STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LIBERTY BANKERS LIFE INSURANCE COMPANY, an Oklahoma insurance company, *Plaintiff*, vs. **HARRY A. GREEN and JANN GREEN, individuals and HARRY A. GREEN & ASSOCIATES, INC., a dissolved Washington Corporation** *Defendants*.	Case No. **CV 2011 10121** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendants' Harry and Jann Green and Harry A. Green & Associates, Inc. (Greens) motion for summary judgment. In 2005, The Point at Post Falls, LLC initially borrowed $3,934,390.00 from plaintiff Liberty Bankers Life Insurance Company (Liberty). Complaint, p. 2, ¶ 6. That was secured by a promissory note by The Point at Post Falls, LLC to Liberty. *Id.,* ¶ 7. Each of the Greens also signed personal guarantees on the obligation by The Point at Post Falls, LLC to Liberty. *Id.,* pp. 2-3, ¶ 8. Liberty claims The Point at Post Falls, LLC defaulted on the principal sum of $7,861,236.00 on the June 30, 2011, maturity date. *Id.,* p. 3, ¶¶ 11, 12. The Point at Post Falls, LLC filed bankruptcy, and on December 20, 2011, Liberty filed this lawsuit against the Greens on their personal guarantees, alleging breach of contract.

On July 25, 2012, Greens filed their motion for summary judgment requesting entry of summary judgment on Liberty's claim for breach of contract. Defendants' Motion for Summary Judgment, p. 2. Also filed that day was an Affidavit of John F. Magnuson for Summary Judgment and a Second Affidavit of John F. Magnuson for Summary Judgment. Specifically, Greens claim Liberty has failed to state a claim upon which relief may be granted under I.R.C.P. 12(b)(6). Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7. This is based on the fact that in their Complaint, Liberty alleges that The Point at Post Falls, LLC defaulted under the terms of the "Seventh Loan Modification Agreement," while Greens claim that if the Point defaulted on any loan agreement, it was the "Eighth Loan Modification Agreement." Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 3-4. Both modification agreements are alleged to have been guaranteed by Greens. Complaint, pp. 2-3. Greens argue that when the Eighth Loan Modification Agreement was executed, it superseded the Seventh Loan Modification Agreement, making the Seventh Loan Modification Agreement moot and without prospective force or effect; thus, the Seventh Loan Modification Agreement could not have been defaulted on. *Id.,* p. 7. Thus, according to the Greens' argument, since the Complaint did not allege a breach of the Eighth Loan Modification Agreement, Liberty has failed to state a claim under Rule 12(b)(6). *Id*.

On August 7, 2012, Liberty filed its Opposition to Defendants' Motion for Summary Judgment, in which Liberty sets forth two arguments against summary judgment: 1) the Greens' contractual liability owed to Liberty under the Guaranty Agreement is independent of any obligation owed by The Point at Post Falls, LLC, and 2) that Liberty has satisfied the minimum requirements of notice pleading by setting forth the prima facie elements of Greens' contractual obligations. Opposition to

Defendants' Motion for Summary Judgment, pp. 1-7. On August 9, 2012, Liberty filed its Motion for Enlargement of Time so that the Affidavit of Allan Scharton (Liberty's Vice-President) in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment could be considered. On August 9, 2012, Scharton's affidavit was filed.

On August 15, 2012, Greens filed their Reply Memorandum in Support of Defendants' Motion for Summary Judgment. Greens claim Liberty has not proven the existence of a binding and valid obligation to which the personal guarantees could apply. Reply Memorandum in Support of Defendant' Motion for Summary Judgment, p. 5. Green argues Liberty has sought enforcement of the Promissory Note under the Seventh Loan Modification Agreement, yet the Seventh Loan Modification Agrreement is no longer valid or binding. *Id.,* pp. 5-6.

Oral argument on Greens' motion for summary judgment was held on August 22, 2012.

