

Mermelstein v Wasplit Group, Inc.

2020 NY Slip Op 34134(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 652500/2019

Judge: Carol R. Edmead

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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INDEX NO. 652500/2019

FRED MERMELSTEIN, PETER O'NEILL, STEVEN MAGID,
MARY DOWNE, ADAM ZION, HILARY HAYES, HUGH
DOWNE, EVAN ROBERTSON, WALTER WILLIAM CLARK
AS TRUSTEE FOR GOLD FINCH ENTERPRISES, INC.
DBP, RONNIE ELDRIDGE AS TRUSTEE FOR THE
BRESLIN PROFIT SHARING PLAN

MOTION DATE 9/23/2020

MOTION SEQ. NO. 001

Plaintiffs,

**DECISION + ORDER ON
MOTION**

- v -

WASPIT GROUP, INC., RICHARD STEGGALL,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted with respect to both the notes and corresponding guaranties held by Hugh Downe (on the \$100,000 note only), Mary Downe, Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP, Steven Magid, Evan Robertson and Adam Zion (on the \$25,000 note only); granted as to the guaranties held by Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan and Adam Zion (on the \$52,677 note), and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hugh Downe and against defendant Wasplit Group, Inc. in the amount of \$171,265.75, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hugh Downe and against defendant Richard Steggall in the amount of \$171,265.75, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to

be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mary Downe and against defendant Wasplit Group, Inc. in the amount of \$167,481.74, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mary Downe and against defendant Richard Steggall in the amount of \$167,481.74, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP and against defendant Wasplit Group, Inc. in the amount of \$170,972.60, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP and against defendant Richard Steggall in the amount of \$170,972.60, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Steven Magid and against defendant Wasplit Group, Inc. in the amount of \$147,199.56, together with interest at the contractual rate of 8% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Steven Magid and against defendant Richard Steggall in the amount of \$147,199.56, together with interest at the contractual rate of 8% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Evan Robertson and against defendant Wasplit Group, Inc. in the amount of \$83,347.94, together with interest at the contractual rate of 13% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Evan Robertson and against defendant Richard Steggall in the amount of \$83,347.94, together with interest at the contractual rate of 13% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Wasplit Group, Inc. in the amount of \$40,883.55, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Richard Steggall in the amount of \$40,883.55, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan and against defendant Richard Steggall in the amount of \$168,931.50, together with interest at the contractual rate of 16% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an

appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Richard Stegall in the amount of \$76,241.62, together with interest at the contractual rate of 12% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED that a Special Referee or Judicial Hearing Officer (JHO) shall be designated to hear and report to this court on issue of the amount of reasonable attorneys' fees, costs, and expenses incurred by plaintiffs Hugh Downe, Mary Downe, Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP, Steven Magid, Evan Robertson, Adam Zion and Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan and Zion in connection with procuring the judgments directed to be entered herein, and it is further

ORDERED that the powers of the Special Referee or JHO shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that the motion for summary judgment in lieu of complaint is denied with respect to both the notes and corresponding guaranties held by H. Downe (on the \$53,000 note), Hilary Hayes and Peter S. O'Neill; and denied as to the guaranties held by Fred Mermelstein, and the action is converted to a plenary action with respect to those notes and/or guaranties, and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry; and it is further

ORDERED that those plaintiffs' motion papers are deemed to be the complaint in the plenary action and defendants shall answer, within thirty days of service upon them of this order with notice of entry, accompanied by said motion papers.

MEMORANDUM DECISION

This is an action for payment under a number of promissory notes issued to plaintiffs by defendant Waspit Group, Inc. (Waspit), and under corresponding guaranties executed by defendant Richard Steggall (Steggall). Plaintiffs now move for summary judgment in lieu of complaint (CPLR 3213) against Waspit in the aggregate amount of \$1,125,547.55 and against Steggall in the amount of \$1,567,165.28, plus pre-judgment interest from April 29, 2019 together with costs and disbursements (motion seq. 001). For the following reasons, the motion is granted with respect to both the notes and corresponding guaranties held by Hugh Downe (H. Downe) (on the \$100,000 note only), Mary Downe (M. Downe), Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP (Gold Finch), Steven Magid (Magid), Evan Robertson (Robertson) and Adam Zion (Zion) (on the \$25,000 note only); granted as to the guaranties held by Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan (Breslin Plan) and Zion (on the \$52,677 note), denied as to both the notes and corresponding guaranties held by H. Downe (on the \$53,000 note), Hilary Hayes (Hayes) and Peter S. O'Neill (O'Neill); and denied as to the guaranties held by Fred Mermelstein (Mermelstein).

