note have not indicated their preference as to which state's law will govern, the two most-important factors that Ohio's courts will consider are the place of making and the place of performance. **12**/

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[12] This is particularly true in the instant case, where all of the other choice-of-law factors are irrelevant. For example, according to Comment e to the Restatement (Second) of Conflict of Laws § 188, the "place of negotiation .... is of less importance ... when the parties ... conduct their negotiations from separate states by mail or telephone." In the instant case, Mr. Mindlin conducted his negotiations from Missouri, while Mrs. Zell began her negotiations in Ohio and then completed them in Florida. In addition, with regard to the factor of domicile, the parties have at all relevant times lived in different states. Mr. Mindlin lived and still lives in Missouri. While Mrs. Zell lived in Ohio at the time the loan was made, since then she has formally changed her domicile to Florida. Finally, the location of the subject matter -- money -- also has little significance here because it was wired electronically from California to Missouri based on wire instructions Mrs. Zell sent to Indiana. (Doc. No. 68 Exhibit 1 at ¶¶ 2, 3, 6, & 7)

The appellees then cited *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E.2d 680 (1950), for the proposition that, between these two factors, the place of performance is the more important one.

In *Meekison*, the court began by noting that the law in Ohio on this issue is inconsistent:

> The courts have differed.... Some of them have held that a cause of action arises at the place where the contract was executed, and that, even if it is to be performed in another state, as a matter of legislative intent, a cause of action can arise only at the place where the debtor can be subjected to the jurisdiction of the court. On the other hand many courts have held that a cause of action arises where the contract upon which the cause of action is based is to be performed or where the breach of it occurs. In 75ALR 211, there is collected a large number of authorities on both sides of the proposition involved.

Before looking at the *Meekison* decision, it is important to emphasize that this court was absolutely correct in saying that "there is collected a large number of authorities on both sides of the proposition." Take, for example, *Standard Agencies, Inc. v. Russell* (1954), 100 Ohio App. 140, 135 N.E. 2d 896 (2nd. Dist.1954). There, the debtors (who were residents of Ohio) signed and executed a note in Indiana. However, because the note would have been usurious (and, therefore, unenforceable) in Ohio, the debtors tried to evade their legal responsibilities by arguing that Ohio law should apply. The court ruled against the would-be debt evaders, stating: "The general rule is that a contract is governed by the law of the place where it was made or entered into." *Id.* at 143, 135 N.E. 2d at 898 (citing 17 C.J.S. Contracts § 12 c; Restatement of the Law of Conflict of Laws § 332). **13/**

In *Meekison*, the note was dated and made in Michigan, but was to be paid in Ohio. Since Michigan's short SOL had expired but Ohio's longer SOL had not, the debtor argued for the application of Michigan law. Since the case law was inconsistent on the place-of-making vs. place-of-performance issue, the court was free to take a position on whichever side it wanted. Therefore, the court used two general principles to decide the case. First, the court stated that "its philosophy [was]

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[13] Recent Missouri cases also hold that a note is governed by the law of the state where the note was made. *See, e.g., Green Acres Enterprises, Inc. v. Freeman*, 876 S.W.2d 636, 640 (1994) ("generally a demand instrument originates in the state where it is issued").

to be in favor of not barring an action which has accrued to an Ohio citizen unless the statutes of limitation unequivocally require it." *Meekison,* 153 Ohio St. at 309, 91 N.E.2d at 684. Second, the court stated "it is not unjust that a person who has received full and complete consideration for the making of a contract should be compelled to execute her part of it." *Id.* at 311, 91 N.E.2d at 684. If the court applied the law of the state where the note was to be performed (Ohio) rather than of the place where the note was made (Michigan), then the debtor would have to repay the money owed. Because making the debtor pay her just debt was legally supportable, that is what the court did.

In the instant case, this Court should use the *Meekison* rationale to apply the holding articulated in *Standard Agencies* to find that the loan is governed by the law of the state where it was made (Missouri). This will vindicate Ohio's "philosophy to be in favor of not barring an action ... unless the statutes of limitation unequivocally require it." And, at the same time, it will fulfill the policy objective "that a person who has received full and complete consideration for the making of a contract should be compelled to execute her part of it." But, actually, this Court need not take a position on this conflicted issue because, in the instant case, the place of performance is irrelevant. To begin with, the place of payment was not even mentioned in the letter-agreement and, pursuant to specific language in the Note, the place of payment was changed to Florida. According to Comment e to the Restatement (Second) of Conflict of Laws § 188: "[P]lace of performance can bear little weight ... when performance by a party is to be divided more or less equally among two or more states." As was previously explained in Section I.B., *supra*, approximately 41 (or over 95%) of the 43 payments that the appellees made to Mrs. Zell were all mailed to her in Florida. Therefore, place of performance as a factor in the choice-of-law question can be safely ignored.

Thus, the only factor left to count is where the loan agreement was made -- and both the letter-agreement and the Note were made in Missouri. First, the last act necessary, under the forum's

rules of offer and acceptance to give the loan agreements binding effect, was their signing. This occurred in Missouri in the case of both the letter-agreement and the Note. Second, both of the loan agreements indicated on their face that they were dated in Missouri. Mr. Mindlin wrote the letter-agreement on the corporate stationery of his Missouri corporation, Suttle Mindlin, LLC, and he wrote "St. Louis, Missouri" above the date on the Note. Third, Mr. Mindlin wrote and typed both agreements in Missouri. Thus, the letter-agreement and the Note are governed by Missouri law. **14/**

H. Ohio's statute of limitations did not expire on the loan

The parties' loan involved three written agreements: (1) the written contract (the letter-agreement that Mr. Mindlin signed on 12/12/2000); (2) the Note that Mr. Mindlin, Ms. Kurila, and Mr. Suttle signed on 1/30/2001; and (3) Mrs. Zell's and Mr. Mindlin's subsequent written agreements to modify the loan's repayment schedule and extend the loan's due date. As will be shown below, under Ohio law the SOLs have not yet expired on any of these three agreements.

1. The applicable statute of limitations is 15 years on the written contract

At p. 12 of her Memorandum Contra (Doc. No. 68), Mrs. Zell explained that after she had agreed to the $90,000 loan, Mr. Mindlin sent her a written contract in the form of a letter-agreement dated 12/12/2000 to memorialize their agreement. Mrs. Zell then attached to her Memorandum Contra a copy of this letter-agreement as well as an Affidavit dated 7/19/20011 explaining how the letter-agreement came to be. (Doc. No. 68 Exhibit 1 at ¶ 3 and Exhibit 1A). As Mrs. Zell further noted, this letter-agreement contained the terms of the parties' agreement: the $90,000 amount of the loan, the five percent annual rate of interest that would accrue on the loan, the loan's due date of one year from the date of the agreement, that Mr. Mindlin was to be personally responsible for the loan, and that the loan proceeds were to be sent to Mr. Mindlin in two equal payments of $45,000

[14] There is no doubt that, in the instant case, a Missouri court would apply Missouri law. Indeed, Ohio is not even a proper venue for this case since none of the parties even lives here. As such, this case represents a classic example of forum shopping.

each in December 2000 and January 2001. Mrs. Zell fulfilled her duties by sending the money as specified. (Doc. No. 68 Exhibit 1 ¶¶ 2-4 & Exhibit 1B) Thereafter, they had a binding contract:

> Generally, where an instrument containing all the essential terms of a contract is executed by one party and accepted and acted on by the other party, the instrument will be considered a contract in writing for purposes of determining which statute of limitations applies, even though the instrument is not signed by the party adopting it.

Weaver Sheet Metal v. Akron Insulating Co., 9th Dist. No. 17312, 1996 WL 1772 (Jan. 3, 1996) (citing *Brown's Run Country Club v. Brown*, 12th Dist. No. CA95-03-048, 1995 WL 577650 (October 2, 1965); Annot., 3 A.L.R.2d 809, 819, § 8). Furthermore, the letter-agreement is a written contract. **15/** As such, it would be subject to Ohio's 15-year SOL for written contracts provided for in ORC § 2305.06. Therefore, the SOL on the letter-agreement will not expire until December 2016.

About 50 days after Mr. Mindlin had sent Mrs. Zell the letter-agreement, Mr. Mindlin sent Mrs. Zell a Promissory Note dated 1/30/2001. (Doc. No. 3 Exhibit A) At the time that the Note was issued, it was a negotiable instrument under Chapter 13 of the Ohio Revised Code. As such, it was governed by ORC § 1303.39(B)(3), which states:

> Except as provided in division (B)(4) of this section, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation.

As explained in Official Code Comment 3 to the former ORC § 1303.75:

> It is commonly said that a check or other negotiable instrument is "conditional payment." By this it is normally meant that taking the instrument is a surrender of the right to sue on the obligation until the instrument is due, but if the instrument is not paid on due presentment the right to sue on the obligation is "revived."

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[15] The letter-agreement is not a negotiable instrument because it was not made "payable to bearer or to order." *See* Official Code Comment 2 to ORC § 1303.03 ("Total exclusion from Article 3 of other promises or orders that are not payable to bearer or to order serves a useful purpose"); Annot., 77 A.L.R.5th 523 ("a note, to be negotiable, must be expressly payable 'to bearer or to order.' Usually this is not a problem, because an instrument either contains the 'magic words' or does not"); *El-Tatawy v. Leader Nat. Ins. Co.*, 1997 WL 543058 (Ohio App. 6th Dist.). Also, the letter-agreement is not negotiable because it was signed by Mr. Mindlin on behalf of Suttle Mindlin, LLC, instead of being "signed by the person undertaking to pay" (*see* Official Code Comment 1 to ORC § 1303.03), who was Mr. Mindlin in his personal capacity.

Since the appellees have refused to pay the Note, they have dishonored it. When a note is dishonored, "the right to sue on the [underlying] obligation is 'revived.'" What this means is that Mrs. Zell can now sue on that underlying obligation, which is her written contract (the letter-agreement). *See, e.g., Cummings v. Groszko*, 76 Ohio App.3d 812, 603 N.E.2d 387, 390-391 (10th Dist.1992) (holding that the SOL applied to the parties' contract rather than to their later-prepared installment note). Of course, the letter-agreement is only enforceable against Mr. Mindlin, who signed it.

2. The applicable statute of limitations is 15 years on the extensions

After the letter-agreement and the Note were executed, the parties entered into written agreements to extend the due date of the loan as a result of Mr. Mindlin's claimed medical and financial problems. Since the extension agreements were in writing, they are subject to Ohio's 15-year SOL on written contracts, which has not yet expired. On the other hand, if these agreements were deemed to be oral rather than written contracts, then they would be subject to Ohio's six-year SOL for oral contracts provided for in ORC § 2305.07. However, under ORC § 2305.08 the SOL on both written and oral contracts can be tolled whenever a debtor makes a partial payment or written acknowledgment of indebtedness, which the appellees did through 2010. *See, e.g., Matter of Estate of Rosen*, 10th Dist. No. 90AP-654, 1990 WL 162773 (Oct. 25, 1990); *Cummings v. Groszko*, 76 Ohio App.3d 812, 603 N.E.2d 387, 390-391 (10th Dist.1992); *Asset Acceptance L.L.C. v. Lemon*, 5th Dist. No. 2007CA0011, 2007-Ohio-6111, 2007 WL 3408304. Moreover, payment by one co-debtor will bind the other co-debtors where the making of the payment has been authorized by the others. *See, e.g., Bender v. Vaughan*, 106 Ohio App. 136, 143, 153 N.E.2d 778, 783 (6th Dist.1958) (citing 54 C.J.S. Limitations of Actions § 331).