This case was set for a five-day jury trial to begin on October 1, 2012. On August 7, 2012, the parties filed a stipulation to continue in this case, and set that matter for hearing on August 22, 2012. At the August 22, 2012, hearing, this Court granted the continuance, and scheduled the case for trial beginning May 6, 2013.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court may properly grant a motion summary judgment only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court construes all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in a light most favorable to the non-moving party. *Partout v. Harper*, 145 Idaho 683, 685, 183 P.3d 771, 773 (2008). The Court draws all inferences and

conclusions in the non-moving party's favor and if reasonable people could reach different conclusions or draw conflicting inferences, then the motion for summary judgment must be denied. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

However, if the evidence shows no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002). The non-moving party "must respond to the summary judgment motion with specific facts showing there is a genuine issue for trial." *Id*. In passing on motions for summary judgment, unsworn statements are entitled to no probative weight; mere denials unaccompanied by facts admissible in evidence are insufficient to raise genuine issues of fact. *Camp v. Jimenez,* 107 Idaho 878, 882, 693 P.2d 1080, 1084 (Ct.App. 1984).

In ruling on the motion, the Court considers only material contained in the affidavits and depositions which are based on personal knowledge and which would be admissible at trial. *Samuel*, 134 Idaho 84, 88, 996 P.2d 303, 307. Summary judgment is appropriate where a non-moving party fails to make a sufficient showing to establish the existence of an element essential to its case when it bears the burden of proof. *Id.*

The standards for review under a Rule 12(b)(6) motion and a summary judgment motion are similar but not identical. *Independent School Dist. of Boise City v. Harris Family Ltd. Partnership*, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011). A Rule

12(b)(6) motion looks only to the complaint, where summary judgment looks beyond the pleadings. *Id*. A motion or failure to state a claim upon which relief may be granted under Rule 12(b)(6), when supported by factual allegations outside of the pleadings, is properly considered as a summary judgment motion under Rule 56. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

III. ANALYSIS.

A. Liberty Has Alleged a Sufficient Claim Under I.R.C.P. 12(b)(6).

Idaho Rule of Civil Procedure 12(b) sets forth six defenses to a pleading. I.R.C.P. 12(b). Rule 12(b)(6) states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses be made by motion . . . (6) failure to state a claim upon which relief can be granted.

I.R.C.P. 12(b)(6).

The general rules of pleadings are set forth in Rule 8. I.R.C.P. 8. A pleading setting forth a claim for relief must contain at minimum:

> (1) if the court be of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled.

I.R.C.P. 8(a)(1). Notice pleading frees the parties from pleading particular issues or theories, while allowing parties to step into the courthouse by merely stating claims upon which relief can be granted. *Cook v. Skyline Corp*., 135 Idaho 26, 33, 13 P.3d 857, 864 (2000). The Idaho Court of Appeals has examined notice pleadings and has observed that a party's pleadings should be liberally construed to secure a "just, speedy and inexpensive" resolution to the case. *Christensen v. Rice*, 114 Idaho 929, 931, 763

P.2d 302, 304 (Ct. App. 1988). Such a liberal approach comes with limitations. *Id*. A plaintiff may be required to refine the issues once litigation has commenced, and where issues not raised by the pleadings are either expressly or impliedly tried, the trial court has discretion as to whether they decide those issues or whether they allow the pleading party to amend the pleadings to conform to the proof offered. *Id.* The Court held that the "emphasis of the [pleading] rule is to insure that a 'just result' is accomplished, rather than requiring strict adherence to rigid forms of pleading." *Id*. The Idaho Supreme Court has stated that the key feature of a pleading is that the plaintiff imparts sufficient notice of his claim against the defendant, even if the theory of recovery is not the same. *Straley v. Idaho Nuclear Corp*., 94 Idaho 917, 921, 500 P.2d 218, 222 (1972). There are also certain situations where pleadings require more depth. I.R.C.P. 9. These special matters include fraud, mistake, condition of the mind, violation of civil or constitutional rights, libel and slander. I.R.C.P. 9 (a-j).