BACKGROUND

Defendant Waspit executed thirteen notes in favor of the ten plaintiffs bearing inception dates between August 2, 2012 and October 15, 2014 (Mortner Aff. [Dkt. 3]¹, Exs. A-J [Dkts. 8-17]). Each note is payable to a single plaintiff, with plaintiffs H. Downe, Mermelstein and Zion receiving two notes apiece. Although the terms of the notes vary in certain respects, each provides for payment of the principal and interest upon the maturity date, with interest at a

¹ References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

higher rate upon default. Some, but not all, require service of a notice of default before the higher rate is triggered, and all of them provide for the payment of costs and expenses, including attorney's fees. Additionally, with one apparent exception, each note is accompanied by a guaranty executed by defendant Richard Steggall (Mortner Aff., Exs. A-D, F-J [Dkts. 8-11, 13-17]). The basic terms of the notes are set forth in the following chart:²

Name	Principal Amount	Inception/ Maturity Dates	Default Date	Initial/ Default Interest Rates	Interest to Maturity	Interest from Default to 4/28/2019	Total Due	NYSCEF Docket Number
Breslin Plan (Guaranty Only)	\$100,000	1/14/14/ 1/4/15	12/30/15	8%/ 16%	\$15,671.23	\$53,260.27	\$168,931.50	15
H. Downe	\$100,000	8/30/12/ 4/30/13	4/30/13	8%/ 11%	\$ 5,326.02	\$ 65939.73	\$171,265.75	13
H. Downe *	\$53,000	N/A	N/A	N/A	N/A	N/A	N/A	13
M. Downe	\$100,000	8/30/12/ 4/30/13	4/30/13	8%/ 11%	\$ 5,326.02	\$62,155.72	\$167,481.74	16
Gold Finch	\$100,000	9/10/12/ 5/10/13	5/10/13	8%/ 11%	\$ 5,304.11	\$65,668.49	\$170,972.60	14
Hayes*	\$110,951	8/18/14/ 1/4/2016	1/4/16	8%/ 12%	\$12,256.28	\$29,424.81	\$152,632.09	12
Magid	\$108,000	10/15/14 1/1/2016	N/A	8%/ 4%	\$10,486.35	\$28,713.20	\$147,199.56	10
Mermelstein* (Guaranty Only)	\$105,333	11/25/13 1/4/16	8/29/17	8%/ 12%	\$31,698.02	\$21,020.42	\$158,051.44	8
Mermelstein* (Guaranty Only)	\$25,000	N/A	N/A	N/A	N/A	N/A	N/A	N/A
O'Neill*	\$50,000	10/23/13/ 10/23/14	10/23/14	8%/ 13%	\$4,000.00	\$29,347.94	\$ 83,347.94	9
Robertson	\$50,000	10/5/13/ 10/5/14	10/5/14	8%/ 13%	\$4,000.00	\$29,347.94	\$ 83,347.94	17
Zion (Guaranty Only)	\$52,677	9/25/13 1/1/16	1/1/16	8%/ 12%	\$12,059.79	\$14,004.86	\$ 76,241.65	11
Zion	\$25,000	5/14/13 1/14/14	N/A	8%/ 11%	\$1,342.46	\$14,541.09	\$ 40,883.55	11

² The court has made corrections to some of the dates and interest calculations provided by plaintiffs, which will be addressed in the discussion of the individual notes below. A default date is provided only for those notes for which a higher interest rate was triggered upon default, either automatically by the passage of the maturity date, or by the issuance of a required notice of default.

* For the reasons discussed below, an immediate judgment cannot be entered upon these notes. Calculations of the interest and total balance are nonetheless provided for some of these notes to indicate what will be owed if the defects are cured after conversion to a plenary action.

Four of the notes – the Breslin note, both of the Mermelstein notes, and the \$52,777 Zion note – have not been made the subject of this motion because they contain arbitration clauses.³ However, the guaranties corresponding to those notes do not contain such clauses, and recovery is sought under them as against Steggall.

All of the plaintiffs have submitted affidavits attesting to the delivery of the notes and guaranties, and the making of any demands or notices required thereunder. They all further assert that they have received no payment of principal or interest, with the exception of an \$8,000 payment to plaintiff M. Downe. In opposition, defendants argue that (1) CPLR 3213 not a proper vehicle to litigate the claims of multiple plaintiffs under a variety of instruments executed under differing circumstances over a period of years, (2) at least nine of the notes may be criminally usurious, (3) some of the notes were issued without consideration, (4) a number of the plaintiffs had close relationships with Waspit as directors or otherwise which create conflicts of interest, or engaged in various forms of wrongdoing against Waspit, (5) some of the documentation is incomplete or missing, and (6) some of the plaintiffs lack the capacity to sue.