3. The applicable statute of limitations is 15 years on the Promissory Note

In the case of the Note, the extension agreements had the effect of turning the Note into a

simple written contract, subject to Ohio's 15-year statute of limitations. This is because the agreements to delay payments on the loan until Mr. Mindlin had recovered both medically and financially destroyed the Note's negotiability. For, if the due date of a note is to be extended, then "a definite time limit must be stated or the time of payment remains uncertain and the order or promise is not a negotiable instrument." Official Code Comment to ORC § 1303.07. *See National City Bank of Cleveland v. Erskine & Sons*, 158 Ohio St. 450, 456, 110 N.E.2d 598, 601 (1953) (quoting former Section 8109 of the Ohio General Code: "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect"). Thus, with regard to the agreement to extend the due date of the loan until the appellees could afford to repay it, courts have held that such a "conditional term of repayment destroyed negotiability." *See Smith v. Vaughn*, 174 Ohio App.3d 473, 475, 882 N.E.2d 941, 942 (1st Dist.2007)(interpreting promissory note that called for borrower to repay "when you can"). The rationale for this was explained in 71 Ohio Jur. 3d Negotiable Instruments, etc. § 113, as follows:

> A promise to pay when the promisor "is able" is a conditional, and not an absolute, promise to pay.... Such a condition in an instrument would appear to destroy negotiability, since Revised Article 3 of the Uniform Commercial Code requires for negotiability that a writing be payable at a definite time, and an instrument is not payable at a definite time where it is payable only upon an act or event uncertain as to time of occurrence. Provisions in notes such as payable "if and when able to pay" are so uncertain that they fail to create a condition for payment.

See, e.g., Williams v. Cooper, 504 S.W.2d 564 (Tex. Civ. App.Eastland 1973); *In Matter of Estate of Balkus*, 128 Wis. 2d 246, 381 N.W.2d 593 (Ct. App. 1985). Similarly, with regard to the agreement to extend the due date of the loan during Mr. Mindlin's illness, when or even if he were ever going to recover was not known at the time of the agreement. Therefore, this modification also defeated the Note's negotiability. Finally, as previously discussed in Section I.A., if the Note were subject to the Small Loans Act as the trial court had found, then this too would render the Note nonnegotiable.

See Akron Auto Finance Co. at 518-519, 35 N.E.2d at 590. In any event, "[n]egotiability is a characteristic of such importance to commercial paper that any doubt is resolved against negotiability." *Pacific Finance Loans v. Goodwin*, 4 Ohio App.2d 141, 143, 324 N.E.2d 578, 580 (8th Dist.1974).

Accordingly, even under Ohio law the SOL on the loan has not expired. The SOL on the non-negotiable Note, the letter-agreement, and the written extension agreements are all subject to Ohio's 15-year SOL on written contracts. For the Note, this will end on 12/31/2016; for the letter-agreement, on 12/12/2016; and, for the written extension agreement regarding the illness only, on either 6/30/2006 (the date of Mr. Mindlin's recovery) or 10/19/2007 (when Mrs. Zell first discovered that Mr. Mindlin had recovered). In addition, based on the partial payments and written acknowledgments of debt, the SOL on all three agreements will be tolled through 2010, meaning that the statutes will actually run in 2025. Even if the extension agreements are deemed to have been oral rather than written contracts, the six-year SOL for oral contracts has also been tolled by the appellees' part payments and written acknowledgments of debt through 2010; therefore, they will not expire until 2016. While the SOL applicable to the letter-agreement (which was signed by only Mr. Mindlin) will run against only Mr. Mindlin, the other SOLs will run against all of the appellees.

I. Every reasonable presumption should be indulged and every doubt should be resolved in favor of affording a party his or her day in court

"Since statutes of limitations 'are limitations upon the rights of the citizens of Ohio for redress, cases in which the application of a statute of limitations is doubtful should be resolved in favor of permitting the case to be decided upon its merits.'" *Cincinnati Ins. Co. v. Alcorn*, 91 Ohio App.3d 165, 170-171, 631 N.E.2d 1125 (12th Dist.1993)(quoting *Wisecup v. Gulf Dev.*, 56 Ohio App.3d 162, 165, 565 N.E.2d 865, 868-869 (1989)). Put another way: "In construing a statute of limitations, every reasonable presumption will be indulged, and every doubt will be resolved in

favor of affording a plaintiff his or her day in court." 66 Ohio Jur. 3d Limitations and Laches § 10. Accordingly, the Ohio Supreme Court "has shown its philosophy to be in favor of not barring an action which has accrued to an Ohio citizen unless the statutes of limitation unequivocally require it." *Meekison v. Groschner*, 153 Ohio St. 301, 309, 91 N.E.2d 680, 684 (1950).

A number of legal arguments have been presented in this brief explaining why the SOL has not expired. First, what the trial court found to be undisputed facts was mistaken. Second, the court based its decision on a statute that, by its own terms, does not even apply to this case. Third, the court ignored the parties' previous agreement that Missouri law applied to the loan. Fourth, even under Ohio law, the 15-year SOL on written contracts has not yet expired. Fifth, it is "universally held" that the SOL is tolled for partial payments or written acknowledgments of debt. Sixth, the court ignored the evidence that the due date of the loan had been extended even though this was the central tenet of the appellees' Complaint. Seventh, the SOL was tolled while the appellees were out of Ohio. Eighth and finally, the appellees impermissibly raised the SOL issue too late.

Thus, even without having "every reasonable presumption ... indulged" or "every doubt resolved in favor" of Mrs. Zell, this Court could easily find that the SOL has not expired on the $90,000 loan that Mrs. Zell made to her nephew. For this is not a case about a "stale claim." On the contrary, this is a case about an elderly aunt who exercised far more care and diligence in managing this loan than did her nephew -- a nephew who tricked his aunt into granting multiple extensions on a loan that it is now clear he never had any intention to repay in full. He repeatedly lied to her about both his inability and his willingness to repay her. He even lied about the state whose SOL they had agreed would apply to the loan. Mrs. Zell made this loan to her nephew for all the right reasons and he seeks not to repay it for all the wrong reasons. To reward the nephew for his deceit is not just contrary to the purposes behind the statute of limitations. It is unconscionable.

II. THE COURT ERRED IN DENYING MRS. ZELL'S MOTION FOR SUM. JUDG.

Because the court found that the SOL on the loan had expired, it denied Mrs. Zell's Motion for Summary Judgment (Doc. No. 70). However, since the SOL has not expired, this was an error.

III. THE COURT ERRED IN GRANTING TPD SUTTLE'S CIV. R. 60(B) MOTION

In its decision (Doc. No. 83) granting Mr. Suttle's Motion for Relief from the Default Judgment (Doc. No. 56), the trial court found that the expiration of the SOL on the loan constituted a "meritorious defense." However, Mr. Suttle's motion did not raise the SOL as a defense and, in any event, the SOL has not even expired. (*See* Section I, *supra*.) As stated in Mrs. Zell's briefs in opposition to Mr. Suttle's motion (Doc. Nos. 65 & 93), hereby incorporated by reference herein, the trial court also erred in finding that Mr. Suttle had demonstrated "excusable neglect." The court based its finding solely on the unsworn hearsay allegation in Mr. Suttle's counsel's brief that "Mr. Suttle did not understand the necessity to file his own answer." While the court found the allegation reasonable considering that Mr. Suttle was a *pro se* litigant and a third-party defendant, Mrs. Zell was prepared to disprove that allegation completely if afforded a hearing. In any event, since Mr. Suttle's motion did not allege sufficient operative facts, the court's finding was contrary to *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 222, 394 N.E.2d 348, 352 (1978). There (as in the instant case), it was noted that "the only operative facts relating to a defense contained in the record are those alleged in the appellant's brief in support of her motion." The court then held that "[t]hese allegations are not of sufficient evidentiary quality to warrant relief from judgment." Similarly, the trial court's finding is contrary to *Fields Excavating, Inc. v. Welsh Electric Company*, 2005 WL 407570 (Ohio App. 10 Dist.) at ¶ 8. There, the court held that "[u]nsworn allegations of operative facts contained in a motion for relief from judgment filed under Civ. R. 60(B) or in a brief attached to the motion are not sufficient evidence upon which to grant a motion to vacate judgment."

CONCLUSION

For the above reasons, this Court should reverse the judgment of the trial court (which granted the Plaintiffs-Appellees' and Mr. Suttle's Motions for Summary Judgment as well as Mr. Suttle's Motion for Relief from the Default Judgment) and remand this case back to the trial court with instructions for it to reconsider Mrs. Zell's Motion for Summary Judgment.

Respectfully submitted,

Jonathan R. Zell (0036831)
jonathan_zell@yahoo.com
5953 Rock Hill Road
Columbus, Ohio 43213-2127
Telephone: (614) 864-2292
Counsel for Defendant/Third-Party Plaintiff-Appellant Eileen Zell

OF COUNSEL:
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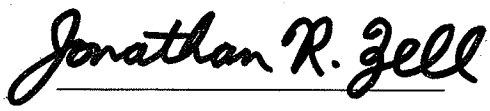
FROST BROWN TODD LLC
10 West Broad Street, Suite 2300
Columbus, Ohio 43215
Telephone: (614) 464-1211
Facsimile: (614) 464-1737
Email: jrupert@fbtlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served via regular U.S. Mail, postage pre-paid, this 17th day of January, 2012, upon:

Gregory S. Peterson, Esq.
Peterson Ellis Fergus & Peer, LLP
250 Civic Center Drive, Suite 650
Columbus, Ohio 43215
Counsel for Plaintiffs-Appellees and Third-Party Defendant-Appellee David Suttle

Mindlin Suttle, LLC
345 Marshall Avenue, Suite 102
St. Louis, Missouri 63119
Third-Party Defendant



Jonathan R. Zell (0036831)

Subject: RE: Questions concerning Memorandum in Opposition to Suttle's Motion

From: Rupert, Jeffrey G. (jrupert@fbtlaw.com)

To: jonathan_zell@yahoo.com;

Date: Tuesday, July 5, 2011 2:14 PM

Jonathon,

Responding to your questions, it is fine if you email me the response tomorrow morning.

As to how it should be signed, I think you should sign it and list me as "of counsel" in the signature block.

For the signature, I don't want you to have to come down here just for that. Can you format it in such a way that the signature page can be a standalone page that you can sign today and drop in the mail to me? You can then revise it up until Friday. I will take care of filing it.

I think you should attach an affidavit from your mother. She has already submitted affidavits in this case, and the other side has not given any indication that they want to depose her.

The page limitation is 15 pages for the memo in opp.

As to citation formats, those are the correct citations. And yes, you should use the numbered paragraph instead of the page number. When you cite a case the second or third time, I would suggest that you use (a) or (b) from the list below although any of those you have listed will be fine.

Jeff

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From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]

Sent: Tuesday, July 05, 2011 12:08 PM
To: Rupert, Jeffrey G.
Subject: Questions concerning Memorandum in Opposition to Suttle's Motion

Hi Jeff,

Here are my questions concerning my Memorandum in Opposition to Suttle's Motion for Relief from Judgment:

1. Is it O.K. if I e-mail you my revised Memorandum in Opposition to Suttle's Motion for Relief from Judgment, containing all the necessary case law, tomorrow morning (Wednesday, July 6)?

2. (a) Who -- you or me -- should sign the Memorandum in Opposition and (b) who should be listed as "of counsel" on it?

3. (a) Does your answer to Question #2 above mean that I must physically come to your firm on Friday (July 8) to actually sign my name on the Memorandum in Opposition; and (b) if so, may I authorize FBT to sign my name for me instead? (I can stop by if required, of course.)

4. I assume that, no matter how you answered Question #2 above, your firm will still be the one printing out our Memorandum in Opposition, filing it with the court, and mailing copies to the other parties' counsel -- right?

5. Do you agree with me that my mother's Affidavit should be attached to our Memorandum in Opposition in order to undermine whatever facts or evidence Suttle might present on the issue of his meritorious defense in the hope that the court will then rule against Suttle without an evidentiary hearing or at least will not rule against my mother without an evidentiary hearing?

6. What is the page limit (double-spaced, 12-point typeface) for our Memorandum in Opposition?

7. Many of the cases I am using (including some you gave to me) look like slip opinions. They state that they should be cited as, e.g., *"Downey v. 610 Morrison Road, LLC*, 2008 WL 2751214 (Ohio App. 10 Dist.)" or as "*Garcia v. Denne Industries*, 2006-Ohio-107." (a) Are those citation formats right? (b) Also, instead of giving page numbers, it looks like I am supposed to give paragraph numbers (see Question #8 below) - right?

