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 13 JAMES F. RIGBY, CHAPTER 7 TRUSTEE

8 **UNITED STATES DISTRICT COURT**
 9 **CENTRAL DISTRICT OF CALIFORNIA**
 10 **SOUTHERN DIVISION**

10 JAMES F. RIGBY, CHAPTER 7
 11 TRUSTEE,

12 Plaintiff,

13 v.

14 STANLEY M. GORDON, individually
 15 and as TRUSTEE OF THE GORDON
 16 FAMILY TRUST DATED FEBRUARY
 17 1, 2006; et al.,

18 Defendants.

17 CITIBANK, N.A., a national banking
 18 association,

19 Counter-Claimant,

20 v.

21 JAMES F. RIGBY, CHAPTER 7
 22 TRUSTEE,

23 Counter-Defendant,

24 And

25 FIRST REPUBLIC BANK, a California
 26 corporation,

27 Third-Party Defendant.
 28

NO. SA CV 13-01352 R (PWJx)

**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

1 Before the Court is Plaintiff's Motion for Partial Summary Judgment
2 Pursuant to Fed. R. Civ. P. 56 (Dkt. #74). In support of his Motion for Partial
3 Summary Judgment, Plaintiff submitted: (1) a Memorandum of Points and
4 Authorities in Support of Motion for Partial Summary Judgment (Dkt. #74-1); (2)
5 Plaintiff's Local Rule 56-1 Statement of Uncontroverted Facts and Conclusions of
6 Law in Support of Motion for Partial Summary Judgment (Dkt. #75); (3)
7 Declaration of Scott B. Henrie in Support of Plaintiff's Motion for Summary
8 Judgment Pursuant to Fed R. Civ. P. 56 (Dkt. #76); (4) Declaration of Kent W.
9 Mordy in Support of Plaintiff's Motion for Partial Summary Judgment (Dkt. #77);
10 and (5) Declaration of Timothy P. Nishimura in Support of Plaintiff's Motion for
11 Partial Summary Judgment (Dkt.# 78).

12 In response to Plaintiff's Motion for Partial Summary Judgment Pursuant to
13 Fed. R. Civ. P. 56 (Dkt. #74), Defendants Stanley Gordon, Ellen Gordon, Ryan
14 Knott, and Ashley Knott filed the following pleadings: (1) Memorandum of Points
15 and Authorities of Defendants Stanley Gordon, Ellen Gordon, Ryan Knott and
16 Ashley Knott in Opposition to Motion for Partial Summary Judgment (Ct. Rec.
17 79); (2) Evidence in Support of Defendants' Opposition to Motion by Plaintiff
18 James F. Rigby for Partial Summary Judgment (Dkt. #80); (3) Responsive
19 Statement of Controverting Material Facts Filed by Defendants Stanley Gordon,
20 Ellen Gordon, Ryan Knott and Ashley Knott in Opposition to Motion for Partial
21 Summary Judgment by Plaintiff James F. Rigby (Dkt. #81); and (4) Evidentiary
22 Objections by Defendants to Evidence Proffered by Plaintiff in Support of Motion
23 for Partial Summary Judgment (Dkt. #82).

24 Plaintiff submitted: (1) Plaintiff's Response to Evidentiary Objections by
25 Defendants to Evidence Proffered by Plaintiff in Support of Motion for Partial
26 Summary Judgment (Dkt. #89) and (2) Plaintiff's Reply in Support of Motion for
27 Partial Summary Judgment (Dkt. #90). On reply, Plaintiff withdrew the
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1 Declaration of Timothy P. Nishimura in Support of Plaintiff's Motion for Partial
2 Summary Judgment (Dkt. #78).

3 **Findings of Fact**

4 1. On February 1, 2006, Michael R. Mastro extended a loan to FlexPoint
5 Funding Corporation in the amount of \$2,000,000. Declaration of Scott Henrie,
6 Ex. C; Dkt. #21, at 2, 42-45; Dkt. #43, at ¶ 1; Dkt. #25, at Ex. 5.

7 2. Defendants Stanley Gordon, Ellen Gordon, Ryan Knott, and Ashley
8 Knott signed as absolute and unconditional guarantors of payment on the
9 Promissory Note. Declaration of Scott Henrie, Ex. C; Dkt. #21, at 2, 42-45; Dkt.
10 #43, at ¶ 1; Dkt. #25, at Ex. 5.

11 3. Defendants have not made any payments on the Promissory Note
12 since July 23, 2007. Declaration of Kent W. Mordy, Ex. A, at 3.

13 4. The Promissory Note calls for interest to accrue at fifteen percent
14 (15%) per annum, with a default interest of thirty percent (30%) per annum.
15 Declaration of Scott Henrie, Ex. C; Dkt. #21, at 43; Dkt. #25, at Ex. 5.

16 5. The Promissory Note contains a maturity date of the earlier of "(a) the
17 completion of sale of all preferred or common stock of the Borrower or (b) twelve
18 (12) months following the funding date, whoever occurs first." Declaration of
19 Scott Henrie, Ex. C; Dkt. #21, at 42, Dkt. #25, at Ex. 5.

20 6. The Promissory Note contains a choice of law provision under which
21 Washington law governs the Note. Declaration of Scott Henrie, Ex. C; Dkt. #21, at
22 43; Dkt. #25, at Ex. 5.

23 7. Payments for the Promissory Note were due to an address on Rainier
24 Ave. South in Seattle, Washington. Declaration of Scott Henrie, Ex. B & C; Dkt.
25 #21, at 42; Dkt. #25, at Ex. 5.