DISCUSSION

CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” The statute “was enacted to provide quick relief on documentary claims so presumptively meritorious that a

³ Although the Magid note also contains an arbitration clause (Magid note [Dkt. 10] § 15[D][ii]), plaintiffs have nevertheless elected to enforce it through this action. CPLR 7503(c) specifically requires one of the parties to first serve a notice of intention to arbitrate in a prescribed form and manner, and from the limited authority on the issue it does not appear that the court has the power to compel arbitration *sua sponte* (see *Amiron Dev. Corp. v Sytner*, 2013 WL 1332725, *3 (ED NY 2013); *Suchodolski Assocs., Inc. v Cardell Fin. Corp.*, 2006 WL 10886, *4 [SD NY 2006], *aff'd in part, dismissed in part*, 261 F App'x 324 [2d Cir. 2008]).

formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 491–92 [2015][internal quotation marks and citations omitted]). A promissory note may qualify as an instrument for the payment of money only (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]) as may a guaranty (*Cooperatieve Centrale*, 25 NY3d 485, 492).

A plaintiff makes a prima facie case under CPLR 3213 “by submitting the promissory note and the guaranty with [the] moving papers and explaining that the maker of the note . . . failed to make the payments required thereunder (*see Goldberger v Magid*, 133 AD3d 546, 546 [1st Dept 2015]; *see Simon v Indus. City Distillery, Inc.*, 159 AD3d 505, 505 [1st Dept 2018]; *Interman Indus. Prod., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 155 [1975]; *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *aff’d* 29 NY2d 617 [1971]). Once this burden is met, the defendant must “submit evidentiary proof sufficient to raise an issue as to any defenses” to the instruments (*Simon*, 159 AD3d 505, 505; *Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept 1993]).

As discussed below, the court rejects all of the defendants’ defenses except, as to certain of the notes, those based upon lack of consideration or missing documentation. Additional defects render calculation of the amounts owed under some of the notes impossible without further proceedings, for which conversion to a plenary action is required. However, the court will grant money judgments as to those notes and guaranties to which no defenses apply, and will direct a hearing as to the proper amount of interest, costs, disbursement and attorney’s fees. The court will first discuss the general defenses or objections common to some or all of the notes, and then address issues specific to any particular note.

General Defenses and Objections

Defendants' Objection to Joinder of Multiple Plaintiffs

Defendants cite no authority for the proposition that multiple and differing notes and guaranties held by multiple plaintiffs may not be adjudicated together in a single CPLR 3213 motion. The court has found no cases prohibiting the practice, and has found a number of cases entertaining it (*see, e.g., Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978] [reinstating grant of summary judgment in lieu of complaint on seven promissory notes delivered over a four month period]; *Mountainview Realty Assocs. v Stark*, 190 AD2d 602, 603 [1st Dept 1993] [affirming granted of judgment under CPLR 3213 in favor of two corporate plaintiffs against a corporate defendant and several individuals]; *Kornfeld v NRX Techs., Inc.*, 93 AD2d 772 [1st Dept 1983] [affirming judgment under CPLR 3213 on a series of notes issued beginning November 1980]). Indeed, under certain circumstances the consolidation of separate proceedings brought under CPLR 3213 may be appropriate (*see, i.e., Concord Assets Fin. Corp. v Radebaugh*, 172 AD2d 446 [1st Dept 1991] [consolidation of proceedings by a corporation and three limited partners on a series of promissory notes executed by an individual defendant]). Thus, far from complicating the proceedings, the procedure promotes judicial economy. Notably, defendants themselves allege that there are defenses common to a number of the instruments.

Usury

Under New York law, a loan may be civilly usurious if it violates General Obligations Law § 5-501 and Banking Law § 14-a(1), which forbid an interest rate exceeding 16%, and criminally usurious if it violates Penal Law § 190.40, which penalizes a rate exceeding 25% (*see Bakhsh v Winston*, 134 AD3d 468, 469 [1st Dept 2015]). “If usury can be gleaned from the face of an instrument, intent will be implied and usury will be found as a matter of law” (*Blue Wolf*

Capital Fund II, L.P. v Am. Stevedoring Inc., 105 AD3d 178, 183 [1st Dept 2013]). A discrepancy between the amount advanced and the amount payable may prima facie evidence of usury (see *Babinsky v Skidanov*, 12 AD3d 271, 271 [1st Dept 2004]; *O'Donovan v Galinski*, 62 AD3d 769, 769–70 [2^d Dept 2009]).