8. Does it matter how I cite cases the **second or third time** after I have already cited them once or does the court have a preference between, e.g., (a) *Downey* at ¶ 53, (b) *Downey, supra*, at ¶ 53, (c) *Downey*, 2008 WL 2751214 (Ohio App. 10 Dist.) at ¶ 53, or (d) *Downey v. 610 Morrison Road, LLC*, 2008 WL 2751214 (Ohio App. 10 Dist.) at ¶ 53?

Thanks,

Jonathan

Weeks, Teri D.

From: Schulkers, David M.
Sent: Wednesday, March 02, 2011 3:44 PM
To: Morris, Shannah J.; Nienaber, Linda S.
Subject: RE: Zell Case

You billed 31 hours totaling $6,558.00

You have 4.70 hours of unbilled time totaling $1,010.50

David M. Schulkers
Billing Assistant | Frost Brown Todd LLC

2200 PNC Center, 201 East Fifth Street | Cincinnati, OH 45202-4182
513.651.6946 Direct | 513.651.6800 Main | 513.651.6981 Fax
dschulkers@fbtlaw.com | www.frostbrowntodd.com

From: Morris, Shannah J.
Sent: Wednesday, March 02, 2011 3:40 PM
To: Schulkers, David M.; Nienaber, Linda S.
Subject: RE: Zell Case

Thanks Dave. Here there any way to pull out just my time? Thanks so much for always helping me/Linda!

Shannah J. Morris
Attorney at Law | Frost Brown Todd LLC

2200 PNC Center, 201 East Fifth Street | Cincinnati, OH 45202-4182
513.651.6167 Direct | 513.651.6800 Main | 513.651.6981 Fax | 513.503.6136 Mobile
smorris@fbtlaw.com | www.frostbrowntodd.com

From: Schulkers, David M.
Sent: Wednesday, March 02, 2011 3:37 PM
To: Nienaber, Linda S.
Cc: Morris, Shannah J.
Subject: RE: Zell Case

Here are the numbers on matter #0502520, Estate Planning.

Billed Fees $37,043.50
Billed Expenses $343.39

Unbilled Fees $1,345.00
Unbilled Expenses $12.26

David M. Schulkers
Billing Assistant | Frost Brown Todd LLC

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From: Nienaber, Linda S.
Sent: Wednesday, March 02, 2011 11:25 AM
To: Schulkers, David M.
Cc: Morris, Shannah J.
Subject: Zell Case

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Dave – See Shannah's note below. The client/matter numbers are 0100171 / 0502520. Thank you.

Linda Nienaber

From: Morris, Shannah J.
Sent: Wednesday, March 02, 2011 11:20 AM
To: Nienaber, Linda S.
Subject: Fw: Mindlin/Zell - Affidavit in Support of Motion for Default Judgment.DOC;Mindlin/Zell - Motion for Default Judgment against D. Suttle.DOC

Can you tell me how much in fees we have for the Zell case? I need it for an affidavit. Billed and unbilled. Thanks.

Subject: RE: I found another Silver Bullet

From: Rupert, Jeffrey G. (jrupert@fbtlaw.com)

To: jonathan_zell@yahoo.com;

Date: Tuesday, August 9, 2011 9:33 AM

Jonathon,

I am having someone research the two points you identified.

For the motion to exceed the page limitation, how many pages should I ask for? 15 pages?

Jeff

From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Tuesday, August 09, 2011 7:16 AM
To: Rupert, Jeffrey G.
Subject: I found another Silver Bullet

Hi Jeff,

1. I have found another -- even better -- silver bullet (again, from my old ***Emanuel*** contracts outline) for our Amended Reply Brief. Sections 86 and 82 of the Restatement of Law (Second), Contracts, says that promises to pay past debts that are no longer legally-enforceable due to the statute of limitations are themselves enforceable without any separate consideration. Moreover, most states follow this rule provided that the promises are in a "signed writing." My mother has a signed letter from Plaintiff Ms. Kurila, emails from Plaintiff Mr. Mindlin, and payment checks from all three debtors -- all dated after the expiration of Ohio's statute of limitations -- that should constitute express and implied promises for them to pay their debt. Moreover, I have checked the Restatement citations on the Internet and they seem correct. **However, I need FBT to find me an Ohio case to cite because the Restatement by itself is insufficient.** Also -- a minor issue that you might choose to ignore -- I am unsure whether an e-mail constitutes a "signed writing" in Ohio. **For your review, below my signature in this present e-mail is a proposed new 4-page section on this issue for my Amended Reply Brief.**

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2. Considering the additional length that the above-described new section will add to my Amended Reply Brief, I think you SHOULD file a Motion for Leave to File our Amended Reply Brief in Excess of the Page Limitation due to the Plaintiffs having raised a new issue by submitting Affidavits at this late date. Since both the Court and Peterson seem to have ignored your past motion to extend, I would say that motion was successful. Therefore, I think you should file another such motion for our Amended Reply Brief and I am hopeful that no one will object to this one, either. In this second motion, perhaps you should also EXPLAIN THAT OUR AMENDED REPLY BRIEF WILL REPLACE OUR PREVIOUSLY-FILED REPLY BRIEF because Peterson's 2-day late filing (assuming that is correct) mooted our earlier brief.

3. Based on what little I could find on the Internet (without benefit of any premium accounts), the Statute of Frauds does have the one-year rule that I cited on page 13 of the last Amended Reply Brief I sent you. However, it appears that the Restatement of Laws (Second), Contracts -- which I cited twice for the one-year rule -- no longer has this rule. Therefore, in answer to your question: **Yes, please give me two citations (preferably an Ohio case) to replace the two outdated citations to the Restatement that I have on page 13.**

4. having worked all night on the new section discussed in paragraph one above (and reproduced for your review below), I would like another day to rewrite the portion of my previous Amended Reply Brief as you had asked me to do.

5. If you need to reach me for something important during the day, you should phone me because I probably will not be online to check my e-mail.

-- Jonathan

Enclosure as noted (below):

I. PLAINTIFFS' WRITTEN PROMISE TO PAY DEBT AFTER EXPIRATION OF OHIO STATUTE OF LIMITATIONS IS ENFORCEABLE WITHOUT CONSIDERATION

As will be demonstrated in Section II of this brief, Missouri law governs the Promissory Note and Missouri's statute of limitations has not yet expired. However, even if this Court should hold that Ohio's six-year statute of limitations (which would have expired on December 31, 2007) does apply, the Plaintiffs' and Third-Party Defendant David Suttle's promises after December 31, 2007 to pay the Note are enforceable without the need for separate consideration.

For example, section 86 of the Second Restatement of Contracts provides that "[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice" unless "the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched." Restatement (Second) of Contracts § 86 (1) and (2)(1979).

The comments to the Restatement explain that there are two rationales for this rule: (1) to enforce promises and (2) to provide restitution. Under the former, it has said that there is "moral consideration" for the promise to pay the now-barred debt. However, because this is unlike the traditional concept of consideration, the comments go on to state that the preferred explanation is to protect those who have conferred a substantial benefit on others and thereby to prevent unjust enrichment. As long as the claim is neither false, stale nor previously litigated, "a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails." *Id.* § 86 cmt. b.

As some leading commentators have explained:

> This situation frequently arises in connection with promises to pay debts barred by the statute of limitations.... Such promises have long been binding even when not supported by consideration. When the promise is to pay the amount of the debt, expectation damages may serve both promissory and restitutionary goals: the promisor is held to his promise and the creditor gets .... the amount the debtor originally promised to pay for the benefit.

Thel and Yorio, *The Promissory Basis of Past Consideration*, 78 VIRGINIA L.R. 1045, 1092, 1092 n. 223 (1992).

These commentators continued by saying about the cases that follow the Restatement:

> The cases may simply show that courts are willing to enforce serious, well-con-

> sidered promises, but not rash and ill-considered promises.... Performance by the promisor, particularly over a long period, confirms that the promise was well-considered.... [Also relevant are] powerful reasons for making a serious promise... [such as whether the promisor had] derived substantial benefit ... [while the promisee had] incurred substantial detriment from the underlying act. *Id.* at 1072.

While following the Restatement rule, most states (like Ohio) require that the promise to pay a debt barred by the statute of limitations must be in writing to be enforceable. **[WE NEED AN OHIO CASE CITATION HERE. QUESTION: Under Ohio law, must the writing be signed? Does e-mail need to be signed, too?]**

The promise to pay a time-barred debt may be implied or express. According to the Second Restatement, an express promise would be "[a] voluntary acknowledgement to the obligee, admitting the present existence of the antecedent indebtedness" or "[a] statement to the obligee that the statute of limitations will not be pleaded as a defense." Restatement (Second) of Contracts § 82(1) and (2)(a) and (c) (1979). On the other hand, an implied promise would be "[a] voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or payment of or collateral security for the antecedent indebtedness." *Id.* § 82(2)(b).

In the instant case, Plaintiffs Michael Mindlin and Elizabeth Kurila made both express and implied written promises to Mrs. Zell after December 31, 2007 stating that they would repay their debt, while Mr. Suttle made an implied promise to repay his debt.. For example, in an e-mail dated March 10, 2010 (a true and accurate copy of which is attached hereto as Exhibit 1), Mr. Mindlin told Mrs. Zell:

> I have always said I will protect your interests. And, I will. I have created jobs for both David [Suttle] and me such that we both can meet this obligation. ***But should David ultimately fail to meet his obligations, I will protect you***.... But whatever David doesnt repay, I will pay you.... ***In the event David fails to perform, I will continue to make monthly payments to you until this entire loan***

> ***is paid off as quickly as possible***. If putting this long standing personal obligation into some form of reasonable written agreement is acceptable, then I will certainly do so. Of course, we will continue paying per our current repayment agreement until this is resolved. (Original emphasis.)

Further, in an e-mail dated July 5, 2010 (a true and accurate copy of which is attached hereto as Exhibit 2), Mr. Mindlin told Mrs. Zell: "I have offered to take full responsibility for all the parties and pay you off, personally. This goes beyond my legal obligations."

Finally, in an letter dated September 14, 2009 (a true and accurate copy of which is attached hereto as Exhibit 3), Ms. Kurila told Mrs. Zell:

> Our interest is not only to repay the loan but to maintain the relationship that we have as a family.... My hope is that we can move through this uncomfortable time and repay the loan without jeopardizing our relationship.... Michael and I have every intention of paying you back and intend to hold David [Suttle] accountable for his interest as well. You must trust us when we tell you that David will keep his end of the agreement.

Attached to Ms. Kurila's letter were a $600 check signed by her and a $600 cashier's check printed with Mr. Suttle's name on it. (See Exhibit 3.) These represent two of the thirty-nine checks that Mr. Mindlin,

Ms. Kurila, and Mr. Suttle had sent individually to Mrs. Zell after December 31, 2007. (*See* ¶ 25 of Mrs. Zell's Affidavit of July 19, 2011, Exhibit 1 to "Defendant's MSJ.") Of the thirty-nine checks sent after December 31, 2007, thirteen were written on the checking account of Suttle Mindlin LLC and were typically signed by Mr. Mindlin, thirteen were written on the checking account of Elizabeth Kurila and Michael Mindlin and were typically signed by Ms. Kurila, and thirteen were cashier's checks printed with Mr. Suttle's name on them. For comparison purposes, the debtors combined had sent a total of only four checks to Mrs. Zell before December 31, 2007.

