

IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
HERBERT FRANCIS WHALEN IV,	)	Case No. 12-09615-JKC-7
aka HERBERT F. WHALEN, aka	)	
HERBERT WHALEN, aka BERT	)	
<u>WHALEN, Debtor</u>	)	
 	)	
MATTHEW D. KNEE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
HERBERT FRANCIS WHALEN IV,	)	
aka HERBERT F. WHALEN, aka	)	
HERBERT WHALEN, aka BERT	)	
WHALEN,	)	
	)	
Defendant.	)	

**COMPLAINT OBJECTING TO THE DISCHARGE OF DEBT**

Matthew D. Knee (“Knee”), a named creditor under debtor’s Schedule of Creditors, hereby objects to the discharge of this creditor’s debt, and in support states as follows:

1. On August 25, 2011, Knee filed his Complaint against creditor asserting legal theories of breach of contract and fraud. A true and accurate copy of the Complaint is attached as Exhibit A.

2. On December 9, 2011, following an evidentiary hearing, a default judgment in the amount of \$748,582.72 was entered in favor of Knee and against debtor, Herbert F. Whalen, IV, in Marion County Superior Court 7 under Cause number 49d07-1108-PL-3344. More specifically, the Trial Court determined that Knee’s damages totaled \$248,694.24 and, after a

finding of fraud on the part of Whalen, trebled the damages and awarded attorney fees pursuant to I.C. 34-24-3-1. A true and accurate copy of the judgment is attached hereto and marked Exhibit B.

3. On August 13, 2012, Whalen filed his Chapter 7 Bankruptcy Petition in which he seeks to discharge the above described debt belonging to Knee. The judgment, however, is a non-dischargeable debt as the debt arose out of representations made by Whalen which he knew to be false, that the representations were intended and did, in fact, deceive Knee, and Knee reasonably relied upon such misrepresentations. Bankr. Code 11 U.S.C.A s523(a)(2)(A).

4. For the foregoing reasons, creditor, Matthew D. Knee objects to the discharge of the debt and/or judgment owed to him pursuant to Bankr. Code 11 U.S.C.A s523(a)(2)(A).

WHEREFORE, Matthew D. Knee respectfully objects to the discharge of this creditor's debt/judgment, that the debt/judgment be treated as non-dischargeable under 11 U.S.C. §523(a)(2)(A), and for all other relief just and proper in the premises.

Respectfully submitted

COOTS, HENKE & WHEELER, P.C.

By: /s/ James K. Wheeler  
James K. Wheeler, #1200-29

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served by First Class United States Mail, postage prepaid, this 27th day of November, 2012, upon:

Gary L. Dilk  
608 E. Market Street  
Indianapolis, IN 46202

Joseph W. Hammes  
TUCKER HESTER, LLC  
429 N. Pennsylvania Street  
Suite 100  
Indianapolis, IN 46204-1816

/s/ James K. Wheeler  
James K. Wheeler

James K. Wheeler #1200-29  
COOTS, HENKE & WHEELER, P.C.  
255 East Carmel Drive  
Carmel, IN 46032-2689  
Telephone: (317) 844-4693

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT NO. \_\_\_\_  
CAUSE NO.: \_\_\_\_\_

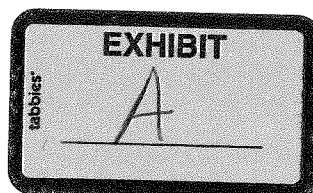
MATTHEW D. KNEE, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
HERBERT F. WHALEN, IV, )  
 )  
Defendant. )

49D07 11 08 PL 033344  
AUG 25 2011  
MARION SUPERIOR COURT

**COMPLAINT FOR DAMAGES**

COMES NOW, MATTHEW D. KNEE, (“Plaintiff”) for his Complaint for Damages against the Defendant, HERBERT F. WHALEN, IV (hereinafter “Defendant”), states as follows:

1. Plaintiff, Matthew D. Knee, is a natural person residing in Hamilton County, Indiana.
2. Defendant, Herbert F. Whalen, IV, is a natural person residing in Marion County, Indiana.
3. Prior to September, 2008, Defendant was the owner of real property located at 962 N. Olney Street, Indianapolis, Indiana 46201 (“Olney Property”), 2845 N. Sherman Drive, Indianapolis, Indiana 46201 (“2845 Sherman Property”), and 2921 N. Sherman Drive, Indianapolis, Indiana 46201 (“2921 Sherman Property”) (collectively the “Properties”).
4. On or about May 27, 2008, Defendant sold the 2845 Sherman Property to Plaintiff for \$56,000. Simultaneously, Defendant also executed a document titled “Binding Legal Contract” (“2845 Sherman Contract”) in which Defendant agreed to make all payments associated with the 2845 Sherman Property including, but not limited to, all mortgage payments, repairs, and replacement costs. Furthermore, Defendant agreed to purchase the 2845 Sherman



Property from Plaintiff in the event Defendant breached the 2845 Sherman Contract. A true and accurate copy of the 2845 Sherman Contract is attached hereto as Exhibit "A" and is incorporated by reference.