However, “[i]n light of the harsh sanction of forfeiture, a borrower asserting a usury defense bears the burden of establishing the defense by clear and convincing evidence as to all its elements” (*Feivel Funding Assocs. v Bender*, 156 AD3d 416, 417 [1st Dept 2017]; see *Giventer v Arnow*, 37 NY2d 305, 308 [1975]; *Blue Wolf*, 105 AD3d 178, 183). Furthermore, neither a corporation nor a corporate guarantor may assert the defense of civil usury (see General Obligations Law § 5–521[1]), *72nd Ninth LLC v 753 Ninth Ave Realty LLC*, 168 AD3d 597, 597 [1st Dept 2019]). Accordingly, defendants may only prevail on the defense as to any of the notes by establishing that it has a criminally usurious rate of 25%.

As preliminary matter, the court rejects plaintiffs’ argument that the usury statutes are completely inapplicable to the loans. Relying on the First Department’s observation that “a corporation may assert criminal usury as a defense where the amount of the loan or forbearance is more than \$250,000 and less than \$2,500,000,” *Blue Wolf*, 105 AD3d 178, 182, plaintiffs argue that the loan amounts at issue here (the highest being \$110,000) are too low to be subject to the defense of criminal usury. Although at least one trial court has seemingly adopted plaintiffs’ interpretation of the quoted language (see *Lincoln Bldg. Servs. Inc. v Dellwood Dev., Ltd.*, 2017 WL 758342 [Sup Ct, NY Co 2017]), this court concurs that the appellate court did not mean to preclude the assertion of the defense for loans under \$250,000 (see *Merchant Cash and Capital, LLC v Transfer Int’l, Inc.*, 2016 WL 7213444, *2 [Sup Ct, Nassau Co 2016]). Rather, the court was merely pointing out that the defense of criminal usury still applies to loans

exceeding \$250,000, even though the defense of civil usury does not. It did not hold that the criminal usury defense *only* applies once the loan exceeds \$250,000.

None of the relevant statutes to which the court alluded⁴ deprives a borrower, individual or corporate, of a criminal usury defense for a loan less than \$250,000. GOL § 5-501(6)(a) eliminates the defense of civil usury for loans (other than mortgage loans) exceeding \$250,000, but preserves the criminal usury defense. Under GOL § 5-501(6)(b), neither civil nor criminal usury may be asserted if the loan exceeds \$2,500,000. The clear objective of the statutes is to restrict, and eventually eliminate, the application of the usury defense for larger loans, not smaller ones.

Defendants' usury defense nevertheless fails because they have not proven, or even unequivocally alleged, that the interest rate on any of the notes exceeds 25%. The stated inception rates are all 8%, with one loan arguably bearing a rate of 15%. The default rates range from 11% to 16%, with one of them arguably as high as 20%. Defendants do not dispute those terms, but instead contend that the value of common stock warrants issued in connection with some of the notes *might* render them usurious if considered in calculating the actual, effective interest rate. Further investigation is required, defendants urge, because some of the warrants referenced in the notes were not attached to plaintiffs' papers, and verbal agreements were made to apply some of the accrued interest to the exercise of a number of the warrants. Defendants contend that the number of shares issued to the plaintiffs were recorded in Waspit's records, and that plaintiffs received periodic statements that included the relevant information.

⁴The court in *Blue Wolf* cited to GOL 5-521(3) in support of the proposition quoted by plaintiffs. That section, however, only announces the general rule that a corporation may assert a criminal usury defense. As noted above, the dollar amounts of the loans to which civil and criminal usury defenses may be asserted are set forth in GOL 5-501(6)(a) and (b).

While under some circumstances a usury defense may be invoked where a loan is disguised as a stock purchase agreement, the rate must be apparent from the terms alleged (*see, e.g., Durst v Abrash*, 22 AD2d 39 [1st Dept 1964] [loan structured as a \$30,000 stock sale to borrower requiring “repurchase” for \$60,000 in fifteen months, was usurious as it resulted in an effective interest rate of 80%], *aff’d*, 17 NY2d 445 [1965]). Accordingly, “a loan is not usurious merely because there is a *possibility* that the lender will receive more than the legal rate of interest” (*Lehman v Roseanne Inv’rs Corp.*, 106 AD2d 617, 618 [2d Dept 1984][emphasis supplied]). If the value of warrants to be issued in connection with a loan is uncertain, or the loan is structured in a way that the issuance of the warrants is merely contingent, the court need not consider the warrants in determining the effective rate of interest (*Phlo Corp. v Stevens*, 2001 WL 1313387, at *4 (SD NY 2001), *aff’d*, 62 F App’x 377 [2d Cir 2003]; *see also Simon v Indus. City Distillery, Inc.*, 159 AD3d 505, 505 [1st Dept 2018] [conversion option contained in the note does not alter the fact that the note is an instrument for the payment of money only]; *Kornfeld v NRX Techs., Inc.*, 93 AD2d 772, 773 [1st Dept 1983], *aff’d*, 62 NY2d 686 [1984].) Additionally, usury is not to be presumed where the stock is issued in lieu of repayment of the note, rather than in addition to it (*see EMA Fin. LLC v AIM Expl., Inc.*, 2019 WL 689237, *7–8 [SD NY 2019]).