Thus, this correspondence and these payments demonstrate both express and implied promises by the Plaintiffs and Third-Party Defendant after December 31, 2007 to repay the debt represented by their loan. Mr. Mindlin's promises could not have been made any more explicitly, for he wrote: "I have always said I will protect your interests. And, I will"; "whatever David doesnt repay, I will pay you"; "Of course, we will continue paying per our current repayment agreement until this is resolved"; and "I have offered to take full responsibility for all the parties and pay you off, personally." Similarly, Ms. Kurila wrote: "Michael and I have every intention of paying you back.... You must trust us...." Mr. Mindlin even acknowledged: "This goes beyond my legal obligations." For his part, Mr. Suttle joined with Mr. Mindlin and Ms. Kurila in sending Mrs. Zell numerous checks after December 31, 2007 in repayment of his debt. Accordingly, all three of them are barred from trying to evade this debt on the basis of the statute of limitations.

Interestingly, as recently as May 3, 2011, even counsel for the Plaintiffs and the Third-Party Defendant represented to this Court that his clients have always intended to repay their debt and that they would not plead the statute of limitations as a defense: "Plaintiffs do not now, nor have they ever, attempted to avoid repayment of the loan. They are simply seeking a determination from the Court as to what the repayment amount should be." ("Plaintiffs' Motion for 'Attorney Eyes Only' Protective Order" at p. 2.)

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Monday, August 8, 2011 5:54 PM
Subject: RE: Thanks for your suggestions & some questions

Jonathon,

You are free to use or ignore my suggestions as to how you want to handle this. As to your specific questions:

(a) I would not submit a spreadsheet at this time.

(b) Our reply brief is due on 8/14, but we should get it in before then due to the earlier brief that we filed to avoid any confusion

(c) I do not think we have grounds to strike the latest memo.

(d) I have not confirmed the accuracy of the Statute of Frauds argument. This looks correct, but I would need to have someone check. Do you want me to have someone research this?

(e) As to the motion for leave on the page limitation, I would suggest that you just file the brief without seeking leave on the page limitation issue. The way the local rules are written, it is near impossible to get a ruling on the length of a reply brief before it is due. I can file a motion for leave, but this will just highlight the issue for the other side. How do you want to handle this?

Jeff

From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Monday, August 08, 2011 2:10 PM
To: Rupert, Jeffrey G.
Subject: Thanks for your suggestions & some questions

Hi Jeff,

1. Thanks for your suggestions. I will take them into account when doing a rewrite, which I should be able to give to you by tomorrow. In general, I agree that anything can be written better and that concise arguments are preferable to long-winded ones. But that assumes a judge smart enough to read between the lines and good writing skills on my part, neither of which we should assume. Your suggestion to keep working the $6,000 amount into the brief is a good one, which I will try to do.

2. I disagree that there was an agreement to delay payments since there was no obligation to make regular payments after the default. Also, regular payments had not even been made before the default.

3. There are several reasons that I have devoted 10 pages to the side-agreement issue. First, as you know, the standard for deciding a MSJ is whether there is a genuine issue as to any material fact. So even a mere $6,000 issue will prevent us from being entitled to judgment as a matter of law. Second, we have already briefed the statute-of-limitations issue in our Memo Contra the Plaintiffs' MSJ. Thus, the task for our Reply Brief is to address the side-agreement issue, which has not been satisfactorily addressed before. This is not technically a "new" issue because it was raised in the Complaint. But the Plaintiffs had not previously explained this issue or offered any evidence of it as they now have done. Finally, your argument that the Court is more, rather than less, likely to rule against us the more effort we put into the side-agreement issue makes as much sense to me as the argument that the more ammunition the duck hunter uses the easier it will be for the duck to escape. If I use a cannon ball to kill a flea, that might be overkill. But using overkill doesn't necessarily mean that one is weak. It just means you want to make sure your enemy is dead. Anyway, a smart judge should be able to decide the case without needing any input from the lawyers. But a dumb judge might need all the help the lawyers can give him. In any event, I don't see why too many long-winded arguments by themselves would doom an otherwise meritorious case (although that is not the best writing style).

4. The reason I didn't put the no-bargained-for exchange/consideration issue first or otherwise highlight it is that you had previously led me to believe that there are a lot of modern exceptions to the old-fashioned rule. Also, what I put first instead was the argument concerning the vagueness of the side agreement, about which

I think the law is more absolute.

5. There are several reasons for arguing against the Plaintiffs' claim that the contract was amended by the parties' actions (or inactions). First, why ignore one of your opponent's arguments, especially one that was reargued in the Plaintiffs' latest memo? Second, why ignore one of your opponent's weakest arguments? Third, although it might go over the Court's head, I argued in the section on this issue that, even if there had been an agreement to delay payments, the delay in making payments would not have affected the accrual of simple interest unless the debtors had already paid 100% of the past-due interest, which they almost never did. By the way, would this be a good time to prepare a new spreadsheet using simple interest or should we just ignore this inconsistency in our court filings?

6. Now for my questions:

(a) I assume that you will decide whether or not you want us to submit a a new spreadsheet using simple interest, right?

(b) I assume that you have determined that our Amended Reply Brief is due on 8/14 although we will file it much sooner, right?

(c) I assume that we have no grounds to strike the Plaintiffs' latest memo although it was 2 days' late, right?

(d) I assume that our initial Reply Brief will automatically be struck once we file our Amended Reply Brief, right?

(e) I assume that you have confirmed the accuracy of the Restatement citation in my Statute-of-Frauds section, which I found in a 30-year-old contracts outline, right?

(f) I assume that you will file a Motion for Leave to File our Reply Brief in Excess of the Page Limitation due to the Plaintiffs' having raised a new issue by submitting Affidavits at this late date, right?

Thanks,
Jonathan

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Monday, August 8, 2011 12:23 PM
Subject: RE: Attached: "Newest Amended Reply Brief"

Jonathon,

In reviewing this brief, I think it overemphasizes the claimed waiver of interest. I think tightening up the sections that you have on the waiver of interest, and perhaps cutting a few would help the brief. The sections on Missouri law are very good, and are focused. I also think that Section II(A) that the method of calculating interest has been abandoned is good. I suggest that you rework the sections on the waiver of interest. Here are my thoughts on how to rework this:

II(B). No bargained for exchange (with intro explaining Mindlins' affidavits and allegations.) I think this is a very strong argument, and I would lead with it. I would then take a somewhat dismissive tone with the remainder of this section, similar to what you have done on the choice of law.

C. There was an agreement to delay payments, and not a waiver of interest

- Your mother's affidavit and version of what happened
- No intent and/or meeting of minds otherwise – not even Mindin's version has these elements. I suggest combining your current (B)(1)(a)-(c) into a page or two. The current version is too long and needs focused. I would use the argument you have re Mindlin's wife and Suttle not being party to the "side agreement" as an example.
- Mindlin never mentioned this supposed waiver until right before litigation
- Short statute of frauds argument.

I would also work in several times the amount at issue. By Mindlin filing suit and not making any payments, he likely has increased the amount he owes more than the $6K at issue with this dubious side agreement.

Also, do we need Section II(B)(2) re action and inaction now that we have the affidavits?

You are obviously free to disagree with my suggestions. My main point is that you spend nearly 10 pages on an issue that has $6K in dispute while you quickly go through the choice of law, which is the far bigger issue. When you argue that much about a small issue, my view is that a Court will be more likely to believe that there is an issue and that it will deny summary judgment on that point.

Jeff

From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Monday, August 08, 2011 9:39 AM
To: Rupert, Jeffrey G.
Subject: Attached: "Newest Amended Reply Brief"

Hi Jeff,

Since we are going to file a request to submit a long Amended Reply Brief, I am attaching to this present e-mail for your review a revised brief where I have added some law to Section II. B. (dealing with the Plaintiffs' Affidavits).

Frankly, I obtained this law from an old ***Emanuel Contracts Outline*** that I used in law school, so someone at FBT will need to review what I wrote for legal sufficiency.

But, before you shake your head at my poor legal-research skills, you should know that I think I have found not one but one and two-third's magic bullets to kill the Plaintiffs' argument that the alleged oral side agreement modified the written Promissory Note.

The first bullet is the Statute of Frauds. Here is my Statute-of-Frauds argument straight out of ***Emanuel's*** (including the Restatement citations):

In their Complaint, the Plaintiffs claimed that: "The parties agreed there would be no payments made and no interest accumulated during Plaintiff Michael Mindlin's illness and resulting disability in 2004, 2005, and half of 2006." (Complaint at ¶ 19.) Furthermore, according to Mr. Mindlin's Affidavit, this alleged agreement occurred shortly after Mr. Mindlin was diagnosed with skin cancer in December 2003. However, according to the Statute of Frauds, a contract that is not to be performed within one year from the making must be in writing. (*See* Restatement 2d, § 198(1).) If no payments were to be made for the 30-month period from January 1, 2004 to June 30, 2006, but payments were then going to resume on July 1, 2006, then that is a contract whose performance would be impossible to complete within a one-year period. Thus, the allegedly modified contract was unenforceable because of the Statute of Frauds. This means that the original contract is left standing and the modification is treated as if it never occurred. (*See* Restatement 2d, § 223(2).)

The two-third's bullet comes from a careful reading of Michael Mindlin's Affidavit. The poor boy can't even lie well! Here is my argument:

According to Mr. Mindlin's affidavit at ¶ 3: "Eileen called me directly and told me not to worry about the loan, not to worry about payments and not to worry [sic] interest as long as I was ill and recovering." Note that Mr. Mindlin alleged that Mrs. Zell "told ***me*** not to worry about the loan...." (Emphasis added.) Mr. Mindlin did not allege that Mrs. Zell told him that Elizabeth Kurila and/or David Suttle did not have "to worry about the loan...." Mr. Mindlin only alleged that Mrs. Zell told Mr. Mindlin that he himself did not have "to worry about the loan...." Accordingly, even if one were to accept the truth of Mr. Mindlin's allegation and even if one were to find that this resulted in a binding contract, that contract applied only to Mr. Mindlin -- not to Ms. Kurila or Mr. Suttle. Thus, Mrs. Zell would still be entitled to judgment as a matter of law against Ms. Kurila and Mr. Suttle.

Please let me know what you think of my revised "Amended Reply Brief," if the Restatement citations in the Statute-of-Frauds section are still accurate, if my statements of black-letter contracts law are accurate, and if you think we need some Ohio case citations (I don't).

By the way, I do not want to be accused of e-mail hacking, so let me double-check with you that we may attach as an exhibit an e-mail that Mr. Mindlin's mother sent from Eileen Zell's e-mail account to Mrs. Mindlin's other son, Matt, about Michael taking business trips when he now claims to have been disabled.

If for any reason our filing deadline is today (August 8), I am ready to give you the Amended Reply Brief to file today. Just call me because, while I will be home, I might not be online during the daytime.

Thanks,
Jonathan

Enclosure: Revised "Amended Reply Brief"

----- Forwarded Message -----
From: Jonathan Zell <jonathan_zell@yahoo.com>
To: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
Sent: Sunday, August 7, 2011 6:30 PM
Subject: This can wait until Monday to be read

Jeff,

O.K., I will wait to hear more from you on Monday. Since it is Sunday, don't bother responding to anymore of my questions today.

On Monday, please consider these issues:

1. What was the deadline for our Reply Brief -- 8/8/2011 or 8/14/2011?

2. If we have a longer amount of time in which to file our Reply Brief, then we should have time to ***request permission to file a longer*** Amended Reply Brief. But does that mean that we should file a motion to strike our own previous Reply Brief, which we intend to replace with our Amended Reply Brief or does an "Amended" Reply Brief do that automatically?

3. Apparently, the Plaintiffs did NOT file a brief out of rule, so we cannot move to strike it, right? But did the Plaintiffs file a late Memo Contra to our MSJ and, if so, what can we do about that?

4. Substantively, you wrote:

(a) **"But what I have always found most convincing is the lack of any email and the fact that Mindlin didn't bring this up until recently."**

Does this have any relevance to our MSJ and, if so, to which issue does it address? Assuming the only issues relevant to the parties' respective MSJs are (i) the S of L and (ii) whether there are any factual disputes that preclude rendering a judgment on the pleadings, I don't see the relevance of your comments at this stage of the case.