5. On or about May 30, 2008, Defendant sold the 2921 Sherman Property to Plaintiff for \$60,000. Simultaneously, Defendant also executed a document titled "Binding Legal Contract" ("2921 Sherman Contract") in which Defendant agreed to make all payments associated with the 2921 Sherman Property including, but not limited to, all mortgage payments, repairs, and replacement costs. Furthermore, Defendant agreed to purchase the 2921 Sherman Property from Plaintiff in the event Defendant breached the 2921 Sherman Contract. A true and accurate copy of the 2921 Sherman Contract is attached hereto as Exhibit "B" and is incorporated by reference.

6. On or about September 12, 2008, Defendant sold the Olney Property to Plaintiff for \$64,000. Simultaneously, Defendant also executed a document titled "Binding Legal Contract" ("Olney Contract") in which Defendant agreed to make all payments associated with the Olney Property including, but not limited to, all mortgage payments, repairs, and replacement costs. Furthermore, Defendant agreed to purchase the Olney Property from Plaintiff in the event Defendant breached the Olney Contract. A true and accurate copy of the Olney Contract is attached hereto as Exhibit "C" and is incorporated by reference.

7. Based upon information and belief, at the time Defendant entered into the 2845 Sherman Contract, the 2921 Sherman Contract, and the Olney Contract (collectively the "Contracts"), he did not intend to honor the provisions in the Contracts.

8. Moreover, based upon information and belief, at the time Defendant sold the Properties to Plaintiff, he knew that the sales prices of the Properties were grossly overstated.

9. In breach of the Contracts, Defendant failed to make the mortgage payments with respect to the Properties, failed to pay for any necessary repairs or replacement costs associated with the Properties, and failed to purchase the Properties from Plaintiff upon breaching the Contracts.

10. As a result of the Defendant's misrepresentations and failure to make any mortgage payments, repairs, and replacement costs associated with the Properties, Plaintiff has been required to expend his personal monies to cover such costs.

11. Additionally, Plaintiff has been unable to sell the Properties because the fair market value of the Properties is much less than the purchase price of the Properties.

#### **COUNT I – BREACH OF CONTRACT**

12. Plaintiff incorporates by reference all allegations contained in rhetorical paragraphs 1 through 11 of Plaintiff's Complaint for Damages.

13. The Contracts constitute valid and binding agreements under Indiana law.

14. Defendant breached the terms of the Contracts by failing to undertake various obligations required by the Contracts including, but not limited to, payment of the monthly mortgage expenses, payment of repair and replacement costs, and failing to purchase the Properties upon breaching the Contracts.

15. Plaintiff has been harmed as a direct and proximate result of the Defendant's failure to comply with the terms of the Contracts.

#### **COUNT II – FRAUD**

16. Plaintiff incorporates by reference all allegations contained in rhetorical paragraphs 1 through 15 of Plaintiff's Complaint for Damages.

17. Defendant misrepresented that Plaintiff was purchasing the Properties for fair market value.

18. The Defendant's misrepresentations were material to Plaintiff's decision to enter into the Contracts and purchase the Properties from the Defendant.

19. Based upon information and belief, Plaintiff purchased the properties for values well in excess of the fair market value of the Properties.

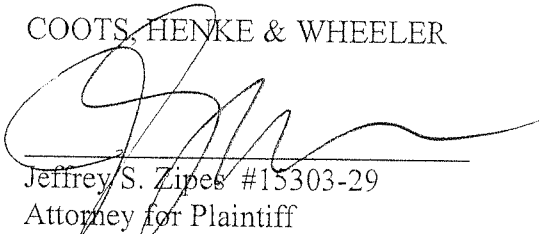
20. Plaintiff relied to his detriment upon Defendant's misrepresentations by entering into the Contracts with the Defendant and purchasing the Properties.

21. Plaintiff has suffered harm as a direct and proximate result of Defendant's misrepresentations in that he has been forced to make mortgage payments and repairs to the Properties and has been unable to sell the Properties because the Properties are worth much less than the value for which he purchased them.