Here, value of the warrants is not apparent on the face of the notes, and defendants have not even speculated as to their value, or as to the resulting interest rate. Nor have defendants submitted documentation of the missing warrants despite having issued them, or supplied Waspit’s corporate records regarding the alleged issuance of stock.⁵ Additionally, as defendants have claimed that accrued interest was applied to exercise the warrants, it would appear that the stock was issued in lieu of repayment rather than in addition to it. In short, the defense rests upon

⁵ Although defendants’ have raised the defense of usury to the Golf Finch note, that instrument does not refer to any warrant.

nothing but the hope that an eventual valuation of the warrants might support a finding of usury. Apart from being wholly speculative, this approach impermissibly relies upon facts which would be extrinsic to the instruments (*Blumenstein v Wasplit Group, Inc.*, 140 AD3d 620, 620 [1st Dept 2016]; *Goldberger*, 133 AD3d 546, 546; *Solomon v Langer*, 66 AD3d 508, 508 [1st Dept 2009]). And to the extent defendants rely on verbal warrants, consideration of their terms is barred because parol evidence may not be introduced to contradict the unambiguous terms of the parties' agreements (*id.*, *Domansky v Berkovitch*, 259 AD2d 331, 331 [1st Dept 1999]).

Plaintiffs additionally contend that collateral estoppel bars the usury defense, in view of a December 8, 2016 bench order in *Cantor v Wasplit*, NY Co. Index No. 158242/2016 (Mortner Reply Aff. [Dkt. 27], Ex. B [Dkt. 29]), which involved the same defendants and a note similar to those in this case. In *Cantor*, the court (Reed, J.) rejected Wasplit's "speculative claim about the value of a warrant", finding there "was no meat on it" and "nothing that supports that there was . . . a substantial value given to the plaintiff that has somehow turned a simple loan and note into some item of usury" (*id.*, p. 14:2-9). Because *Cantor* involved a different plaintiff, and because every note must be considered in view of its specific terms and the surrounding circumstances, the court disagrees that the ruling has collateral estoppel effect (*see, e.g., Orr v Yun*, 95 AD3d 661, 662 [1st Dept 2012]; *Giordano v Patel*, 177 AD2d 468, 470 [2d Dept 1991].) For the reasons stated above, however, the court agrees with the result, which was reached upon facts virtually indistinguishable from those presented here.

Lack of Consideration

Defendants argue that some of the notes may lack consideration, because they were issued to replace earlier notes which have not been supplied on this motion, and whose actual value is unknown. However, this speculation does not suffice, as once a plaintiff has submitted

proof of the note and default thereon, the burdens shifts to the defendant to prove lack of consideration (*see Neo Universe Inc. v Ito*, 147 AD3d 682, 682 [1st 2017]; *Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]). As the issuer of the notes, Waspit was in a position to place them into the record and prove their value if it thought the consideration was absent or inadequate.

In any event, the notes recite that they were issued “for value received” and specifically identify the prior notes. This is sufficient to establish consideration (*see Am. Bank & Tr. Co. v Lichtenstein*, 48 AD2d 790, 790–91 [1st Dept 1975), *aff’d*, 39 NY2d 857 [1976] [guaranty that recited it was issued for “any financial accommodations given” sufficiently stated consideration]). Although a recitation of consideration is merely an admission of fact which may be rebutted by parol evidence, the party asserting an absence of consideration must present the facts supporting their claim in evidentiary form (*see Ehrlich v Am. Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 258 [1970]; *Boaz Bag v Alcobi*, 129 AD3d 649, 649–50[1st Dept 2015]). Defendants have not attempted to do so here.

Nevertheless, the express terms of two of the notes do raise questions as to whether the funds were actually advanced. The O’Neill note provides that it is due “twelve months from the date on which the lender advances the Principal Sum to the Borrower” (O’Neill Note ¶ 1). Although the O’Neill affidavit states that the note was delivered on October 23, 2013, it does not say if or when the funds were ever advanced. And if they were advanced, the court cannot determine the maturity date without knowing the date of receipt. Accordingly, judgment cannot be granted until that information is supplied.