(b) **"I would not focus on parsing the affidavits as much as you have as it makes this issue bigger than it is."**

Since one of the only two issues is whether there are any factual disputes that preclude rendering a judgment on the pleadings, I don't think we should be afraid of making this issue any bigger than it is. It is already huge. But we can attack the Affidavits by arguing that they do not contain evidence "showing the elements of a contract" (see below). I think it is necessary to parse the language used to do this.

(c) **"I also think a case or two about the lack of specificity would be good."**

As you know, I ended the Amended Reply Brief with the following:

The Plaintiffs' Affidavits fall far short of showing the elements of a contract: an intent by Mrs. Zell to be bound, a meeting of the minds, a bargained-for exchange, and consideration supporting modification of the Promissory Note.

It would certainly be easy to cite cases to support the above black-letter law. Can FBT find the cases to do so given FBT's online research capabilities?

Thanks!

Jonathan

Subject: RE: Ohio case law research on Promise to Pay Time-Barred Debt

From: Rupert, Jeffrey G. (jrupert@fbtlaw.com)

To: jonathan_zell@yahoo.com;

Date: Wednesday, August 10, 2011 6:32 PM

Jonathon, I will have an associate research these issues. Also, you are correct that August 15th would be the date. Jeff

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From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Wednesday, August 10, 2011 5:43 PM
To: Rupert, Jeffrey G.
Subject: Ohio case law research on Promise to Pay Time-Barred Debt

Hi Jeff,

This email addresses two related issues: (1) finding ***Ohio*** cases holding that a promise to pay a time-barred debt is enforceable under the principle of unjust enrichment and (2) arguing in the alternative that the Plaintiffs' written promises to pay their debt AFTER the contract was made -- but BEFORE the statute of limitations expired -- are binding due to BOTH ***detrimental reliance*** AND ***promissory estoppel***. The second issue, of course, is would be much easier to find ***Ohio*** cases for. (Actually, the legal doctrines are so well known that case citations might not even be necessary.) I will discuss these issues in reverse order below.

I. ISSUE TWO

The second argument is as follows:

As Mr. Mindlin has alluded to in his Affidavit with the words "I have always said I will protect your interests," the Plaintiffs' both written and oral promises to Mrs. Zell date back well before Ohio's statute of limitations would have expired. Whenever Mrs. Zell would grow concerned about the unpaid debt and the increasing passage of time, usually Mr. Mindlin, but occasionally Ms. Kurila, would always assure Mrs. Zell that, if Mrs. Zell just waited long enough, the debtors would fully repay her. These promises were intended to, and did in fact, induce Mrs. Zell to refrain from foreclosing on the debtors' loan. It also allowed the Plaintiffs to stay in Mrs. Zell's good graces for which they were rewarded by continuing to receive thousands

of dollars in cash every year in birthday, anniversary, and holiday gifts for themselves and their children. Thus, under the common law doctrine of promissory estoppel, the Plaintiffs' promises are binding since injustice can be avoided only by enforcement of the promise. Moreover, Mrs. Zell relied on the Plaintiffs' promises to her detriment (especially after the Ohio statute of limitations expired), thereby creating a quasi-contract. For all of these reasons, the instant case is a most compelling one for the application of the rule against unjust enrichment.

QUESTION: At present, as shown above, I only argue promissory estoppel and detrimental reliance as reasons supporting the application of the principle of unjust enrichment for the purpose of holding enforceable a promise to pay a time-barred debt -- which, in Ohio, might not be good law based on the lack of any Ohio cases (see ISSUE I below). Therefore, should I also make separate and independent arguments for promissory estoppel and detrimental reliance in our brief? Or is what I have written above sufficient?

II. ISSUE I

Especially without access to premium online-legal-research sites, I have had difficulty finding Ohio cases holding that a promise to pay a time-barred debt is enforceable under the principle of unjust enrichment. All I have found are cases holding that a claim for unjust enrichment, which arises from a contract implied in law or a quasi-contract, is enforceable WHERE THERE WAS NO PREVIOUS CONTRACT BETWEEN THE PARTIES (which is not true in our case). Hopefully, your associate will have better luck. But, if not, your associate might look at the citations listed below, which I have found but cannot access or read. The citations below may or may not contain the Ohio cases we are looking for.

1. **Oetting v. Sparks, 109 Ohio St. 94,143 N.E. 184 (1923)** (decedent gave birth after having made a donative promise to next-of-kin).

2. **Freedline v. Cielensky, 115 Ohio App. 138, 184 N.E.2d 433 (1961)**(Even in the absence of promise, the claim of unjust enrichment can lead to a judicial balancing of accounts between the parties).

3. **In re Yeager Co., 227 F. Supp. 92 (N.D. Ohio), aff'd, 315 F.2d 864 (6th Cir. 1963)**(In conventional terms, a claim must be identified as one "on the contract" to enforce the expectancy or reliance protection, or one "off the contract" to exonerate the restitution interest).

4. **Dawson, Restitution Or Damages? 20 OHIO ST. L.J. 175, 177 (1959)**(The fundamental conception of unjust enrichment, namely, that a compelling reason for liability is demonstrated where defendant's gain can be tied directly to plaintiff's loss. "Yet it is the presence of some kind of

gain-loss equation that explains the extraordinary progress of the unjust enrichment idea in most of its modern applications. For persons who have suffered loss, the loss alone is bad enough. But when it has produced an identifiable gain in another person, the sense of loss is greatly aggravated. Likewise, . . . the merit of a claim for loss is much reinforced when the loss is matched by the gain of another").

5. **Hughes v. Oberholtzer, 162 Ohio St. 330, 335, 123 N.E.2d 393, 397 (1954)**("The purpose of the quasi-contract action is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant").

III. OUR FILING DEADLINE

Since our Amended Reply Brief is due 8/14 (which falls on a Sunday), I assume that means it is due on Monday, 8/15, right?

Thanks,

Jonathan

----- Forwarded Message -----
From: Jonathan Zell <jonathan_zell@yahoo.com>
To: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
Sent: Tuesday, August 9, 2011 8:07 PM
Subject: Plse tell ur associate to research this differently

Jeff,

Contrary to what your associate has told you, I think that sections 82 and 86 of the Restatement Second are indeed good law in Ohio and, moreover, that your associate will find numerous Ohio cases stating the same thing as those sections in the Restatement Second **IF** the associate researches this differently as explained below.

I think the reason no Ohio cases have applied sections 82 or 86 of the Restatement is because THOSE ARE NEW SECTIONS. For example:

(1) My 1977 Emanuel Law Outline cites to sections 86 and 87 (not 82) of the Tentative Drafts (1968-1976) of the Second Restatement of Contracts.

(2) Also, the law review article -- Thel and Yorio, *The Promissory Basis of Past Consideration*, 78 VIRGINIA L.R. 1045, 1092, 1092 n. 221-222 (1992) -- that I quoted in my Amended Reply Brief cites not merely the Second Restatement but also the First Restatement and then goes on to say that this law is of very "long" duration:

"This situation frequently arises in connection with promises to pay debts barred by the statute of limitations. The First Restatement's famous list of promises that are binding without consideration began not with Section 90, but with debtors' promises to pay debts barred by the statute of limitations. *
Such promises have long been binding even when not supported by consideration." **

*
Restatement of Contracts sec. 86 (1932).

**** See, e.g., Born v. La Fayette Auto Co., 145 N.E. 833, 836 (Ind. 1924); Gillingham v. Brown, 60 N.E. 122, 122 (Mass. 1901); Hart v. Boyt, 54 Miss. 547, 548 (1877); Restatement (Second) of Contracts sec. 82(1) (1979); see also 1A Arthur L. Corbin, Corbin on Contracts sec. 211, at 278 (1963)("It is universally held that a past debt that has been barred by the statute of limitations is a sufficient basis for a new promise."); John E. Murray Jr., Murray on Contracts, sec. 67(A)(1), at 291 (3d ed. 1990)(discussing past acts as consideration). See generally John D. Calamari & Joseph M. Perillo, The Law of Contracts, secs. 5-5, 5-7 (3d ed. 1987)(discussing effect of and rationale behind rule concerning promises to pay barred debts); 1A Corbin, supra, secs. 214-219 (discussing enforcement of new promises to pay antecedent debts and revival of remedies based on partial payments); E. Allan Farnsworth, Contracts, sec. 2.8 (2d ed. 1990)(discussing moral obligations exception to bargain rule); 1 Samuel Williston, The Law of Contracts secs. 160-178 (1920)(outlining the early law and moder rule governingt he enforceability of a promise to pay past indebtedness).**

Sorry, I guess I should have given you the above information before. Anyway, now you can tell your associate that, instead of looking for cases that cite sections 82 and 86 of the Restatement Second, your associate should look for Ohio cases that (1) apply the substantive law contained in sections 82 or 86 of the Restatement Second; (2) THAT CITE TO SECTION 86 IN THE FIRST RESTATEMENT; (3) that cite the cases from other states listed in the second footnote above; and/or (4) that cite the authorities listed in the second footnote above.

Given the following statement by one of those cited authorities, I am confident that your associate will find many Ohio cases:
"It is
universally held that a past debt that has been barred by the statute of limitations is a sufficient
basis for a new promise." (Emphasis added.)

Thanks,

Jonathan

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Tuesday, August 9, 2011 6:04 PM
Subject: FW: I found another Silver Bullet

Jonathon,

On the two research issues, no Ohio cases have applied Section 82 or 86. There is an Ohio Revised Code section that seems somewhat similar to those Restatement sections, but this Revised Code section does not apply to R.C. 1303.61, the statute of limitations for notes. You still could argue that the Restatement applies, but you will have to do so by citing to the Restatement.

Also, my associate has a case cite for you on the statute of frauds.

Finally, I will get the page limitation motion filed tomorrow.

Jeff

From: Klingelhafer, Katherine
Sent: Tuesday, August 09, 2011 5:10 PM
To: Rupert, Jeffrey G.
Subject: FW: I found another Silver Bullet

Jeff—

On the question of the Restatement of the Law of Contracts Section 82, which addresses promises to pay past debts that are no longer enforceable, I could not find any Ohio state cases citing either Section 82 or Section 86 of the Restatement. It appears that Ohio Courts have not addressed these sections, and have not adopted the Restatement language. It is not clear if an Ohio Court would apply Restatement provisions, particularly in a case where specific UCC statutory provisions govern. Restatement provisions are more general than the UCC provisions adopted by statute.

While the Restatement is not cited to by Ohio courts, I did find an Ohio statute, R.C. 2305.08 titled Partial Payments, that is similar to Section 82, which indicates that the statute of limitations runs from the time a payment is made on a demand founded on a contract or a promise to pay is made. However, this statute is designed to apply to the general statute of limitations for written or oral contracts, which is a different statute of limitations than for notes. No similar provision exists for the statute of limitations on a note, R.C. 1303.16(A), and I could not find any cases applying the statute on promises to pay in the context of a note under the UCC.

R.C. 2305.08 states that:

> If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 [written and oral contracts statutes of limitation] of the Revised Code, after such payment, acknowledgment, or promise.

Subject: RE: New Brief Attached & Surprises

From: Rupert, Jeffrey G. (jrupert@fbtlaw.com)

To: jonathan_zell@yahoo.com;

Date: Thursday, August 11, 2011 7:10 PM

Jonathon,

Below is the results of the research. I doubt that this will add much to the substance of your draft, but you likely will want to add a few of the case cites.

As to the draft, I suggest that the first section be broken up into two sections: (1) new promise to pay debt after SOL expired and (2) promises before SOL expired were detrimentally relied upon. I think these are separate concepts, and dividing the two will make the arguments easier to follow. As to the new promise to pay after the SOL expired argument, I suggest that you tell the Court at the start of the section what the "new promise" was by moving some of the latter paragraphs on the Mindlin emails to the front of that section. It will help the Court understand the issue better, as I found myself wondering what the new promise was. Also, I would anticipate that the Court will have questions as to whether the "new promise" was definite enough to be enforceable as the affidavits detail settlement discussions where the parties could not agree what was owed.