26 8. The Promissory Note was made for business/commercial purposes to
27 FlexPoint Funding Corp., a corporation. Dkt. # 25, at 14.

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1 from Washington's usury law, *Paulman v. Filtercorp*, 73 Wn. App. 672 (1994).
2 The parties agree that the transactions at issue in the instant case was for
3 commercial purposes. California does not have a material greater interest than
4 Washington in having its laws applied in this case.

5 6. Each state had parties to the Promissory Note, and each state has made
6 policy choices about the interest rates allowable in certain situations. *Shannon-*
7 *Vail Five, Inc. v. Bunch*, 270 F.3d 1207 (9th Cir. 2001). Therefore, the parties'
8 choice to apply Washington law should be honored.

9 7. The Promissory Note and the First Amendment are properly in evidence
10 before this Court. As commercial paper, they are self-authenticating. Fed. R.
11 Evid. 902(9); *United States v. Pang*, 362 F.3d 1187 (9th Cir. 2004). Defendants
12 have also previously introduced and authenticated these two documents
13 themselves.

14 8. The interpretation of guarantees is the same as those applied to contracts
15 generally. *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760 (1970). The
16 primary goal in interpreting a contract is to ascertain the parties' intent. This is
17 done by focusing on the written instruments. *First Citizens Bank & Trust Co. v.*
18 *Cornerstone Homes & Development, LLC*, 178 Wn. App. 207 (2013). Defendants
19 sign their names directly below the word "guarantors," which was printed in
20 capital letters. The Promissory Note also states that the signature on this note is an
21 absolute and unconditional personal guaranty of payment and performance.

22 9. Defendants' attempt to create ambiguity in the terms of the guarantees
23 are unavailing. For example, they observe that the section of the Promissory Note
24 entitled "Security" does not reference a guaranty. The question of what collateral
25 secures the Promissory Note is a separate question from the scope of the guaranty.
26 There can be no question that defendants agreed to be guarantors. As guarantors,
27 defendants have promised to perform if FlexPoint fails to perform. It is undisputed
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1 that FlexPoint has failed to perform. Defendants are therefore individually liable
2 on the Promissory Note.

3 10. The parties agree that the First Amendment to the Promissory Note was
4 validly entered into and is binding on the parties. The parties dispute the
5 authenticity and enforceability of the Second Amendment.

6 11. A subsequent agreement modifying an existing contract must be
7 supported by new consideration independent of the consideration involved in the
8 original agreement. *Boardman v. Dorsett*, 38 Wn. App. 338 (1984). The only
9 possible consideration to support the second amendment is Mr. Knotts' purported
10 promise not to file bankruptcy. A promise also constitutes valid consideration if
11 the promise is binding on the party making it, *Sargent v. Drew-English, Inc.*, 12
12 Wn.2d 320 (1942). A promise not to file bankruptcy is not binding because it is
13 unenforceable, *In re Huang*, 275 F.3d 1173 (9th Cir. 2002).

14 12. Like a prepetition waiver of a bankruptcy discharge, a promise not to
15 file bankruptcy goes against public policy because it would frustrate the purposes
16 of the Bankruptcy Code. *In re Cole*, 226 B.R. 647 (9th Cir. BAP 1998). Such a
17 promise, therefore, does not constitute valid consideration, and the Second
18 Amendment is not binding on the parties.

19 13. Under Washington law, a finding of laches requires a finding that
20 plaintiff's delay resulted in material prejudice to the defendant. *Davidson v. State*,
21 116 Wn.2d 13 (1991). Here, there was no prejudice to the defendants. They imply
22 that they were prejudiced because Mastro fled to France. However, they went to
23 France and obtained Mastro's declaration in which he states the Second
24 Amendment is authentic. Because the Trustee is not able to cross-examine Mastro,
25 the only party prejudiced by Mastro being in France is the Trustee.

26 14. Defendants owe at least \$1,250,000 based on their personal guaranty of
27 the Note because: (1) they are absolute guarantors of payment; (2) Defendants
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1 have admitted the amount due is \$1,250,000.00 (Dkt. #43, at 2); (3) the Note came
2 due on February 1, 2010; and (4) no payments have been made to retire the Note.

3 15. Defendants have not explained how else they were prejudiced by the
4 claimed delay in this case, and no prejudice is apparent.

5 16. Plaintiff's motion is granted. In response to the Trustee's Statement of
6 Uncontroverted Fact No. 3, defendants do not put forward any evidence that they
7 have made any payments on the note since July 23, 2007, this fact is therefore
8 established.

9 17. The terms and authenticity of the Promissory Note and the First
10 Amendment are undisputed; and so is Mr. Mordy's arithmetic in calculating the
11 interest owed. Judgment is entered in favor of the Trustee and against the four
12 individual defendants in the amount of \$3,058,333.33 as of May 31st, 2014.

13 **IT IS SO ORDERED** for the reasons articulated above, Plaintiff's Motion
14 for Partial Summary Judgment is **GRANTED**. A judgment shall be entered in
15 favor of Plaintiff consistent with these Findings of Fact and Conclusions of Law.

16 DATED: July 23, 2014



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HON. MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

20 PRESENTED BY:
21 WILLIAMS, KASTNER & GIBBS PLLC
22 /s/ Manish Borde, Pro Hac Vice
Zackary A. Paal, Cal. State Bar No. 261827
23 Scott B. Henrie, WSBA #12673, Pro Hac Vice
Manish Borde, WSBA #39503, Pro Hac Vice

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