A similar deficiency precludes judgment on the \$53,000 H. Downe note. It provides that the maturity date “is four (4) months from the date on which the Lender advances the Principal

Sum to the Borrower” (\$53,000 H. Downe note ¶ 1). Although the Note states that a first, \$27,000 installment of the Principal Sum was to be advanced upon signing, it provides that the second, \$26,000 installment would be advanced only “upon the Borrower providing the Lender with copies of signed funding documents between the Borrower and Highfand Global Partners Inc. and Advanced Patent Technologies Inc.” (*id.*, first unnumbered paragraph). Again, the accompanying lender’s affidavit does not address whether or when the funding contingency occurred. For that reason, and for the additional reason identified regarding the calculation of interest in the discussion of the \$53,000 H. Downe note below, summary judgment in lieu of complaint on the note is denied.

Allegations of Wrongdoing/Conflicts

In his opposing affidavit (Dkt. 24), defendant Steggall makes a litany of allegations which he contends make enforcement of the notes and guaranties improper. In addition to referencing alleged verbal agreements and corporate records that have not been corroborated by any documentary evidence, he claims that

- (1) Edward Downe (E. Downe), a paid Waspit consultant who is the husband of plaintiff M. Downe and father of plaintiffs H. Downe and Hayes, knew, along with H. Downe, that repayment of the notes was dependent upon a “permanent and significant funding event”;
- (2) E. Downe conditioned the issuance of one of H. Downe’s loans upon Waspit’s investing \$75,000 in a company to which he had various ties, and received a portion of the \$75,000 to pay a premium on his life insurance policy;
- (3) E. Downe conditioned the issuance of the second M. Downe loan upon Waspit’s assignment of a \$50,000 loan to a company to which E. Downe had ties;
- (4) E. Downe received consulting and other fees from Waspit derived from the company’s promissory note loan proceeds;
- (5) H. Downe, a director of Waspit at the time the notes were issued, and E. Downe “had access to certain information with respect to Waspit which could create potential conflicts of interest and breach of confidentiality obligations”;

- (6) Plaintiff Mermelstein was a director of Waspit at the time it issued the notes, knew it could not repay them absent the “funding event” mentioned above, and thus has a conflict of interest;
- (7) Waspit is considering suing E. Downe for making false and unauthorized representations to plaintiffs;
- (8) Plaintiff Zion made false, fraudulent and defamatory statements about Steggall, Waspit and other companies to influence plaintiffs to join in this action, using his position as a Brooklyn district attorney to bolster his credibility, and has exhibited bad character by engaging in fraud with respect to his own father’s insurance policies.

Steggall Aff. ¶¶ 3-10.

With regard to the allegations against Zion, Steggall also states that he does not “desire to disclose the specifics of the false and fraudulent defamatory statements out of a desire not to make them part of the public record and therefore add to the damaging and profound impact his statements have on myself and the companies which I am involved with” (*id.*, ¶ 4).

Steggall’s claims are again wholly uncorroborated, and rely on matters extrinsic to the notes. None of the notes condition repayment upon a funding event, or states that Waspit was required to make investments, assign loans, or pay E. Downe to receive funding. Defendants do not explain how the directors’ loans to Waspit gave rise to potential or actual conflicts of interests, or why such conflicts would invalidate the notes. The accusations of fraud, defamation and other misconduct are vague, and there is no suggestion that they played any part in inducing the execution of the notes. In short, the Steggall affidavit consists of precisely the sort of “conclusory or irrelevant allegations” that are insufficient to defeat a motion for summary judgment in lieu of complaint (*Rotuba*, 46 NY2d 223, 231).

Missing or Incomplete Documentation

As noted above, recovery upon the notes is not precluded by virtue of plaintiffs’ failure to place the warrants into the record. However, as noted, CPLR 3213 requires proof of the

instrument sued upon. Plaintiff Hayes has not attached to her affidavit a copy of the guaranty, and the signature page is missing from the promissory note.

Furthermore, the affidavit of plaintiffs' counsel indicates that plaintiff Mermelstein is seeking recovery under the guaranty of a \$25,000 promissory note, and that amount is seemingly included in the calculations of the aggregate amount due from Steggall under all of the guaranties combined. Yet neither the \$25,000 note nor the guaranty are attached to, or even mentioned, in the Mermelstein affidavit. Although summary judgment on a guaranty may be granted despite the plaintiff's failure to attach the underlying promissory note (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]; *European Am. Bank & Tr. Co. v Schirripa*, 108 AD2d 684, 684 [1st Dept 1985]), it obviously cannot be in the absence of the guaranty itself.

Accordingly, summary judgment in lieu of complaint must be denied upon the instruments discussed above. However, if they are able, plaintiffs may cure the deficiencies in documentation upon proper papers in a motion for summary judgment once this proceeding is converted to a plenary action (*see, e.g., Sea Trade*, 11 AD3d 483, 486; *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 672 [1st Dept (2009)]).