In a suit brought on a collateral or continuing guaranty, courts have set forth similar but slightly differing elements necessary to establish a prima facie case. However, most courts have agreed at minimum that the plaintiff is required to establish the existence of the guaranty agreement. *Tripps Restaurants of North Carolina, Inc. v. Showtime Enterprises, Inc.*, 154 N.C.App. 389, 392, 595 S.E.2d 765, 767 (Ct. App. 2004); *Juzwik v. Juzwik*, 140 Ill.App.3d 644, 649, 94 Ill.Dec. 926, 929 (2d Dist. 1986); *J.P. Morgan Chase Bank, N.A. v. Bauer*, 92 A.D.3d 641, 641-42, 938 N.Y.S.2d 190, 191 (2012); *Cottonport Bank v. Reason*, 801 So.2d 1236, 1239 (La.App. 3 Cir. 2001). In Illinois the plaintiff further establishes a prima facie case by proof of the original indebtedness and the debtor's fault. *Juzwik*, 140 Ill.App.3d 644, 649, 94 Ill.Dec. 926, 929 (2d Dist. 1986). In New York, the plaintiff must establish the existence of the

underlying credit agreement, the personal guaranty and the default of the underlying agreement. *J.P. Morgan*, 92 A.D.3d 641, 641-42, 938 N.Y.S.2d 190, 191 (2012).

In the case of a defective complaint, certain rules apply. Where a complaint fails to allege, or defectively alleges, a material fact, thereby failing to tender an issue as to such fact, the "defect or omission may be cured by a plea or answer which tenders an issue as to the fact by specifically denying it. *Peterson v. Hague*, 51 Idaho 175, 181, 4 P.2d 350, 352 (1931). When there is an entire absence of a material allegation in a complaint, rather than a merely a defective statement of the necessary averment, the allegations of an answer do not cure the defect. *Ayers v. General Hospital*, 67 Idaho 430, 436, 182 P.2d 958, 960 (1947).

In this case, Liberty has set forth in its Complaint the following allegations:

> 7. In consideration of this extension of credit, The Point at Post Falls, LLC executed and delivered to Liberty Bankers a *Promissory Note* in the original amount of $3,932,390.00 payable to Liberty Bankers according to the terms thereof.
>
> 8. In further consideration of the extensions of credit to The Point at Post Falls, LLC, Defendants, HAARY A. GREEN, JANN GREEN, and HARRY A. GREEN & ASSOCIATES, INC., each executed and delivered to Liberty Bankers their personal continuing guarantees of The Point at Post Falls, LLC's obligations to Liberty Bankers.
>
> 10. On April 30, 2010, the parties agreed to and executed a *Seventh Loan Modification Agreement*, which modified and amended certain provisions of Exhibit 1. Specifically, it extended the maturity date of Exhibit 1 [Promissory Note] to June 30, 2011.
>
> 11. The Point at Post Falls, LLC breached its obligation on Exhibit 1 [Promissory Note] by failing to pay all sums due and owing when the obligation matured on June 30. 2011. In addition, the Promissory Note is in default due to the bankruptcy and/or insolvency of The Point at Post Falls, LLC.
>
> 13. As guarantors, the Defendants, HARRY A. GREEN, JANN GREEN, and HARRY a. GREEN & ASSOCIATES, INC., are primarily and jointly and severally liable, for all obligations assumed pursuant to the terms of the Exhibits 2 and 3 [Guaranty Agreements], and Liberty

> Bankers may at its election, proceed directly against the Defendants as guarantors without first pursuing any remedy against The Point at Post Falls, LLC.
>
> 14. As such, the Defendants, HARRY A. GREEN, JANN GREEN, and HARRY A. GREEN & ASSOCIATES, INC., are liable, jointly and severally, to Liberty Banks for all sums currently due and owing . . .

Complaint, pp. 2-4.

As this is a guaranty pleading, it does not fall under any of the situations listed under I.R.C.P. 9 (fraud, mistake, condition of the mind, violation of civil or constitutional rights, libel and slander). Thus, it falls under the normal pleading rules set forth in I.R.C.P. 8. As *Straley* states, the key feature of a pleading is that the plaintiff imparts sufficient notice of his claim against the defendant and only requires a short and plain statement of jurisdiction, a short and plain statement of the claim and a demand for relief. This issue in this case is the short and plain statement of Liberty's breach of contract claim.