WHEREFORE, Plaintiff, Matthew D. Knee, respectfully prays that he be fully compensated for his actual damages, treble damages, costs, attorney's fees, and for all other just and proper relief.

Respectfully submitted,

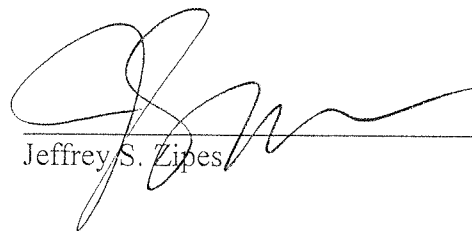
COOTS, HENKE & WHEELER



Jeffrey S. Zipes #15303-29  
Attorney for Plaintiff

REQUEST FOR JURY TRIAL

Plaintiff, by counsel, respectfully requests that the above-mentioned cause be tried with the intervention of a jury.



Jeffrey S. Zipes

Jeffrey S. Zipes  
COOTS, HENKE & WHEELER  
255 East Carmel Drive  
Carmel, IN 46032  
(317) 844-4693



### Binding Legal Contract

Regarding Property located at:

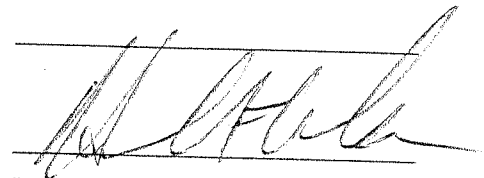
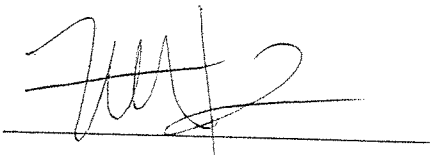
2845 N Sherman  
Indianapolis, IN 46221

This contract is between:  
Matthew Knee

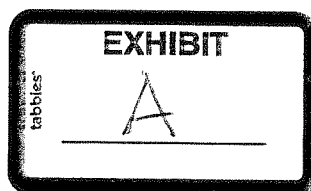
And

Herbert F Whalen

Regarding property located at 2845 Sherman , Herbert F. Whalen guarantee that Matthew Knee and CGKM Properties, LLC will have zero out of pocket expenses for a two year period beginning on May 27, 2008 through May 27, 2010 with regards to this property including but not limited to: mortgage payments, repairs of any sort related to the property in any fashion, replacement costs of anything related to this property, utility costs, insect damage of any sort, trash clean up costs, maintenance of the property, mowing, snow removal, labor costs etc. Matthew Knee AND CGKM PROPERTIES, LLC will have zero out of pocket expenses without exception relating to 2845 Sherman Indianapolis IN 46221 for a two year period. During this period Herbert F. Whalen has to keep the property in the same or better condition as it was when purchased. Herbert F. Whalen are guaranteeing that he will provide the entire Mortgage Payment whether the rent is paid or not. Failure to do any of the above will breach this agreement and Bert Whalen are obligated to purchase the property from Matthew Knee AND CGKM PROPERTIES, LLC for the same amount the property was sold within 30 days if the contract is breached.



Herbert F. Whalen      Date:



## Binding Legal Contract

Regarding Property located at:

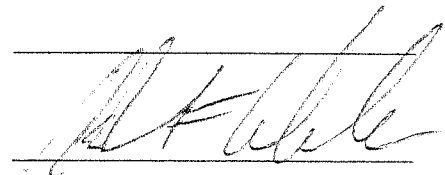
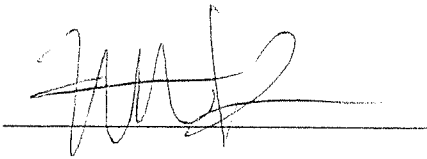
2921 N Sherman  
Indianapolis, IN 46221

This contract is between:  
Matthew Knee

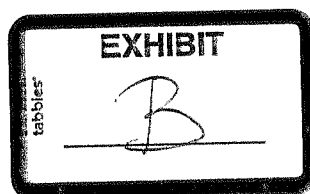
And

Herbert F Whalen

Regarding property located at 2921 Sherman , Herbert F. Whalen guarantee that Matthew Knee and CGKM Properties, LLC will have zero out of pocket expenses for a two year period beginning on May 30, 2008 through May 30, 2010 with regards to this property including but not limited to: mortgage payments, repairs of any sort related to the property in any fashion, replacement costs of anything related to this property, utility costs, insect damage of any sort, trash clean up costs, maintenance of the property, mowing, snow removal, labor costs etc. Matthew Knee AND CGKM PROPERTIES, LLC will have zero out of pocket expenses without exception relating to 2921 Sherman Indianapolis IN 46221 for a two year period. During this period Herbert F. Whalen has to keep the property in the same or better condition as it was when purchased. Herbert F. Whalen are guaranteeing that he will provide the entire Mortgage Payment whether the rent is paid or not. Failure to do any of the above will breach this agreement and Bert Whalen are obligated to purchase the property from Matthew Knee AND CGKM PROPERTIES, LLC for the same amount the property was sold within 30 days if the contract is breached.