Capacity to Sue

Defendants challenge the capacity of two of the plaintiffs to sue upon the instruments. First, defendants note that the guaranty sued upon by Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan were made payable to "The Breslin Profit Sharing Plan care of Alan S. Honig, and fault Ms. Eldridge's failure to submit documentation that she is the successor trustee. Similarly, defendants challenge whether Walter William Clark is currently the trustee of Gold Finch Enterprises, Inc. DBP, notwithstanding that the instruments are made payable to "Walter

William Clark as Trustee of Gold Finch Enterprises, Inc. DBP under agreement dated May 17, 1994." This is a feigned issue. Both Ms. Eldridge and Mr. Clark have submitted affidavits attesting that they are the trustees of the relevant entities, and defendants have failed to submit any evidence contradicting the plaintiffs' sworn statements (*see, e.g., Wells Fargo Bank, N.A. v Parker*, 125 AD3d 848, 850 [2d Dept 2015]).

Instrument-Specific Issues

As discussed below, upon a careful examination of the notes and guaranties the court has found other defects in some of them which preclude immediate judgment. Additionally, the court has determined there are errors in some of the calculations of interest which require that judgment to be entered in a different amount than demanded by plaintiffs. If the parties wish to contest the court's calculations, they may present their own calculations at the hearing on costs, expenses and attorney's fees directed below. However, any disputes must be strictly limited to mathematical calculations based upon the principal amounts, interest rates, inception and default dates set forth in the chart provided above, and not upon either parties' differing interpretation of the terms of the instruments.

Plaintiff Hugh Downe

On his \$100,000 note, plaintiff H. Downe calculates the interest to maturity to be \$5347.74 (M. Downe Aff. ¶ 23). The court calculates the interest instead as \$5,326.02 for the 243 days between August 30, 2012 and April 30, 2013 as follows: $(\$100,000 \times 8\%) \times (243/365)$. Although M. Downe's affidavit misstates the maturity date as June 19, 2013 rather than April 30, 2013 as set forth in the note, the error does not appear to stem from having used the wrong date, but from having counted an extra day. However, plaintiff appears to have used the erroneous June 19th date in calculating the post default interest as \$64,463.01. The correct amount is

\$65,939.72, calculated as follows for the 2,188 days between May 1, 2013 to April 28, 2019:
 $(\$100,000 \times 11\%) \times (2,188/365)$, for a total balance of \$171,265.75.

As discussed above, the court cannot enter judgment on H. Downe's \$53,000 note because it is unclear whether and when the funds were advanced. There is also a second problem with calculating the balance due, even assuming Waspit ultimately received all of the funds. The interest rate is defined as the fixed sum of \$2,650 (H. Downe note, first unnumbered paragraph) rather than a percentage rate. Based on the \$53,000 principal amount, plaintiff contends that this reflects a rate of 15% because the note was payable in four months. However, the rate would be higher if less than \$53,000 was received on the inception date. Additionally, the note provides for a default rate equal to the interest rate plus 5%, and as the interest rate is defined as a fixed dollar amount rather than a percentage, it is not clear what the parties intended.

Plaintiff Mary Downe

Plaintiff Mary Downe calculates the interest due at maturity as \$5,437.74 and the post-default interest as \$64,463.01. Both of these figures appear to be incorrect. The interest to maturity should be \$5,326.02, calculated as follows for the 243 days between August 30, 2012 and April 30, 2013: $(\$100,000 \times 8\%) \times (243/365)$.

The post-default interest must be calculated in two parts. First, for the 630 day period between May 1, 2013 and when Waspit paid \$8,000 on January 21, 2015. That amount is \$18,986.30, calculated as follows: $(\$100,000 \times 11\%) \times (630/365)$. Second, for the 1,557 day period between January 22, 2015 and April 28, 2019. That amount is \$43,169.42, calculated on the reduced principal amount as follows: $(\$92,000 \times 11\%) \times (1,557/365)$. The post-default interest is thus \$62,155.72, which when added to the interest to maturity equals \$67,481.74, for a total balance due of \$167,481.74.

Plaintiff Gold Finch

Plaintiff Gold Finch calculates the interest due at maturity to be \$4,975.15 (Clark Aff. ¶ 13). However, the court calculates the amount to be \$5,304.11 for the 242 days between September 10, 2012 and May 10, 2013 as follows: $(\$100,000 \times 8\%) \times (242/365)$. Plaintiffs' calculations of interest for the period from maturity to the date of this motion on April 28, 2019 are correct, resulting in a total amount due of \$170,972.60.