In a suit on a guaranty, courts have stated that at minimum, a prima facie case requires the plaintiff to establish the existence of the guaranty agreement. Here, Liberty has alleged in its Complaint that Greens executed personal continuing guarantees of The Point at Post Falls, LLC's obligations to Liberty and further provided copies of the executed Guaranty agreements by each defendant as exhibits. To go further, as appellate courts in Illinois and New York have done, Liberty has also alleged the existence of the original Promissory Note and the Seventh Loan Modification Agreement and provided copies of both as exhibits and alleged that The Point at Post Falls, LLC breached its obligation on the original promissory note by failing to pay all sums due and owing on June 30, 2011, as required by the Seventh Loan Modification Agreement. By doing so, Liberty has provided information regarding the original indebtedness and the debtor's default.

Greens claim that the Promissory Note was further modified after the Seventh Loan Modification Agreement by the Eighth Loan Modification Agreement. Further, Greens allege that when the Eighth Loan Modification Agreement was executed by the parties, the Seventh Loan Modification Agreement ceased to have any prospective force or effect, due to a specific provision in the Eighth Loan Modification Agreement that states that the Eighth Loan Modification Agreement "represents the final agreement between the parties." Memorandum in Support of Defendants' Motion for Summary Judgment, p. 7. Thus, Greens argue that this language in the Eighth Loan Modification Agreement superseded the Seventh Loan Modification Agreement. *Id.* As such, Greens argue the Seventh Loan Modification Agreement could not have been breached, as it no longer was in effect. Greens argue the Complaint does not mention the Eighth Loan Modification Agreement and so does not specifically allege a breach thereof. This is the main point of the Greens' argument, that because Liberty's Complaint does not specifically allege that the breach was for the Eighth Loan Modification Agreement, or even mention its existence, Liberty's Complaint fails under I.R.C.P. 12(b)(6). Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 6-8; Reply Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 5-6.

However, Greens fail to take into account the guiding principle regarding pleadings, that the plaintiff impart "sufficient notice" of his claim. As stated in *Peterson*, when a complaint defectively alleges, or fails to allege a material fact, thereby failing to tender an issue as to such fact, the defect or omission may be cured by an answer tendering an issue by specifically denying it. In the Amended Answer, Greens "affirmatively deny that said sums were immediately due or payable based upon the terms and conditions under which the 'Eighth Loan Modification Agreement' was

executed therein." First Amended Answer, Counterclaims and Demand for Jury Trial, p. 3, ¶ 12. Defendants Amended Answer also mentions the Eighth Loan Modification Agreement in several other paragraphs. Thus, the omission of the mention of the Eighth Loan Modification Agreement is a defect in the Complaint that was cured by Greens' Amended Answer affirmatively denying the allegations based on the Eighth Loan Modification Agreement. This is not an entire absence of a material allegation because the allegation of the Complaint remains the same, that The Point at Post Falls, LLC defaulted on its loan from Liberty and the Greens are liable for that debt as absolute guarantors. Therefore, Liberty's Complaint does provide a claim upon which relief can be granted under I.R.C.P. 12(b)(6) because it sets forth a basic prima facie case of guaranty liability. Liberty's Complaint also provides the Greens with enough notice, as Greens were able to not only affirmatively deny the allegations in their Amended Answer, but also mention the Eighth Loan Modification Agreement. Based on these facts, Greens' Motion for Summary Judgment under I.R.C.P. 12(b)(6) must be denied.

B. Liberty Has Proven Guaranty and Liberty Has Proven an Obligation Sufficient to Survive Summary Judgment.

As mentioned above, in their Reply Memorandum, Greens acknowledge that Liberty has proven the existence of a Guaranty, Greens claim Liberty has not proven the existence of a binding and valid obligation to which the personal guarantees could apply. Reply Memorandum in Support of Defendant' Motion for Summary Judgment, p. 5. Green argues Liberty has sought enforcement of the Promissory Note under the Seventh Loan Modification Agreement, yet the Seventh Loan Modification Agreement is no longer valid or binding. *Id.,* pp. 5-6. Greens argue: "In essence, Plaintiff has filed a Complaint seeking recovery under a Guaranty of an obligation that no longer exists."

Id., p. 6. Greens' argument bypasses the fundamentals of guaranty law and ignores case law on contract interpretation.

A guaranty is an undertaking or promise by the guarantor which is collateral to a primary or principle obligation by another which binds the obligor to performance in the event of nonperformance by the other. *Commercial Credit Corp. v. Chisholm Bros. Farm Equipment Co.*, 96 Idaho 194, 196, 525 P.2d 976, 978 (1974). A continuing guaranty assumes a future course of dealing covering a series of transactions extending over an indefinite time. *Id*. A conditional guaranty expressly or impliedly contemplates the happening of some contingent event of some act on the creditor's part, as a condition precedent to the guarantor's liability. *Id*. Conversely, an absolute or unconditional guarantee is a promise by the guarantor to pay the debt or perform the obligation without requiring the secured party to first exhaust its remedies against the debtor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990). A court can hold a defendant liable on the guaranty agreement only. *Id*. Language that states that the guarantors are "jointly, severally, and unconditionally promise and guaranty full and complete payment . . ." of the obligation of the principal has been held to be that of an absolute guaranty. *McConnon & Co. v. Stallings*, 44 Idaho 510, 510, 258 P. 527, 528 (1927).

An action on a guaranty provides a separate remedy from those on the underlying principal obligation and may generally be pursued independently of an action on the principal obligation or debt. 38 Am. Jur. 2d Guaranty § 92 (2012). Thus, an unconditional guaranty does not require a creditor to attempt to collect from the principal debtor before seeking collection from the guarantor. *CIT Financial Services v. Herb's Indoor RV Center, Inc.*, 118 Idaho 185, 187, 795 P.2d 890, 892 (Ct. App. 1990).

However, suit on a guaranty still requires the non-performance of the principal debtor because, by definition, a guaranty is "an undertaking by a third person to another to answer for the payment of a debt, incurred by a named person, in the event that the named person fails to pay." *Eubank v. First Nat. Bank of Bellvill*, 814 S.W.2d 130, 133 (Tex.App. 1991). A separate remedy simply refers to the fact that a creditor may choose whether to sue the principal debtor on the underlying obligation or sue the guarantor on the guaranty.

When there is an original contract executed and subsequently a supplementary contract is executed regarding the same subject matter, the Idaho Supreme Court has held that the two contracts are to be construed together. *Columbia Trust Co. v. Elkelberger*, 42 Idaho 90, 99, 245 P.78, 81 (1925). If the two contracts differ, then the first contract is held to be modified; if not, then the first contract is enforced according to its terms. *Id*. In order for a later instrument to rescind an earlier one, there must be a demonstration of mutual intent. *Miller v. Estate of Prater*, 141 Idaho 208, 212, 108 P.3d 355, 359 (2005). General rules of contract interpretation apply; thus, if there is no ambiguity on the issue, it may be decided as a matter of law. *Id*. On the other hand, if an inconsistency between the two instruments creates an ambiguity, then the intent of the parties must be determined through a factual inquiry. *Id.* Amended agreements should be construed together with the original agreements where possible. *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). The making of a new contract does not necessarily supersede a former contract unless it 1) explicitly rescinds it, 2) deals with the subject matter so comprehensively as to be complete in itself, or 3) is so inconsistent with the first contract that the two cannot be read together. *Id*. Furthermore, when a subsequently executed agreement specifically references and

relies on a former agreement, the two agreements must be interpreted together, if possible. *Id.* In *Ossewarde*, the amended purchase agreement was incomplete and specifically referenced the original purchase agreement, the original promissory note and the amended promissory note. *Id*. However, the amended promissory note explicitly rescinded the former promissory note. *Id*. The Court held that the original and amended purchase agreements were to be construed together, but that the amended promissory note stood alone. *Id*.

In this case, it is necessary to look at the language of the Eighth Loan Modification Agreement. Paragraphs 13, 16 and 22 are particularly instructive on this issue. Affidavit of John F. Magnuson, Re: Defendant's Motion for Summary Judgment, filed July 25, 2012, Exhibit A, Eighth Modification Agreement, pp. 4-5. Paragraph 13 of the Eighth Modification Agreement states: "Except as expressly modified and extended hereby, all terms and provisions of the Loan Documents are and shall remain unchanged, and the Loan Documents are hereby ratified and confirmed and shall be and shall remain in full force and effect." *Id.,* p. 4. ¶ 13. Paragraph 16 of the Eighth Modification Agreement states: "Any reference to the Note or any of the other Loan Documents shall mean the Note and the other Loan Documents as singularly and collectively modified and extended hereby." *Id.,* p. 4. ¶ 16. Paragraph 22 states: "This Agreement represents the final agreement between the parties herein and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties." *Id.,* p. 5. ¶ 22. It is this "final agreement" language of Paragraph 22 of the Eighth Modification Agreement upon which Greens seize.

The relevant part of the Seventh Loan Modification Agreement is Paragraph 3, which states, "The maturity date as such term is defined in the Note and Loan

Documents is hereby changed and extended to June 30, 2011 (the "Maturity Date"). Complaint, Exhibit 4, p. 2, ¶ 2. The Eighth Loan Modification Agreement makes no mention at all of the Maturity Date, much less grants an extension of such.

It is clear by the language of Paragraph 13 of the Eighth Loan Modification Agreement that the Eighth Loan Modification Agreement was meant to supplement, rather than completely supersede the Seventh Loan Modification Agreement. Paragraph 13 of the Eighth Loan Modification Agreement directly states all provisions of prior loan documents remain unchanged unless expressly modified by the Eighth Loan Modification Agreement. The Eighth Loan Modification Agreement does not mention the Maturity Date at all, so according to Paragraph 13 of the Loan Modification Agreement, the Seventh Loan Modification Agreement would control.

Furthermore, according to *Columbia Trust* and *Ossewarde* the two agreements must be read together where possible, and this is especially true with amended agreements. Under *Ossewarde*, a new contract does not supersede a former contract unless it explicitly rescinds the former contract, deals with the subject matter so comprehensively as to be complete in itself or is so inconsistent with the former contract that the two cannot be read together. *Opportunity L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263. In the present case, the Eighth Loan Modification Agreement does not explicitly rescind the Seventh Loan Modification Agreement. Because the Eighth Loan Modification Agreement does not include a Maturity Date, it is not comprehensive enough to be read by itself. It is also clear, as stated above, that the express language of the Eighth Loan Modification Agreement contemplated the modifications to be read together (Paragraph 13 of the Eighth Loan Modification Agreement states all provisions of prior loan documents remain unchanged unless expressly modified by the Eighth Loan Modification Agreement). Therefore, according

to the Seventh Loan Modification Agreement, the Maturity Date was June 30, 2011, and as such, Liberty was not incorrect in stating in the Complaint that the Greens had breached their obligation on the Promissory Note, as modified by the Seventh Loan Modification Agreement.

The Greens' claim that the Seventh Loan Modification Agreement was superseded by the Eighth Loan Modification Agreement by virtue of Paragraph 22 of the Eighth Loan Modification Agreement is not valid. While Paragraph 22 states that the Eighth Loan Modification Agreement "represents the final agreement between the parties," that language is in reference to potential contradiction by prior, contemporaneous or subsequent oral agreements, signaling a contemplated fully integrated agreement, rather than a rescission of all prior executed agreements.

Liberty was not incorrect in its Complaint regarding the allegations of breach of the Promissory Note and the Seventh Loan Modification Agreement. Greens acknowledge that Liberty has proven the existence of a Guaranty. Reply Memorandum in Support of Defendant' Motion for Summary Judgment, p. 5. Greens' claim that Liberty has not proven the existence of a binding and valid "obligation" to which the personal guarantees could apply is without merit, at least at summary judgment under a I.R.C.P. 12(b)(6) claim, as it ignores case law on contract interpretation. Green's Motion for Summary Judgment must be denied for this reason as well.

IV. CONCLUSION AND ORDER.

For the reasons stated above, Greens' Motion for Summary Judgment against Liberty must be denied.

IT IS HEREBY ORDERED Defendants' Harry and Jann Green and Harry A. Green & Associates, Inc. (Greens) motion for summary judgment against Liberty Bakers Life Insurance Company (Liberty) is DENIED.

Entered this 5th day of September, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Jonathon D. Hallin	666-4112	John F. Magnuson	667-0500

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Jeanne Clausen, Deputy Clerk