Herbert F. Whalen      Date:



## Binding Legal Contract

Regarding Property located at:

962 N Olney  
Indianapolis, IN 46221

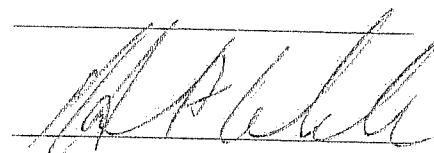
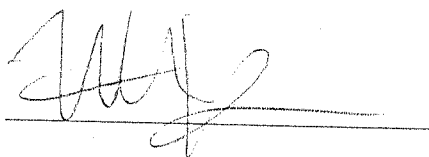
This contract is between:

Matthew Knee

And

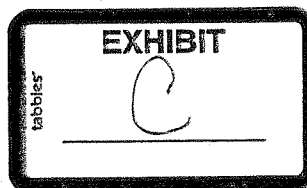
Herbert F Whalen

Regarding property located at 962 N Olney, Herbert F. Whalen guarantee that Matthew Knee and CGKM Properties, LLC will have zero out of pocket expenses for a two year period beginning on 9/12 2008 through 9/12 2010 with regards to this property including but not limited to: mortgage payments, repairs of any sort related to the property in any fashion, replacement costs of anything related to this property, utility costs, insect damage of any sort, trash clean up costs, maintenance of the property, mowing, snow removal, labor costs etc. Matthew Knee AND CGKM PROPERTIES, LLC will have zero out of pocket expenses without exception relating to 962 N Olney Indianapolis IN 46221 for a two year period. During this period Herbert F. Whalen has to keep the property in the same or better condition as it was when purchased. Herbert F. Whalen are guaranteeing that he will provide the entire Mortgage Payment whether the rent is paid or not. Failure to do any of the above will breach this agreement and Bert Whalen are obligated to purchase the property from Matthew Knee AND CGKM PROPERTIES, LLC for the same amount the property was sold within 30 days if the contract is breached.



Herbert F. Whalen

Date:



STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )  
  
MATTHEW D. KNEE, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. )  
 )  
HERBERT F. WHALEN, IV, )  
 )  
 ) Defendant. )

IN THE MARION SUPERIOR COURT NO. 7  
CAUSE NO.: 49D07-<sup>1108</sup>~~0741~~-PL-33344

**FILED**  
180 DEC 09 2011  
*Elizabeth J. White*  
CLERK OF THE MARION CIRCUIT COURT

**DEFAULT JUDGMENT**

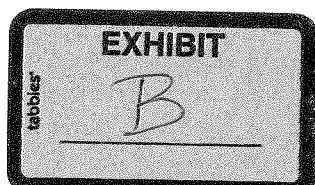
Plaintiff, Matthew D. Knee, appears in person and by counsel for hearing on damages. Defendant fails to appear. Testimony heard.

And the Court being duly advised in the premises, now finds that judgment should be entered in favor of Plaintiff, Matthew D. Knee, and against Defendant, Herbert Whalen, in the amount of Two Hundred Forty-Eight Thousand Six Hundred Ninety-Four Dollars and Twenty-Four Cents (\$248,694.24), which shall be tripled pursuant to I.C. § 34-24-3-1, and attorney fees of Two Thousand Five Hundred Dollars (\$2,500.00) shall be awarded for a total Judgment of Seven Hundred Forty-Eight Thousand Five Hundred Eighty-Two Dollars and Seventy-Two Cents (\$748,582.72).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that a default judgment in the total amount of Seven Hundred Forty-Eight Thousand Five Hundred Eighty-Two Dollars and Seventy-Two Cents (\$748,582.72) should be and hereby is entered against Defendant, Herbert F. Whalen, IV, and in favor of Plaintiff, Matthew D. Knee. Post Judgment interest shall accrue at the statutory rate.

DATED: DEC 09 2011

*Michael Feele*  
\_\_\_\_\_  
JUDGE  
Marion Superior Civil Court No. 7



Copies to:

Jeffrey S. Zipes  
COOTS HENKE & WHEELER, P.C.  
255 East Carmel Drive  
Carmel, IN 46032-2689

Herbert F. Whalen, IV  
12634 Shorevista Dr.  
Indianapolis, IN 46236