On the detrimental reliance argument, it would be helpful if your mother averred (if she can) that she did not foreclose on the loan due to the email promises. Also, you likely will need an affidavit from her to authenticate the new emails. At the end of the detrimental reliance section (p. 9), I suggest that you change the references from Plaintiffs' counsel to just "Plaintiffs" as it a stronger argument if Plaintiffs say it, which they did.

I suggest that you tone down the references to Mindlin being a liar. I realize that you believe he is, but those allegations seemed a little out of place for a summary judgment motion. The Judge will likely view the different versions of whether there was a conversation as a disputed material fact, which the Court sees frequently in summary judgment motions.

The remainder of the brief seems largely similar to what you sent before, and I have given you comments on that.

Jeff

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Jeff—

First, a Westlaw keycite search shows that no Ohio cases cite to the Restatement of Contracts (First) Section 86. This is the section on promises to pay debts barred by the statute of limitations, and mirrors the Restatement Second Section 82. I also did a keycite search on the case law specifically provided by Mr. Zell (the second footnote cases, Born v. LaFayette Auto, Gillingham v. Brown, and Hart v. Boyt) and found no Ohio cases citing those cases.

As opposed to focusing on the statutory provision we discussed yesterday, which applied to the statutes of limitations for a breach of contract, I have done some more general research to find something referencing the Restatement or addressing Mr. Zell's issue more generally. Below are some cases that speak to the issue generally, and an OJur section that cites to the Restatement. When searching on the substance of Mr. Zell's request, nearly every case that discusses these issues is from the 1800s.

In searching Ohio law I located a 1931 case citing to the First Restatement Section 85 et seq, and discussing a promise to pay an existing debt where the statute of limitations has expired. The case ultimately holds that the promise to pay would be enforceable under Restatement Section 90 grounds: "A promise, which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise." Below is the commentary in the case on promises to pay debts barred by the statute of limitations:

While it is well understood as an elementary principle of the law of contracts that a consideration must exist to render a promise enforceable, there are several varieties of obligations that have long been held to be valid in which it is difficult to see any consideration. Among these are new promises to pay debts extinguished by a discharge in bankruptcy, or barred by the statute of limitations. Sometimes it has been said that these old obligations create a moral liability sufficient to stand as a consideration, although a mere moral obligation of itself is no consideration at all. Sometimes it has been said that this moral obligation is sufficient when joined with a prior legal obligation, but if that prior legal obligation has been extinguished it is not easy to see how it adds anything to the valueless moral obligation. When those responsible for the new monumental Restatement of the Law of Contracts approached this problem, they swept away the ingenious efforts to locate and define the consideration underlying such obligations, and

laid down the broad proposition that no consideration was required in such obligations. Section 85 et seq., Restatement of the Law of Contracts.

W.B. Saunders Co. v. Galbraith 40 Ohio App. 155, 159, 178 N.E. 34, 35 (Ohio App.1931).

A very old Ohio case addresses this issue and held that "under the limitation laws of this state, the acknowledgment and promise to pay a debt which is barred by the statute does not revive the original cause of action, but if a creditor would enforce collection, he must do it by suit on the subsequent promise." Essentially, the Court found that a promise to pay was enforceable but that it did not revive the original cause of action and did not revive the original 15 year statute of limitations on the note. Below is a quote addressing the promise to pay a debt already barred which may be of some use:

"The question is not whether the acknowledgment of a subsisting indebtedness upon a note, already barred by the statute of limitations, and a promise to pay the same, constitutes a contract which can be enforced, for of this we suppose there can be no doubt. Although a note may be barred by a statute of limitations, still a moral obligation rests upon the maker to pay, and this moral obligation would constitute a sufficient consideration for a new promise. But the question is, whether such an acknowledgment and promise revives and resuscitates the note, so as to give it life and vigor for an additional period of fifteen years, from the date of the acknowledgment or promise."

Hill v. Henry 1848 WL 74, 3 (Ohio) (.December Term 1848).

OJur cites to the Restatement Second on this point, and I've included that below to the extent that it will strengthen his existing argument citing the Restatement.

Ohio Jurisprudence § 53. Moral obligations

Generally, a mere moral obligation or conscientious duty arising wholly from ethical motives, unconnected with any legal obligation or the receipt of benefit by the promisor of a material or pecuniary nature, will not furnish sufficient consideration for an executor promise.[FN1] However, a moral obligation arising from what was once a legal liability that has become suspended or barred by the operation of a positive rule of law may furnish consideration for a subsequent executory promise.[FN2]

Under the Restatement Second, Contracts, a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.[

FN3

] Examples of enforceable promises enumerated in the Restatement of Contracts include a promise to pay a debt barred by the statute of limitations or a debt discharged in bankruptcy, a promise to fulfill a duty in spite of nonperformance of a condition, a promise to perform a voidable duty, and a promise reasonably inducing definite and substantial action.[FN4] Thus, a debt barred by a discharge in bankruptcy may be revived by a new promise to pay, and at any time between the filing of

the petition and the discharge, a bankrupt may rightfully make an enforceable promise to pay the creditor in full.[FN5] However, a promise by a debtor to pay a debt discharged in bankruptcy will not revive the debt if conditioned on certain facts that are not performed; conditions must be fully complied with before the discharged debt will be revived.[FN6]

[FN1]

Hoodlett v. Hoodlett, 12 Ohio L. Abs. 577, 1932 WL 1753 (Ct. App. 4th Dist. Athens County 1932); In re Knisely's Estate, 27 Ohio Op. 216, 39 Ohio L. Abs. 393, 12 Ohio Supp. 140 (Prob. Ct. 1943)

[FN2]

Am. Jur. 2d, Contracts § 159-

[FN3]

Restatement Second, Contracts § 82(1).-

[FN4]

W.B. Saunders Co. v. Galbraith, 40 Ohio App. 155, 11 Ohio L. Abs. 34, 178 N.E. 34 (8th Dist. Cuyahoga County 1931) (approving the Restatement approach).

[FN5]

Progressive Finance Co. v. Marshall, 36 Ohio L. Abs. 482, 44 N.E.2d 480 (Ct. App. 1st Dist. Hamilton County 1942).

[FN6]

Baker v. Hughes, 56 Ohio App. 53, 9 Ohio Op. 225, 22 Ohio L. Abs. 66, 10 N.E.2d 20 (3d Dist. Marion County 1937).

- As to the doctrine of promissory estoppel, see § 45

OHJUR CONTRACTS § 53

Below is the requested case law for Mr. Zell on the promissory estoppel, detrimental reliance, and unjust enrichment issues.

Promissory Estoppel

Ohio courts have adopted the Restatement Section 90 on promissory estoppel:

> An action for damages under promissory estoppel provides an adequate remedy for an unfulfilled or fraudulent promise. "The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice." *Doe v. Univision Television Group, Inc.* (Fla.App.1998), 717 So.2d 63, 65, citing Restatement of the Law 2d, Contracts (1981) Section 90; see also *Cohen v. Cowles Media Co.* (Minn.1992), 479 N.W.2d 387, 389. We adopted promissory estoppel through the Restatement of the Law 2d, Contracts (1973), Section 90 in **101 *97 *Talley v. Teamsters, Chauffeurs, Warehousemen, & Helpers, Local No. 377* (1976), 48 Ohio St.2d 142, 146, 2 O.O.3d 297, 357 N.E.2d 44. "To be successful on a claim of promissory estoppel, '[t]he party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading.' " *Shampton v. Springboro,* 98 Ohio St.3d 457, 2003-Ohio-1913, 786 N.E.2d 883, ¶ 34, quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630, citing *Heckler v. Community Health Serv.* (1984), 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42.

Olympic Holding Co., L.L.C. v. ACE Ltd. (2009), 122 Ohio St.3d 89, 96-97, 909 N.E.2d 93, 100 – 101.

Ohio Court apply a four part test when analyzing a promissory estoppel claim:

> "Under Ohio law, the 'elements of a promissory estoppel claim are (1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise.' " *Sweitzer v. American Express Centurion Bank,* 554 F.Supp.2d 788, 796 (S.D.Ohio 2008) (Smith, J.) (quoting *Weiper v. W.A. Hill & Assoc.,* 104 Ohio App.3d 250, 661 N.E.2d 796 (1st Dist.1995), *appeal denied,* 74 Ohio St.3d 1446, 656 N.E.2d 346 (1995) (internal punctuation omitted)). *See also Holt Company of Ohio v. Ohio Machinery Co.,* 2007-Ohio-5557, 2007 WL 3027084 (10th Dist.2007) (same).

Executone of Columbus, Inc. v. Inter-Tel, Inc. (2009), 665 F.Supp.2d 899, 915 (S.D. Ohio).

I could not locate any case law on promissory estoppel specifically applying to promises to pay on time-barred debts. The closest case I found in discussing this was the *W.B. Saunders Co. v. Galbraith* (1931), 40 Ohio App. 155, 159, 178 N.E. 34, 35 (sent in response to a research question yesterday).

Detrimental Reliance

In Ohio detrimental reliance is not a separate cause of action, rather it is an element of certain causes of action:

> As a matter of law, Ohio does not recognize a cause of action for "detrimental reliance." *Carpenter v. Scherer-Mountain Ins. Agency* (1999), 135 Ohio App.3d 316, 733 N.E.2d 1196, fn. 3, citing *Gottfried-Smith v. Gottfried* (1997), 119 Ohio App.3d 646, 650, 695 N.E.2d 1229. Detrimental reliance arises as an element of various causes of action (e.g., promissory estoppel, misrepresentation) but is not a cause of action unto itself. Id. However, based upon the allegations set forth in Craigmyle's counterclaim and the arguments in his motion, it appears that his claim of "detrimental reliance" is actually a cause of action for promissory estoppel.

Dailey v. Craigmyle & Son Farms, L.L.C. (2008), 894 N.E.2d 1301, 1306.

Unjust Enrichment

I could not find Ohio cases using unjust enrichment to enforce a promise to pay a debt. If anything, cases articulate that unjust enrichment is only a proper remedy where there is no promise. The doctrine implies a promise where none was actually made.

> When a court makes a finding of unjust enrichment, it recognizes a promise by the defendant, implied in law, to pay a reasonable amount for the services rendered. *Sonkin & Melena Co., L.P.A. v. Zaransky* (1992), 83 Ohio App.3d 169, 175, 614 N.E.2d 807. There is no need for the law to create a fictional promise and construct a quasi-contractual remedy when a promise has been made in fact. Thus, "[i]t is only when parties do not expressly agree that the law interposes and raises a promise." 66 American Jurisprudence 2d (1973) 948-49, Restitution and Implied Contracts, Section 6. We are unable to conceive any set of factual circumstances in which Booher would lack a contractual remedy and still merit enforcement of its unjust enrichment claim. Moreover, a claim for unjust enrichment will not lie when the subject matter of the claim is covered by an express contract. See *Caras, supra,* at 9. Thus, the assurances offered by Tammy Erickson could not provide an independent ground for asserting Booher's unjust enrichment claim.

Booher Carpet Sales, Inc. v. Erickson (1998), Greene Co. No. 98-CA-0007, 1998 WL 677159, 11.

I reviewed the 5 citations Mr. Zell sent under this issue, and none dealt with unjust enrichment in a context of promise to pay a time-barred debt. In fact, I could not locate any cases involving unjust enrichment recovery when a written contract existed. Courts focus on unjust enrichment as an "implied promise" that is created in law where no actual promise was made in fact.

Let me know if you have follow-up questions. Thanks.

Katy

From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Thursday, August 11, 2011 11:52 AM
To: Rupert, Jeffrey G.
Subject: New Brief Attached & Surprises

Hi Jeff,

Please find attached my very newest Amended Reply Brief.