Plaintiff Mermelstein

As noted above, neither the alleged \$25,000 note issued to plaintiff Mermelstein nor its corresponding guaranty have been placed into the record. Judgment is likewise unavailable at this time on the guaranty of his \$105,333 note. That note is dated November 25, 2013, whereas the guaranty states that it pertains to a note dated January 12, 2015, albeit for that same odd amount. Although plaintiffs' counsel notes that both instruments were actually executed close to January 12, 2015 (on January 29), with the implication that the misidentification of the note in the guaranty was a mere scrivener's error, an affidavit from Mermelstein explaining what transpired will be needed to cure the defect.

Costs, Expenses and Attorney's Fees

As noted, all of the notes and guaranties provide for the payment of plaintiffs' costs and expenses, including attorney's fees. Such clauses are enforceable (*see Chen v Yan*, 109 AD3d 727, 731 [1st Dept 2013]), and the court shall refer that issue to a special referee/judicial hearing officer as to those instruments upon which judgment shall be ordered herein. Insofar as all plaintiffs are represented by the same counsel, separate hearings are not required.

Form of the Judgments

Although plaintiffs suggest that judgments should be entered in “aggregate” amounts against defendants, different amounts are owed to different plaintiffs. The court therefore directs that separate judgments be directed in favor of the plaintiffs as set forth below.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted with respect to both the notes and corresponding guaranties held by Hugh Downe (on the \$100,000 note only), Mary Downe, Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP, Steven Magid, Evan Robertson and Adam Zion (on the \$25,000 note only); granted as to the guaranties held by Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan and Adam Zion (on the \$52,677 note), and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hugh Downe and against defendant Wasplit Group, Inc. in the amount of \$171,265.75, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Hugh Downe and against defendant Richard Steggall in the amount of \$171,265.75, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mary Downe and against defendant Wasplit Group, Inc. in the amount of \$167,481.74, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mary Downe and against defendant Richard Steggall in the amount of \$167,481.74, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to

be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP and against defendant Waspit Group, Inc. in the amount of \$170,972.60, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP and against defendant Richard Steggall in the amount of \$170,972.60, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Steven Magid and against defendant Waspit Group, Inc. in the amount of \$147,199.56, together with interest at the contractual rate of 8% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Steven Magid and against defendant Richard Steggall in the amount of \$147,199.56, together with interest at the contractual rate of 8% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Evan Robertson and against defendant Waspit Group, Inc. in the amount of \$83,347.94, together with interest at the contractual rate of 13% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Evan Robertson and against defendant Richard Steggall in the amount of \$83,347.94, together with interest at the contractual rate of 13% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Waspit Group, Inc. in the amount of \$40,883.55, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Richard Steggall in the amount of \$40,883.55, together with interest at the contractual rate of 11% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Ronnie Eldridge as Trustee for the Breslin Profit Sharing Plan and against defendant Richard Steggall in the amount of \$168,931.50, together with interest at the contractual rate of 16% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED and ADJUDGED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff Adam Zion and against defendant Richard Steggall in the amount of \$76,241.62, together with interest at the contractual rate of 12% per annum thereon from April 29, 2019 until the date of entry of judgment, in the amount of \$ _____, as calculated by the Clerk, and thereafter at the statutory rate together with costs and disbursements of this action to be taxed by the Clerk upon submission of an appropriate bill of in the amount of \$ _____, for a total amount of \$ _____; and it is further

ORDERED that a Special Referee or Judicial Hearing Officer (JHO) shall be designated to hear and report to this court on issue of the amount of reasonable attorneys' fees, costs, and expenses incurred by plaintiffs Hugh Downe, Mary Downe, Walter William Clark as Trustee for Gold Finch Enterprises, Inc. DBP, Steven Magid, Evan Robertson, Adam Zion and Ronnie

Eldridge as Trustee for the Breslin Profit Sharing Plan and Zion in connection with procuring the judgments directed to be entered herein, and it is further

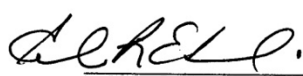
ORDERED that the powers of the Special Referee or JHO shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that the motion for summary judgment in lieu of complaint is denied with respect to both the notes and corresponding guaranties held by H. Downe (on the \$53,000 note), Hilary Hayes and Peter S. O'Neill; and denied as to the guaranties held by Fred Mermelstein, and the action is converted to a plenary action with respect to those notes and/or guaranties, and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry; and it is further

ORDERED that those plaintiffs' motion papers are deemed to be the complaint in the plenary action and defendants shall answer, within thirty days of service upon them of this order with notice of entry, accompanied by said motion papers.

<p>10/26/2020</p> <hr/> <p>DATE</p>			 <p>J.S.C. HON. CAROL R. EDMEAD J.S.C.</p> <hr/> <p>CAROL R. EDMEAD, J.S.C.</p>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE