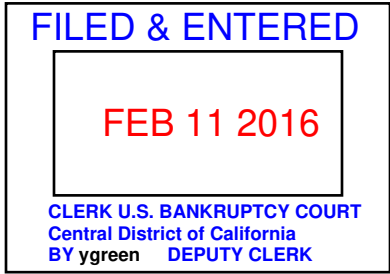


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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RIVERSIDE DIVISION

In re:  
  
Peter Francis Macera Jr.,  
  
Debtors.

Case No. 6:14-bk-18815-WJ  
  
Chapter 7  
  
Adv. No. 6:15-ap-01047-WJ

Robert S. Whitmore, Chapter 7 Trustee;  
El Drag, Inc., a California Corporation,  
  
Plaintiffs,  
  
v.

**STATEMENT OF UNCONTROVERTED  
FACTS AND CONCLUSIONS OF LAW IN  
SUPPORT OF ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
SUMMARY ADJUDICATION**

Wells Fargo Bank, N.A., a national banking  
association; Peter Francis Macera Jr.; Susan  
Lehman,  
  
Defendants.

Hearing:  
Date: November 6, 2015  
Time: 11:00 a.m.  
Location: Courtroom 304  
3420 Twelfth Street  
Riverside, California 92501

1 On July 23, 2015, the plaintiffs, Robert S. Whitmore, chapter 7 trustee, and El Drag, Inc.,  
2 a California corporation (“Plaintiffs”), filed a motion for partial summary judgment [docket #38]  
3 (“MSJ”). On November 6, 2015, the Court held a hearing regarding the matter and took the MSJ  
4 under submission. The Court now rules based on the following statement of uncontroverted facts  
5 and conclusions of law. For the reasons set forth below, the Court hereby grants the MSJ. A  
6 separate judgment shall be entered concurrently.

7 After consideration of the papers in support of and in opposition to Plaintiffs’ MSJ and the  
8 oral argument of counsel, the Court determines that the following facts have been established.

9  
10 **UNCONTROVERTED FACTS**

11 1. On June 9, 2003, Goldstone Financial, Inc. transferred the real property located at  
12 13533 2nd Avenue, Victorville, San Bernardino County, California, APN 3090-191-17-0000  
13 (“Victorville Property”) to El Drag, Inc. (“El Drag”). The grant deed was recorded as document  
14 number 2003-0384960 on June 9, 2003 in the official records of San Bernardino County.

15 2. On October 30, 2003, the defendant Peter Francis Macera, Jr. (“Macera”) executed,  
16 as an individual, a promissory note (“Note”) in favor of World Savings Bank, FSB in the principal  
17 sum of \$75,000.

18 3. On October 30, 2003, Macera, as an individual, executed a deed of trust (“Original  
19 Deed of Trust”) against the Victorville Property securing the Note in favor of World Savings  
20 Bank, FSB. The Original Deed of Trust was recorded as document number 2003-0856907 on  
21 November 14, 2003 in the official records of San Bernardino County.

22 4. On the date that both the Note and Original Deed of Trust were executed by  
23 Macera as an individual, El Drag was the sole holder of title to the Victorville Property.

24 5. Sometime after October 30, 2003, defendant Wells Fargo Bank, N.A. (“Wells  
25 Fargo”) succeeded World Savings Bank’s interest in the Note and Original Deed of Trust.

26 6. On April 30, 2014, Macera, as president of El Drag, executed on behalf of El Drag  
27 a deed of trust (“New Deed of Trust”) on the Victorville Property to secure the original 2003 Note

1 in favor of Wells Fargo. The New Deed of Trust was recorded as document number 2014-  
2 0168013 on May 8, 2014 in the Official Records of San Bernardino County. The New Deed of  
3 Trust recites that it “secures a promissory note dated October 30, 2003, in the amount of  
4 \$75,000.00.” The New Deed of Trust declares that it is granted “in consideration of the  
5 foregoing” recitals.

- 6 7. The consideration referenced in the New Deed of Trust was the original 2003 Note.
- 7 8. The New Deed of Trust does not reference any contemporaneous consideration.
- 8 9. No contemporaneous consideration was provided for the New Deed of Trust.

9

10

**CONCLUSIONS OF LAW**

11

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §1334.

12

2. There are no genuine issues of material facts and the undisputed facts clearly  
13 demonstrate that, by providing the New Deed of Trust, El Drag became a guarantor or surety of  
14 Macera’s individual obligation under California Civil Code § 2787 and *Bull v. Coe*, 77 Cal. 54,  
15 61-62 (Cal. 1888).

16

3. There are no genuine issues of material fact that the New Deed of Trust was not  
17 contemporaneous with the Note it was purported to secure.

18

4. At the hearing regarding the MSJ on November 6, 2015, counsel for Wells Fargo  
19 acknowledged that the facts recited above in paragraphs 1-7 are uncontroverted.

20

5. With respect to the facts recited above in paragraphs 8-9, counsel for Wells Fargo  
21 contended on the record that the \$75,000 loan provided in 2003 (as documented by the Note)  
22 constitutes “contemporaneous consideration” (a proposition the Plaintiffs dispute and which the  
23 court hereby rejects) but did not otherwise claim that any other “contemporaneous consideration”  
24 existed. In other words, Wells Fargo does not dispute the factual assertion by the Plaintiffs that  
25 no “contemporaneous consideration” existed other than the claim by Wells Fargo that the 2003  
26 loan of \$75,000 (as documented by the Note) constituted “contemporaneous consideration”.

1           6.       As a consequence, summary judgment is appropriate with respect to the first cause  
2 of action asserted in the Plaintiffs' amended complaint.

3           7.       It is undisputed that the \$75,000 loan in 2003 was between Macera (personally)  
4 and the predecessor of Wells Fargo. There is no evidence that El Drag was a borrower, guarantor  
5 or otherwise involved in the loan in any manner. All the evidence presented indicates the \$75,000  
6 loan was a personal loan by Macera which did not involve in any manner El Drag.

7           8.       It is also undisputed that, at the time of the loan, El Drag owned the Victorville  
8 Property, not Macera. As a result, the \$75,000 loan was effectively unsecured unless and until the  
9 owner (El Drag) granted a deed of trust.

10          9.       The predecessor of Wells Fargo apparently never realized the problem with title.  
11 Later, Wells Fargo did discover the problem (apparently when attempting to foreclose).

12          10.       Therefore, in 2014, Wells Fargo demanded (and obtained) the New Deed of Trust  
13 from El Drag.

14          11.       Prior to obtaining the New Deed of Trust, El Drag had no obligation to repay the  
15 \$75,000 loan evidenced by the Note. There is no evidence that El Drag had any obligation to  
16 Wells Fargo (or its predecessor) for the \$75,000 loan or the Note.

17          12.       As a consequence, when El Drag executed the New Deed of Trust, it guaranteed  
18 (for the first time) the \$75,000 loan and the Note. Prior to executing the Note, El Drag was not a  
19 guarantor of the loan or the Note.

20          13.       Pursuant to section 2792 of the California Civil Code, a guaranty must have  
21 separate consideration unless the guaranty arises at the time of the original transaction. In this  
22 case, the original loan occurred in 2003 but the guaranty did not arise until 2014. Therefore, the  
23 guaranty is void for lack of contemporaneous consideration under section 2792. *Rusk v. Johnston*,  
24 18 Cal. App. 2d 408, 409 (Cal. App. 1937).

25          14.       At the hearing regarding the MSJ, Wells Fargo admitted that the New Deed of  
26 Trust secures the 2003 loan for \$75,000 and the Note. The consideration for the New Deed of  
27 Trust is the 2003 loan. But that consideration is clearly not "contemporaneous". Providing

1 consideration for the New Deed of Trust eleven years earlier is not contemporaneous under any  
2 reasonable definition of the word. Wells Fargo has not provided any case authority for the  
3 proposition that consideration provided eleven years earlier is “contemporaneous”. This argument  
4 would render the word “contemporaneous” meaningless and the provisions of section 2792 of the  
5 California Civil Code meaningless.

6 15. Plaintiffs are entitled to judgment, as a matter of law, on the first claim for relief  
7 that the New Deed of Trust is invalid for a lack of consideration.

8 #####

Date: February 11, 2016

  
\_\_\_\_\_  
Wayne Johnson  
United States Bankruptcy Judge