1. In this version of the brief, I have added the following citations and e-mail exhibits:

a. A citation to the O.R.C. in the Statute of Frauds section of the brief.

b. Citations to the O.R.C. and to several hornbooks (but no Ohio cases) in the section on the enforceability of a promise to pay a time-barred debt in the brief.

c. Two OLD e-mails -- dated 8/27/2003 and 1/12/2004 -- sent by M. Mindlin to E. Zell for the

subsection on promissory estoppel and detrimental reliance in the section on the enforceability of a promise to pay a time-barred debt in the brief.

d. The reply e-mail (dated 1/18/2004) from E. Zell to M. Mindlin to the 1/12/2004 e-mail referenced in 1(c) above.

2. In this version of the brief, I have added the following textual points:

a. The 1/12/2004 and 1/18/2004 e-mails (above) represent the **ENTIRE** alleged side agreement between the parties and constitute the **SOLE** basis for the Plaintiffs' claim that Mrs. Zell had agreed to suspend the accumulation of interest on the loan from January 1, 2004 to June 30, 2006.

b. In the e-mail dated 1/12/2004, Mindlin informs E. Zell for the first time about his cancer and then **asks her for more time in which to repay the loan after he recovers**.

c. In the e-mail dated 1/18/2004, E. Zell a**grees to give Mindlin more time in which to repay the loan after he recovers, saying: "Everything between us will be on hold 'til then."***

(* This e-mail was printed out by E. Zell right before she sent it and while it was still in draft form. Since the e-mail account E. Zell used for this e-mail was closed years ago, this is the only copy we have of this e-mail as well as of the 8/27/2003 and 1/12/2004 e-mails. Since the 8/27/2003 and 1/12/2004 e-mails were sent to E. Zell, they properly printed out.)

d. Although M. Mindlin had avered in his Affidavit that the alleged side agreement was made when E. Zell telephoned M. Mindlin shortly after learning about his cancer, in fact E. Zell never telephoned M. Mindlin the whole time he was ill. Thus, the 1/12/2004 and 1/18/2004 e-mails (above) comprise the TOTAL alleged side agreement.

3. You and I had previously discussed the 1/18/2004 e-mail (which is quoted in full in the attached version my brief). But not until today did I put this e-mail in context and realize that it was a REPLY to the 1/12/2004 e-mail. Anyhow, sorry if either of the above two e-mails will come as a surprise to you. But I hope you agree they will help our case, and please be assured that I do NOT have anymore surprises in store

for you.

4. I have made several other minor revisions, some of which were an attempt to follow your recommendations to a **modest** extent and others that were thought to be consistent with those recommendations.

5. Provided that you approve of the attached version of my brief and your associate finds no Ohio cases on the enforceability of a promise to pay a time-barred debt, then what I have attached is the brief that I propose we file.

-- Jonathan

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Wednesday, August 10, 2011 6:32 PM
Subject: RE: Ohio case law research on Promise to Pay Time-Barred Debt

Jonathon, I will have an associate research these issues. Also, you are correct that August 15th would be the date. Jeff

---

From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Wednesday, August 10, 2011 5:43 PM
To: Rupert, Jeffrey G.
Subject: Ohio case law research on Promise to Pay Time-Barred Debt

Hi Jeff,

This email addresses two related issues: (1) finding ***Ohio*** cases holding that a promise to pay a time-barred debt is enforceable under the principle of unjust enrichment and (2) arguing in the alternative that the Plaintiffs' written promises to pay their debt AFTER the contract was made -- but BEFORE the statute of limitations expired -- are binding due to BOTH ***detrimental reliance*** AND ***promissory estoppel***. The second issue, of course, is would be much easier to find ***Ohio*** cases for. (Actually, the legal doctrines are so well known that case citations might not even be necessary.) I will discuss these issues in reverse order below.

I. ISSUE TWO

The second argument is as follows:

As Mr. Mindlin has alluded to in his Affidavit with the words "I have always said I will protect your interests," the Plaintiffs' both written and oral promises to Mrs. Zell date back well before Ohio's statute of limitations would have expired. Whenever Mrs. Zell would grow concerned about the unpaid debt and the increasing passage of time, usually Mr. Mindlin, but occasionally Ms. Kurila, would always assure Mrs. Zell

Subject: New Brief Attached & Surprises

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As Mr. Mindlin has alluded to in his Affidavit with the words "I have always said I will protect your interests," the Plaintiffs' both written and oral promises to Mrs. Zell date back well before Ohio's statute of limitations would have expired. Whenever Mrs. Zell would grow concerned about the unpaid debt and the increasing passage of time, usually Mr. Mindlin, but occasionally Ms. Kurila, would always assure Mrs. Zell that, if Mrs. Zell just waited long enough, the debtors would fully repay her. These promises were intended to, and did in fact, induce Mrs. Zell to refrain from foreclosing on the debtors' loan. It also allowed the Plaintiffs to stay in Mrs. Zell's good graces for which they were rewarded by continuing to receive thousands of dollars in cash every year in birthday, anniversary, and holiday gifts for themselves and their children. Thus, under the common law doctrine of promissory estoppel, the Plaintiffs' promises are binding since injustice can be avoided only by enforcement of the promise. Moreover, Mrs. Zell relied on the Plaintiffs' promises to her detriment (especially after the Ohio statute of limitations expired), thereby creating

Subject: Questions on Your Motion for Leave to File in Excess of Page Limitation

From: Jonathan Zell (jonathan_zell@yahoo.com)

To: jrupert@fbtlaw.com;

Date: Tuesday, August 9, 2011 11:16 AM

Hi Jeff,

1. Thanks for assigning an associate to find case citations for me. As soon as your associate has them, please let me know.

2. Regarding the length of the Reply Brief: As you know, before I added the new 4-page section today on the issue of a written promise to pay a time-barred debt, the Amended Reply Brief came to 15 pages not including the Certificate of Service. Leaving aside the question for the moment of how much I will be able to cut from the length of the brief as you had previously suggested I do, that comes to 19 pages.

However, I was impressed by the fact that your previous -- and successful -- motion for leave to file in excess of what was then a 15-page limit, DID NOT ASK FOR A SPECIFIED NUMBER OF EXCESS PAGES. As you know, we then submitted a 29-page memo in opposition. Accordingly, I think you should consider doing the same thing you did before regarding the page limit by not suggesting a maximum number of pages yourself. However, if you think you should suggest a maximum, then I would suggest 19 pages in case I am not able to cut out even a whole page.

3. By the way, do you think I could please review your NEW motion for leave to file in excess of the page limit BEFORE you file it this time because I am concerned about (a) how we explain the need for the excess length (e.g., Plaintiffs' hitting us for the first time with the operative facts and evidence of the so-called side agreement) and (b) how we explain our need to file an Amended Reply Brief to replace our original Reply Brief (e.g., that Plaintiffs' late-filed Memo in Opposition has rendered most of our original Reply Brief moot).

4. By the way, I am proposing to add one more sentence to the end of my proposed new section on the written promise to pay a time-barred debt. I have made this addition (marked in red) to the draft of the new section that I had appended to the end of my **previous** e-mail, which you can see by scrolling down this page to the end until you come to that e-mail.

Thanks,
Jonathan

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Tuesday, August 9, 2011 9:33 AM
Subject: RE: I found another Silver Bullet

Jonathon,

I am having someone research the two points you identified.

For the motion to exceed the page limitation, how many pages should I ask for? 15 pages? 95

Jeff

Subject: Re: Zell Research

From: Jonathan Zell (jonathan_zell@yahoo.com)

To: jrupert@fbtlaw.com;

Date: Wednesday, July 13, 2011 10:52 PM

Hi Jeff,

Thanks for the case research on the conflicts-of-law issue. I will read it and see if there is anything I can cite to in our upcoming court papers.

However, in answer to your question, I think that we can win the conflicts issue based on the facts alone. So case research on this issue can be kept to a minimum. However, as you will see below, there is another aspect of this issue (i.e., a previous admission by Mindlin that Missouri law applies), which I think your firm **SHOULD** research.

But, before getting to the "admission" aspect, let me return to the conflict-of-laws question. As you will see in my upcoming Memo in Opposition to Plaintiffs' and TPD's MSJ (yes, I have decided to write BOTH a Memo Contra their MSJ as well as our own MSJ), opposing counsel continually gets his facts wrong.

For example, the Note was made in Missouri, not Ohio; and the place of performance/breach started out in Ohio, but then changed to Florida. Therefore, on these two issues at least -- place where contract was made and place of performance -- there is no reason that Ohio's law should apply. (However, applying Florida's law does not help us, either, because, like Ohio, Florida seems to have a short statute of limitations, too.)

Who drafted the Note and where it was drafted:

1. In MISSOURI, Mindlin wrote, typed, and signed the first Note -- albeit only o/b/o the corporation (Suttle Mindlin LLC) -- creating a BINDING CONTRACT between Eileen Zell and Suttle Mindlin LLC.

2. Then, in Ohio, my mom's attorney wrote a draft proposing REVISIONS in the parties' original contract.

3. Finally, in MISSOURI, Mindlin accepted the proposed revisions suggested by my mom's attorney and then Mindlin rewrote, re-typed, and (together with the other debtors) signed a NEW contract to supersede the first contract.

Thus, both the original and the updated contracts were created in MISSOURI (with input from my mom's attorney regarding the latter contract only).

However, to be fair, the new contract that Mindlin rewrote and re-typed made only inconsequential changes to the sample contract that my mom's attorney had suggested. But I don't think the plaintiffs should be able to get their choice of law ratified by the Court simply by arguing that the plaintiffs PLAGIARIZED my mom's attorney's sample contract. Plagiarism or not, Mindlin rewrote and re-typed the new Note.

The place of performance/breach of the Note:

The original Note did not state where payments were to be made. The updated Note stated that payments

were to be made at what was then my mom's Columbus address BUT WHEN THE AGENT CONTINUED by stating that my mother could change the place of payments at will. Thereafter, my mother DID change the place of payments to her address in Florida. The debtors then starting sending payments to my mother in Florida (except perhaps in the summers, when my mother was usually back in Ohio.) As a result, the vast majority of the payments were sent to Florida. **However, to document this, should my mom ask her bank for records showing when she deposited the debtors' checks in her bank's Florida branch and when she deposited them in the bank's Ohio branch?**

By the way, since my mom lived with Mindlin's mother in Florida, Mindlin could always find out from his own mother when my mom was in Florida and when she was in Ohio. Usually, Mindlin's mother would return to Ohio for the summers with my mom and they would both then live in my mom's Columbus house.

There is, however, one area that needs case research

Finally, remember that Mindlin sent my mom an email in which he stated that his attorney had told him that Missouri law would apply. Mindlin cited this information to argue that my mother did NOT need to hire a lawyer to draft a refinancing agreement because the current agreement would remain enforceable for some time in the future. **So please ask your staff to look into whether Mindlin's statement is a binding admission, raises a reliance issue, or creates laches, etc.**

Mindlin made this statement in his e-mail to Mrs. Zell dated April 24, 2010: "At some expense, I have worked with our lawyer to determine that the current agreement is binding under Missouri law and we do not need a new agreement. Furthermore, a Missouri court will hold that the payment schedule we have in place is also binding" (Exhibit A to Mrs. Zell's First Requests For Admissions and Interrogatories).

I will be sending you my draft pleadings very soon.

Thanks,
Jonathan

From: "Rupert, Jeffrey G." <jrupert@fbtlaw.com>
To: Jonathan Zell <jonathan_zell@yahoo.com>
Sent: Wednesday, July 13, 2011 6:25 PM
Subject: Zell Research

Jonathon,

I had an associate do some limited research on whether Missouri law would apply, and there is no simple answer. Recent cases apply the Restatement's factor-driven test (elements listed below), and the case results will vary depending on the facts of each case. Before I had her do any more research, I wanted to touch base with you about how to proceed as searching for comparable facts can be a much more involved project than searching for a point of law. I suggest that we have her do a limited amount of additional research to hopefully find some cases that you could cite that had similar facts, but limit the time that she spends. You may be able to do some of this research yourself if you want to do so, or you could elect to just argue the factors without having case examples. I had the associate attach some cases that apply the Restatement, but the facts in these cases are not that close to those here. I note that the attached Restatement PDF is quite lengthy and cites to numerous cases, and you may find some

Let me know how you want to proceed.

Jeff

Jeffrey G. Rupert
Attorney at Law | Frost Brown Todd LLC

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jrupert@fbtlaw.com | www.frostbrowntodd.com

From: Klingelhafer, Katherine
Sent: Wednesday, July 13, 2011 5:50 PM
To: Rupert, Jeffrey G.
Subject: Zell Research

Jeff—

I've pulled a few cases for Zell's review that will help in his argument about the proper choice of law. Modern cases cite to the Restatement of the Law 2d, Conflict of Laws, while there are older cases that rely on old traditional tests and generalizations. I was trying to keep the research brief and the costs down, but it seems that the Restatement factor-driven test should be applied and would negate the old traditional tests and generalizations that we focused on earlier. I have attached the Restatement and other pertinent cases for reference, and can spend more time on this for a more thorough analysis if needed.

Plaintiff's Motion for Summary Judgment cites to the Montana Coal & Coke case, which is very old (1904), but states clearly the generalization that the law of the state where a contract is to be performed is the law that should apply. By contrast, the 1954 *Standard Agencies, Inc. v. Russell* (1954), 100 Ohio App. 140 case cited by Zell contains a general statement that the law of the state where a contract is "made" is the applicable law. While these cases have not been explicitly overruled, decisions dating back to 1984 have described these types of decisions as following the old "traditional" rules, which depended upon the type of contractual issue being litigated and alternately use the state where a contract is made, the state where a contract is to be performed, and the state where the lawsuit is brought. The traditional rules were applied inconsistently, and the *Mickel v. Raymond Lovelady Builders Aids, Inc.* Court noted that the modern trend is away from the rigid adherence to the traditional rules and toward following the Restatement rules. See *Mickel v. Raymond Lovelady Builders Aids, Inc.* (Aug. 31, 1984)C.A. No. L-83-415, 1984 WL 7954.

Recent Supreme Court cases adopt the use of the Restatement factor-driven test. In determining the applicable law in a contract action the Restatement of the Law 2d, Conflict of Laws Section 188, which deals with the situation where the parties have not designated a choice of applicable law, should apply. That section states in part at 575:

> "(2) In the absence of an effective choice of law by the parties (see Section 187), the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:
>
> "(a) the place of contracting,

"(b) the place of negotiations of the contract,

"(c) the place of performance,

"(d) the location of the subject matter of the contract, and

"(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
* * * "

Gries Sports Enterprises, Inc. v. Modell (1984), 15 Ohio St.3d 284, 287, 473 N.E.2d 807, 810. See in *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 477, 747 N.E.2d 206, 209.

Let me know if you would like further analysis, but it seems that attempts to cite one general rule would rely on old traditional rules that should be replaced with the more modern Restatement Test.

Katy

Slonecker, Wanda M.

From: Rupert, Jeffrey G.
Sent: Thursday, July 14, 2011 9:20 AM
To: 'Jonathan Zell'
Subject: RE: Strategy Questions on our MSJ, etc.

Jonathon,

On the page limitation issue, I submitted a request to the Court yesterday for permission to exceed the page limitation for both the MSJ and the Memo in Opp to the MSJ. I will email that pleading to you later today.

As to which law applies, I think we need to argue that Missouri law applies in both the MSJ and Memo in Opp. As to the Memo in Opp, you suggest arguing that the Ohio statute does not apply due to some material questions of fact. You will then have to argue that Missouri law applies because you will need to show that the question of whether Ohio law applies is material. The larger point you raise is how to make the argument – do you argue that there are material questions of fact as to whether Ohio law apply or that there are no material question of fact that Missouri law applies.

Before I get to your specific questions you have raised, I also wanted to point out that Mindlin essentially cannot withdraw his lawsuit. Your mother has filed a counterclaim, so the case will remain pending even if Mindlin were to withdraw his claim. It is highly unlikely that he would withdraw his claim as it is essentially his defense to your mother's claims.

As to you specific questions:

1. You are correct that you must show that there is a material question of fact for the MSJ to be denied. However, the facts surrounding whether the Ohio SOL applies is only material if you argue that Missouri law should apply.

2. You could decide to only oppose the other side's MSJ if you choose. I would suggest filing your own motion for summary judgment as you likely will written nearly all of the same argument in your Memo in Opposition. Perhaps you could combine the two into one document.

3. On the question of whether Missouri law applies, that will be a based on the facts and will be influenced how courts have decided similar factual patterns. I do not know what the case law research would lead to, but I think this will be a close call from the facts that you have told me – your mother's lawyer drafting documents in Ohio, and Mindlin in Missouri. I think the fact that the makers signed the Note in Missouri will be a very helpful factor, and will hopefully be the decisive factor.

4. I think the conflict of law analysis should be covered. You will need to distinguish the old Ohio case cited by Peterson, and explaining to the conflicts case law is a very good way to do that. It will also show that he doesn't know what he is talking about.

5. As mentioned above, I have asked for permission to exceed the page limitation for the Memo in Opp.

6. I have not researched the consideration issue, but will have someone do so if you would like. In general, it is difficult to win on a consideration argument as the bar for establishing consideration is very low.

7. I would not count on the Court giving us more time. We can certainly ask for it, but my concern is that we might not get a ruling before the deadline passes. If we get additional information after the deadline, we will file a supplement to our earlier motion. Also, you should mention the pending discovery issue in the Memo in Opp to remind the Court of this.

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8. I addressed this in response to No. 7.

You and your mother obviously make the decisions on how to proceed with settlement and I fully recognize I have no authority to discuss settlement with the other side, but my advice to you would be to send the email that you previously drafted to Peterson to see if this leads to any discussions. I think you have risk as to whether Missouri or Ohio law applies. You can obviously decide to accept that risk and proceed forward if you choose, but I think it is helpful to know what the settlement options are.

Jeff

Jeffrey G. Rupert
Attorney at Law | Frost Brown Todd LLC

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From: Jonathan Zell [mailto:jonathan_zell@yahoo.com]
Sent: Thursday, July 14, 2011 8:14 AM
To: Rupert, Jeffrey G.
Subject: Strategy Questions on our MSJ, etc.

Hi Jeff,

You previously asked me if I wanted you to ask the Court to grant us permission to exceed the page limit on our MSJ and I said "Yes." But you did NOT ask me about extending the page limit for our Memorandum in Opposition to the other side's MSJ.

In my Memorandum in Opposition to the other side's MSJ (which I will submit to you shortly under separate cover), I have already used up 12 pages just by arguing that the facts show that the relevant contacts regarding the loan agreement took place in Missouri (or at least outside Ohio); one additional page arguing that, if Missouri law governs the Note, then Missouri's 10-year (or so) statute of limitations has not expired; and one more page writing the Certificate of Service.

Therefore, if I am also going to argue, in our Memorandum in Opposition, that the rules pertaining to conflicts of law provide that the loan agreement is governed by Missouri law, then I will need permission to exceed the page limitation on our Memorandum in Opposition to the other side's MSJ (but not on our own MSJ).

So here are our four choices: (1) I can omit from our Memorandum in Opposition to the other side's MSJ the argument that the rules pertaining to conflicts of law provide that the loan agreement is governed by Missouri law; (2) I can get permission to exceed the page limit and then put this argument into our Memorandum in Opposition to the other side's MSJ; (3) I can file our own MSJ and put this argument in it; and/or (4) I can decline to file our own MSJ.

What do you advise?

Correct me if I am wrong, but I assume that, for us to win our own MSJ, we must affirmatively prove that the loan agreement is governed by Missouri law. However, for us merely to defeat the other side's MSJ, the

only thing we must do is to show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies as the other side has argued in its MSJ. By the way, in my Memorandum in Opposition to the other side's MSJ, I definitely think that I DO show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies.

In other words, the argument that the rules pertaining to conflicts of law provide that the loan agreement is governed by Missouri law would seem only to be necessary in our own MSJ, not in our Memo in Opposition to the other side's MSJ. In most cases, I would have normally expected that the question of whether the statute of limitations has expired would be a question of law for the Court to decide. However, in this case, I am arguing that it might involve a question of fact for the jury to decide.

Anyway, **IF you tell me that my assumptions above are correct,** then this is where some strategy comes into play. On the one hand, if we are NOT sure that Missouri law applies, then we should avoid letting the Court see our argument by NOT submitting our own MSJ and by not arguing that Missouri law applies in our Memo in Opposition to the other side's MSJ, either -- unless, in order to defeat the other side's MSJ, we must persuade the Court that Missouri law applies.

On the other hand, if we are sure that Missouri law applies, then we can file our own MSJ **without being afraid** that -- having been presented with both arguments (the other side's argument that Ohio law applies and our argument that Missouri law applies) -- the Court might decide that Ohio law applies and grant the other side's MSJ.

There are, however, two other questions we must answer before we can decide whether or not we should file our own MSJ. The first question is: Is it likely that the Court would rule that the alleged oral side agreement is not enforceable as a matter of law because it was not supported by consideration? If not, then we should probably not bother to file our own MSJ ever. The second question is: Is it likely that the Court would grant us an extension of time before we have to file our MSJ on the grounds that (a) we have had no opportunity to ask TPD Suttle for discovery and (b) the plaintiffs have refused to comply with our discovery requests thus far? If so, then we should probably not file our own MSJ now, but consider filing it in the future.

Although my mother and I have previously informed the other side that my mother wants a trial, it would also be consistent with my mother's wishes for her to win this case on a MSJ. However, because I think the odds of recovering attorneys fees from the plaintiffs would be higher if the other side simply withdrew its lawsuit and made my mother a voluntary payment without requiring a release, my mother's preference would be to force the plaintiffs to withdraw their lawsuit rather than for her to win on a MSJ.

I think it is probable that the plaintiffs will lose their MSJ and that TPD Suttle will lose his 60(B) motion. However, whether the plaintiffs will withdraw their lawsuit if they lose their MSJ and if TPD Suttle loses his 60(B) motion is the $64,000 question. I think that they will. By withdrawing, the Mindlins will protect whatever it is they are hiding in their financial records, will save the costs and burden of complying with our discovery requests, will avoid having to commit perjury at trial and then worry about the big deal I told their lawyer I would make out of it, and will avoid attorney fees for the hearings on the 60(B) motion, on the motion for a protective order, on the motion to remove me, and for a trial. And Peterson will avoid having all of the false statements in his pleadings exposed in those hearings.

So, my questions for you are:

(1) For us merely to defeat the other side's MSJ, is the only thing that we must do is to show that there are material questions of fact that must first be determined before the Court can find that Ohio's statute of limitations applies as the other side has argued in its MSJ?

(2) If so, then does my Memo in Opposition to the other side's MSJ do that?

(3) How sure are you that Missouri law applies to the Note?

(4) Should our Memorandum in Opposition to the other side's MSJ argue that the rules pertaining to conflicts of law provide that the loan agreement is governed by Missouri law?

(5) If your answer to #4 above is "Yes," will you please ask the Court to grant us permission to exceed the page limit on our Memorandum in Opposition to the other side's MSJ?

(6) How likely is it that the Court would rule that the alleged oral side agreement is not enforceable as a matter of law because it was not supported by consideration?

(7) Is it likely that the Court would grant us an extension of time before we have to file our MSJ on the grounds that (a) we have had no opportunity to ask TPD Suttle for discovery and (b) the plaintiffs have refused to comply with our discovery requests thus far?

(8) Can we find out the answer to #7 above from the Court before July 19th, the deadline for filing our MSJ?

As you can probably see, I am leaning towards not filing our own MSJ at the present time. But my final decision will be dependent on your answers to the above questions.

Thanks,
Jonathan

P.S. Today, you will have my draft Memo in Opposition to the other side's MSJ to help you answer some of the above questions.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2018, I electronically filed the foregoing *Plaintiff-Appellant's Separate Appendix* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, causing notice of such filing to be served on the following registered CM/ECF participants in this case:

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