AED, Inc. v. KDC Investments, LLC Clerk's Record v. 2 Dckt. 38603

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Got your message. I was hoping to receive some indication on what licenses etc were missing. Without that I can only assume that in fact there was nothing amiss on that front and it is just a pre text to avoid this deal.

Leanne will forward you the fully executed proposal. Given that the bridge deal and the blow it up deal are tied together, Idaho is the proper venue and jurisdiction to hear this case. I am aware of the merger clause, but a promise of future performance which induces an agreement and which the promising party never intended to perform creates a question of fact for the jury in Idaho and gets around the parol evidence rule. The suit will seek damages, as well as to rescind the the whole deal, and start with a motion for pre judgment attachment of the bridge for both purposes.

I urge your clients to at least consider the cost of litigation in Idaho and consider making some offer of settlement.

Please contact me after you have considered the above.

Sent from my iPad
EXHIBIT "C"
Correct. In fact, my client’s plans to demolish the bridge no longer include blasting.

Jeremy

Ok. Just to make sure I am clear. Your client will not rescind and will not allow AED to blow the bridge pursuant to the contract between them (I understand that you don’t think there is a contract.)

Art.

My client will not rescind the transaction—they are going ahead with the demolition of the Bellaire Bridge as soon as they have gotten all the proper permits from the city. My client may be willing to reopen negotiations; however, given the conduct of your client, I doubt it. Your client could have had a $50,000 payment from us to settle this matter by now but he refused to negotiate in good faith.

Jeremy J. Domozick, Esquire
The Domozick Law Firm PLLC
101 N Lynnhaven Road, Suite 202
Virginia Beach, VA 23452
Phone: (757) 965-3747
Fax: (757) 351-2083
From: Arthur Bistline [mailto:arthurmooneybistline@me.com]
Sent: Friday, September 03, 2010 1:40 PM
To: Jeremy Domozick; Jeremy Domozick
Cc: Leanne Villa
Subject: KD AED

My client stands ready willing and able to return the $25,000 paid by your client if your client will rescind this entire transaction. Please let me know as soon as possible.

Arthur Bistline
Bistline Law
1423 N. Government Way
Coeur d Alene, Idaho 83814
(208)665-7270
(208)665-7290 (f)
FACTS

AED's ownership of the subject bridge arose from AED's involvement with the show, "The Imploders" on the Learning Channel. While AED was finalizing its purchase of the bridge, simultaneously, Lee and Krystal Chaklos negotiated with AED to purchase the bridge. Although AED was in negotiations with the Chaklos, AED had reservations due to the fact that AED was ultimately responsible for the removal of the bridge. AED's responsibility are to Roger Barrack, who sold AED the bridge, and to the Federal Court who had ordered removal of the bridge.¹ Any deal to sell the bridge required AED to be involved in the demolition both to generate cash flow for AED and assure proper demolition.²

¹ Affidavit of Eric Kelly at 4 – 8.
² Affidavit of Eric Kelly at 9.
On January 14, 2010, Eric Kelly (hereinafter “Kelly”), an employee of AED, and Lee Chaklos exchanged an e-mail where the parties agreed to all the material terms of the agreement. The agreement was that Kelly would purchased the bridge and sell it to KDC for $25,000 and the Delta Group (Lee Chaklos company) would retain AED to blast the steel superstructure for $175,000.³

On May 19, 2010, Kelly sent Krystal Chaklos an e-mail which set forth the terms for the blasting contract between AED and Delta Demolition.⁴ The following day, Krystal Chaklos returned the signed purchase and sale agreement (hereinafter “PSA”) accompanied by a fax cover sheet indicating that she looked forward to working with AED.⁵

The PSA required KDC to pay $25,000 upon execution of the agreement. The PSA also provided for modification by the parties. On May 20, 2010, the parties executed a document entitled “Letter of Contingency”, which provided the $25,000 would be paid no later than May 25th and if not so paid, all prior agreements of the parties would be null and void. The purchase money for the bridge was not paid on May 25th.⁶ On May 27th, AED informed KDC the contract was terminated because the purchase money was not paid.⁷

After the PSA was void based on the failure to pay, AED and KDC continued to negotiate regarding the sale and demolition of the bridge. On June 1, 2010, Kelly proposed to sell the bridge to KDC per the original agreement provided KDC executed a contract to allow AED to blast the bridge. Krystal Chaklos responded, “You have my word that AED will do the blast as long as you

³ Affidavit of Eric Kelly at 11.
⁴ Affidavit of Eric Kelly at 12.
⁵ Affidavit of Eric Kelly at 13.
⁶ In response to the Court’s question at the last hearing regarding the recitation of consideration paid in the bill of sale given from AED to KDC, a false recitation of consideration is not conclusive that the consideration was paid. Lewis v. Fletcher 101 Idaho 530, 532, 617 P.2d 834, 836 (1980). Affidavit of Eric Kelly at 15.
⁷ Affidavit of Eric Kelly at 16.
are still receptive to doing... Krystal." 8 The same day, KDC and AED executed a contract for AED to blast the bridge (hereinafter the "Demolition Agreement"). 9 The purchase money for the sale of the bridge was paid on June 3, 2010.

The demolition agreement required KDC to pay $30,000 on or before June 9, 2010. The PSA required that KDC substitute itself as the real party in interest into the federal court case. 10 KDC did not pay the deposit on the 9th as required by the purchase and sale agreement and refused to take the steps necessary to substitute itself into the federal court lawsuit. 11

After June 9th, AED continued in good faith to fulfill its obligations pursuant to the parties’ bargain, notwithstanding the fact that KDC had for the second time breached the agreement. AED incurred time and expenses, including the purchase of the explosives for the job which had been custom cut for the project. 12

On June 14th, AED inquired regarding payment and informed KDC that AED would not be going any further unless AED received payment pursuant to the parties’ written agreement. 13 In that same e-mail Kelly informed KDC that it would take about two days to obtain a West Virginia contractor’s license in response to KDC’s continued stalling of payment based on the failure of AED to have that license. It took three days to obtain that license. 14

On June 16th, Kelly and Lee Chaklos had a discussion about the failure of KDC to pay the $30,000 as required by the demolition agreement. 15 During that exchange, Lee Chaklos offered to sell the bridge back to AED for $25,000. Later that day, Krystal Chaklos sent Kelly a letter stating that the price to buy the bridge back was the amount of the blast contract -- $175,000. Then later,

8 Affidavit of Eric Kelly at 18.
9 Affidavit of Eric Kelly at 19.
10 Affidavit of Eric Kelly at 20.
11 Affidavit of Eric Kelly at 20.
12 Affidavit of Eric Kelly at 28.
13 Affidavit of Eric Kelly at 23.
14 Affidavit of Mark Wilburn.
15 Affidavit of Eric Kelly at 24.
Krystal Chaklos sent Kelly an e-mail informing him that AED needed a West Virginia Contractors License to participate in the project and that AED would be paid when Delta had received the City of Benwood’s permit to proceed.\(^{16}\)

On June 18\(^{th}\) AED responded in writing to Krystal Chaklos’ e-mail regarding KDC’s failure to pay based on permitting and informed her that permitting was not a condition precedent to payment. AED further informed her necessary permitting would be in place by the time AED had to perform under the parties agreement.\(^{17}\) On June 29\(^{th}\) AED informed Krystal Chaklos that AED stood ready, willing, and able to perform.\(^{18}\)

On July 7\(^{th}\), AED involved its counsel who wrote to Krystal Chaklos and demanded either that the deposit be wired or that suit would be filed.\(^{19}\) The response to the demand was that KDC had discussed the proposal with its counsel and the KDC was not in breach of the proposal because AED was not qualified to do the job. In that same response, KDC repudiated its obligation to go forward with AED on the demolition project. Counsel for AED then demanded the KDC identify in what respects AED was not qualified to do the job, and the response was that AED had not, “…conveyed the proper paperwork for qualification,” and that AED and Kelly were well aware of the required paperwork, but the “required paperwork” was left still undefined.\(^{20}\)

On July 13\(^{th}\) counsel for KDC wrote a letter to counsel for AED taking the position that the blasting contract was not a contract, and alleged KDC had not signed it and that even if it was a contract, AED had breached it because AED did not have a West Virginia contractor’s license and, “…did not meet other various licensing and permit requirements,” but again the requirements were

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16 Affidavit of Eric Kelly at 25, 26
17 Affidavit of Eric Kelly at 27.
18 Affidavit of Eric Kelly at 28.
19 Affidavit Krystal Chaklos in support of motion for summary judgment at Exhibit D.
20 Affidavit Krystal Chaklos in support of motion for summary judgment at Exhibit E.
left unidentified. Furthermore, KDC now took the position that AED did not have proper insurance.

Additionally, on July 13th, AED offered to return KDC's purchase money for the bridge. On July 21st counsel for AED spoke with counsel for KDC and asked him to identify what licensing requirements were missing and no additional information was provided. No more specific information was provided. This suit was then commenced.

KDC is only entitled to summary judgment that Lee Chaklos bears no personal responsibility as an officer, director or shareholder of KDC as he held none of those positions.

I. AED’s failure to have a license at the time of contracting with KDC does not render the agreement illegal because the purpose of the agreement is not illegal, AED could have (and did) acquire a license, and failure to obtain a permit does not render a construction contract illegal in West Virginia.

KDC argues that its contract with AED is illegal because AED did not have a West Virginia Contractors license. The failure to have the required governmental or agency approvals is not a prerequisite to entering into a valid contract, and the failure to have a West Virginia Contractors license is not a defense to a breach of contract action.

An illegal contract is one whose purpose is to break the law as in Trees v. Kersey, 138 Idaho 3, 56 P.3d 765 (2002). The Court in that case found the parties agreement to be illegal because the purpose of the contract was to break the law – to engage in public works contracts without proper licensing. The contract in question here is not for an illegal purpose. In order for the logic of the Trees case to be applicable here, the parties would have had to have an agreement that AED would not obtain a contractor’s license. Such is not contemplated by the parties’ agreement. It is true that

21 Affidavit of Arthur M. Bistline at 2.
22 Affidavit of Eric Kelly at 29.
23 Affidavit of Arthur M. Bistline at 3.
AED cannot perform the agreement without first obtaining a license, but that does not render the agreement illegal.

It is a fact that AED did not have a West Virginia contractor's license at the time the parties reached the agreement, but that does not render the agreement illegal. As the West Virginia Supreme Court has noted, the fact that a party may need to take steps to obtain proper government approval does not render a contract illegal.

Many contracts cannot lawfully be performed without securing a permit, license, or approval from some governmental officer or board, and yet the contracts are not deemed illegal. Professor Williston says, "The fact that a party bargains to do an act which will be illegal unless governmental permission is obtained does not make such bargain illegal, and if he does not obtain such permission he is responsible in damages for failure to perform."

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Most importantly, the contract is not unenforceable based on illegality because the contract cannot even be found to be illegal based on a failure to obtain a West Virginia Contractor license. Even if AED had performed the work without a license, AED could still maintain suit to be paid based on the contract.

Thus, we now hold that the West Virginia Contractor Licensing Act, West Virginia Code §§ 21-11-1, et seq. (1991), does not bar a contractor who is not properly licensed thereunder from bringing or maintaining an action, including any counterclaim, in any court of this state to recover performance compensation under a construction contract with a property owner.

Whether or not AED had a valid contractor's license is not relevant to whether the contract between AED and KDC is illegal. The contract is not illegal.

II. AED adequately alleged that KDC agreed that AED would assist in the demolition of the bridge and that KDC had no intention of honoring that bargain when it made it.

KDC next argues that AED did not plead fraud with specificity because AED did not indicate "...which defendant made the representation, when it was made, or what the actual contents of the representation were." AED is not alleging that KDC made a fraudulent representation of a past fact, AED is alleging that KDC made a promise it never intended to keep – a promise made in order to induce AED to go forward with the sale of the bridge. The promise was made orally on more than one occasion, and in signed writing on June 1st, 2010, which is attached to Plaintiff’s amended complaint and counter claim as Exhibit B.

AED's complaint sets forth exactly what promise was made that AED alleges KDC never intended to keep and complies with the rule that allegations of fraud be plead with specificity.

III. KDC has no standing to raise the issue of AED's corporate status and AED has been reinstated so its corporate status is no longer relevant.

KDC has no standing to challenge its agreement with AED on the grounds that AED did not exist and therefore did not have the power to act. Idaho Code 30-1-304(1) provides, "...the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act." Subsection 2 of that statute provides when Corporation action may be attacked and by whom, and KDC is not allowed to challenge this action. KDC cannot escape its contractual obligations by arguing that AED did not have the capacity to act.
Furthermore, as this Court has already noted, Idaho Code 30-1-1422 provides that reinstatement after administrative dissolution is retroactive to the date of dissolution and it is as if dissolution never occurred. AED has been reinstated, so it is as if dissolution had never occurred.

IV. Whether a party has been fraudulently induced into entering into an agreement is a question of fact and the facts and circumstances surrounding the breach of the demolition agreement by KDC indicate that KDC never had any intention of honoring that agreement.

The argument that there is no evidence that as of June 1st KDC did not intend to fully perform the agreement and that KDC terminated the agreement when AED threatened it with a lawsuit for failing to pay the deposit. KDC breached the demolition contract under circumstances which could lead a jury to reasonably conclude that it never intended to honor that contract.

Whether or not a party was fraudulently induced into entering into a contract is a question of fact. "Thus, even assuming the district court concluded that these actions amount to fraud in the inducement, there are factual disagreements about the understanding and intent of each party to the deed of trust and promissory note, precluding summary judgment." Losee v. Idaho Co. 148 Idaho 219, 223-224, 220 P.3d 575, 579 - 580 (2009)

Evidence of fraudulent inducement can be proved by circumstantial evidence. Progressive Ins. Co. v. Wasoka 178 Vt. 337, 372, 885 A.2d 1166, 1192 (Vt.2005). This makes sense because the party accused of fraud is always going to maintain that he or she had the present intent to fulfill the contract, as is the case here. However, the circumstances surrounding that party’s breach or repudiation of the agreement create the question of fact as to whether the party ever intended to fulfill that promise. “But while breach alone is no evidence of fraudulent intent, breach combined with “slight circumstantial evidence” of fraud is enough to support a verdict for fraudulent inducement.” Tony Gullo Motors I, L.P. v. Chapa 212 S.W.3d 299, 305 (Tex.2006)
KDC alleges that its breach was excused because, "...AED never supplied any of the necessary permits or licenses to perform operations in West Virginia." This is the same excuse KDC provided before terminating the contract and there is no reasonable interpretation of the parties’ agreement that supports taking this position. KDC created a condition precedent to payment when none exists.

Not only was KDC creating conditions precedent where none existed, KDC was withholding payment based on the failure of KDC to obtain the necessary permits. Krystal Chaklos clearly sets forth that AED will be paid when KDC obtains the necessary permits.

KDC’s only defense to its breach by failing to pay the deposit is not supported by the plain language of the parties’ written agreement. That agreement contains no contingencies which would allow the withholding of the deposit and cannot be reasonably interpreted that way. It certainly cannot be interpreted as allowing KDC to withhold the deposit until KDC has obtained its permits.

KDC is in such blatant breach of the parties’ agreement, a jury could reasonably conclude it never had the intention of fulfilling its promise to allow AED to blast the bridge.

V. AED can seek rescission because only an offer of tender is required and AED offered to return the purchase price for the bridge before filing suit.

In Harger the Idaho Supreme Court correctly sets forth the law regarding an action at law to enforce a rescission – an action on rescission, as opposed to an equitable action for rescission. An action at law based on a rescission requires that a valid tender occur. It is an element of rescission. This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender.

A legal rescission, which requires a showing of actual tender, is accomplished by a meeting of the minds of the parties to a contract to terminate their agreement.

24 Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment at paragraph 8.
Mutual assent may be by offer to rescind and acceptance by the other party, but the offer on the one side must be accepted on the other, before its withdrawal, and one party to a contract cannot abrogate or rescind it by merely giving notice to the other of its intention so to do. However, where a party, even without right, claims to rescind a contract, if the other party agrees to the rescission or does not object thereto and permits it to be rescinded, the rescission is by mutual consent.”


“An intent to rescind a contract may be inferred.... However, such a rescission is in effect a parole modification of the written agreement which in Idaho must be proven by clear and convincing evidence.” Lewis v. Huff 125 Idaho 438, 440, 872 P.2d 701, 703 (1994) citing M.K. Transport v. Grover, 101 Idaho 345, 349 n. 5, 612 P.2d 1192, 1196 n. 5 (1980).

Thus, a rescission is a contract which occurs outside of court and in order to have a valid legal rescission, a valid tender of consideration is required. Harger. However, when a rescission agreement is not reached and one of the parties goes to Court seeking rescission, tender is not required. This is exactly what Harger acknowledges in the following passage:

Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order.

Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case. O'Connor v. Harger Const., Inc. 145 Idaho 904, 912, 188 P.3d 846, 54 (Idaho, 2008)
The Idaho Supreme Court specifically acknowledges that the issue of a valid tender is only relevant whether a valid rescission was completed out of Court – a legal agreement to rescind. For example, if Harger were claiming that the parties had agreed to a rescission, then Harger had to show proper tender. The Court then expressly holds that the failure to complete a rescission out of court is not relevant to the trial Court's ability to rescind a contract.

AED is not claiming a valid rescission occurred, only that it is entitled to a judgment for rescission based on fraud or a material breach of the parties agreement. An actual tender of consideration is not required in such a case, which is what Harger was acknowledging. Harger is consistent with prior Idaho law that only an offer to restore the other party the consideration that party provided is required to seek rescission by the Court.

"A party seeking to rescind a transaction on the ground of fraud must restore or offer to restore the other party to the status quo before the contract was formed. Watson v. Weick, 141 Idaho 500, 507, 112 P.3d 788, 795 (2005) citing White v. Mock, 140 Idaho 882, 104 P.3d 356 (2004); Haener v. Albro, 73 Idaho 250, 249 P.2d 919 (1952). Also see Lithocraft, Inc. v. Rocky Mountain Marketing, 108 Idaho 247, 248, 697 P.2d 1261, 1262 (Ct.App.1985) – "It is well-established that he who seeks equity must first do equity; he who seeks equitable rescission must first tender or offer to tender that which he has received.". (emphasis supplied)

When a party is seeking a judgment for rescission, an offer to tender is all that is required and such was made in this case. On July 13th, 2010, AED informed KDC it was their last chance to accept the return of their money.26 That is an offer to return the consideration provided and sufficient to allow AED to seek rescission.

Also see Stefanac v. Cranbrook Educational Community, 435 Mich. 155, 208, 458 N.W.2d 56, 80 (Mich.1990)

26 Affidavit of Eric Kelly at 29
The chancellor had the power to cancel or rescind a contract. A person could, therefore, bring an action seeking cancellation of a contract or release, as distinguished from an action claiming that the contract or release had been rescinded. This Court said:

"It is said that plaintiff neither restored nor offered to restore to defendant the property received before seeking rescission. Neither was necessary. A bill in equity praying rescission proceeds on a theory that there has been no rescission, not on the theory that rescission has already been accomplished."


A claim in a lawsuit for rescission based on fraud or a material breach of the parties' agreement, as opposed to an action based on the factual allegation that the parties reached an agreement to rescind are not the same things. This action is the former and no actual tender is required before AED can proceed with the claim.

Furthermore, AED has plead that the agreement that it be allowed to blast the bridge was material to the parties' agreement. When a material provision of the parties' contract is breached, the non-breaching party is entitled to rescission as one of its remedies. Ervin Const. Co. v. Van Orden 125 Idaho 695, 699-700, 874 P.2d 506, 510-511 (1993). Whether or not a breach is material is a question of fact. Id.

AED is entitled to rescission if it proves fraud or a material breach of the parties' agreement.

Actual tender was not required to seek this relief.

VI. If AED proves fraud, then one of AED's options is specific performance as the involvement of AED in the demolition process was and is material to AED.

AED is the party on the hook to Roger Barack, the original owner of the bridge, as well as to the United States Federal District Court to ensure proper removal of the bridge. That is why AED made it a condition that AED be involved in the demolition.
KDC has indicated it no longer intends to use explosives to demolish the bridge or AED in any manner, which increases the risk and costs associated with removal of the bridge. This increases the risk that AED will be required to expend money to comply with its obligations to Barrack as well as to the federal court, but no number can be placed on that risk. It is this risk AED sought to avoid by requiring it be involved in the demolition of the bridge and no number can be placed on this increased risk. “Performance of services of such a character that their value cannot be estimated by a pecuniary standard is required to permit a decree of specific performance.” Andrews v. Aikens, 44 Idaho 797, 798, 260 P. 423, 424 (1927)

Furthermore, in light of KDC’s failure to pay the purchase money for the bridge, and then the failure to pay the $30,000 deposit, as well as Lee Chaklos’s efforts to borrow against the bridge, it is seriously in question whether AED will have any remedy at law to recoup monetary damages occasioned by KDC’s breach of the blasting agreement and the unknown monetary damages which may occur because KDC does not properly remove the bridge.

AED bargained for and received the consideration that it would participate in the demolition of the bridge to guard against certain risks identified above. AED is entitled to what it bargained for and if not entitled to rescission, AED is entitled to specific performance. If KDC does not wish for AED to be involved, then KDC should accept AED’s offer of rescission.

CONCLUSION

For the reasons set forth above, AED requests that this Court grant none of the relief sought by KDC in its motion for summary judgment, other than to dismiss Lee Chaklos in his individual capacity.
DATED this 70 day of December, 2010.

ARTHUR M. BISTLINE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 70th day of December, 2010, I caused to be served a true and correct copy of the foregoing RESPONSE TO SUMMARY JUDGMENT by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

BY: LEANNE VILLA

RESPONSE TO SUMMARY JUDGMENT -14

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

566 of 1046
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYSTAL
CHAKLOS, individually,

Defendants.

Case No. CV10-7217

NOTICE OF HEARING

Date: January 12, 2011
Time: 9:30 a.m. (Pacific Time)
Hon. John T. Mitchell, Presiding

YOU WILL PLEASE TAKE NOTICE that defendants, by and through their attorneys of record, Hall, Farley, Oberrecht & Blanton, P.A., will bring for hearing their Motion to Strike Affidavits of Arthur Bistline, Eric Kelly, and Mark Wilburn filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment on Wednesday, January 12, 2011, at 9:30 a.m. (Pacific Time), at the Kootenai County Courthouse, before the Honorable John T. Mitchell.

NOTICE OF HEARING - 1
DATED this 5 day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

U.S. Mail, Postage Prepaid

---

Hand Delivered

Overnight Mail

Telecopyst 208/665-7290

Email arthurmooneybistline@me.com

---

Randall L. Schmitz

NOTICE OF HEARING - 2
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

COME NOW defendants, KDC Investments, LLC, Lee Chaklos and Krystal Chaklos (collectively referred to as "KDC"), by and through their counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and submit this Memorandum in Opposition to Plaintiff’s Motion to Reconsider Decision Holding That Plaintiff is Not Entitled to Rescission.

DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER DECISION HOLDING THAT PLAINTIFF IS NOT ENTITLED TO RESCISSION
I. INTRODUCTION

On December 6, 2010, the Court heard argument from the parties on KDC’s Motion for Preliminary Injunction and other related motions. Relevant to this action, plaintiff argued that it was entitled to rescission, because *O’Connor v. Harger Construction, Inc.*, 145 Idaho 904, 188 P.3d 846 (2008), changed Idaho common law that had existed since prior to statehood, and no longer required a party seeking rescission to have made a tender. On December 15, 2010, the Court issued its Memorandum Decision and Order on defendant KDC’s Motion for Preliminary Injunction. With regard to plaintiff’s request for rescission of the Asset Purchase and Liability Assumption Agreement (“Purchase Agreement”), the Court found plaintiff’s arguments regarding *O’Connor* were misguided and held that “AED has failed to tender the $25,000.00. Rescission is not available to AED.” *Id.* at p. 16.

AED now asks the Court to reconsider its ruling regarding rescission, based upon yet another incorrect reading of the *O’Connor* case. Specifically, plaintiff now appears to argue that *O’Connor* does not change well established Idaho case law regarding rescission, but instead attempts to make a distinction between out of court and in court rescission. Regardless, AED has failed to supply the Court with new facts or new case law in support of its Motion to Reconsider. Instead, AED has simply reargued earlier cited cases in an attempt at a second bite at the apple. Like its original misreading of *O’Connor*, plaintiff’s new reading of *O’Connor* fails to get around the well established requirement in Idaho, that a party seeking rescission must have tendered back the consideration for the agreement, and the instant motion for reconsideration should be denied.

DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER DECISION HOLDING THAT PLAINTIFF IS NOT ENTITLED TO RESCISSION - 2
II. STANDARD

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. Straub v. Smith, 145 Idaho 65, 175 P. 3d 754 (2007); Jordan v. Beeks, 135 Idaho 586, 21 P.3d 908 (2001); Watson v. Navistar Int'l Transp. Corp., 121 Idaho 643, 827 P.2d 656 (1992). When ruling on a motion for reconsideration, "the trial court should take into account any new facts presented by the moving party that bear on the correctness of the order." Coeur d'Alene Mining Co. v. First Nat. Bank of North Idaho, 118 Idaho 812, 800 P.2d 1026 (1990). "A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be." Id. The burden is on the moving party to bring to the trial court's attention the new facts. Id.

III. ARGUMENT

AED has not presented any new facts or argument with regard to its request for reconsideration of the Court's ruling that AED may not seek rescission. Rather, AED merely rehashes its previous argument.

AED is not entitled to rescind the Purchase Agreement because it failed to take the necessary steps to preserve a claim of rescission.

At common law, if a party's manifestation of assent to contract was induced by either a fraudulent or a material misrepresentation by the other party, upon which the recipient was justified in relying, the contract was voidable by the recipient. See RESTATEMENT (SECOND) OF CONTRACTS § 164(A) (1981). A voidable contract exists where one or more parties have the power to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance. See id. at § 7. Material misrepresentation permits the defrauded party to elect from three possible remedies: damages,
rescission or enforcement of the bargain against the fraudulent party according to the fraudulent party’s representation of the bargain. See 12 Samuel Williston, Contracts § 1523, at 606-07 (3rd ed.1970); Queen City Farms v. Central Nat. Ins., 126 Wash.2d 50, 891 P.2d 718 (1995).

Rescission of a contract is intended to place the parties in the positions they occupied prior to the contract and is available only when one of the parties has committed a material breach, which destroys the entire purpose for entering into the contract. See Crowley v. Lafayette Life Ins. Co., 106 Idaho 818, 683 P.2d 854, 857 (1984). The party desiring to rescind a contract must, prior to rescinding, tender back to the other party any consideration or benefit received under the contract by the rescinding party. See id.; see also Peterson v. Universal Automobile Ins. Co., 53 Idaho 11, 16, 20 P.2d 1016, 1021 (1933) (The company, after notice of the ground for forfeiture, by retaining the premium without canceling the policy, waives the breach); Gossett v. Farmers Ins. Co. of Washington, 133 Wash.2d 954, 948 P.2d 1264, 1274 (1997); 17 Am.Jur.2d Contracts § 512 (1964); 17A C.J.S. Contracts § 439 (1963). These rules of the common law are in effect in Idaho unless modified by other legislative enactments. See I.C. § 73-116; Evans v. Twin Falls County, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990).

Robinson v. State Farm Mut. Auto. Ins. Co., 137 Idaho 173, 180-181, 45 P.3d 829, 836-837 (2002); see also, Primary Health Network, Inc. v. State, Dept. of Admin., 137 Idaho 663, 668, 52 P.3d 307, 312 (2002) (rescission is an equitable remedy that totally abrogates the contract and is normally granted only when one of the parties has committed a breach so material that it destroys or vitiates the entire purpose for entering into the contract).

In arguing against the preliminary injunction, plaintiff took the position that O’Connor v. Harger Construction, Inc., altered the common law of rescission that had existed in Idaho prior to statehood, that a party seeking rescission of a contract, must first, tender back to the other party any consideration or benefit received under the contract. After considering plaintiff’s argument and the established case law cited by KDC regarding parties seeking rescission, the Court stated, “[t]his Court agrees with KDC, that such proposition by AED is a grossly misleading argument.” The Court went on to quote directly from the O’Connor case “[a] party
seeking to rescind a contract must ordinarily return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.”

For purposes of this Motion to Reconsider, AED has apparently abandoned its earlier argument and now argues that O’Connor “sets forth the law regarding an action at law to enforce a rescission—an action on rescission, as opposed to an equitable action for rescission. An action at law based on a rescission requires that a valid tender occur. It is an element of rescission. This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender.” See AED’s Response to Summary Judgment, p. 9 (emphasis in original).

Plaintiff’s new reading of O’Connor is similarly misleading and incorrect. As explained below, O’Connor does not establish a change to Idaho’s common law regarding rescission or the tender requirements, and does not call out a distinction between rescission as a cause of action or as a remedy sought.

In O’Connor, the plaintiff O’Connor purchased land from the defendant Harger with an agreement that defendant would also build a home on the land, with both the plaintiff and the defendant believing that access to the land could be obtained via an easement with a neighbor. The easement could not be obtained. Id. 145 Idaho at 907-910, 188 P.3d at 846-849. The defendant offered to rescind the contract and return the deposit money. In response, the plaintiff filed an action for breach of contract seeking damages, specific performance or restitution. Id. The district court rescinded the contract and ordered the defendant to return the deposit (minus materials kept by the plaintiff). Plaintiff O’Connor appealed the district court’s decision, arguing
that rescission was not available because the defendant had not actually tendered the deposit money back and, therefore, was not entitled to rescission. \textit{Id.} In affirming the lower court's decision, the Supreme Court of Idaho stated "[a] party seeking to rescind a contract ordinarily must return any consideration or the benefit received by the rescinding party before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender." The Court then went on to state that the defendant was relieved of its duty to tender the deposit "[o]nce O'Connor filed suit for breach of contract against Harger. . . ." \textit{Id.} 145 Idaho at 912, 188 P.3d at 854.

\textit{O'Connor} does not stand for either of the two separate theories put forth by plaintiff. Rather, \textit{O'Connor} merely continues the long standing common law rule that "[a] party seeking to rescind a contract ordinarily must return any consideration or the benefit received by the rescinding party before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender." \textit{Id.} 145 Idaho at 911, 188 P.3d at 853.

In this case, unlike \textit{O'Connor}, AED had an opportunity, and an obligation, to tender the consideration for the Purchase Agreement back to KDC prior to filing suit, but failed to do so. Plaintiff's new reading of \textit{O'Connor} fails to give rise to the Court to reconsider its previous ruling that plaintiff's may not seek rescission of the Purchase Agreement. As such, AED is precluded, as a matter of law, from seeking rescission of the Purchase Agreement.

Finally, in support of its Motion to Reconsider regarding the Court's ruling on rescission, plaintiff cites to \textit{Ervin Const. Co. v. Van Orden}, 125 Idaho 695, 699-700, 874 P.2d 506, 510-511 (1993), for the proposition that "when a material provision of the parties' contract is breached,
the non breaching party is entitled to rescission as one of its remedies." Plaintiff failed to indicate that the above quoted language in Ervin cites to Crowley v. Lafayette Life Insurance Co., 106 Idaho 818, 821, 683 P.2d 854, 857 (1984). In Crowley, the Supreme Court of Idaho stated:

Rescission is equitable in nature and is intended to place the parties in the positions they occupied prior to the contract. Furthermore, rescission is available only when one of the parties has committed a material breach which destroys the entire purpose for entering into the contract. Also important herein is the rule of law that the party desiring to rescind the contract must, prior to rescinding, tender back to the other party any consideration or benefit received under the contract by the rescinding party.

(Emphasis added).

As such, it is clear that whether the grounds for rescission are fraud, material breach, or mutual mistake, a party seeking rescission must actually make a tender of the consideration prior to seeking rescission. In the instant action, it is undisputed that plaintiff did not make a tender of the consideration prior to filing suit and, therefore, is not entitled to seek rescission of the contract.

IV. CONCLUSION

Based on the foregoing, KDC requests the Court deny plaintiff's Motion to Reconsider Decision Holding That Plaintiff is Not Entitled to Rescission.

RESPECTFULLY SUBMITTED this 5th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By __________________________
John J. Burke - Of the Firm
Randy L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January, 2011, I caused to be served a true copy of the foregoing DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

Randy L. Schmitz

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 11
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS TAL CHAKLOS, individually,

Defendants.

COME NOW defendants KDC Investments, LLC and Lee and Krystal Chaklos ("KDC"), by and through their undersigned counsel of record, and submit the following Memorandum in support of their Motion to Strike Affidavits of Arthur Bistline, Eric Kelly, and Mark Wilburn Filed In Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment.

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AFFIDAVITS OF ARTHUR M. BISTLINE, ERIC J. KELLY, AND MARK WILBURN, FILED IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT
I. Argument

KDC argues in its Memorandum in support of its Motion for Summary Judgment that, among other things, assuming that there was a valid contract between KDC and AED regarding demolition of the Bellaire Bridge ("Bridge"), any claim by AED for breach of this "contract" must fail because AED did not have a West Virginia contractor's license, making any contract illegal and thus void. Similarly, KDC argues that any claim by AED against KDC for fraud regarding the alleged demolition contract must fail because, without such a contractor's license and without being a corporation in good standing, AED could not have reasonably relied upon any alleged misrepresentation by KDC regarding a contract to demolish the bridge. Such reliance would have been unreasonable in light of AED's illicit status as a contractor and as a business entity.

In support of its Opposition to KDC's Motion for Summary Judgment, AED has submitted Affidavits from Arthur Bistline, Eric Kelly, and Mark Wilburn. In addition to being objectionable on several other grounds, none of the Affidavits are relevant to the key arguments outlined above. They should thus be stricken from the record.

A. Affidavit of Arthur M. Bistline

The Affidavit of Arthur M. Bistline in Opposition to Summary Judgment, including exhibits, is wholly irrelevant to KDC's Motion for Summary Judgment. Mr. Bistline's Affidavit contains statements that confirm that KDC considered the fact that AED did not have a West Virginia contractor's license to be a breach of any contract that might exist (¶ 2). Mr. Bistline's Affidavit also contains reference to "other various licensing and permit requirements" that AED failed to meet, and states that counsel for KDC did not elaborate on what those other
requirements might be (¶ 2-5). Mr. Bistline even goes so far as to attach an alleged email he wrote to counsel for KDC that expresses his disappointment that he did not receive more information about these other requirements (¶ 5).

These statements and exhibit regarding the "other requirements" are irrelevant. Relevant evidence is evidence that tends to make the existence of any material fact more probable or less probable than it would be without the evidence. I.R.E. 401; State v. Hocker, 115 Idaho 544, 768 P.3d 807 (Ct. App. 1989). Evidence that is not relevant is inadmissible. I.R.E. 402. The fact that is material to KDC's Motion for Summary Judgment is that AED did not have a West Virginia contractor's license. Mr. Bistline's statements and exhibit regarding other areas in which AED may have been deficient do not make the lack of a contractor's license more or less probable. Therefore, such statements and exhibit are irrelevant and should be stricken from the record.

Similarly, Mr. Bistline's Affidavit contains statements regarding alleged comments from counsel for KDC that upon AED's failure to secure all necessary licenses and permits, KDC no longer intended to blast the Bridge (¶ 6). Mr. Bistline attaches an alleged email from counsel for KDC regarding the same (¶ 6). Once again, this information is irrelevant to KDC's Motion for Summary Judgment. No foundation has been laid for the admissibility of those emails. Moreover, the email is admissible under I.R.E. 408 as it obviously contains settlement negotiations. Thus, any evidence in Mr. Bistline's Affidavit and exhibits regarding KDC's intentions after AED failed to secure a contractor's license is irrelevant, inadmissible, and should be stricken from the record.
In sum, the entirety of Mr. Bistline’s Affidavit is irrelevant, lacks foundation, and contains inadmissible settlement discussions, and should be stricken from the record. Furthermore, except for the first paragraph, Mr. Bistline’s Affidavit and corresponding exhibits are hearsay (¶¶ 2-6), and thus KDC objects to its admission into the record on this basis.

B. Affidavit of Eric J. Kelly

Eric J. Kelly has submitted an affidavit in opposition to summary judgment which contains 34 paragraphs and numerous exhibits. Not a single paragraph or attached exhibit is relevant to KDC’s arguments in its Motion for Summary Judgment, and thus the Affidavit in its entirety should be stricken from the record. Only two paragraphs of Mr. Kelly’s Affidavit mention AED’s lack of a West Virginia contractor’s license, which of course is the basis for KDC’s argument that any alleged demolition contract (the basis for AED’s complaint) is illegal and thus void.

In the first paragraph to mention AED’s lack of a contractor’s license (¶ 26), Mr. Kelly merely reiterates that KDC informed AED that it needed a West Virginia contractor’s license. Mr. Kelly’s only other comment addressed to the threshold argument of the illegality of any demolition contract is his statement that he told KDC that AED’s obtaining a contractor’s license “was not a condition precedent” to the alleged agreement (¶ 27). These statements are irrelevant. As noted above, relevant evidence is evidence that tends to make the existence of any material fact more or less probable than it would be without the evidence. Whether AED’s obtaining a contractor’s license was a condition precedent to any alleged agreement is not a material fact. AED’s admitted lack of a contractor’s license would have rendered any demolition contract
illegal and thus void, regardless of whether possession of such a license was a condition precedent.

In short, Mr. Kelly's Affidavit and attached exhibits do not dispute the material fact that AED did not have a West Virginia contractor's license and that thus any demolition agreement was illegal and therefore void. Neither does the affidavit address the material fact that AED was administratively dissolved. It does not contain any factual statements demonstrating fraud and does not address rescission of the Purchase Agreement other than to admit only a mere offer of rescission was made. Finally, the affidavit does not contain any other statement that addresses KDC's arguments for summary judgment. Mr. Kelly's Affidavit is replete with conclusory allegations, legal conclusions and opinions without foundation. Thus, Mr. Kelly's Affidavit should be stricken from the record on the basis of its irrelevance.

Furthermore, KDC objects to several of the paragraphs in Mr. Kelly's Affidavit on the basis that they are hearsay (¶¶ 6, 8, 10, 16, 17, 23, 24, 30, 33), that they offer a legal conclusion (¶¶ 9, 11-14, 19-24), that they are speculative and not based upon personal knowledge (¶¶ 20, 21, 30, 31 and 33), and that lack foundation (¶¶ 7, 10, 14, 17, 20, 21, 30, 31, 33).

C. Affidavit of Mark Wilburn

Mark Wilburn states in his Affidavit that he is over 18, lives in Tennessee, and has knowledge of the facts of this case (¶¶ 1-2). Mr. Wilburn further states that he is the AED employee in charge of obtaining permits for the company (¶ 3); that he did in fact obtain a West Virginia contractor's license for AED (¶ 4); and that once he received the West Virginia contractor's license application, it took him three days to obtain the license for the company
(¶ 5). Mr. Wilburn also attaches a blank copy of the West Virginia contractor’s license application booklet (¶ 4).

None of the above information is relevant to KDC’s arguments for summary judgment, as none of these statements tend to make the existence of any material fact more or less probable. Again, the material fact is that without a contractor’s license at the time of making any demolition agreement, such agreement would have been illegal and thus void. Mr. Wilburn’s Affidavit does not dispute that AED did not have a contractor’s license at the time it allegedly entered into an agreement with KDC. The allegations that AED was able to obtain such a license quickly once it did submit an application has no bearing whatsoever on the illegality of the alleged contract at the time of its making. Mr. Wilburn does not even state when the application was submitted. Furthermore, there has been no foundation laid for the admission of the application into evidence.

Because Mr. Wilburn’s Affidavit is wholly irrelevant and it lacks foundation for the attached exhibit, it should be stricken from the record.

II. Conclusion

Because none of the Affidavits submitted by Plaintiff in opposition to KDC’s Motion for Summary Judgment are relevant, KDC Investments’ Motion to Strike them should be granted.

RESPECTFULLY SUBMITTED this 5th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By: __________________________
John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy
☐ Email arthurmooneybistline@me.com

Randall L. Schott

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE AFFIDAVITS OF ARTHUR M. BISTLINE, ERIC J. KELLY AND MARK WILBURN FILED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 7
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSAL CHAKLOS, individually,

Defendants.

COME NOW defendants KDC Investments, LLC and Lee and Krystal Chaklos ("KDC"), by and through their undersigned counsel of record, and pursuant to Idaho Rule of Civil Procedure 12(f) request an Order striking the Affidavit of Arthur Bistline, dated December 30, 2010, the Affidavit of Eric J. Kelly, dated December 30, 2010, and the Affidavit of Mark Wilburn.
Wilburn, dated December 30, 2010, all submitted in support of plaintiff AED, Inc's ("AED's") Opposition to Defendants' Motion for Summary Judgment.

This Motion is supported by the Memorandum filed contemporaneously herewith, and all pleadings and papers on file in this action.

Oral argument is requested.

RESPECTFULLY SUBMITTED this ____ day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By ____________________________
John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Randall L. Schmitz

MOTION TO STRIKE AFFIDAVITS OF ARTHUR M. BISTLINE, ERIC J. KELLY AND MARK WILBURN FILED IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 2
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSAL
CHAKLOS, individually,

Defendants.

COME NOW Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos ("KDC"), by and through their attorneys of record, Hall, Farley, Oberrecht & Blanton, P.A., and hereby move this Court for an Order shortening the required period for notice of hearing on the Motion to Strike Affidavits of Arthur Bistline, Eric Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment. This motion is made on
the grounds and for the reasons that the required notice cannot be given prior to the hearing to be
held on January 12, 2011.

RESPECTFULLY SUBMITTED this 5th day of January, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

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Randall L. Schmitz

MOTION TO SHORTEN TIME - 2
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS1AL CHAKLOS, individually,

Defendants.

COMES NOW, KDC Investments, LLC, Lee Chaklos and Krystal Chaklos (collectively referred to as “KDC”), by and through their counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and submit this Reply Memorandum in Support of Defendants’ Motion for Summary Judgment.

DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1
I. INTRODUCTION

As made clear in its opening Memorandum, AED cannot establish the necessary elements on its claims for breach of contract or fraud in the inducement. Further, the Court has previously ruled that with regard to the Asset Purchase and Liability Assumption Agreement, AED is not entitled to seek rescission, as it failed to preserve such claim when it filed its action prior to tendering back to KDC the consideration it received for the agreement.

In an unpersuasive effort to avoid summary judgment, AED attacks the Court’s previous ruling regarding rescission by completely altering its interpretation of 0’Connor v. Harger to create a distinction that does not exist, relies upon case law from West Virginia despite the fact the agreements contain Idaho choice of law provisions, and generally attempts to muddy the waters enough to survive summary judgment. Further, with regard to the claims against Lee Chaklos, plaintiff has admitted that such claims should be dismissed.

The affidavits and evidence put forward by AED in opposition fail to create genuine issues of material fact, and summary judgment is appropriate.

II. ARGUMENT

A. AED’s Breach of Contract Claim Fails as a Matter of Law Because the Underlying “Demolition Agreement” is an Illegal Contract

AED was precluded from entering into a contract to perform construction work in West Virginia as it was not licensed as a contractor in West Virginia, and the “Demolition Agreement” is therefore illegal.

It is undisputed that AED was not licensed as a contractor in West Virginia at the time it entered into the “Demolition Agreement.” Pursuant to West Virginia Code Section 21-11-6

No person may engage in this state in any act as a contractor, or submit a bid to perform work as a contractor, as defined in this article, unless such person holds a
As such, a contract that calls for a non-licensed entity to perform construction work in West Virginia violates the express language of West Virginia Code Section 21-11-6, and, therefore, is illegal and void.

As explained in depth in KDC’s Memorandum in Support of Motion for Summary Judgment, “An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy.” Trees v. Kersey, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). “A contract ‘which is made for the purpose of furthering any matter or thing prohibited by statute . . . is void.’” Id. (emphasis in original) (quoting Kunz v. Lobo Lodge, Inc., 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct. App. 1999)). “[W]here a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition . . . or to the ignorance of the parties as to the prohibiting statute.” Id. at 6-7, 56 P.3d at 768-69 (quoting Porter v. Canyon County Farmers’ Mut. Fire Ins. Co., 45 Idaho 522, 525, 263 P. 632, 633 (1928)).

In Trees, two general contractors entered into an oral joint venture agreement after one of the general contractors, Trees, lost its public works license and its bonding capacity. Id. at 5, 56 P.3d at 767. Under the terms of the joint venture agreement, the Kerseys (defendant general contractor) agreed to procure bids, pay insurance premiums, and pay costs in consideration for the Trees to act as the general contractor for jobs that were awarded to the joint venture. Id. The parties split profits on a fifty-fifty basis and performed between 35 and 50 jobs under this joint venture agreement. Id.
After a payment dispute, Trees filed a complaint against the Kerseys, alleging the Kerseys breached the joint venture agreement in failing to provide a final accounting for a particular job. *Id.* at 5-6, 56 P.3d at 767-68. The Trees also sued for fraud, claiming the Kerseys failed to disclose or equally share profits as contemplated by the joint venture agreement. *Id.* at 6, 56 P.3d at 768. The trial court found that the Kerseys were in breach of a valid joint venture agreement and that they committed fraud in withholding profits. *Id.* The Idaho Supreme Court, however, held because Trees was an unlicensed contractor, the joint venture was an illegal contract under the PWCLA, and that the agreement was void. *Id.* at 8, 56 P.3d at 770.

*Trees* is on point with the instant matter. AED, like Trees was not licensed to perform construction work at the time it entered into an agreement to perform the blasting work on the bridge. As in Trees, the statute governing contractor licensing in West Virginia required all persons performing contracting work, including bidding, be licensed. As such, a contract such as the "Demolition Agreement" that called for AED to perform contracting work in West Virginia violates the West Virginia Contractor Licensing Act, just as the Trees joint venture violated Idaho statutes. Therefore, the purpose of the "Demolition Agreement"—to perform contracting work in West Virginia—was illegal.

Plaintiff attempts to distinguish *Trees* by citing to and relying upon West Virginia case law. See Response to Summary Judgment, p. 6. However, the "Demolition Agreement" clearly provides that it shall be governed by Idaho Law. See Exhibit B attached to Plaintiff's Amended Complaint, p. 7 at ¶ GC4.

In determining the law applicable to a contract, this Court applies the Restatement (Second) of Conflict of Laws. See *Ward v. Puregro*, 128 Idaho 366, 368-69, 913 P.2d 582, 584-
85 (1996); Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 58 n. 1, 773 P.2d 1143, 1145
n. 1 (1989). The Restatement provides that “[t]he law of the state chosen by the parties to govern
their contractual rights and duties will be applied if the particular issue is one which the parties
could have resolved by an explicit provision in their agreement directed to that issue.”
Restatement (Second) of Conflict of Laws § 187(1) (1971).

Even if an issue could not be resolved by an explicit provision in the contract, the chosen
law will apply unless:

    (a) the chosen state has no substantial relationship to the parties or the
        transaction and there is no other reasonable basis for the parties’ choice, or

    (b) application of the law of the chosen state would be contrary to a
        fundamental policy of a state which has a materially greater interest than the
        chosen state in the determination of the particular issue and which, under the rule
        of § 188, would be the state of the applicable law in the absence of an
        effective choice of law by the parties.

Id. § 187(2).

The parties elected Idaho law to govern the “Demolition Agreement.” AED is a
corporation organized under the laws of Idaho, and therefore, a substantial relationship exists
between AED and Idaho. It does not appear that application of Idaho case law regarding
illegal/void contracts, is contrary to a fundamental policy of West Virginia. Therefore, Idaho, not
West Virginia law applies to the issue of an illegal contract.

B. **AED’s Fraud Claim Should Be Dismissed as a Matter of Law**

AED’s fraud claim should be dismissed as a matter of law because AED failed to plead
its claim with the required specificity, because AED has failed to provide any evidence that as of
June 1, 2010, KDC intended to not allow AED to blow the Bridge, and because AED did not
have the right to rely on any promise from KDC to blow the Bridge, when at the time, it was an
administratively dissolved corporation and was not licensed in West Virginia to perform such work. As to the above-cited reason, KDC relies upon its earlier argument as contained in its Memorandum in Support of Motion for Summary Judgment. KDC states the following in support of its argument that AED did not have a right to rely upon KDC’s promise to allow AED to blow the Bridge, and that AED has failed to come forward with a showing (either direct or circumstantial), that KDC never had an intention to honor the “Demolition Agreement.”

1. **AED Cannot Establish It Had A Right to Rely Upon Any Statement from KDC That AED Would Blow The Bridge When AED Was Administratively Dissolved at The Time**

It is undisputed that at the time the “Demolition Agreement” was entered into, AED was administratively dissolved. According to the Idaho Business Corporation Act (“IBCA”) an administratively dissolved corporation continues its corporate existence “but may not carry on any business except that necessary to wind up and liquidate its business and affairs. . .” I.C. § 30-1-1421.

As the Court is aware, there are two contracts at issue in this case. The first regarding the sale of the Bridge and the second “Demolition Agreement.” In its ruling on the Motion for Preliminary Injunction, the Court stated KDC could not pick and choose upon these agreements; either AED had the authority to enter into both of them or none. However, as discussed below, there is a significant difference between the purpose of the two agreements, and the difference explains how AED did not have a right to rely on the statement from KDC that it would allow AED to blow the bridge.

The IBCA provides that an administratively resolved corporation may not carry on any business, “except that necessary to wind up and liquidate its business affairs under section 30-1-1405, Idaho Code. . . .” I.C. § 30-1-1421. Idaho Code Section 30-1-1405 provides that a
dissolved corporation may do “every other act necessary to wind up and liquidate its business and affairs.” This includes the sale of an asset, such as the Bridge at issue in this case.

However, the “Demolition Agreement” called for performing new demolition work in the future. An administratively dissolved corporation is not allowed to enter into a contract to perform new work, as it is not necessary to wind up or liquidate its business and affairs.

AED argues that KDC has no standing to challenge the agreement based upon the corporate status of AED at the time it entered into the agreements. However, AED misunderstands KDC’s argument. KDC is not challenging AED’s ability to enter into the “Demolition Agreement.” Rather, KDC argues AED is unable to establish its claim of fraud because it cannot show that it had the right to rely on KDC’s promise to allow AED to perform the Bridge demolition, when it, and it alone, knew it was administratively dissolved at the time of entering into the agreement.

2. AED Cannot Establish It Had A Right to Rely Upon Any Statement From KDC That AED Would Blow the Bridge, When AED Was Not Licensed to Perform Contract Work at The Time

As addressed in KDC’s Memorandum in Opposition to Plaintiff’s Motion to Reconsider, which is incorporated herein as if fully set forth, West Virginia statutes require any contractor to be licensed in West Virginia to bid on or conduct any contracting work in the state of West Virginia. As such, at the time that AED and KDC entered into an agreement whereby AED was to blow the Bridge, such agreement violated the West Virginia Contractor Licensing Act and was void. Stated simply, AED does not have the right to rely upon an agreement to perform work that violated West Virginia law.
3. **Plaintiff Has Failed to Come Forward With Any Evidence, Direct or Circumstantial, That KDC Did Not Intend to Allow AED to Blast the Bridge**

As set forth in the Memo in Support of Motion for Summary Judgment, a party alleging fraud concerning future events must prove by clear and convincing evidence that the speaker made the promise without intending to keep it. *See Magic Lantern Productions, Inc. v. Dolsot*, 126 Idaho 805, 807, 892 P.2d 480, 482 (1994) overruled on other grounds by *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001). In the instant action, plaintiff has failed to come forward with any evidence, direct or circumstantial, that as of June 1, 2010, KDC intended to not allow AED to blast the Bridge.

A party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of that party’s pleadings” the opposing party’s response “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Idaho Rule of Civil Procedure 56(e).

A review of plaintiff’s Response to Summary Judgment shows that the entire section on this matter is wholly conclusory. Rather, plaintiff states “[t]he argument that there is no evidence that as of June 1st KDC did not intend to fully perform the agreement and that KDC terminated the agreement when AED threatened it with a lawsuit for failing to pay the deposit. KDC breached the demolition contract under circumstances which could lead a jury to reasonably conclude it never intended to honor the contract.” *See Response to Summary Judgment*, p. 8-9.

Again, plaintiff has failed to come forward with any direct or even circumstantial evidence establishing KDC did not intend to allow AED to blast the bridge as of June 1, 2010. Rather, plaintiff argues that KDC’s refusal to pay the $30,000 without AED obtaining the...
necessary permits indicates KDC’s intent to never honor the agreement, because such requirement was not contained within the agreement. However, plaintiff’s argument fails because the “Demolition Agreement” states that “AED will: 1. Supply the necessary explosives permits, both Federal and State, to perform operations in the State of WV.” See Amended Complaint, Exhibit A to Demolition Agreement. As such, AED clearly had an obligation to obtain the necessary permits to perform the work pursuant to the “Demolition Agreement.”

Further, as indicated in the correspondence between KDC and AED, KDC informed AED that it would not pay the initial payment until such permits were obtained and gave AED numerous opportunities to obtain the permits. These circumstances in no way rise to the level necessary to create a genuine issue of material fact that at the time it entered the “Demolition Agreement” KDC had no intention of allowing AED to perform the work.

C. **Even Assuming AED Can Prove Fraud, Which It Cannot, AED Is Still Not Entitled to Equitable Remedies Including Specific Performance or Rescission**

1. **AED Is Not Entitled to Specific Performance**

KDC will not revisit all of its arguments as to why plaintiff is not entitled to specific performance even in the event it is able to establish fraud. In short, AED is not entitled to specific performance because it is an extraordinary remedy that can provide relief when legal remedies are inadequate. *Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). In the instant action, AED has sufficient legal remedies under the “Demolition Agreement” such that specific performance is not appropriate.

AED argues that it is somehow still responsible to Roger Barack and the United States Federal District Court to ensure proper removal of the Bridge, and that based upon these responsibilities it faces increased risks that a dollar figure cannot estimate. AED’s argument
fails on multiple levels. First, the Asset Purchase and Liability Assumption Agreement removed any liability AED has regarding demolition of the bridge. Second, damages for the alleged fraud are not outside of the realm of value.

For the above stated reasons AED is not entitled to specific performance in this action.

2. AED Is Not Entitled To Rescission

For the reasons stated in its Memorandum in Opposition to Plaintiff's Motion for Reconsideration, which are incorporated herein as if fully set forth, AED is not entitled to rescission as it failed to tender consideration it received from Purchase Agreement prior to seeking rescission.

IV. CONCLUSION

Based on the foregoing, KDC requests the Court grant its motion for summary judgment.

RESPECTFULLY SUBMITTED this 5th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randy L. Schmitz - Of the Firm
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of January, 2011, I caused to be served a true copy of the foregoing DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

☑ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telexcopy
☑ Email arthurmooneybistline@me.com

Randy L. Schmitz

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 11
ATLHUR BISTLINE
BISTLINE LAW, PLLC
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(208) 665-7270
(208) 665-7290 (fax)
arthurmooneybistline@me.com
ISB: 5216

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYSTAL
CHAKLOS, individually,

Defendants.

Case No. CV10-7217

PLAINTIFF'S REPLY TO
DEFENDANTS' RESPONSE TO
MOTION TO RECONSIDER

KDC correctly points out that AED is changing its position that O'Connor v. Harger
held that tender was not required. The fact that counsel for AED is willing to admit that he was
wrong to state that Harger changed existing law, however, is not relevant to whether or not AED
is correct that only an offer of tender is required to seek equitable rescission based on a material
breach or fraud.

KDC asserts that AED has presented no new facts or legal argument on this issue. This is
untrue. AED cited to Watson v. Weick, 141 Idaho 500, 507, 112 P.3d 788, 795 (2005) and
Lithocraft, Inc. v. Rocky Mountain Marketing, 108 Idaho 247, 248, 697 P.2d 1261,
1262 (Ct.App.1985) both of which state that an offer to tender is sufficient. After filing this
motion for reconsideration, AED has discovered that Harger, is only reciting existing Idaho law on this subject – tender is not required to seek rescission by the Court.

In limine, counsel for appellant contends that, before a party is entitled to rescind a contract, he must put, or offer to put, the other party in status quo by a full restoration of all he has received. The rule there stated is applicable in cases where a rescission is made before an action is brought, but it is not necessary where a suit for rescission is brought.

The correct rule is stated in 24 Am. & Eng. Ency. of Law, p. 621. The author there says: “Whether the complainant in a suit for rescission must as a condition precedent to relief have offered or tendered restitution to the defendant prior to the beginning of the suit is a matter upon which the authorities are conflicting. The rule of the better considered cases is that it is sufficient that the plaintiff makes his offer to restore or to do equity in his bill or complaint, and shows therein that he has substantially preserved the status quo on his part so as to be able to fulfill his offer.

This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that, the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith.

Gamblin v. Dickson, 18 Idaho 734, 736, 112 P. 213, 213 (1910) (emphasis supplied)

Harger is a correct statement of the law and tender is not required to seek rescission, just an offer to restore the consideration received. Also see,

Willis v. Willis, 93 Idaho 261, 265, 460 P.2d 396, 400 (1969) -- So far as the record is concerned there is no showing she made any offer or tender to restore or return any of the property or funds,…” Wife claiming fraud in procurement of divorce settlement.

Wetterow v. White, 71 Idaho 372, 374, 232 P.2d 973, 975 (1951) – “Yet in their complaint and upon the trial they sought the remedy of rescission, to obtain which the law requires that they act promptly upon the discovery of the grounds therefore, and to restore, or
**offer to restore**, to the other party that which they have received under the contract.” Action to set aside sale of business based on misrepresentation.

Turner Agency v. Pemberton, 38 Idaho 235, 238, 221 P. 133, 134 (1923) -- “When one has been defrauded in making a contract, he must rescind the same and **offer to restore the party to his original rights** within a reasonable time after the discovery of the fraud, or he may affirm the contract and claim damages for the injury, neither of which did the defendant do.”


Hayton v. Clemans, 30 Idaho 25, 32, 165 P. 994, 996 (1916) – “The contention of appellant on this point, as I understand it, is that before a party is entitled to rescind a contract he must put, or offer to put, the other party in statu quo by a full restoration of all that he has received. **This Court has heretofore held that this rule is applicable in cases where a rescission is made before an action is brought, but that such a tender or offer is not necessary as a condition precedent to a suit for rescission**, and I feel that such decision is controlling and correct.” (emphasis supplied)

DATED this 7th day of January, 2011.

[Signature]

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2011, I caused to be served a true and correct copy of PLAINTIFF'S REPLY TO DEFENDANTS’ RESPONSE TO MOTION TO RECONSIDER by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

BY: LEANNE VILLA
AED, INC., an Idaho corporation

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,

Defendants.

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to Defendant’s Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn filed with this court dated January 5, 2011, as follows:

I. Motion to Strike Bistline Affidavit

1. KDC argues that the references to “various other licensing requirements that AED failed to meet” is not relevant because KDC only raise the existence of the West Virginia Contractor’s license on summary judgment.

AED responds that KDC raised the issue pertaining to the lack of any proof that KDC or its owners/agents lacked the present intent to go forward with the blast contract at the time they agreed to do so. This makes all the circumstances attendant to the parties negotiations and KDC’s breach relevant.
KDC is not going to admit to lacking the present intention to perform the contract with AED. As set forth in AED’s response brief, this intent can be shown by circumstantial evidence. The jury must consider the circumstances surrounding the negotiation and breach of the blast contract to determine if KDC ever really intended to go forward with AED. As this Court noted in Batchelor v. Payne 2009 WL 2929264, 5 (Idaho Dist.2009), the clear and convincing standard regarding fraud does not apply at summary judgment, just the normal summary judgment standards. AED need only come forward with evidence from which a jury could reasonably determine that fact in AED’s favor. Brown v. City of Pocatello, 148 Idaho 802, 806, 229 P.3d 1164, 1168 (2010). The circumstances that make it look like KDC never intended to perform are:

A. KDC breached the blasting agreement nine (9) days after it entered into it by failing to pay the deposit;

B. KDC provided no written explanation for this until four (4) to five (5) days after it failed to pay;

C. KDC’s explanation for failing to pay was because KDC had not obtained the necessary permits and that is not a condition precedent to its obligation to pay and no reasonable person could read it that way. The contract provides for a specific date for payment and does not in any way condition payment on that date;

D. KDC stated in e-mails that that AED had to have a West Virginia contractor’s license, but did not actually say that was why they were withholding payment, although AED understood it that way;

E. AED responded that it could obtain a contractor’s license in a couple of days;

F. At no point did KDC ever inform AED that if AED produced a West Virginia Contractor’s license the deposit of $30,000 would be paid;

Contractor’s license the deposit of $30,000 would be paid;
G. KDC was told that AED was suspending its performance until KDC performed, but also that AED was still willing to perform. KDC still did not perform;

H. AED demanded that KDC pay or AED would file suit at a time when AED had the right to demand payment;

I. KDC responded that because AED had demanded what it rightfully could, KDC was terminating the party’s agreement because KDC had not violated the parties agreement;

J. KDC was asked by counsel for AED to identify what other issues existed with licensing and insurance and the other issues were not identified;

K. KDC then directed its counsel to write a letter alleging for the first time that the parties did not have any agreement, and that AED had no contractor’s license and other previously unidentified issues;

L. KDC’s counsel was asked to identify what the problems were, and KDC did not specify, other than the contractor’s license;

M. On the summary judgment KDC now raises the West Virginia Contractor’s License issue as the issue with KDC’s performance and no other issue. KDC was told that the contractor’s license was not an issue in June 2010, and it is legally no basis for KDC to withhold payment.

KDC’s breach is completely unexplained. No reasonable person could read the blasting contract as allowing payment of the deposit to be withheld for any reason, and certainly not for the lack of a contractor’s license. KDC has changed its excuse for this blatant breach over time, including, directing their lawyer to argue that no contract existed to blast the bridge, a point not
argued by KDC’s present counsel. A jury could reasonably conclude the KDC wanted to buy the bridge and not use AED to blow it, but it knew that AED blasting the bridge was a condition to the purchase so it misrepresented its intention to hire AED, and then immediately breached the agreement.

2. **KDC argues that KDC’s statement that it does not intend to blow the bridge is not relevant.**

   AED has alleged that AED being involved in the blast/demolition of the bridge was material to the parties’ agreement. Eric Kelly’s affidavit explains that it is material to him that the bridge be blasted instead of mechanically taken down. This is based on his experience as well as his engineer’s opinion.

   KDC did agree to take on the responsibility of the demolition of the bridge, but that does not relieve AED of its obligation to do the same to both the Federal Court and Roger Barrack. It is this liability of AED that AED cannot assign away.\(^1\) AED can assign and sell the bridge, but it cannot eliminate its own liability by doing so which is why AED being involved in the demolition was and is material to any agreement to sell the bridge.

3. **KDC argues that Bistline affidavit contains settlement negotiations.**

   I.R.E. 408 forbids offers to compromise or the conduct surrounding offers of compromise from being admitted into evidence, “...to prove liability for, invalidity of, or amount of the claim or any other claim.” First, nothing in Bistline’s affidavit contains any offer of compromise so the rule does not apply. Second, the evidence is not offered to show the validity or amount of the claim, it is offered to show KDC’s evolving excuses for its failure to perform pursuant to the parties agreement.

---

\(^1\) See Affidavit of Eric Kelly in response to motion to strike. Paragraph 34 is the no assignment clause and paragraph 12 is the requirement that AED substitute itself into the federal court case.
I.R.E. 408 specifically provides, “This rule does not require exclusion if the evidence is offered for another purpose,…”

4. **KDC argues that Bistline’s affidavit contains hearsay.**

Paragraph’s 2 through 6 of Bistline’s affidavit contain recitations of conversations between counsel for KDC and counsel for AED, both agents of their respective clients who were retained to deal with this dispute. None of the statements are hearsay. Idaho Rule of Evidence 801(d)(2)(C) provides that, “a statement by a person authorized by a party to make a statement concerning the subject,” are not hearsay. Similarly, I.R.E. 801(d)(2)(D) provides that, “a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship,” is not hearsay.

II. **Motion to strike Eric Kelly Affidavit**

1. **KDC argues that “Mr. Kelly’s affidavit and attached exhibits do not dispute the material fact that AED did not have a West Virginia Contractor’s license.”**

Again, this is not the only point raised on summary judgment. KDC argued on summary judgment that there was no evidence that KDC did not have a present intent to perform its agreement with AED for AED to blast the bridge. Once KDC raises that allegation, all the facts and circumstances surrounding the negotiations and breach become relevant.

Furthermore, KDC’s argument is that AED cannot claim rescission because it cannot prove fraud. AED has also plead a material breach of the parties agreement which is an alternative grounds for rescission. That materiality of AED being allowed to blow the bridge is directly relevant to this.
2. KDC also argues that Kelly’s affidavit contains hearsay at certain paragraphs.

KDC makes no argument to which AED may reply but AED will do its best to respond as follows:

Paragraph 6: The last sentence of paragraph 6 is hearsay;

Paragraph 8: Contains no out of Court statements, except to the extent you can read into it that the Chaklos were saying they wanted to buy the bridge, which is an admission of a party opponent;

Paragraph 10: Contains no out of Court statements at all so cannot be hearsay;

Paragraph 16: Contains Mr. Kelly’s own statements as well as admissions of party opponents in the exhibit. Furthermore, KDC is not alleging that the statements were not made, so other circumstantial guarantees of trustworthiness exist making the statement admissible under I.R.E. 803(24);

Paragraph 17: Chaklos’ statements are admissions of a party opponent;

Paragraph 23: Contains Mr. Kelly’s own statements regarding actions taken by him and is not attempting to introduce any other statement into evidence. Furthermore, KDC is not refuting that the statements were made, so other circumstantial guarantees of trustworthiness exist making the statement admissible under I.R.E. 803(24) even if it is hearsay;

Paragraph 24: The statements of Chaklos are admissions of a party opponent;

Paragraph 30: Contains no out of Court statements, other than Chaklos which are admissions of a party opponent;

Paragraph 33: KDC moved for summary judgment based on the summary judgment pleadings as well as all pleadings and papers on file in this action. AED’s expert witness disclosure
is a pleading on file and KDC has explicitly asked the Court to consider it so it may not object to its consideration by the Court on hearsay or any other grounds.

3. **KDC also argues that Kelly’s affidavit offers legal conclusion.**

Again, KDC makes no argument to which AED may reply, but AED will do its best to respond as follows:

Paragraph 9: Perhaps KDC is saying that whether or not AED is responsible to remove the bridge or KDC is, is a legal conclusion. AED and KDC are both obligated to remove the bridge, just to different parties. AED is stating its understanding that it is legally obligated to the Federal Court and Roger Barrack to demolish the bridge. That is not a legal conclusion, that is a fact.

The rest of the complained about paragraphs contain no legal conclusions for the same reason. A party’s understanding of his, her or its obligations is not a legal conclusion.

4. **KDC argues that Kelly’s affidavit is speculative as they are not based on personal knowledge.**

Again, without argument or explanation, but AED will do its best to respond as follows:

Paragraph 20: Kelly is reciting terms out of the purchase and sale agreement to which AED was a party and of which he has personal knowledge;

Paragraph 21: Kelly has personal knowledge of this fact;

Paragraph 30: Kelly has personal knowledge of his own concerns;

Paragraph 31: To the extent that Kelly is testifying that KDC has no independent ability to finance the demolition of the bridge, Kelly has personal knowledge of the fact that KDC breached its promise to pay shortly after it made it and without any good reason to do so;
Paragraph 33: Kelly has personal knowledge of his engineer’s reports and his own concerns.

5. KDC argues that Kelly’s statement lack foundation.

Paragraph 7: How Kelly lacks foundation to testify regarding the value of scrap steel in light of what he does for a living\(^2\) is not clear, just as it is not clear why he would not know the volume of traffic in a river which has a bridge across it he is legally obligated to remove.

Paragraph 10: It is conceivable that Kelly does not really know if Chaklos can actually accomplish the demolition with or without Kelly’s assistance.

As far as the rest of the listed paragraphs, AED is not able to discern what the foundational arguments would be and therefore cannot formulate any response.

III. Motion to Strike Wilburn Affidavit.

KDC raised the issue of whether there was any evidence of KDC’s lack of intent to perform the blasting contract for fraudulent inducement purposes. The reliance of KDC on the fact that AED lacked a contractor’s license to withhold payment was not reasonable. KDC was told it would only take a few days to obtain that license and the fact that it did only take a few days to obtain shows that AED’s assertion to KDC in this regard was reasonable.

IV. Conclusion.

Based on the foregoing, AED requests the Court deny Defendant’s Motion to Strike.

DATED this \(?\) day of January, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff

\(^2\) Which is set out in his prior affidavits on file.
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

Hand-delivered [ ]
Regular mail [ ]
Certified mail [ ]
Overnight mail [ ]
Facsimile to (208)395-8585 [x]
Interoffice Mail [ ]

BY: ________________
LEANNE VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS TAL CHAKLOS, individually,

Defendants.

Case No. CV10-7217

AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO STRIKE AND DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

I, Eric Kelly, having been first duly sworn, upon oath depose and state that:

1. I am over the age of eighteen (18) and an individual residing in the state of Idaho;

2. I am the Plaintiff in this matter and familiar with the facts and circumstances surrounding this matter and am competent to testify as to the matters herein contained;

3. Attached as exhibit “A” is a true and correct copy of the contract whereby I purchased the bridge from Roger Barack;
4. Attached as exhibit "B" is a true and correct copy of the federal Court pleading showing AED substituted as the real party in interest in that case.

DATED this 10th day of January, 2011.

\[Signature\]  
ERIC J. KELLY  
Plaintiff

SUBSCRIBED AND SWORN before me this 10th day of January, 2011.

\[Signature\]  
Leanne Villa  
Notary in and for the State of Idaho  
Residing at: Hayden  
Commission Expires: 10/15/2016
CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

Hand-delivered
Regular mail
Certified mail
Overnight mail
Facsimile to (208)395-8585
Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

Hand-delivered
Regular mail
Certified mail
Overnight mail
Facsimile to (208)446-1132
Interoffice Mail

BY: LEANNE VILLA
CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (the “Agreement”) is entered into effective May 13, 2010 by and between Roger Barack (“Barack”), Ohio Midland, Inc. (Midland”), Eric Kelly (Kelly”), and Advanced Explosives Demolition, Inc (“Advanced”).

WHEREAS, Barack and Midland have agreed with Kelly and Advanced to pursue sale and transfer of the Bellaire Tool Bridge and related items; and

WHEREAS, Kelly and Advanced in pursuit of this sale and transfer need to engage in contract negotiations regarding the bridge; and

WHEREAS, the information provide by Barack and Midland pursuant to and in the contract negotiations to Kelly and Advanced is confidential.

WHEREFORE, the parties enter into the following agreement:

1. Barack and Midland will provide all information necessary and draft agreements for contract negotiations to Kelly and Advanced.

2. The information contained therein shall not be disclosed by Kelly or Advanced to anyone other than their lawyers, accountants, and key decision making personnel. Kelly and Advanced will instruct anyone to which they divulge this information that they must not divulge the information.

3. Kelly and Advanced recognizes that, if the information is divulged, the disclosure of that information would cause irreparable harm to Barack and Midland. The harm caused by disclosure of the information could not be adequately compensated with money damages and further recognizes that, if Kelly, Advanced, or anyone associated with them divulges the information in violation of this Agreement without receiving written consent from Barack and Midland, Barack and Midland shall be entitled to receive an injunction from a court of competent jurisdiction prohibiting such disclosure and they will take corrective action.

4. If Barack and Midland obtain an injunction of any kind against Kelly, Advanced, or anyone associated with them pursuant to this Agreement, Kelly and Advanced shall pay the cost of attorney fees and associated costs incurred by Barack and Midland.

AGREED TO BY:

Advanced Explosives Demolition, Inc

Date: 5/13/10

By: Mark Wilburn for AED et all
Date: 5/13/10

Eric Kelly, personally

Date: ________________

Roger Barack Personally

Ohio Midland, Inc.

Date: ________________

By: ____________________
Roger Barack, President
ASSET PURCHASE AND LIABILITY ASSUMPTION AGREEMENT

This Asset Purchase and Liability Assumption Agreement (this "Agreement") is made and entered into effective as of the date of the last execution of this Agreement ("Effective Date"), by and among Roger Barack ("Barack"); Ohio Midland, Inc., an Ohio Corporation ("Ohio Midland"); (collectively the "Sellers") and Advanced Explosives Demolition, Inc. an Idaho corporation (the "Buyer").

WHEREAS, Sellers desire to sell their interest in a bridge crossing the Ohio River from Bellaire, Ohio to Benwood, West Virginia commonly known as the Bellaire Toll Bridge or the Bellaire Highway Bridge and all interest in any associated appurtenances, utilities, piers, ramps, agreements, leases, ordinances and any other item of personal property associated with the bridge (collectively the "Bridge") except for any rights held by the Sellers pursuant to the Act (as defined below) which the Sellers shall be transferred back to Sellers effective upon the demolition of the Bridge and removal and cleanup of the Bridge in its entirety;

WHEREAS, the Bridge was originally constructed and operated by the Interstate Bridge Company ("Interstate Bridge"), pursuant to an Act of Congress (the "Act");

WHEREAS, the Bridge and all associated agreements, and assets were transferred to Roger Barack ("Barack") from Interstate Bridge by the General Assignment and Bill of Sale dated March 22, 1991 (the "1991 Sale Agreement") (a copy of which is attached hereto as Exhibit 1) and the Asset Purchase and Liability Assumption Agreement (the "1991 Sale Agreement") (a copy of which is attached hereto as Exhibit 2);

WHEREAS, Barack transferred all of his interest in the Bridge to Ohio Midland, Inc. in the Bill of Sale and Assignment dated January 5, 1996 (the "1996 Assignment") (attached hereto as Exhibit 3);

WHEREAS, questions have arisen as to whether or not Barack effectively transferred all of his interests in the Bridge to Ohio Midland, Inc., Barack is personally entering into this Agreement so that no questions exist as to the authority to transfer the property and obligations set forth in this Agreement;

WHEREAS, Buyer desires to purchase the Bridge and to assume all responsibilities associated with the Bridge, including its proper demolition and removal on or before June 1, 2011; and.

WHEREAS, all of the parties agree to such sale and purchase and assumption of liabilities, subject to the terms and conditions of this Agreement.

NOW THEREFORE, for and in consideration of the foregoing recitals, the purchase and sale and assumption of liabilities of the Bridge, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties enter into the following agreement:

..................................................

SM/Barack/Sale Purchase Agmt for Bridge-5-13-10

RB AED

AED Inc. vs. KDC Investments, LLC, et al Supreme Court Case No. 38603-2011 617 of 1046
Sale

1. The Sellers agree to sell, transfer, assign and deliver to the Buyer all of their interest in the Bridge, all appurtenances and everything associated with the Bridge, except: (1) that any rights held by the Sellers pursuant to the Act shall be transferred back to Sellers effective upon the demolition of the Bridge and removal and clean-up of the Bridge in its entirety; and (2) the four spires on the Bridge. Further, Buyer hereby grants to Sellers, individually or collectively, the option to purchase any of the piers that are part of the Bridge for one dollar ($1.00) upon Notice from Sellers to Buyer of their exercising this option and prior to the demolition of the piers. If Sellers exercise this option, Sellers shall be responsible for all of Buyer's costs associated with any changes required for the demolition of the Bridge by the transfer of the piers to the Sellers.

Consideration

2. In addition to the promises set forth in this Agreement by the Buyer, which shall constitute consideration for this Agreement, Buyer shall pay Ohio Midland $1.00 for the Bridge and all associated property transferred by this Agreement upon execution of this Agreement.

Possession

3. Possession of the Bridge by the Buyer and all other property to be conveyed pursuant to this Agreement shall be given on June 1, 2010.

Contingencies

4. This Agreement is contingent upon:

There are no contingencies.

Demolition

5. As a material inducement and as part of the consideration to the Sellers to enter into this Agreement, Buyer hereby agrees that it shall demolish and remove the Bridge and all associated structures, improvements, utilities, piers, ramps, appurtenances and all other things associated with the Bridge where-so-ever located, on or before June 1, 2011 in accordance with:

(A) Any and all laws and regulations of: (i) the city of Benwood, West Virginia, the Village of Bellaire, Ohio; (ii) the counties of Belmont County Ohio, and Marshall County, West Virginia, (iii) the states of Ohio and West Virginia; and (iv) the United States of America; including but not limited to the laws and regulations administered by the United States Coast Guard; the United States Corps of Engineers, the Ohio Environmental Protection Agency, the West Virginia Environmental Protection Agency, the United States Environmental Protection Agency;
that are in any way applicable to such demolition and removal of the Bridge;

(B) Any and all requirements of the agreement dated March 13, 1925 between the Pennsylvania Railroad Company and The Interstate Bridge Company (a copy of which is attached hereto as Exhibit 4 and incorporated herein by reference) (the “1925 B&O Agreement”);

(C) Any and all requirements of the agreement dated December 22, 1925 between The Interstate Bridge Company and the Baltimore and Ohio Railroad Company (a copy of which is attached hereto as Exhibit 5 and incorporated herein by reference) (the “1925 B&O Agreement”), and the amendment of that agreement dated June 13, 1963 (a copy of which is attached hereto as Exhibit 6 and incorporated herein by reference) (the “1963 B&O Amendment”);

(D) Any and all requirements of the ordinance dated January 25, 1977 adopted by Council of the City of Benwood, West Virginia (a copy of which is attached hereto as Exhibit 7 and incorporated herein by reference) (the “1977 Benwood Ordinance”);

(E) Any and all requirements of the 1991 Sale Agreement (a copy of which is attached hereto as Exhibit 2 and incorporated herein by reference);

(F) Any and all requirements of the 1996 Assignment (a copy of which is attached hereto as Exhibit 3 and incorporated herein);

(G) Any and all requirements of the Opinion & Order dated March 30, 2007 issued by the United States District Court for the Southern District of Ohio, Eastern Division in the case of Ohio Midland, Inc. et al v. Gordon Proctor, Director of Ohio Department of Transportation, et al. Case No. C2-05-1097) (the “Litigation”) (a copy of which is attached hereto as Exhibit 8 and incorporated herein by reference) (the “2007 Court Order”), and any subsequent orders regarding demolition and/or removal of the Bridge issued in that case including the December 23, 2009 order (a copy of which is attached hereto as Exhibit 9 and incorporated herein by reference) (the “2009 Court Order”); and

(H) Any and all requirements associated with any utilities that are located on or near the Bridge, including, but not limited to, a natural gas pipeline located near the Bridge as described in the April 17, 1991 letter from Columbia Gas (a copy of which is attached hereto as Exhibit 10 and incorporated herein by reference) (the “1991 Columbia Gas Letter”) and the electrical service currently in use on the Bridge.

6. The Buyer represents, warrants, and covenants with and to the Sellers, that it has the ability, financial resources, knowledge, technical expertise, qualifications and experience to
demolish the Bridge in accordance with the terms of this Agreement, and that it fully intends to comply: (i) with the requirements of demolishing the Bridge and all related items; (ii) all obligations to remove the debris and all parts of the Bridge in accordance with all laws and regulations; and (iii) all other applicable requirements identified in the preceding section 5, on or before June 1, 2011. Buyer further represents that it has: (i) investigated the Bridge and everything associated with the Bridge; (ii) investigated the legal requirements surrounding the ownership and demolition of the Bridge; (iii) through its own investigation has diligently researched these issues; and (iv) fully satisfied itself that it can accomplish all of the requirements of this Agreement. Buyer specifically acknowledges that the Sellers are relying upon these representations in entering into this Agreement.

**Condition of Property Transferred**

7. Sellers agree that upon delivery of the Bill of Sale, the improvements constituting the Bridge shall be in the same condition they are on the Effective Date, reasonable wear and tear excepted. Buyer acknowledges that the Bridge and improvements thereon and all appurtenances are being sold “AS IS” and “WHERE IS”. Buyer specifically acknowledges that it is not relying upon any representation of Sellers as to the condition or status of the Bridge or any associated real or personal property. Buyer is assuming all risks of the Bridge, including but not limited to environmental concerns.

**Assignments and Assumptions**

8. Sellers assign any and all rights, obligations and interest they have in the: (i) 1925 Pa. Railroad Agreement; (ii) 1925 B&O Agreement; (iii) 1963 B&O Amendment; (iv) 1977 Benwood Ordinance; (v) the 1991 Sale Agreement; and, (vi) the 1996 Assignment. Buyer specifically acknowledges and accepts Sellers’ assignment of their rights, obligations and interest in the: (i) 1925 Pa. Railroad Agreement; (ii) 1925 B&O Agreement; (iii) 1963 B&O Amendment; (iv) 1977 Benwood Ordinance; (v) the 1991 Sale Agreement; and, (vi) the 1996 Assignment. Buyer further promises and covenants to comply with the requirements of the: (i) 1925 Pa. Railroad Agreement; (ii) 1925 B&O Agreement; (iii) 1963 B&O Amendment; (iv) 1977 Benwood Ordinance; (v) the 1991 Sale Agreement; and, (vi) the 1996 Assignment, in owning and demolishing the Bridge.

9. Buyer assumes as of the date of possession all future obligations arising by virtue of the fact it owns the Bridge including, but not limited to all maintenance, safety, structural and other repairs, whether known or unknown.

10. Buyer assumes the obligations of agreements, ordinances, and court orders assigned by this Agreement.

**Indemnification and Liabilities**

11. Buyer will not assume and will have no responsibility for any liabilities, contracts, commitments and other obligations of the Sellers unless expressly assumed in this Agreement, including without limitation the following:
(A) Any obligations or liabilities of the Sellers arising under this Agreement;

(B) any obligation of the Sellers for federal, state or local income tax liability (including interest and penalties) arising from the operations of the Sellers up to the time of transfer of possession or arising out of the sale by the Sellers of the Bridge;

(C) any obligation of the Sellers for any transfer, sales or other taxes, fees or levies arising out of the sale of the Bridge;

(D) Any obligation of the Sellers for expenses incurred in connection with the sale of the Bridge; or

(E) Any other liability or obligation of the Sellers which is not expressly assumed by the Buyer in this Agreement.

12. Buyer specifically acknowledges that Sellers are under order by the United States District Court for the Southern District of Ohio, Eastern Division in the case of Ohio Midland, Inc. et al v. Gordon Proctor, Director of Ohio Department of Transportation, et al., Case No. C2-05-1097, to remove the Bridge, and those Sellers, by entering into this Agreement is doing so to fulfill any and all obligations to remove the Bridge as required by the Court. Buyer further acknowledges that by taking ownership and responsibility for demolition of the Bridge pursuant to this Agreement that this Litigation exists and requires the removal of the Bridge over the property currently owned by Norfolk Southern Railway Co. as set forth in the 2009 Court Order pursuant to the 1925 Pa. Railroad Agreement. Buyer further represents that it shall remove the Bridge in compliance with the 2009 Court Order. In addition to the rights and remedies specified in this Agreement, if after Notice from Sellers, Buyer fails to take all actions necessary to comply with the 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge within fifteen (15) days, Sellers shall have the absolute right to take all actions necessary to comply with 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge and to demolish and remove any part of the Bridge. Sellers shall also have the absolute right to sell any part of the Bridge in order to recover its cost associated with complying with 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge. In the event that Sellers receive more money than its cost in complying with 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge, it shall pay any amount that exceeds its costs to Buyer. In the event that Seller has to exercise its rights under this provision, Buyer shall remain the owner of the Bridge and shall continue to have all responsibilities set forth herein including any responsibility created by law, this Agreement or any obligation assigned by this Agreement. In the event that Sellers have to take action in order to comply with the 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge, Buyer shall do all things necessary to assist Sellers in complying with the 2007 Court Order, the 2009 Court Order or any other order issued in the Litigation regarding demolition of the Bridge or any part of the Bridge.
Buyer hereby consents to Sellers taking all actions necessary to substitute Buyer as a party in the Litigation replacing Sellers as parties. Buyer shall execute all documents necessary to enable Sellers to substitute Buyers as a party in the Litigation. It shall be Sellers’ responsibility to facilitate Buyer’s substitution as a party; however, Buyer shall cooperate with Sellers in taking all actions necessary to substitute Buyer as a party. The substitution of Buyer as a party in the litigation will probably occur after the transfer of possession of the Bridge.

13. Notwithstanding anything contained herein or in any other documents executed by Sellers, Sellers hereby represent and warrant to Buyer, that they have fully disclosed to it all liabilities associated with the Bridge of which they are aware, and that they are aware of no facts or circumstances pertaining to the Bridge that have not been so disclosed. Sellers specifically represent in addition to anything they have told Buyer, that they specifically give notice that in addition to the normal day-to-day operating expenses of Bridge, Sellers are aware of the liabilities set forth in: (i) 1925 Pa. Railroad Agreement; (ii) 1925 B&O Agreement; (iii) 1963 B&O Amendment; (iv) 1977 Benwood Ordinance; (v) the 2007 Court Order; (vi) the 2009 Court Order; (vii) the 1991 Columbia Gas Letter; (viii) the 1991 Sale Agreement; and, (ix) the 1996 Assignment. Sellers have no reason to suspect that any disclosure they have made is untrue or incorrect in any material respect or omits to state a material fact necessary in connection therewith.

14. Indemnification by the Sellers:

(A) From and after the transfer of Possession, the Sellers, jointly and severally, agree to defend, indemnify and hold the Buyer and its affiliates harmless from and against all indemnifiable damages of the Buyer. For this purpose, "indemnifiable damages" of the Buyer means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including reasonable attorneys' fees and court costs) incurred or suffered by the Buyer, or any of its directors, officers, agents, employees or affiliates or its affiliates' directors, officers, agents or employees, as a result of or in connection with: (i) any inaccurate representation or warranty made by the Sellers in or pursuant to this Agreement, (ii) any default in the performance of any of the covenants or agreements made by the Sellers in this Agreement, or (iii) any occurrence, act or omission of the Sellers or any shareholder, director, officer, employee, consultant or agent of the Seller which occurred prior to the transfer of possession, and causes damage to the Buyer or its affiliates.

(B) Sellers will assume the defense of any claim or any litigation resulting from a claim, provided that (i) the counsel for the Sellers who conduct the defense of such claim or litigation will be reasonably satisfactory to the Buyer; and (ii) the Buyer may participate in such defense at the expense of Sellers. Except with the prior written consent of the Buyer, Sellers will not consent to entry of any judgment or order or enter into any settlement that provides for injunctive or other non-monetary relief affecting the Buyer or that does not include a release of Buyer by each
claimant or plaintiff from all liability with respect to such claim or litigation.

(C) In the event that the Buyer in good faith determines that the conduct of the defense of any claim or any proposed settlement of any such claim by the Sellers might be expected to materially and adversely affect the Buyer, the Buyer will have the right to assume control over the defense, settlement, negotiations or litigation relating to any such claim at the sole cost of the Sellers, provided that if the Buyer does take over and assume control, the Buyer will not settle such claim or litigation without the written consent of the Sellers, such consent not to be unreasonably withheld or delayed.

(D) In the event that the Sellers do not accept the defense of any matter within 20 days of receiving notice of a claim, the Buyer will have the right to defend against any such claim or demand and will be entitled to settle or agree to pay in full such claim or demand at the sole expense of Sellers.

15. Indemnification by the Buyer:

(A) From and after the transfer of Possession, the Buyer, jointly and severally, agrees to defend, indemnify and hold the Sellers and its affiliates harmless from and against all indemnifiable damages of the Sellers. For this purpose, "indemnifiable damages" of the Sellers means the aggregate of all expenses, losses, costs, deficiencies, liabilities and damages (including reasonable attorneys' fees and court costs) incurred or suffered by the Sellers, or any of its directors, officers, agents, employees or affiliates or its affiliates' directors, officers, agents or employees, as a result of or in connection with: (i) any inaccurate representation or warranty made by the Buyer in or pursuant to this Agreement, (ii) any default in the performance of any of the covenants or agreements made by the Buyer in this Agreement, or (iii) any occurrence, act or omission of the Buyer or any shareholder, director, officer, employee, consultant or agent of the Seller which occurred after the transfer of possession, and causes damage to the Sellers or its affiliates.

(B) Buyer will assume the defense of any claim or any litigation resulting from a claim, provided that (i) the counsel for the Buyer who conducts the defense of such claim or litigation will be reasonably satisfactory to the Sellers; and (ii) the Sellers may participate in such defense at the expense of Buyer. Except with the prior written consent of the Sellers, Buyer will not consent to entry of any judgment or order or enter into any settlement that provides for injunctive or other non-monetary relief affecting the Sellers or that does not include a release of Sellers by each claimant or plaintiff from all liability with respect to such claim or litigation.
(C) In the event that the Sellers in good faith determines that the conduct of the defense of any claim or any proposed settlement of any such claim by the Buyer might be expected to materially and adversely affect the Sellers, the Sellers will have the right to assume control over the defense, settlement, negotiations or litigation relating to any such claim at the sole cost of the Buyer, provided that if the Sellers does take over and assume control, the Sellers will not settle such claim or litigation without the written consent of the Buyer, such consent not to be unreasonably withheld or delayed.

(D) In the event that the Buyer do not accept the defense of any matter within 20 days of receiving notice of a claim, the Sellers will have the right to defend against any such claim or demand and will be entitled to settle or agree to pay in full such claim or demand at the sole expense of Buyer.

16. as of the date of transfer of possession of the Bridge:

(A) Sellers shall be liable for and shall pay all federal and state transfer, sales and use taxes properly payable upon and in connection with the conveyance and transfer of assets purchased herein;

(B) Sellers shall deliver to Buyer a duly executed Bill of Sale, in the form attached hereto as Exhibit 11;

(C) Sellers shall deliver to Buyer such evidence as Buyer’s counsel may reasonably require as to the authority of the person or persons executing documents on behalf of Sellers;

(D) Buyer shall deliver to Sellers such evidence as Sellers’ counsel may reasonably require as to the authority of the person or persons executing documents on behalf of Buyer;

(E) Sellers shall deliver to Buyer possession and occupancy of the Bridge; and,

(F) Buyer and Sellers shall deliver such additional documents and affidavits as shall be reasonably required to consummate the transaction contemplated by this Agreement.

Bridge Spires
17. Buyer shall take all actions practicable to preserve and salvage the four bridge spires and deliver them to the Sellers at a place in Belmont County Ohio selected by the Sellers.

**Publication of History or Controversy Surrounding the Bridge**

18. Buyer shall not provide any type of statement to anyone regarding the history of the Bridge or any controversy surrounding the Bridge, without first providing it in writing to the Sellers and obtaining the Sellers’ written permission to release the written statement concerning the history of the Bridge or any controversy surrounding the Bridge.

**General Terms**

19. Each party agrees to execute all necessary documents to effectuate the terms of this Agreement.

20. Sellers will pay, through date of possession, all accrued utility charges and any other charges that are or may become a lien. Buyer shall take all actions necessary to transfer all utilities into its name and to be prepared on the date of possession to maintain the Bridge in accordance with all applicable laws and regulations including, but not limited to, the United States Coast Guard requirements for lighting.

21. Time shall be of the essence for this Agreement and of every part thereof.

22. Neither Sellers, nor Buyer, has retained or employed any person, firm or corporation (other than its attorneys and accountants) to bring about, or to represent them in, the transactions contemplated by this Agreement.

23. Buyer represents and warrants to Sellers that it has received all information necessary to enter into this Agreement and needs no further information or inspection of the Bridge, in order to enter into this Agreement. Buyer further acknowledges that it has been given all access necessary to inspect the Bridge.

24. Each party will pay all expenses it incurs in connection with the negotiation, execution and performance of this Agreement, including the fees and expenses of agents, representatives, accountants and counsel.

25. The representations and warranties of the Sellers contained in this Agreement and the exhibits to this Agreement will have been true, complete and correct as of the date of this Agreement, and they will be true and correct as of the time of transfer of possession. The Sellers will have performed and complied with all of their obligations required by this Agreement to be performed or complied with at or prior to the time of transfer of possession. The Sellers will have delivered to the Buyer a certificate, dated as of the date of the time of transfer of possession, certifying that such representations and warranties are true, complete and correct and that all such obligations have been performed and complied with.

SM/Barack/Sale Purchase Agmt for Bridge-5-13-10

AED Inc. vs. KDC Investments, LLC, et al Supreme Court Case No. 38603-2011 625 of 1046
26. The representations and warranties of the Buyer contained in this Agreement will have been true and correct as of the date of this Agreement, and they will be true and correct as of the time of transfer of possession. The Buyer will have performed and complied with all of its obligations required by this Agreement to be performed or complied with at or prior to the time of transfer of possession. The Buyer will have delivered to the Sellers a certificate, dated as of the date of the time of transfer of possession; certifying that such representations and warranties are true and correct and that all such obligations have been performed and complied with.

27. All of the respective representations and warranties of the parties to this Agreement will survive the consummation of the transactions contemplated by this Agreement.

28. The parties may amend, modify and supplement this Agreement in such manner as may be agreed upon by them in writing and signed by all the parties. This Agreement will be binding upon and inure to the benefit of the parties and their respective successors, assigns, heirs and legal representatives.

29. Any notice, request, information or other document to be given under this Agreement to any of the parties by any other party will be in writing and will be given by hand delivery, Telex, certified mail or a private courier service which provides evidence of receipt as part of its service, as follows:

(A) If to the Sellers, addressed to:

Roger Barack
P.O. Box 403
Neffs, Ohio 43940
(740) 676-2172
(740) 676-1549

Copy to:

Law Office of Sean A. McCarter
471 East Broad Street, Suite 2001
Columbus, Ohio 43215
(614) 358-0880
(614) 280-9675 (fax)

(B) If to the Buyer, addressed to:

Advanced Explosives Demolition Inc
645 North Gavilan Lane
Coeur d'Alene, ID 83815

Ph/Fax 866.903.5551
info@biggerblast.com
www.biggerblast.com
30. Any party may change the address or Telecopier number to which notices are to be sent to it by giving written notice of such change. Any notice will be deemed given on the date of hand delivery, transmission by Telecopier, receipt by certified mail or delivery to a courier service, as appropriate.

31. If any provision of this Agreement is determined to be illegal or unenforceable, such provision will be deemed amended to the extent necessary to conform to applicable law or, if it cannot be so amended without materially altering the intention of the parties, it will be deemed stricken and the remainder of the Agreement will remain in full force and effect.

32. This Agreement sets forth the entire agreement among the parties hereto and fully supersedes any and all prior discussions, agreements, or understandings between the parties and cannot be changed except by a written agreement executed by all of the parties. All material representations by the Sellers regarding the Bridge which is relied upon by the Buyer are set forth in this Agreement.

33. This Agreement will be binding on and inure to the benefit of the parties and their heirs, executors, legal administrators, successors and assigns.

34. This Agreement or provisions of this Agreement can only be assigned with the consent of all of the parties whose interests are affected by such assignment.

35. In consideration of Sellers entering into this Agreement, Buyer shall provide Sellers with a guaranty fully executed in the form attached hereto as Exhibit 12 and incorporated herein by reference.

36. This Agreement shall be controlled and interpreted according to the laws of the State of Ohio.

37. This Agreement is a negotiated contract and should a dispute arise is not to be construed for or against any party herein.

38. Venue for any dispute arising pursuant to this Agreement shall be in the Court of Common Pleas of Belmont County, Ohio.
IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement as of the date first above referenced.

Roger Barack

County of

: ss
State of Ohio

The foregoing instrument was acknowledged before me this ___ day of __________, 2010 by Roger Barack.

Notary Public

OHIO MIDLAND, INC.,
An Ohio Corporation

By: ______________________
   Roger Barack, President

County of

: ss
State of Ohio

The foregoing instrument was acknowledged before me this ___ day of __________, 2010 by Roger Barack, the President of Ohio Midland, Inc. an Ohio corporation, on behalf of the corporation.

Notary Public

SM/Barack/Sale Purchase Agmt for Bridge-5-13-10

RB_____ AED_____

AED Inc. vs. KDC Investments, LLC, et al    Supreme Court Case No. 38603-2011
Advanced Explosives Demolition Inc
An Idaho Corporation

By: [Signature]

Title: [Signature]

The foregoing instrument was acknowledged before me this 12th day of May, 2010 by [Signature], an authorized representative of Advanced Explosives Demolition, Inc., an Idaho corporation, on behalf of the corporation.

[Notary Public]

[Signature]

Notary Public
exp. June 18, 2013
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO MIDLAND, INC., et al.,

Plaintiffs,

v.

GORDON PROCTOR, et al.,

Defendants.

ORDER

This matter is before the Court on Plaintiffs' Motion to Substitute Parties (Doc. 182). On December 23, 2009, this Court ordered Plaintiffs to demolish the Bellaire Bridge ("the Bridge"). Pursuant to that Order, Plaintiffs entered into a contract with Advanced Explosives Demolition, Inc. ("AED"). The agreement involves the transfer of ownership of the Bridge from Plaintiffs to AED so that AED can demolish the Bridge. Under Federal Rule of Civil Procedure 25(c), "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." A district court has discretion in deciding whether to allow substitution after a transfer of interest. Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150, 154 (6th Cir. 1992).

Because the contract between Plaintiffs and AED contains an explicit agreement that AED will be substituted as a party in this action, the Court will exercise its discretion to allow
substitution under Rule 25(c). AED will be substituted for Plaintiffs Ohio Midland, Inc. and Roger Barack. Plaintiffs’ Motion is therefore GRANTED.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: September 8, 2010
ARTHUR M. BISTLINE
BISTLINE LAW, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
(208) 665-7270
(208) 665-7290 (fax)
abistline@povn.com
ISB: 5216

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

Case No: CV-10-7217
NOTICE OF SERVICE

The Plaintiff, AED, INC., by and through its undersigned Attorney, and pursuant to Rule 33 of the Idaho Rules of Civil Procedure, hereby gives notice of serving PLAINTIFF'S RESPONSE TO DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION upon Defendants' attorney of record, Randy L. Schmitz & John Burke together with a copy of this Notice of Service via the method indicated below.

Dated this 7th day of January, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiffs
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[x] Email
[ ] Interoffice Mail

BY: LEANNE VILLA

LEANNE VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,  
Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS TAL CHAKLOS, individually,  
Defendants.

COME NOW Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos ("KDC"), by and through their undersigned counsel of record, and submit their Objection to Affidavit of Eric J. Kelly in Support of Plaintiff's Opposition to Defendants' Motion to Strike and Defendants' Motion for Summary Judgment ("Kelly Affidavit").

OBJECTION TO AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO STRIKE AND DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT - 1
On January 10, 2011, at 3:01 p.m., Plaintiff AED, Inc. ("AED") served upon KDC an Affidavit of Eric J. Kelly in Support of Plaintiff’s Opposition to Defendants’ Motion to Strike and Defendants’ Motion for Summary Judgment. First, the deadline for plaintiff to respond to Defendants’ Motion for Summary Judgment has passed. Second, Defendants never received an “Opposition” to the Motion to Strike. Defendants are without notice as to the purpose of this affidavit but it does not appear relevant to oppose either Defendants’ Motion to Strike or Defendants’ Motion for Summary Judgment. Therefore, Defendants object to this late filed affidavit.

RESPECTFULLY SUBMITTED this 11th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By __________

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

Randall L. Schmitz

OBJECTION TO AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 3
**Description**
CV 2010-7217 AED Inc. vs. KDC Investments 20110112 Motion Summary
Judgment
Judge: John T. Mitchell
Court Reporter: Julie Foland
Clerk: Shari Rohrbach

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<tr>
<td>09:28:16 AM</td>
<td>Judge</td>
<td>Calls, here on DF MSJ, DF Motion to Strike from Mr Bistline that has been noticed up. A Motion to Reconsider - clerk has no record of that.</td>
</tr>
<tr>
<td>09:29:42 AM</td>
<td>Bistline</td>
<td>I believed my staff did call, I instructed them to call. It adds nothing new to the hearing, its a procedural thing.</td>
</tr>
<tr>
<td>09:30:30 AM</td>
<td>Judge</td>
<td>We have a lot crammed into an hour, I won't hear that today. Deal with Motion to Shorten Time first.</td>
</tr>
<tr>
<td>09:30:52 AM</td>
<td>Bistline</td>
<td>No obj to that.</td>
</tr>
<tr>
<td>09:30:57 AM</td>
<td>Judge</td>
<td>Will hear Mtn to Strike, we have an hour. I've read the Motion to Strike.</td>
</tr>
<tr>
<td>09:31:34 AM</td>
<td>Schmitz</td>
<td>Nothing to add to that.</td>
</tr>
<tr>
<td>09:31:42 AM</td>
<td>Bistline</td>
<td>Nothing to add.</td>
</tr>
<tr>
<td>09:31:49 AM</td>
<td>Judge</td>
<td>I'll take that under advisement.</td>
</tr>
<tr>
<td>09:32:02 AM</td>
<td>Schmitz</td>
<td>I've gone back through the Kelly affd. I can give the paragraph numbers of the ones I think are most objectionable if the court could focus on that. Para 11, 14, 19, 20, 21, 22, 24, 25, 30, 31, and 33.</td>
</tr>
<tr>
<td>09:33:23 AM</td>
<td></td>
<td>RE: Wilburn affd, there's no foundation for the attached application, no indication when he received that. I'm not to concerned to the attachments to the Bistline affd.</td>
</tr>
<tr>
<td>09:34:08 AM</td>
<td>Bistline</td>
<td>I don't know what the obj are to those paragraphs.</td>
</tr>
<tr>
<td>09:34:18 AM</td>
<td>Judge</td>
<td>That was set forth in the brief.</td>
</tr>
<tr>
<td>09:34:28 AM</td>
<td>Bistline</td>
<td>I think my brief is an adequate response.</td>
</tr>
<tr>
<td>09:36:10 AM</td>
<td>Judge</td>
<td>Proceed with MSJ.</td>
</tr>
<tr>
<td>09:36:14 AM</td>
<td>Schmitz</td>
<td>We've received the reply which has case law we've not seen before, is other briefing going to be done?</td>
</tr>
<tr>
<td>09:36:50 AM</td>
<td>Judge</td>
<td>Correct on the Mtn to Reconsider, I've read the Mtn to Reconsider on the summary jdmt issues, not read the Memo in Opposition, that's separate, or reply. We're done briefing MSJ.</td>
</tr>
<tr>
<td>09:38:02 AM</td>
<td></td>
<td>RE: our summary jdmt. One of the main issues is ownership. We did bring that to light when we answered the amended complaint.</td>
</tr>
</tbody>
</table>
Whoever owns the bridge demolishes and owns the salvage. So owning the bridge is central in this case. AED and KDC discussed blasting the bridge when they discussed selling it. It was the intent to have KCS blast the bridge. Demolishing is longer process, have to get stuff ready to go. Blasting is placing the explosives and ready to go. AED says it'll take 14 days to blast. After that you clean up what was exploded. The demo agreement has many problems, it's a question of fact and we're focusing on legal argument. We're not waiving anything on that. One problem is the proposal wasn't accepted by KDC, signed as received, but it contemplates a separate agreement to be entered. Term 1 says upon receiving a signed contract, #8 says another contract, Exh A to Crystals Affd. This contemplated an additional agreement was to be entered to. Parties were thinking KDC would be general contractor, AED would be subcontractor. That was discussed, KDC hired Delta to be general contractor. That was included in Exh A, reads. June 11 letter to W VA Dept of labor says bridge is owned by KDC. Delta to be general contractor. AED to act as a specialty contractor. KDC application says working as sub contractor. AED was going to be a sub to Delta contractor. Delta did supply a subcontract to AED which they refused to sign as they believed they had a signed agreement. I have not provided that to the court. Eric Kelly acknowledges receipt of that and wasn't going to sign. Ask the court to allow time to file that by Friday.

Delta did provide AED a subcontract and they did not sign. Then the logger heads started to happen. KDC didn't make the 30,000 payment, so AED got upset because no payment had been made. Page 4 of the proposal says AED was to provide permits. KDC was saying you can't to this until you get permits, I'm not sure why AED refused to do that. KDC was refusing to pay when they hadn't done any work. So both parties are getting fed up with each other. So KDC said we're done, we're not going to use you. That's where we're at factually. So the legal argument deal with ownership of the bridge and breach of contract. Purchase Agreement is unambiguous. AED cannot get past the four corners of the contract. KDC owns the bridge, the get to demolish it. AED is angry they haven't been paid, so they allege fraud. But they can't prove fraud. They didn't plead fraud. In the first Compliant we weren't sure what was plead. Three def, KDC, and the Chaklos'. They don't distinguish anything between the def. You have to plead facts for each def. Fraud has to be plead with particularity. We think it should be dismissed on those grounds. They're asserting we don't have standing. We're saying they can't prove fraud, they were administratively dissolved and can't carry on business. They can wind up afffairs, they can sell assets. They can sell the bridge, wind up business, can't enter into an agreement to do something new. So how can they rely on what they can't legally do. And they didn't have a West Virginia
<table>
<thead>
<tr>
<th>Time</th>
<th>Participant</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>09:59:36 AM</td>
<td>Schmitz</td>
<td>No evidence of fraudulent intent. All the evidence submitted shows the contrary. They got into a disagreement on when the 30,000 payment was to be made. That's past June 1. The only evidence AED has come forward with is the non payment. That's not enough to show fraud. Everything shows they were going to use AED until AED said we're going to sue you. Why didn't they just get the permits and licenses then turn to KDC and say we've got them and they need to pay. For these reasons fraud cannot be proven. They're not entitled to recission. The previous ruling is that they're not entitled to rescind the agreement. If they're not entitled to rescind then KDC owns the bridge, then KDC is entitled to have title quieted. They've submitted a Kelly affd, and attaching the contract between Barrik and AED. I'm assuming they're trying to show AED had an obligation. As the court noted the purchase agreement is unambiguous, they assigned everything to KDC to demolish the bridge. A party cannot come into court with unclean hands, not entitled to recission.</td>
</tr>
<tr>
<td>10:06:36 AM</td>
<td>Judge</td>
<td>I want to understand what you've just said, pause. Where's the nonassignable issue raised?</td>
</tr>
<tr>
<td>10:09:18 AM</td>
<td>Schmitz</td>
<td>I don't know if it's raised in the order from Judge Marbly. Para 34 page 11, reads. They haven't said if they've gotten Barricks permission. There is nothing in the purchase agreement to restrict AED to assign. As it stands now they can't rescind. So title would vest with KDC. Once we have the ownership issue determined then breach of contract is left. They're not entitled to specific performance. That's only used when legal remedies are inadequate. They can still attempt to prove breach of contract. They didn't have the West Virginia license until suit was filed. Idaho law is what they're trying to enforce. Looking to that, any contract prohibited by statue is void.</td>
</tr>
<tr>
<td>10:15:14 AM</td>
<td>Judge</td>
<td>I've read the brief and case, I understand your argument.</td>
</tr>
<tr>
<td>10:15:33 AM</td>
<td>Schmitz</td>
<td>OK, that's all I'll say about, if the court agrees we're entitled to summary judgment.</td>
</tr>
<tr>
<td>10:16:05 AM</td>
<td>Judge</td>
<td>Does the PL have objection to Delta subcontract being included in the record?</td>
</tr>
<tr>
<td>10:16:33 AM</td>
<td>Bistline</td>
<td>Yes, for purposes to blast the bridge there was a contract, based on rubbermaid. If the Court wanted to provide another MSJ hearing they could raise it</td>
</tr>
<tr>
<td>10:17:38 AM</td>
<td>Schmitz</td>
<td>The arguments are all there.</td>
</tr>
<tr>
<td>10:18:23 AM</td>
<td>Bistline</td>
<td>The reasons for filing Kelly affd are in response to strike the Affd. AED is not saying they can void the agreement with KDC. AED is still on the hook with feds. They've indicated they do not intend to blast the bridge. AED is not claiming the contract is void.</td>
</tr>
<tr>
<td>Time</td>
<td>Role</td>
<td>Text</td>
</tr>
<tr>
<td>--------------</td>
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<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>10:21:20 AM</td>
<td>Judge</td>
<td>As far as the agreement overlooked by the defense, file by end of business tomorrow. Will allow any objection to that, other than Rule 56, to be filed by Jan 19, response by Jan 21. Require defense to explain why it's relevant, PL can file why it's not relevant. Go ahead with MSJ argument Mr Bistline.</td>
</tr>
<tr>
<td>10:23:11 AM</td>
<td>Bistline</td>
<td>KDC says contract was to be under Idaho law, there's no provision for that. AED not having W VA license does not make contract void. There's no contemplation of not having the license, what they're trying to say is withholding payment is based on contractor license. There is no statement saying when you show the license we'll wire the money, that was never said. It's not an illegal contract. They're defending an action based on lack of contractor license, W VA says that's not a defense.</td>
</tr>
<tr>
<td>10:26:25 AM</td>
<td>Judge</td>
<td>What agreement does it say your clients needs to get license?</td>
</tr>
<tr>
<td>10:26:36 AM</td>
<td>Bistline</td>
<td>It's in the blast agreement, it's in the future tense. Crystal Affd,</td>
</tr>
<tr>
<td>10:28:28 AM</td>
<td>Judge</td>
<td>It seems that's limited to explosive permits.</td>
</tr>
<tr>
<td>10:28:40 AM</td>
<td>Bistline</td>
<td>It doesn't say they have to have a W VA contractor license. They're making things up. I write a letter saying give us the money or you'll get sued, that's my clients right. They made up a provision. AED paid money for explosives, they relied on this. The date of the fraud act, June 1, 2010, they faxed back the agreement with initials on every page saying it's the agreement. It's a promise to blow up the bridge. Officer of the corporation initialed every page. W VA says lack of a license is not a defense to a suit. IC 30-1-304, re: validity of corporation. Agreement to sell the bridge done in reliance of KDC. There's been no valid explanation for not paying the 30,000. They have no good reason for why they did this. On the recission issue, they raised that again in their brief.</td>
</tr>
<tr>
<td>10:34:53 AM</td>
<td>Schmitz</td>
<td>He's arguing reconsideration.</td>
</tr>
<tr>
<td>10:35:08 AM</td>
<td>Bistline</td>
<td></td>
</tr>
<tr>
<td>10:35:20 AM</td>
<td>Judge</td>
<td>What are you talking about?</td>
</tr>
<tr>
<td>10:35:34 AM</td>
<td>Bistline</td>
<td>Reply brief cites correct case. I've found cases back to 1910,</td>
</tr>
<tr>
<td>10:35:58 AM</td>
<td>Schmitz</td>
<td>We're getting into reconsideration issues.</td>
</tr>
<tr>
<td>10:36:13 AM</td>
<td>Bistline</td>
<td>From what I've found, Harder is decided correctly.</td>
</tr>
<tr>
<td>10:36:46 AM</td>
<td>Schmitz</td>
<td>Idaho law is in the proposal agreement, page 7 - the demo agreement, the blasting agreement. Under GC4 heading, reads, Exh A, under Crystals affd.</td>
</tr>
<tr>
<td>10:37:48 AM</td>
<td>Bistline</td>
<td>Agree he's correct.</td>
</tr>
<tr>
<td>10:37:55 AM</td>
<td>Judge</td>
<td>Let's move on.</td>
</tr>
</tbody>
</table>

AED Inc. vs. KDC Investments, LLC, et al, Supreme Court Case No. 38603-2011
<table>
<thead>
<tr>
<th>Time</th>
<th>Participant</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:38:03 AM</td>
<td>Schmitz</td>
<td>He's argued this under W VA case law. Page 437, KDC. You can't enforce a void contract. Crystal affd exh B, page 350, an email to Lisa Kelly, will make an effort to send the money but based on permits and approval. RE: fraud, need to satisfy pleading requirements. What they plead is insufficient. On reconsideration, we don't agree on this new case law changes anything. The reason it's mentioned in our brief is that it was filed the day we received the court's ruling. I didn't have a chance to take it out. My understanding is we're not going to argue that today.</td>
</tr>
<tr>
<td>10:42:33 AM</td>
<td>Judge</td>
<td>We're running to late. I'll take it under advisement and issue a decision.</td>
</tr>
</tbody>
</table>

Produced by FTR Gold™
www.fortherecord.com
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT 
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

YOU WILL PLEASE TAKE NOTICE that the undersigned has called up for hearing before

The Honorable John T. Mitchell on Wednesday, January 26, 2011, at 2:00 pm or as soon thereafter

as counsel may be heard, at the Kootenai County Courthouse, the following matter(s):

MOTION TO RECONSIDER MEMORANDUM DECISION HOLDING THAT PLAIN'TIFF IS NOT ENTITLED TO RESCISSION

If these matters are resolved, the moving party shall contact the judge's office to cancel this

hearing.

DATED this 12th day of January, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2011, I caused to be served a true and correct copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

Honorable John T. Mitchell
Kootenai County Courthouse

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY:  

JENNIFER JENKINS

JENNIFER JENKINS
Lee Chaklos, being first duly sworn upon oath, deposes and states as follows:

1. I am one of the Defendants in the above-entitled action and, as such, have personal knowledge of the facts set forth herein.

SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1
2. I am the President and sole shareholder of Delta Demolition Group, Inc. ("Delta Demo").

3. KDC hired Delta Demo to act as the general contractor responsible for demolishing the Bellaire Toll Bridge (the "Bridge").

4. AED was to act as an independent subcontractor to Delta Demo for purposes of blasting the Bridge. Delta Demo sent AED a subcontract for this purpose.

5. Attached hereto as Exhibit "A" is a true and correct copy of an email dated June 25, 2010, that I sent to AED with Delta Demo's standard form subcontract as an attachment. Also attached as Exhibit "A" is a true and correct copy of Mr. Kelly's email dated June 27, 2010, to Mark Wilburn from AED, on which I was copied, wherein Mr. Kelly states that he does not agree with Delta Demo's form subcontract and will not let the AED proposal be superseded by any other agreement.

Subscribed and sworn to before me this 13 day of January, 2011.

Lee Chaklos

Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment - 2
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telexcopy
Email arthurmooneybistline@me.com

Randy L. Schure

SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 3
-- On Sun, 6/27/10, Eric J Kelly <eric@biggerblast.com> wrote:

From: Eric J Kelly <eric@biggerblast.com>
Subject: FW: Subcontractor agreement
To: "Mark Wilburn" <mark@biggerblast.com>
Cc: deltademo@yahoo.com
Date: Sunday, June 27, 2010, 2:27 PM

Mark,

Look this over and tell me what you think.

I do not agree with this form at all. Our Contract/Proposal Agreement has not been complied with and what makes us believe this one will likewise.

The AED proposal will not be superseded by any other agreement.

These people always look for ways to stall for time. Find out if the permit for phase 1 has been issued on Monday please. If it has, and they have not complied with the Original Proposal terms, there’s no need for us to give them ammunition to stall and/or think they own the bridge. They have violated the original terms. I was advised by our lawyer in Ohio to place an injunction on the sale since the terms were violated and contract was breached.

Krystal and Lee Chaklos stated, and I quote “we will forward the $30,000 when we receive our first permit”. This is:
1. Contrary to the June 1st contract signed with the Sales Agreement

2. Contrary to the June 9th payment terms signed by Krystal Chaklos

3. A deliberate breach of contract which allows us to rescind on the Agreement.

Just so there are no ambiguities, AEO does not agree to this Mickey Mouse form. It has no foundation to precede an already endorsed contract.

What are they attempting to do? You can advise them if they want AEO off the job to pay $75,000. After receipt of the funds, AEO will absolve all persons of legal restitution and formalities.

Thanks,

Eric J. Kelly

From: Krystal Chaklos [mailto:dellademo@yahoo.com]
Sent: Friday, June 25, 2010 8:33 PM
To: Eric@biggerblast.com
Cc: mark@biggerblast.com
Subject: Subcontractor agreement

To: Eric Kelly

DBA:AED

From: Lee Chaklos

DBA:DDG (General Contractor Job #WV012010)
Please see attached requirements.

Once all requests are in compliance, Delta will sign approval.

best regards,

No virus found in this incoming message.
Checked by AVG - www.avg.com
Version: 9.0.851 / Virus Database: 271.1.1/3089 - Release Date: 08/23/10 02:35:00

No virus found in this message.
Checked by AVG - www.avg.com
Version: 10.0.1153 / Virus Database: 424/3244 - Release Date: 11/08/10

Click here to report this email as spam.
Delta Demolition Group
400 Jonathan’s Cove Court
Virginia Beach, Virginia

SUBCONTRACT

Address

Project

Location

Job Telephone

Architect/Engineers

Delta Demolition, (hereafter Contractor) and Subcontractor agree as follows:

1. Subcontractor agrees to provide all labor, materials, scaffolds, tools and equipment to perform the following work:

   [Blank lines for work description]

   (hereafter Work) for the above named Project in accordance with and as shown on the Plans and Specifications and the General and Special Conditions of the Contract prepared by the above named Architect/Engineers more specifically identified as follows:

2. Subcontractor agrees to perform the Work in accordance with job progress schedules that may be revised from time to time and job demands and complete the Work on or before ________.

3. Contractor agrees to pay Subcontractor the Contract Sum of $_______, in current funds in monthly payments and a final payment as herein provided, subject to additions and deductions as herein provided, which Contract Sum shall include all permits, fees, inspection costs and sales and/or use taxes required by any governmental authority.

4. Subcontractor assumes for the Work covered by this Subcontract, all obligations placed upon Contractor in the General Contract between Contractor and Owner, the General and Special Conditions, if any, and the Plans and Specifications above described, all of which are incorporated herein and made a part hereof. The Work shall be performed by Subcontractor to the satisfaction of the Owner, Architect/Engineers and Contractor, and in accordance with all ordinances, rules, regulations and requirements of any and all governmental authorities and with all applicable Federal State or local codes. Subcontractor shall obtain and pay for all permits and licenses pertaining to the Work required by any governmental authority as part of the Contract Sum.

5. Before commencing the Work, Subcontractor shall procure and continue in full force and effect until completion of the Work at least the following insurance:
   a. Worker’s Compensation and Employer’s liability insurance with limits and endorsements at least equal to that in force for the Contractor.
   b. General Liability Insurance naming the Contractor as an additional insured on the subcontractor’s commercial general liability policy, which additional insured status shall be on a primary basis, with the following minimum limits unless prescribed at a higher level in the contract document:
      i. General Aggregate (on “per project” basis) $2,000,000
      ii. Products/Completed Operations Aggregate $2,000,000
      iii. Personal/Advertising Injury $1,000,000
      iv. Each Occurrence $1,000,000
   c. Automobile Liability insurance with a $1,000,000 Limit.
   d. Commercial Umbrella (with the Contractor named Additional Insured) $4,000,000
   e. Insurance coverage at least equal to in both amount and type of coverage for any insurance coverage the Contractor may need for the specific job. This includes, but is not limited to, USL&H and Marine Employers Liability (Jones Act).

   Before commencing the Work, Subcontractor shall furnish certificates to Contractor showing the above insurance is in full force and shall also furnish satisfactory evidence that Subcontractor is properly licensed to do business and perform this Subcontract and that all necessary permits covering the Work have been obtained. The additional insured coverage required by this section shall include both work in progress (i.e. ongoing operations) and completed work (i.e. completed operations). The additional insurance coverage required by this section shall be maintained for a period of 12 months following the date all operations under this subcontract are completed. In addition, the subcontractor shall give the contractor thirty (30) days advance written notice before the Subcontractor cancels any of the insurances required by this section.

6. The following special provisions shall apply to the Subcontract:
   a. Subcontractor shall provide to Contractor a completed IRS Form W-9 Request for Taxpayer Identification Number and Certification or an acceptable substitute of Form W-9.
• Subcontractor must provide a copy of their bond/safety program to Contractor before starting work.
• Insurance Certificates must name this job specifically (unless this is an annual contract).
• Performance as described in Article 5 of the General Terms and Conditions of this agreement will initiate a $500.00 per day damage assessment.
• Subcontractor is responsible for all costs to remove and dispose of hazardous material created by Subcontractor, their employees or equipment, or created as a result of or during the course of their work.

7. This written Subcontract specifically including the General Terms and Conditions set forth on the back thereof, and further specifically including the other contract documents incorporated herein by reference, constitutes our complete agreement and supersedes any oral or written negotiations.

MODIFICATIONS OF THESE TERMS AND PROPOSED EXTRAS TO THIS SUBCONTRACT MUST BE SUBMITTED IN WRITING AND SIGNED BY PROJECT MANAGER (NOT JOB SUPERINTENDENT) TO BE VALID.

CONTRACTOR

By: ____________________________  
Title: ____________________________  
(SUBCONTRACTOR)  

GENERAL TERMS AND CONDITIONS

1. Interpretation of Plans, Corrective Work Guarantee. The Work included under this Subcontract is to be done to the satisfaction of the Architect/Engineer, and the decision of the Architect/Engineer shall be final. Subcontractor shall immediately take down all portions of the Work, and remove all materials condemned by the Architect/Engineer and/or Contractor as being improper, unsound, or not in conformity with the Plans and Specifications; and Subcontractor, at its own expense, shall make such condemned Work good. All Work executed under this Subcontract shall be guaranteed free from defective materials and workmanship for a period of one (1) year from the date of the final certificate of the Architect/Engineer, or the guarantee period set forth in other contract documents, whichever period is longer. Contractor may retain any monies due Subcontractor until all corrections required by Subcontractor are completed.

2. Monthly and Final Payments. If requested by Contractor, Subcontractor shall submit a detailed schedule showing the subdivision of the Contract Sum into its various parts for the purpose of checking requisitions before commencing the Work. On or before the last day of each month, Subcontractor shall submit to Contractor in the form required a written requisition for payment for the proportionate value of the Work installed to that date, which requisition shall be approved for payment by Contractor’s Project Manager. The monthly requisitions less a reserve of 10% will be paid during the succeeding month after Contractor receives payment from the Owner. Any reserve withheld from subcontractor will be paid within 30 days of all of the following: (a) receipt of a lien waiver from subcontractor, (b) receipt by contractor of all reserve withheld by Owner, and (c) the resolution of all subcontractor punch list items to the satisfaction of Owner, contractor, and architect/engineer.

3. Change Orders and Extras. No alterations, changes, deductions, or "extras" in or to the Work shall be made except on the written order of Contractor signed by the Project Manager, not the Superintendent, and when so made the value thereof stated in the order shall be added or deducted from the Contract Sum. Subcontractor shall not negotiate directly with Owner and if Owner or Architect/Engineer should direct or request any alteration, change, deduction or extra, Subcontractor shall refer such direction or request to Contractor.

4. Labor. All labor throughout the Work shall be acceptable to the Owner and Contractor and of a standard of skill and quality that will permit the Work to be carried on harmoniously, without delay, and that will in no case, or under any circumstances, cause any disturbance, interference, or delay to the progress of the building, structure, facilities, or any other work being carried on by the Owner or Contractor in any other local. Should labor fail to meet this standard, Contractor may terminate this Subcontract and Subcontractor will be paid for Work completed prior to the cancellation.

5. Delay, Default & Termination. Should Subcontractor at any time refuse or neglect to supply a sufficiency of skilled workmen, materials of the proper quality and quantity, or fail in any respect to prosecute the Work with promptness and diligence, or cause by any action or omission the stoppage or delay of or interference with the Work or of any other Subcontractors or otherwise be in default of the subcontract, Contractor may after twenty-four (24) hours written notice addressed to the Subcontractor at the address noted on the reverse side of this Subcontract, provide through itself or through others, any such labor or materials, and deduct the cost thereof from any money due or thereafter to become due the Subcontractor. In case of such termination of employment of Subcontractor, said Subcontractor shall not be entitled to receive any further payment under this Subcontract until the said Work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed expense incurred by Contractor in finishing said Work, such excess shall be paid to Subcontractor. If expense shall exceed such unpaid balance, Subcontractor shall pay the difference to Contractor, including any damages for delay. If the General Contract between
the Owner and Contractor is terminated, contractor may also terminate this Subcontract by giving Subcontractor prorata for all Work they performed under this Subcontract and the actual cost of any materials specially fabricated hereunder less salvage value.

6. Clean-up. Subcontractor shall keep the premises free from accumulation of waste material and rubbish, and at the completion of the Work, shall remove from the premises all of its rubbish, implements, and surplus materials and shall leave the premises broom clean. Should Subcontractor fail to remove its debris, Contractor will remove it and charge the cost to the Subcontractor.

7. Liens. Subcontractor shall submit, with each monthly requisition, evidence that all sub-subcontractors, or persons furnishing to Subcontractor material, and any other person who might claim a mechanic’s lien through Subcontractor, have been paid by furnishing with each such monthly requisition a partial release of lien from such sub-subcontractor, materialmen, or other persons claiming a lien. With each such monthly requisition, Subcontractor shall also furnish to Contractor its partial release of lien. Upon making application for final payment, Subcontractor shall again furnish evidence, if requested to do so by Contractor, that all sub-subcontractors and persons furnishing material have been paid and shall also procure for Contractor final releases of lien from all such sub-subcontractors, persons furnishing material, and any other person who might claim a lien through Subcontractor. If at any time there shall be evidence of a lien or claim for which, if established, Contractor or Owner might become liable and which is chargeable to Subcontractor, the Contractor shall have the right to retain out of any payment due, or to become due, an amount sufficient to indemnify Contractor and Owner against such lien or claim and to charge or deduct all the cost of defense therefore, including reasonable attorney’s fees.

8. Assignment & Sub-Subcontracting. The performance of this Subcontract may not be assigned by Subcontractor without first obtaining consent therefor, in writing, from Contractor. In the event Subcontractor assigns the right to receive the Contract Sum, upon written notice thereof, the Subcontractor agrees that all payments to become due under Subcontract shall be by joint check to the Subcontractor and its assignee.

9. Indemnity. Subcontractor does hereby indemnify and save the Contractor, Owner, and Architect/Engineer harmless of and from any loss, damage, cost, and expense which the Contractor, Owner, and/or Architect/Engineer may suffer, sustain, or be threatened with liability for arising either under any Workmen’s Compensation Law or otherwise, out of the performance of this Subcontract by Subcontractor, his agents, employees, materialmen, or sub-subcontractors; and Subcontractor acknowledges and agrees that one hundred ($100.00) dollars of the Contract Sum represents the specific consideration paid by Contractor for all of the indemnifications from Subcontractor to Contractor, Owner, and Architect/Engineer, under the terms of this Subcontract and the Contract documents made a part thereof.

10. Governing Law. This Subcontract shall be construed under, and in accordance with, the provisions of the law of the State where the project is located.

11. Time. It is expressly agreed that time is the essence of this Subcontract and Subcontractor agrees to timely perform the Subcontract, it being further understood that should the Subcontractor be delayed in the prosecution or completion of the Work by act, neglect, or default of Contractor; or for any other causes, then the Subcontractor shall be entitled to an extension of time within which to perform the Subcontract, which shall be the Subcontractor’s sole remedy, provided, however, that Subcontractor notifies Contractor in writing that an extension of time will be required.

12. Shop Drawings. The Subcontractor shall prepare and submit to Contractor such shop drawings as may be necessary to completely describe the details of construction of the Work. Approval of these shop drawings by Contractor and/or Architect/Engineer will not relieve the Subcontractor of its obligation to perform the work in strict accordance with the Plans and/or Specifications or the proper matching and fitting of the Work with contiguous work.

13. Loss or Damage to Work. Contractor shall not be responsible for loss or damage to the Work included in this Subcontract until after final acceptance of the Work by the Contractor and/or Architect/Engineer, nor shall it be responsible for loss or damage to materials, tools, or appliances of the Subcontractor used, or to be used, in the prosecution of the Work however caused. In the event that there is damage to any shipment of materials furnished under this Subcontract, Subcontractor shall fill out necessary claim forms and make necessary collections.

14. Attorney’s Fees. In the event it becomes necessary for Contractor to enforce this Subcontract to secure the performance thereof or to assert any claim against Subcontractor, Subcontractor agrees to pay a reasonable attorney’s fee and any costs incurred thereby.

15. Severable Terms. These Terms and Conditions are severable and to the extent any of them may violate any applicable law, statute or ordinance, the same shall be void but all others shall remain in full force and effect.
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Case No. CV 10-7217

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

At the hearing on Defendants' Motion for Summary Judgment held on January 12, 2010, counsel for defendants requested the opportunity to submit a supplemental affidavit attaching the subcontract Delta Demolition Group, Inc. ("Delta Demo") sent to AED. The Court indicated it would allow defendants to submit the affidavit and exhibit, with a brief explanation of the exhibit's relevance, as long as it was submitted by the end of business on January 13, 2010. Plaintiff would then have one week, or by January 19, 2010, to lodge an objection, if any.

DISCUSSION

The Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment ("Supplemental Affidavit") and the attached subcontract are submitted as factual support of the transactional history between the parties. It is not offered at this time as evidence that AED breached any agreement with KDC or Delta Demo. Rather, it is offered as further evidence that KDC intended, on June 1, 2010, and thereafter, to hire AED to blast the Bridge.

On June 1, 2010, AED sent a Proposal to KDC (AED refers to the Proposal as the "demolition agreement"). The cover letter sent with the Proposal anticipates that KDC was to act as the general contractor for demolishing the Bridge. (Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment ("Krystal Aff."), Ex. A., KDC 000431). The Proposal indicates a separate agreement would be entered between the parties. (Id at KDC000432-433). However, KDC was acting as the owner and hired Delta Demo to act as the general contractor. (Id at ¶ 5; Affidavit of Lee Chaklos in Support of Motion for Summary Judgment, ¶ 4). The fact that Delta Demo was to act as the general contractor is supported by AED's own submissions to various City of Benwood and West Virginia state agencies. (Id, Ex

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 2
A. KDC000440-441; 446; 449; and 451). Since AED was going to be a subcontractor to the general contractor, it meant AED would need a subcontract with Delta Demo. Exhibit A to the Supplemental Affidavit is evidence that Delta Demo sent a subcontract to AED for that purpose.

Exhibit A to the Supplemental Affidavit is relevant to show that KDC and Delta Demo were still taking steps after June 1, 2010, to hire AED to blast the Bridge. If they were still taking steps on June 25, 2010, to hire AED, then KDC must have had the intent to hire AED to blast the Bridge on June 1, 2010. This evidence directly contradicts AED’s fraud claim. AED has not produced a single document or affidavit, other than claiming KDC breached the Proposal (aka “demolition agreement”), to show that on June 1, 2010, KDC did not intend to allow AED to blast the Bridge.

While the Delta Demo subcontract, along with AED’s documents to the City of Benwood and state of West Virginia, are evidence that there was no meeting of the minds as to all the material terms of the Proposal (aka “demolition agreement”), it is not offered for that purpose at this time. Instead, it is offered as corroborating evidence that on June 1, 2010, KDC intended to hire AED to blast the Bridge.

RESPECTFULLY SUBMITTED this 13th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke / Of the Firm
Randall L. Schmitz / Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 3
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

Randall L. Schmitz

MEMORANDUM IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 4
In the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

AED, Inc., an Idaho corporation

Plaintiff,

vs.

KDC Investments, LLC, a Virginia LLC, and Lee Chaklos and Krystal Chaklos, individually

Defendants.

Case No. CV10-7217

Plaintiff’s Argument Regarding Affidavit of Lee Chaklos Pertaining to Subcontractor Proposal

At hearing, KDC referenced the proposed subcontract form in an attempt to call the validity of the existing blasting contract into question. KDC stated that it showed that the parties had material terms left to reach agreement upon. When and if the issue of the somewhat sloppy language of the blasting contract is properly raised, the evidence will show that it is the product of home grown legal work, which does not change the fact that the parties intended it to be the binding agreement between them, and that it contains all material terms.

Now, KDC seeks to introduce the subcontract form as evidence that KDC intended to hire AED. Whether or not KDC ever intended to fulfill its promise that AED would demolish the bridge is a question of fact. Allowing the subcontract form into evidence at this stage of the
proceeding only highlights this question of fact so AED does not object to its introduction and makes the following argument.

In Losee v. Idaho Co, 148 Idaho 219, 220 P.3rd 575 (2009), the Losee’s argued that they were not told a deed of trust would be a lien and were told that it would not be recorded. A trust deed is to secure repayment of a sum of money. No reasonable person would think it did not create a lien or that the bank would not record it. The bank testified on summary judgment that the Losee’s were told it would be recorded. Nevertheless, the Supreme Court said the issue of fraudulent inducement should not have been decided on summary judgment. Id at 223-224, 579 - 580. Here, KDC immediately and without any explanation breached the parties agreement and thereafter sent AED a meaningless form which served no purpose, other than perhaps to try and create the ability to make the very argument that KDC tried to make at summary judgment - that the parties had not yet reached an agreement.

KDC never took the position that it did not have a binding contract with AED to blast the bridge until KDC’s attorney took that position more than a month after the $30,000 was due. When KDC was receiving demands for payment of the $30,000 deposit, it did not respond, “we are not paying you until we have a deal,” which is what any reasonable person would say to such a request if in fact they did not think they had a deal. No evidence is before this Court that KDC indicated at any point that the reason it was breaching its obligation to pay was the failure of AED to do something with the subcontractor agreement form. Likewise, no evidence is before this Court that KDC or Delta ever presented a complete proposal. What was presented accomplished nothing so it is reasonable to assume it was just some tactic in sending it to AED.

The proposed subcontract form was a proposal for a new contract when a contract already existed and it contained no material terms. The scope of work at paragraph 1, the date of
completion at paragraph 2, and the price at paragraph 3 are all blank. Other than the blank material terms, the subcontract agreement form speaks to the same exact subject matter as the original blasting agreement, but modifies the terms and proposes additional terms which are not essential terms.

No evidence is before the Court KDC has advanced no argument whatsoever that the failure of AED to take some action with this form had anything to do with KDC's withholding payment. KDC presentation of this subcontractor agreement form to AED was nothing more than a stall and any reasonable juror could so conclude.

DATED this 26th day of January, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[ ] Facsimile to (208)395-8585
[ ] Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[ ] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: LEANNE VILLA
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation, Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Case No. CV 10-7217

REPLY IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT


REPLY IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1
INTRODUCTION

At the hearing on Defendants' Motion for Summary Judgment held on January 12, 2010, counsel for defendants requested the opportunity to submit a supplemental affidavit attaching the subcontract Delta Demolition Group, Inc. ("Delta Demo") sent to AED. The Court indicated it would allow defendants to submit the affidavit and exhibit, with a brief explanation of the exhibit's relevance, as long as it was submitted by the end of business on January 13, 2011. Plaintiff would then have one week, or by January 19, 2011, to lodge an objection, if any.

DISCUSSION

Defendants submitted the Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment ("Supplemental Affidavit") and the attached subcontract on January 13, 2011, as required by the Court. Despite confirming with defense counsel that plaintiff's objection, if any, was due by January 19, 2011, plaintiff did not file its Argument Regarding Affidavit of Lee Chaklos Pertaining to Subcontractor Proposal ("Plaintiff's Argument") until January 20, 2011. Therefore, defendants object to Plaintiff's Argument as being untimely.

Furthermore, in reference to the subcontract attached to the Supplemental Affidavit, plaintiff states that "AED does not object to its introduction." However, plaintiff then improperly adds additional argument in opposition to defendants' motion for summary judgment. Plaintiff's objection was to be limited to the admissibility of the subcontract. Since AED had no objection to its introduction, its argument should have ended there. This was not an opportunity for plaintiff to have another bite at the summary judgment apple and certainly not an opportunity to cite additional case law. Therefore, defendants object to the arguments and case law included...
in Plaintiff's Argument after the second full paragraph in which plaintiff states it has no objection to introducing the subcontract.

In the event the Court entertains plaintiff's arguments, defendants offer the following brief response. Plaintiff mistakenly contends that KDC referenced the subcontract at the hearing in an attempt to question the validity of the “demolition agreement.” As explained at the hearing and in the Memorandum in Support of Supplemental Affidavit, the subcontract is offered as evidence to refute plaintiff's fraud claim. It is offered as further evidence that KDC intended, on June 1, 2010, and thereafter, to hire AED to blast the Bridge.

Plaintiff is also incorrect that any question of fact renders summary judgment inappropriate. To the contrary, once evidence is introduced to support the summary judgment motion, the non-moving party must come forward with evidence to establish a genuine issue of material fact. To establish a genuine issue of material fact, then, the non-moving party must do more than recite general or conclusory allegations and must produce more than a “mere scintilla” of evidence. *Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 618, 717 P.2d 1033, 1036 (1986) (unsupported general or conclusory allegations are not sufficient in the face of a motion for summary judgment); *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 549, 691 P.2d 787, 795 (Ct. App. 1984) (the creation of "only a slight doubt as to the facts will not defeat a summary judgment motion"); *Tri-State Nat'l. Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 447 P.2d 409 (1968) (to forestall summary judgment, more is required than raising "slightest doubt as to the facts").

The Ninth Circuit has expressly stated that “[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment.” *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987), cert. denied, 484 U.S. 1006 (1988).
plaintiff cannot rest upon the allegations in his complaint, but must establish each
element of his claim with "significant probative evidence tending to support the
complaint." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n., 809 F.2d
626, 630 (9th Cir.1980). Genuine issues of material fact are not raised by
conclusory or speculative allegations, and the purpose of summary judgment is
not to replace conclusory allegations in pleading form with conclusory allegations
in an affidavit. Anderson, 477 U.S. at 249. The party opposing the motion must do
more than simply show that there is some metaphysical doubt as to the material
1348, 89 L.Ed.2d 538 (1986). "A plaintiff's belief that a defendant acted from an
unlawful motive, without evidence supporting that belief, is no more than
speculation or unfounded accusation about whether the defendant really did act
from an unlawful motive." Carmen v. San Francisco Unified School Dist., 237
F.3d 1026, 1028 (9th Cir.2001).


Plaintiff has not even produced a mere scintilla of evidence in opposition. It rests on its
general conclusory allegations that KDC breached the "demolition agreement" and a jury could
conclude fraud was committed. That is not sufficient to avoid summary judgment in the face of
the documents and affidavits submitted by defendants.

RESPECTFULLY SUBMITTED this 21st day of January, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

REPLY IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT - 4
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

REPLY IN SUPPORT OF SUPPLEMENTAL AFFIDAVIT OF LEE CHAKLOS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 5
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Case No. CV 10-7217

NOTICE OF TAKING DEPOSITION DUces TECUM OF ERIC KELLY

Date: January 27, 2011
Time: 9:00 a.m.

YOU WILL PLEASE TAKE NOTICE that Defendants, KDC Investments, LLC ("KDC"), Lee Chaklos and Krystal Chaklos, by and through its counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., will take the deposition of ERIC KELLY, at the Kootenai County Courthouse, 324 W. Garden Avenue, Couer d'Alene, Idaho, (208) 446-1765 (ask for Bailiff Rick or Jury Commissioner Pete Barnes at the Bailiff's Desk when entering courthouse), commencing at 9:00 a.m. on Thursday, January 27, 2011, and continuing from time to time until completed, at

NOTICE OF TAKING DEPOSITION DUces TECUM OF ERIC KELLY - 1
which place and time you are invited to appear and take part in such deposition as you deem proper.

The deponent is required to bring with him the following:

1) Any journals, diaries, summaries, statements, notes or other written materials prepared or maintained by deponent, which documents refer or relate to any facts relative to this lawsuit.

2) Copies of all documents, photographs, video tapes, audio tapes or illustrations in deponent’s possession which have not previously been provided to defendants and which relate in any way to plaintiff’s claims or damages claimed in this action.

3) All other documents relevant to plaintiff’s claims in this action which have not previously been provided to defendants.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

DATED this 21st day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

NOTICE OF TAKING DEPOSITION DUCES TECUM OF ERIC KELLY - 2
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
Facsimile: (208) 665-7290  

M&M Court Reporting  
816 E. Sherman Ave, Ste 7  
Coeur d'Alene, ID 83814  
PHONE: 208-765-1700 or 800-879-1700  
FAX: 208-765-8097  

U.S. Mail, Postage Prepaid  
Hand Delivered  
Overnight Mail  
Telecopy  
Email arthurmooney@bistline@me.com  

U.S. Mail, Postage Prepaid  
Hand Delivered  
Overnight Mail  
Telecopy 208/765-8097  
Email  

Randall L. Schmitz

NOTICE OF TAKING DEPOSITION DUCES TECUM OF ERIC KELLY - 3
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,
   Plaintiff,
   vs.
   KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL
   CHAKLOS, individually,
   Defendants.

Case No. CV 10-7217

NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY

Date: January 27, 2011
Time: 1:00 p.m.

YOU WILL PLEASE TAKE NOTICE that Defendants, KDC Investments, LLC
(“KDC”), Lee Chaklos and Krystal Chaklos, by and through its counsel of record, Hall, Farley,
Oberrecht & Blanton, P.A., will take the deposition of LISA KELLY, at the Kootenai County
Courthouse, 324 W. Garden Avenue, Coeur d’Alene, Idaho, (208) 446-1765 (ask for Bailiff Rick
or Jury Commissioner Pete Barnes at the Bailiff’s Desk when entering courthouse), commencing
at 1:00 p.m. on Thursday, January 27, 2011, and continuing from time to time until completed, at

NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY - 1
which place and time you are invited to appear and take part in such deposition as you deem proper.

The deponent is required to bring with her the following:

1) Any journals, diaries, summaries, statements, notes or other written materials prepared or maintained by deponent, which documents refer or relate to any facts relative to this lawsuit.

2) Copies of all documents, photographs, video tapes, audio tapes or illustrations in deponent’s possession which have not previously been provided to defendants and which relate in any way to plaintiff's claims or damages claimed in this action.

3) All other documents relevant to plaintiff’s claims in this action which have not previously been provided to defendants.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

DATED this 21st day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY - 2
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d’Alene, ID 83814
Facsimile: (208) 665-7290

M&M Court Reporting
816 E. Sherman Ave, Ste 7
Coeur d’Alene, ID 83814
PHONE: 208-765-1700 or 800-879-1700
FAX: 208-765-8097

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy
- Email arthurmooneybistline@me.com
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy 208/765-8097
- Email

Randall L. Schmitz

NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY - 3
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

NOTICE IS HEREBY GIVEN that on the 21st day of January, 2011, a true and correct original of DEFENDANT KDC INVESTMENTS, LLC’S RESPONSES TO PLAINTIFF’S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS, together with a copy of this Notice of Service were served by the method indicated below and addressed to the following:

NOTICE OF SERVICE OF DISCOVERY - 1
NOTICE OF SERVICE OF DISCOVERY - 2
ATTORNEY FOR PLAINTIFF

208-665-7290 p. 1

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYS'TAL
CHAKLOS, individually,

Defendants.

Case No. CV10-7217

PLAINTIFF'S RESPONSE TO
DEFENDANTS' REPLY REGARDING
SUPPLEMENTAL AFFIDAVIT OF LEE
CHAKLOS

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to
Defendant's Reply In Support of Supplemental Affidavit of Lee Chaklos In Support of Motion
for Summary Judgment filed with this court dated January 21, 2011, as follows:

Defendants can show no prejudice by the fact that the response was one day late and are
in no position to argue that this Court should not consider argument that was submitted in
violation of a scheduling order. KDC submitted the proposed subcontractor form in violation of
I.R.C.P. 56 as it was not submitted in KDC's opening filings or even in reply. Furthermore,
KDC attempted initially to submit the document to show that KDC does not think it had a
contract which had nothing to do with the issues raised on summary judgment.
This proposed subcontractor form was presented at hearing and none of the argument raised in the submittal of the affidavit after the hearing were raised at hearing. KDC argued in submitting this affidavit that it is evidence of KDC’s intention to use AED as it had promised. If this Court is going to allow KDC to violate I.R.C.P. 56 and accept this document, AED certainly has the right to comment on the evidence.

DATED this 24th day of January, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: ________________________________
LEANNE M. VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation, Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Case No. CV 10-7217

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF
ERIC KELLY

Date: January 27, 2011
Time: 9:00 a.m.

YOU WILL PLEASE TAKE NOTICE that Defendants, KDC Investments, LLC ("KDC"), Lee Chaklos and Krystal Chaklos, by and through its counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., will take the deposition of ERIC KELLY, at Bistline Law, 1423 N. Government Way, Coeur d'Alene, Idaho, (208) 665-7270, commencing at 9:00 a.m. on Thursday, January 27, 2011, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF ERIC KELLY - 1
The deponent is required to bring with him the following:

1) Any journals, diaries, summaries, statements, notes or other written materials prepared or maintained by deponent, which documents refer or relate to any facts relative to this lawsuit.

2) Copies of all documents, photographs, video tapes, audio tapes or illustrations in deponent’s possession which have not previously been provided to defendants and which relate in any way to plaintiff’s claims or damages claimed in this action.

3) All other documents relevant to plaintiff’s claims in this action which have not previously been provided to defendants.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

DATED this 25th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

M&M Court Reporting
816 E. Sherman Ave, Ste 7
Coeur d'Alene, ID 83814
PHONE: 208-765-1700 or
800-879-1700
FAX: 208-765-8097

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF ERIC KELLY - 3
John J. Burke  
ISB #4619; jjb@hallfarley.com  
Randy L. Schmitz  
ISB #5600; rls@hallfarley.com  

HALL, FARLEY, OBERRECHT & BLANTON, P.A.  
702 West Idaho, Suite 700  
Post Office Box 1271  
Boise, Idaho 83701  
Telephone: (208) 395-8500  
Facsimile: (208) 395-8585  

Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,  
Plaintiff,  

vs.  

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,  
Defendants.  

Case No. CV 10-7217

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY

Date: January 27, 2011  
Time: 1:00 p.m.

YOU WILL PLEASE TAKE NOTICE that Defendants, KDC Investments, LLC ("KDC"), Lee Chaklos and Krystal Chaklos, by and through its counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., will take the deposition of LISA KELLY, at Bistline Law, 1423 N. Government Way, Couer d'Alene, Idaho, (208) 665-7270, commencing at 1:00 p.m. on Thursday, January 27, 2011, and continuing from time to time until completed, at which place and time you are invited to appear and take part in such deposition as you deem proper.

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY - 1
The deponent is required to bring with her the following:

1) Any journals, diaries, summaries, statements, notes or other written materials prepared or maintained by deponent, which documents refer or relate to any facts relative to this lawsuit.

2) Copies of all documents, photographs, video tapes, audio tapes or illustrations in deponent's possession which have not previously been provided to defendants and which relate in any way to plaintiff's claims or damages claimed in this action.

3) All other documents relevant to plaintiff's claims in this action which have not previously been provided to defendants.

The above deposition will be conducted pursuant to the Idaho Rules of Civil Procedure before a Notary Public of the State of Idaho, or such other officer authorized by law to administer oaths.

DATED this 25th day of January, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By ________________________________

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of January, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
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FAX: 208-765-8097

U.S. Mail, Postage Prepaid  
Hand Delivered  
Overnight Mail  
Telecopy  
Email arthurmooneybistline@me.com

U.S. Mail, Postage Prepaid  
Hand Delivered  
Overnight Mail  
Telecopy 208/765-8097  
Email

Randall L. Schmitz

AMENDED NOTICE OF TAKING DEPOSITION DUCES TECUM OF LISA KELLY - 3
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I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant KDC Investments LLC's (KDC) Motion for Summary Judgment filed December 15, 2010.

This Motion for Summary Judgment follows on the heels of KDC's Motion for Preliminary Injunction filed November 17, 2010, which was denied on December 15, 2010, as this Court found there are too many unanswered questions to grant such relief. Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, p. 27-28. The following facts are taken from that December 15, 2010, "Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction":

This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1.
Defendant KDC bought the bridge from plaintiff AED, Inc. (AED) via a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that "purchase agreement", KDC assumed responsibility for "proper demolition and removal [of the bridge] on or before June 1, 2011." Id., p. 1. Subsequently, a separate "demolition agreement" between the parties was at least discussed, if not executed. At the end of the "demolition agreement" AED's Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC's Krystal Chaklos, also on June 1, 2010. However, the "demolition agreement" which is titled a "proposal" lacks a signature by any person from KDC on the first page "accepting" the agreement. The "purchase agreement" clearly places the responsibility to demolish the bridge on KDC. The "demolition agreement", if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC's efforts to demolish the bridge stopped as a result of a letter sent the United States Coast Guard "...until the court sorts out ownership of the Bellaire Bridge." Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction "...prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge..." Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter "KDC" collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: "Said promise was material to the parties' transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge." Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the "purchase agreement." The "purchase agreement" places the responsibility for demolition of the bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED's Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this
Court to enjoin "AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011." Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants' Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC's motion. On November 22, 2010, KDC filed its Reply to Plaintiff's Objection to Defendant KDC Investments, LLC's Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply complain that KDC had violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the November 24, 2010, hearing, the Court re-scheduled oral argument on KDC's motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a "Motion to Strike Portions of Krystal Chaklos Affidavit." On November 24, 2010, AED also filed the "Affidavit of Mark Wilburn in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction" and the "Affidavit of Eric J. Kelly in Support of Plaintiff's Objection to Issuance [sic] of Preliminary Injunction." On November 29, 2010, AED filed "Plaintiff's Response to Issuance of Preliminary Injunction", providing the Court with AED's substantive arguments regarding KDC's motion for preliminary injunction. On December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Reply in Support of Motion for Preliminary Injunction." Also on December 2, 2010, KDC filed "Defendant KDC Investments, LLC's Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn." On December 3, 2010, KDC filed an "Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction" and an "Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction".

On December 6, 2010, the same day scheduled for oral argument, AED filed a "Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos" and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled "Plaintiff's Notice of Filing" to which was attached the Idaho Secretary of State's Corporation Reinstatement Certificate dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED's motion to shorten time to hear AED's Motion to Strike Affidavits of Krystal Chaklos.
and Lee Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED’s Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.

Next, argument was heard on KDC’s motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC’s motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC’s motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC’s motion for preliminary injunction, following which the Court took said motion under advisement.

The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶5.

KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for $25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED’s initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. Id. KDC now seeks a preliminary injunction “to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to rescind the Agreement.” Reply to Plaintiff’s Objection to Defendant KDC Investment, LLC’s Motion for Mandatory Injunction, p. 4.

Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, pp. 1-5.


This Court’s Pretrial Order, dated November 24, 2010, required the party opposing any motion for summary judgment to serve and file materials objecting thereto no later than 14 days before hearing on the motion. KDC’s motion for summary judgment was scheduled for hearing on January 12, 2010. The deadline for AED to file materials objecting thereto was December 29, 2010.
object to the motion was December 29, 2010. Nothing was received by the Court from
AED by this deadline, nor was anything filed by AED by that deadline.

On December 30, 2010, AED filed its “Response to Summary Judgment”, an
“Affidavit of Eric J. Kelly in Opposition to Summary Judgment”, an “Affidavit of Arthur M.
Bistline in Opposition to Summary Judgment”.

On January 5, 2011, KDC filed its “Motion to Strike Affidavits of Arthur M.
Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to
Defendants’ Motion for Summary Judgment”, a “Memorandum in Support of Motion to
Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of
Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment”, as well as a
“Motion to Shorten Time” to hear the Motion to Strike Affidavits of Arthur M. Bistline,
Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’
Motion for Summary Judgment, since said motion was filed less than fourteen days
before the January 12, 2011, hearing. I.R.C.P. 7(b)(3)(A). Also on January 5, 2011,
KDC filed “Defendants’ Reply Memorandum in Support of Motion for Summary
Judgment.” On January 7, 2011, AED filed “Plaintiff’s Response to Defendants’ Motion
to Strike Plaintiff’s Affidavits Filed in Support of Plaintiff’s Opposition to Motion for
Summary Judgment.” On January 10, 2011, AED filed an “Affidavit of Eric J. Kelly in
Support of Plaintiff’s Opposition to Defendants’ Motion to Strike and Defendants’ Motion
for Summary Judgment.” The next day, on January 11, 2011, KDC filed its “Objection
to Affidavit of Eric J. Kelly in Support of Plaintiff’s Opposition to Defendants’ Motion to
Strike and Defendants’ Motion for Summary Judgment.”

Oral argument was held on KDC’s motion for summary judgment on January 12,
2011. At oral argument on January 12, 2011, counsel for AED had no objection to the
Motion to Shorten Time to hear KDC’s Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment. Accordingly, the Motion to Strike was granted. At the conclusion of oral argument this Court took under advisement KDC’s Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment, and KDC’s Motion for Summary Judgment.

At oral argument on January 12, 2011, counsel for AED objected to KDC’s last second attempt to place into the record a Delta Demolition subcontract that was supplied to AED which AED refused to sign. The Court allowed additional briefing on the issue. On January 13, 2011, KDC filed a “Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment.” On January 20, 2011, AED filed “Plaintiff’s Argument Regarding Affidavit of Lee Chaklos Pertaining to Subcontractor Proposal.” On January 24, 2011, AED filed “Plaintiff’s Response to Defendants’ Reply Regarding Supplemental Affidavit of Lee Chaklos.”

Separate from AED’s response and affidavits regarding KDC’s motion for summary judgment, on December 30, 2010, AED also filed a “Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission” and a “Plaintiff’s Motion to Shorten Time” requesting that AED’s Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission be heard on January 12, 2011 (and thus less than 14 days before hearing as required by I.R.C.P. 7(b)(3)(A)), at the same time as KDC’s motion for summary judgment. Counsel for AED also filed a Notice of Hearing purporting to notice AED’s Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission be heard on
January 12, 2011. However, counsel for AED did not get approval from the Clerk of the Court to have either “Plaintiff’s Motion to Shorten Time” requesting that AED’s Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission, or AED’s motion to shorten time be heard on January 12, 2011. On January 5, 2011, KDC filed “Defendants’ Memorandum in Opposition to Plaintiff’s Motion to Reconsider Decision Holding that Plaintiff is Not Entitled to Recession”. On January 7, 2011, AED filed its “Plaintiff’s Reply to Defendants’ Response to Motion to Reconsider”. At the January 12, 2011, hearing on KDC’s motion for summary judgment, the Court made it clear it had not read the pleadings that pertained to AED’s motion for reconsideration, that the Court would not hear argument on AED’s motion for reconsideration and that such motion for reconsideration would need to be heard at a later point in time. Oral argument on that motion for reconsideration was heard on January 26, 2011.

II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted 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 must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); Sewell v. Neilson, Monroe Inc., 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).
A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. Jordan v. Beeks, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. Johnson v. Lambros, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). A motion for reconsideration of an interlocutory order of the trial court may be made at any time before entry of the final judgment, but not later than fourteen days after entry of the final judgment. I.R.C.P. 11(A)(2)(B).

III. ANALYSIS.

A. KDC's Motion to Strike Affidavits of Kelly, Bistline and Wilburn.

The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial. Gem State Ins. Co. v. Hutchinson, 145 Idaho 10, 13, 175 P.3d 172, 175 (2007) (citing Carnell v. Barker Mgmt., Inc., 137 Idaho 322, 327, 48 P.3d 651, 656 (2002)). This Court applies the abuse of discretion standard when reviewing a trial court's determination of the admissibility of testimony in connection with a motion for summary judgment. Id., at 15, 175 P.3d at 177. (citing McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)).


KDC seeks to strike the affidavits of Arthur Bistline, Eric Kelly, and Mark Wilburn as irrelevant to the matters before the Court. KDC also argues Bistline's affidavit contains e-mails for which no foundation has been laid and matters which are the subject of settlement negotiations and not properly before the Court pursuant to I.R.E. 408. Memorandum in Support of Motion to Strike- pp. 3-4. KDC claims all but paragraph one of Bistline's affidavit is hearsay. Id., p. 4. KDC states Kelly's affidavit is also irrelevant, and that none of the matters discussed by Kelly dispute that AED did
not have a West Virginia contractor's license. *Id.*, pp. 4-5. Finally, KDC claims none of Wilburn's affidavit is relevant to the matter before the Court as he merely discusses having applied for and received the applicable license and does not dispute AED's not having a valid license at the time it entered into the demolition agreement with KDC. *Id.*, pp. 5-6.

AED responds that its affidavits point to the question of whether KDC ever intended to perform the agreement it had with AED concerning demolition of the bridge. Plaintiff's Response to Defendants' Motion to Strike, pp. 2-4. AED also argues no portion of Bistline's affidavit contains an offer of compromise and Rule 408 is therefore inapplicable and, as Bistline had knowledge of conversations he previously had, no hearsay is implicated. *Id.*, pp. 4-5. With regard to Kelly's and Wilburn's affidavits, AED points out that the mere question of whether AED had a valid contractor's license is not the only issue raised at summary judgment. *Id.*, p. 5. AED, finally, evaluates both Wilburn's and Kelly's affidavits for any plausible hearsay objections and finds none. *Id.*, pp. 6-7.

On summary judgment, the district court is not permitted to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983); *Altman v. Arndt*, 109 Idaho 218, 221, 706 P.2d 107, 110 (Ct.App. 1985). But, where pleadings, depositions, admissions, or affidavits raise questions as to the credibility of witnesses or the weight of the evidence, the motion for summary judgment should be denied. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). The Court (as trier of fact at the summary judgment stage of proceedings) is entitled to give testimony the weight to which it deems such evidence is entitled. *Christensen v. Nelson*, 125 Idaho 663, 666, 873 P.2d 917, 920 (Ct.App. 1994)
("As a trier of fact, the district court was allowed to make the final decision on how much weight, if any, to give to an expert's testimony. Provided that the trier of fact does not act arbitrarily, an expert's opinion may be rejected even when uncontradicted. *Simpson v. Johnson*, 100 Idaho 357, 362, 597 P.2d 600, 605 (1979).")

If KDC now seeks to call into question the veracity or credibility of witnesses, it would follow that this Court should not grant it the summary judgment it seeks. The question of whether a matter is relevant under I.R.E. 401 is very broad. That is, whether the existence of *any fact* of consequence to the determination of the action is made more or less probable than it would have been without the proffered evidence. I.R.E. 401. A trial court's ruling on the relevance of evidence before it is reviewed under the abuse of discretion standard. *Slack v. Kelleher*, 140 Idaho 916, 924, 104 P.3d 958, 966 (2004). Therefore, although not relevant to the precise issue identified by KDC (i.e. whether AED had the proper West Virginia license at the time it entered into the demolition agreement), it cannot be said that the affidavits of Bistline, Kelly and Wilburn contain evidence which would not make any fact of consequence more or less probable than it would be without the proffer of such evidence. All of KDC's relevance objections are overruled.

As to KDC's objections to Bistline's affidavit as to lack of foundation and contains inadmissible settlement discussions, those objections are overruled.

As to KDC's hearsay objections to Kelly's affidavit, that is sustained as to paragraph 6. The objection as to paragraph 8 is sustained but on different grounds (it is unclear which of the Chaklos is claimed to be speaking). The objection as offering a legal conclusion is sustained as to paragraphs 9, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, (but all exhibits referenced in those paragraphs are admitted and considered). The
objection as to being speculative, not based upon personal knowledge and lack of foundation is sustained as to paragraphs 10, 14, 17, 20, 21, 30, 31 and 33.

As to KDC's lack of foundation objection to Wilburn's affidavit, that objection is sustained as no date is mentioned. As to the exhibit attached, the objection is sustained for the same reason.

KDC's Motion to Strike is granted as to all above sustained objections. Any objection not specifically mentioned is overruled, and as to all overruled objections, KDC's Motion to Strike is denied.

B. KDC's Motion for Summary Judgment.

In its Memorandum in Support of Motion for Summary Judgment, KDC makes several arguments: (1) AED's breach of contract claim should be dismissed because it is based on an illegal contract; (2) AED's fraud claim should be dismissed because (a) the claim was not pled with particularity, (b) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia Contractor's License and had been administratively dissolved by the Idaho Secretary of State and (c) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on June 1, 2010; (3) AED is not entitled to rescission of the Purchase Agreement; (4) AED is not entitled to specific performance; (5) AED's claims against Lee Chaklos must be dismissed because he is not an owner, director, officer, or agent of KDC; and (6) KDC should be granted its requested quiet title action. Memorandum in Support of Motion for Summary Judgment, pp. 9-22. These issues will be addressed in that order.

As a preliminary matter of law, this Court finds Idaho law applies to the contracts at issue. Counsel for AED argued at oral argument on summary judgment on January 12, 2011, that "...there is no provision in that [blasting] contract that says it's to be
interpreted by Idaho law." That is simply false. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, Exhibit A, Bates Stamp 437, reads: "In consideration of the strict liability nature of many of AED’s operations, the parties hereto agree that this agreement shall be governed by and interpreted in accordance with laws of Kootenai County, ID and subject to prime agreement." The purchase agreement also specifically states Idaho law shall apply. Complaint and Amended Complaint, Exhibit A, p. 11, ¶ 36 reads: "This Agreement shall be controlled and interpreted according to the laws of the State of Idaho."

1. Illegal Contract.

KDC argues AED’s breach of contract claim on the “demolition agreement” must be dismissed because the demolition contract was illegal given AED’s failure to obtain a valid contractor’s license before entering into the demolition agreement. Memorandum in Support of Motion for Summary Judgment, pp. 9-12. KDC claims: “It is undisputed that AED did not have its West Virginia contractor’s license at the time of entering the demolition agreement and did not receive it until October 17, 2010.” Id., p. 11. No citation is given for this claim. The Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8, places the fact in the record, and places the burden on AED to rebut the claim. Krystal Chaklos of KDC states:

KDC did not pay the $30,000 to AED because AED never supplied any of the necessary permits or licenses to perform operations in West Virginia. KDC repeatedly informed AED that it needed a West Virginia contractor’s license to perform the blasting. However, at no time did AED ever provide proof that it obtained a West Virginia contractor’s license.

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8.

It is KDC’s contention that the demolition agreement between the parties is illegal, and therefore void, because it amounts to a contract to perform an act prohibited
by law; that is, AED entered into the demolition agreement without the required West Virginia contractor's license. *Id.*, p. 9. AED does not deny it lacked a contractor's license when it entered into the contract. AED instead argues the purpose of the contract was not illegal, thus, the contract itself is not rendered illegal. Response to Summary Judgment, p. 5. AED states it had the ability to obtain a valid West Virginia contractor's license (and eventually did so), and further, West Virginia law does not render a contract illegal for failure to obtain proper government approval. *Id.*, p. 6.

KDC cites for this Court the Idaho Supreme Court case Trees v. Kersey, 138 Idaho 3, 56 P.3d 765 (2002), as being factually similar. *Id.*, p. 10. AED states the purpose of the agreement here, unlike the one in Trees, was not to break the law. Response to Summary Judgment, p. 5. In Trees, the general contractor plaintiff lost its public works license and bonding capacity, but entered into an agreement with a second general contractor, "which provided that the Kerseys would bid on the project in their name, procure the bond, insurance, and pay the bills, and Trees would be responsible for everything else, including acting as the general contractor on the job." 138 Idaho 3, 5, 56 P.3d 765, 767. In Idaho, an illegal contract is one which "rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy." Trees, 138 Idaho 3, 6, 56 P.3d 765, 768, citing Quiring v. Quiring, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). As quoted by KDC, a contract "made for the purpose of furthering any matter or thing which is prohibited by statute...is void." Kunz v. Lobo Lodge, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App. 1999).

Memorandum in Support of Motion for Summary Judgment, p. 11. The District Court in Trees had enforced the illegal contract between the parties, finding that a joint venture existed. The Idaho Supreme Court found this to be error. 138 Idaho 3, 9-10, 56 P.3d
765, 771-72. However, because of the unique facts of the case, particularly the District Court's finding that Kerseys had committed many instances of fraud independent of the wrong committed to the public, the Idaho Supreme Court opted not to strictly apply the illegality doctrine, but rather applied a fraud exception. 138 Idaho 3, 10, 56 P.3d 765, 772. (holding the Kerseys could not benefit from the joint venture agreement, engage in fraudulent conduct, and then seek to avoid enforcement of the agreement.)

In their Purchase Agreement in this case, AED and KDC agreed the terms of the agreement be controlled and interpreted according to Idaho law. Purchase Agreement, p. 11, ¶ 36. Such choice of law provisions are addressed by Idaho Code § 28-1-105:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or such other state or nation shall cover their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to the state.

I.C. § 28-105(1). The requirements of the Idaho Contractor Registration Act (and/or the Idaho Public Works Contractors Act) and the West Virginia Contractor Licensing Act are substantially similar. Both require a contractor to be registered or licensed in order to engage in the business or act in the capacity of a contractor or when holding himself out as a contractor. See I.C. § 54-1902(1); I.C. § 54-5201(1); W.Va.Code § 21-11-1.

Both the Idaho and West Virginia Codes contemplate the licensing and registration requirements to apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Because of the choice of law provision in the Purchase Agreement, Idaho law controls regarding submission of bids and entering into contracts to perform construction while not properly licensed and/or registered.

A court has a duty to sua sponte raise the issue of illegality of a contract. Barry
v. Pacific West Construction, Inc., 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) (holding a contract between a general contractor and subcontractor on a public works project was void for failure of the subcontractor to have a public works license and that both the district courts and Appellate Courts of Idaho have a duty to raise the issue of illegality.); ParkWest Homes, LLC v. Bamson, 149 Idaho 603, __, 238 P.3d 203, 208 (2010). In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, "because the contract constituted an agreement to perform an illegal act." Barry, 140 Idaho 827, 832, 103 P.3d 440, 445. The Idaho Supreme Court in Barry found the contract between a general contractor and the illegally unlicensed subcontractor to be illegal and therefore unenforceable, but then went on to determine whether either party was entitled to its damages outside the existence of a legal contract; the Court held the illegally unlicensed subcontractor was entitled to recover under the theory of unjust enrichment. 140 Idaho 827, 833, 103 P.3d 440, 446. The Trees decision, as argued by AED, is likely inapposite as the purpose of the contract in Trees was from its inception to engage in illegal behavior.

Here, the facts are more similar to those in Barry. The contract would have been illegal by virtue of AED's failure to properly register/and or be licensed. In the instant matter, KDC's repudiation of the contract was based, at least in part, upon AED's failure to obtain the necessary licensing/registration. The date on which precisely AED obtained its West Virginia contractor's license is unclear, but likely did not happen until October 17, 2010. It is undisputed that AED did not have its West Virginia contractor's license at the time of contracting. In his affidavit, dated November 24, 2010, Mark
Wilburn testifies AED “has acquired all necessary permits to demolish the bridge, other than permission of the United States Coast Guard.” Affidavit of Mark Wilburn, p. 1, ¶ 3. But November 24, 2010, is not the relevant time period.

Even in the light most favorable to AED, the non-moving party, the motion for summary judgment by KDC on the issue of illegality of the underlying demolition agreement must be granted. Because a contractor must be licensed at the time a bid is submitted, and AED has presented this Court with no evidence as to what precise date upon which it became licensed, AED could not have properly submitted the bid in spring of 2010 and then later secure appropriate licensing in the fall of 2010. At the time of actual performance of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties. However, there is simply nothing before the Court to indicate that this licensing/registration was in place at the time AED submitted the bid which gave rise to the demolition agreement.

KDC is entitled to summary judgment on its claim that AED lacked the required license and lacked the required permits at the time it entered into the demolition agreement. The demolition agreement is an illegal contract. KDC is entitled to summary judgment against AED on its breach of contract claims on that agreement.

2. AED’s Fraud Claim.

KDC argues AED’s fraud claim should be dismissed because: (a) the claim was not plead with particularity; (b) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia contractor’s license and had been administratively dissolved by the Idaho Secretary of State; and (c) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on

In response, AED argues its complaint set forth exactly what promise KDC made and never intended to keep. Response to Summary Judgment, p. 7. AED argues this is sufficient to comply with the rule that fraud allegations be pled with specificity. Id. AED goes on to argue its corporate status was reinstated, rendering KDC’s argument regarding AED’s inability to rely on statements made during AED’s dissolution irrelevant. Id., pp. 7-8. Finally, AED argues the issue of fraudulent inducement involves a question of fact implicating the circumstances surrounding breach of the demolition agreement and whether KDC ever intended to honor the agreement. Id., pp. 8-9.

As a preliminary matter, KDC errs in its contention that a party must demonstrate fraud concerning a future event by clear and convincing evidence. Memorandum in Support of Motion for Summary Judgment, pp. 12, 15. Appellate courts in Idaho have refused to apply the clear and convincing burden of proof in reviewing summary judgment in fraud and misrepresentation cases. Large v. Cafferty Rea/y, Inc., 123 Idaho 676, 680, 851, P.2d 972, 976 (1993). In fraud and misrepresentation cases, courts apply the usual standard of review at summary judgment to determine whether there is a genuine issue of material fact making summary judgment improper. G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 417-18, 808 P.2d 851, 854-55 (1991). Thus, all AED must do in order to survive summary judgment is identify a genuine issue of material fact with regard to its fraudulent inducement claim.

a. Failure to Plead Fraud With Particularity is Not Fatal to AED’s Claim.

In its Amended Complaint, AED alleges:

In order to induce Plaintiff to enter into the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the bridge. Said promise was material to the parties’ transaction
and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge.

... Defendants’ conduct of promising to allow Plaintiff to demolish the bridge when Defendants’ [sic] had no intention of honoring that commit [sic] amounts to fraud in the inducement.

Amended Complaint, pp. 2-3, ¶¶ 9 and 15. KDC noted AED uses the term “Defendants” collectively throughout its Complaint and never identifies specific allegations asserted against each defendant. Memorandum in Support of Motion for Summary Judgment, p. 13. AED is deficient in that regard. KDC also notes the heart of AED’s fraud claim is that “[i]n order to induce Plaintiff to enter the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the Bridge.” Memorandum in Support of Motion for Summary Judgment, p. 13, citing Amended Complaint, ¶ 9. KDC then correctly argues: “This general conclusory statement is insufficient to maintain a fraud claim against three separate defendants.”

Id. In support of that argument, KDC quotes from 37 Am.Jur.2d Fraud and Deceit, § 464 (2001):

A Plaintiff alleging fraud must specify the time, place, and contents of any alleged false representations and the full nature of the transaction, including the content of the false representations, the fact misrepresented, what was obtained or given up as a consequence of fraud, and which individual made the representation.... If fraud is alleged against multiple defendants, acts complained of by each defendant should be separately set forth in the complaint.

Id. The claim in AED’s Amended Complaint that “[i]n order to induce Plaintiff to enter the agreement to sell the bridge to Defendants, Defendants agreed they would hire Plaintiff to demolish the Bridge” satisfies neither of the requirements of time and place. The requirement of “contents of the representation” and “why it was false” are only minimally satisfied. The requirement of “who made the representation” is not satisfied at all. Even though AED now concedes claims against Lee Chaklos individually should
be dismissed, and accordingly, AED could make the argument that which party engaged in the purported fraud is therefore, moot, “which party” is not what the above quote from Am.Jur.2d says. The quote from Am.Jur.2d says: “which individual made the representation”. A corporation can only act through its agents, and AED has not set forth in its Amended Complaint who within KDC agreed AED would “demolish the Bridge.”

A party must establish nine elements to prove fraud: “1) a statement or representation of fact; 2) its falsity; 3) its materiality; 4) the speaker’s knowledge of its falsity; 5) the speaker’s intent that there be reliance; 6) the hearer’s ignorance of the falsity of the statement; 7) reliance by the hearer; 8) justifiable reliance; and 9) resultant injury.”

Glaze v. Deffenbaugh, 144 Idaho 829, 833, 172 P.3d 1104, 1008 (2007) (quoting Mannos v. Moss, 143 Idaho 927, 931, 155 P.3d 1166, 1170 (2007) (“Reed fails to plead these elements in a general sense, let alone with particularity and, as such, has failed to state a claim upon which relief may be granted as to fraud.”).

An allegation of fraud is a conclusion of law. General allegations that do not set forth the particular circumstances are not sufficient, and every element of the cause of action must be alleged in full, factually and specifically. Allegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient.

37 Am.Jur 2d Fraud and Deceit, § 464 (2010). Mere assertions of “fraud” or that a party “acted fraudulently” without including facts to which such a term has a reference is nothing more than a mere legal conclusion. Id. See e.g. Sunset Financial Resources, Inc. v. Redevelopment Group V, LLC, 417 F.Supp.2d 632, 643, n. 17 (D.N.J. 2006).

“Plaintiff asserting a fraud claim is not required to plead date, place, or time of fraud, so long as plaintiff uses alternative means of injecting precision and some measure of substantiation into its allegations.” Id., quoting Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 791, (3d Cir.1984).
In *Seville*, the Third Circuit held that plaintiffs satisfied Rule 9(b) by incorporating into plaintiff's complaint a specific list of machine parts involved in the fraud, as well as described the transactions that involved these parts. See *id.* The court concluded that the heightened pleading requirement was met because the complaint "sets forth [i] the nature of the alleged misrepresentations, and [ii] while it does not describe the precise word used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation." *Id.*

417 F.Supp.2d 632, 643, n. 17. While AED may not have pled their fraud in the inducement claim with the particularity KDC would have preferred, AED's fraud claim goes well beyond a mere legal conclusion and, arguably, while not naming the time, date and place of the alleged fraud, KDC has been provided with a sufficient measure of precision and substantiation of AED's claim.

b. AED Had No Right to Rely on any Alleged Misrepresentation by KDC.

KDC next claims AED had no right to rely on any alleged misrepresentations by KDC because AED had been administratively dissolved by the Idaho Secretary of State and had no West Virginia Contractor's license. Memorandum in Support of Motion for Summary Judgment, pp. 14-15. KDC argues AED had no right, as a matter of law, to rely upon the representations of KDC that KDC would hire AED to demolish the bridge. *Id.*, p. 14. KDC notes the demolition agreement was entered into on June 1, 2010, but AED failed to secure a West Virginia contractor's license at least until October 17, 2010, which was well after the demolition agreement had been terminated in July 2010. *Id.* Because AED could not have even submitted a bid to blast the bridge without the proper license, it follows, per KDC, that AED could not have relied upon any alleged misrepresentation. KDC makes essentially the same argument with respect to AED's having been administratively dissolved on November 5, 2009, and for the six months prior to entering into the purchase agreement. *Id.*, pp. 14-15. Because AED could not
have legally performed the demolition of the bridge at the time it entered into agreements to do so, because of a lack of licensing, AED could not have rightfully relied upon the promise that it would be the party selected to demolish the bridge. *Id.*

AED responds only that KDC cannot challenge any corporate action on the ground that AED had been administratively dissolved; that AED has been reinstated by the Secretary of State, which reinstatement is retroactive to the time of dissolution; and that the question of whether fraud in the inducement is present is one for the trier of fact. Response to Summary Judgment, pp. 7-8. In reply, KDC clarifies any agreement entered into by the parties whereby AED was to blow the bridge was void as it violated the West Virginia Contractor Licensing Act. Defendants' Reply Memorandum in Support of Motion for Summary Judgment, p. 7.

As discussed *supra*, the demolition agreement entered into by the parties was void and illegal due to AED's failure to have the proper license under West Virginia law at the time it contracted to demolish the bridge. The West Virginia requirements for contractors mirror those in Idaho. And, importantly, both the Idaho and West Virginia Codes contemplate the licensing and registration requirements apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Thus, any position AED may take with regard to the contract for demolition being executory, and AED's ability to secure the proper registration and licensing pursuant to the Codes prior to demolition work commencing, is inapposite. AED must have had the proper registration and license at the time of contracting, in addition to having the same at the time of performance. While I.C. § 30-1-1422(3) does, as argued by AED, provide that reinstatement of a formerly dissolved corporation relates back to the date of dissolution.
"and the corporation resumes carrying on its business as if the administrative
dissolution had never occurred", AED's failure to comply with statutory requirements for
registration and licensing does result in AED's being unable to, as a matter of law,
justifiably rely upon alleged misrepresentations by KDC. Accordingly, summary
judgment must be granted in favor of KDC on this aspect of AED's fraud claims.

c. AED Has No Evidence That on June 1, 2010, KDC Did Not
Intend to Allow AED to Blast the Bridge.

Regarding AED's fraudulent inducement claim, the parties provide different facts
regarding each parties' intentions on June 1, 2010. KDC argues it made a
representation concerning a future date on June 1, 2010, and that AED cannot prove
KDC entered into the demolition agreement with no intent to perform. Memorandum in
Support of Motion for Summary Judgment, pp. 15-16. AED argues KDC had no
intention of fully performing the parties' agreement as of June 1, 2010. Response to
Summary Judgment, p. 8. In support of its argument, AED claims KDC improperly
attempted to create a condition precedent (that one or both of the parties never had
proper prerequisite West Virginia licenses, registrations, or permits) where none
existed. And, AED claims KDC withheld payment based on KDC's own failure to obtain
the necessary licenses (in addition to withholding payment based on AED's failure to
obtain licenses, registrations, and permits.) Id., p. 9. Specifically, AED claims:

Not only was KDC creating conditions precedent where none existed,
KDC was withholding payment based on the failure of KDC to obtain the
necessary permits. Krystal Chaklos clearly sets forth that AED will be
paid when KDC obtains the necessary permits. 25

Response to Summary Judgment, p. 9. This claim by AED's counsel that “...KDC was
withholding payment based on the failure of KDC to obtain the necessary permits” is
not supported by the very “facts” AED submits in its own agent's affidavit. Footnote 25
of AED's Response to Summary Judgment reads: "Affidavit of Eric Kelly at 26."

Paragraph 26 of the Affidavit of Eric Kelly reads:

That evening [June 16, 2010 according to ¶ 24], Krystal Chaklos sent an e-mail stating that AED needed a West Virginia Contractors License to participate in the project and that AED would be paid when Delta had achieved the City of Benwood's permit to proceed. (See Exhibit "J" attached hereto and incorporated herein.)

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 26. Here is what the actual email from Krystal Chaklos to Eric Kelly reads:

Eric,

You will need a WEST VIRGINIA CONTRACTORS LICENCE! From the state of West Virginia to participate in this project. Your mobility advance will be given to you once Delta has achieved the city of Benwoods permit to proceed.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, Exhibit J. (all emphasis in original). To make what AED's counsel writes in its brief true, Delta must be KDC. Delta is not KDC. Delta Demolition Group, Inc., (Delta Demo) is a Virginia corporation in good standing, which was hired by KDC to act as the general contractor responsible for demolishing this bridge, and AED was to act as an independent subcontractor to Delta Demo for purposes of blasting that bridge. Affidavit of Lee Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶ 2, 4. Lee Chaklos is president and sole shareholder of Delta Demolition Group, Inc., and Lee Chaklos is not a member, officer or director of KDC. Id., ¶¶ 2, 3. Thus, this claim by AED's counsel that "...KDC was withholding payment based on the failure of KDC to obtain the necessary permits" is false according to AED own agent's affidavit. There is no basis set forth in AED's Response to Summary Judgment (pages 8 and 9) which refutes KDC's argument in this regard. KDC argues as follows:

On June 1, 2010, AED and KDC signed the "demolition agreement." The demolition agreement embodies the promise upon
which AED bases its fraud claim; KDC's promise to allow AED to blast the bridge. One of the terms of the demolition agreement required KDC to pay AED a $30,000 "deposit" on June 9, 2010. Another term required AED to supply the necessary federal and state permits to perform blasting operations in the State of West Virginia. It is undisputed that the deposit was never paid. The non-payment of the deposit is what led AED to terminate the demolition agreement by threatening to file a lawsuit and rescind the demolition agreement. However, the failure to pay the deposit was not because KDC never intended to allow AED to blast the Bridge. Rather, the deposit was not paid because AED refused to get the necessary licenses and permits to perform the work.

* * *

The evidence shows that AED was required to obtain all necessary permits and licenses to perform the blasting work in West Virginia. AED submitted the applications, but refused to pay for the permits. Therefore, it did not receive the permits. Pursuant to the West Virginia Contractor Licensing Act, AED also needed to obtain a contractor's license. It did not do so until October 17, 2010, after both parties terminated the "demolition agreement," and after AED filed its original complaint in this case. KDC informed AED that it would not pay any money to AED until it received the necessary permits and licenses. KDC did not decide to use a different contractor to blast the Bridge until it received threatening emails from AED and its lawyer. The evidence shows that KDC refused to pay AED the "deposit" because AED failed to obtain the necessary permits and licenses to perform blasting work in West Virginia, not because KDC never intended to allow AED to perform the blasting. Since there is no evidence that KDC had no intention of allowing AED to perform the blasting at the time the demolition agreement was signed, AED cannot prove fraud concerning this future event.

Response to Summary Judgment, pp. 16-18. While the above passage contains no citation to the record, the argument is supported by the record. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, ¶1-9; Affidavit of Eric J. Kelly in Opposition to Summary Judgment, pp. 4-5, ¶ 19, Exhibit F. The very first obligation AED assumed in that demolition agreement was to "Supply the necessary explosives permits, both Federal and State, to perform operations in the State of WV." Id., Exhibit F, p. 4. West Virginia statutes require any contractor to be licensed in West Virginia to bid on or conduct any work in the state of West Virginia. West Virginia Code § 21-11-64; 21-11-3. The above email from Krystal Chaklos to Eric Kelly shows the
requirement that AED have a West Virginia's contractor's license: "You will need a WEST VIRGINIA CONTRACTORS LICENCE!" Affidavit of Eric J. Kelly in Opposition to Summary Judgment, Exhibit J. (all emphasis in original). AED failed in its duty to have the federal and state permits and to have a West Virginia contractor's license.

As noted by KDC:

Generally, the representation forming the basis of a claim for fraud must concern past or existing material facts. Representations concerning future events are usually not considered actionable.

Magic Lantern Productions, Inc. v. Dolsot, 126 Idaho 805, 807, 892 P.2d 480, 482 (1994), see also Thomas v. Medical Center Phys., 138 Idaho 200, 207, 61 P.3d 557, 564 (2002) (An action for fraud or misrepresentation will not lie for statements of future events). Memorandum in Support of Motion for Summary Judgment, p. 15. A promise or statement is actionable if it is proven that the speaker made the promise without intending to keep it. Id., citing Magic Lantern, 126 Idaho 805, 807, 892 P.2d 480, 482; Thomas, 138 Idaho 200, 207, 61 P.3d 557, 564. KDC thus argues:

AED must prove that on June 1, 2010, when KDC allegedly entered the demolition agreement, KDC did not intend to perform the agreement. There is no evidence to support this claim.

Id. This Court agrees. AED has shown nothing that demonstrates KDC never intended to permit AED to demolish the bridge on the date the demolition agreement was entered into. Accordingly, summary judgment must be granted in favor of KDC on this aspect of AED's fraud claims.

3. Rescission of the Purchase Agreement is Not Available to AED.

There is both an issue of law and a factual discussion about the rescission issue.

First the legal discussion.

Both parties cite to O'Connor v. Harger Construction, 145 Idaho 904, 18 P.3d...
846 (2008), as being dispositive of whether rescission is available to AED. In its Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, this Court determined:

KDC argues AED did not tender back to KDC the $25,000.00 KDC paid to AED in consideration for the purchase agreement. Therefore, KDC argues AED is not entitled to rescission of the Agreement. Memorandum in Support of Motion for Mandatory Injunction, pp. 13-16. KDC quotes extensively from Robinson v. State Farm Mut. Auto Ins. Co., 137 Idaho 181, 45 P.3d 829, 837 (2002), for the proposition that a party seeking to rescind a contract must tender any consideration or benefit received before rescinding. Id., p. 14. Here, AED alleges fraud and breach of contract in its Complaint. The relief sought by AED is for the Court to “[e]nter judgment rescinding the parties’ agreement and restoring the parties to their status quo with all offsets and credits as are required to fashion and [sic] equitable remedy for Plaintiff.” Complaint, p. 4. Thus, at all times AED has sought rescission of the “purchase agreement”, and AED certainly had not disputed that it did not at any time tender the $25,000.00 back to KDC.

AED argues: “A valid tender is no longer required under Idaho Law to seek rescission”, citing O’Connor v. Harger Construction Inc., 145 Idaho 904, 188 P.3d 846 (2008). Plaintiff’s Response to Issuance of Preliminary Injunction, p. 4. This Court agrees with KDC, that such proposition by AED is a grossly misleading argument. As noted by KDC, the Idaho Supreme Court in O’Connor stated:

[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. Defendant KDC Investments, LLC’s Reply in Support of Motion for Preliminary Injunction, p. 11. AED has failed to tender the $25,000.00. Rescission is not available to AED. However, with all the other unsolved issues in this case, a preliminary injunction cannot be granted in favor of KDC.

Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, pp. 16. Subsequent to the Court’s ruling on the preliminary injunction, AED filed a motion for reconsideration asking the Court to reconsider its ruling with regard to rescission. This motion was not properly noticed-up, but was unilaterally tacked-on by counsel for AED to the time for hearing on KDC’s motion for summary judgment. Thus,
AED's motion for reconsideration was not heard on January 12, 2011, but was instead heard on January 26, 2011.

AED argues that rescission is a valid form of relief available to it in its response memorandum on summary judgment. Response to Summary Judgment, pp. 9-12. AED argues in O'Connor the Idaho Supreme Court correctly "...sets forth the law regarding an action at law to enforce a rescission, but states the instant matter differs as it is an equitable action for rescission – an action on rescission, as opposed to an equitable action for rescission." Id., p. 9. (emphasis in original). AED continues:

An action at law based on a rescission requires that a valid tender occur. It is an element of rescission. This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender.

Id. AED argues O'Connor stands for the proposition that where rescission amounts to an offer and acceptance outside of court, valid tender is required. Id., p. 10. AED argues: "However, when a rescission agreement is not reached and one of the parties goes to court seeking rescission, tender is not required." Id.

On reconsideration, AED cites Gamblin v. Dickson, 18 Idaho 734, 736, 112 Idaho P. 213, 213 (1910), and Hayton v. Clemens, 30 Idaho 25, 32, 165 P. 994, 996 (1916) in support of this argument.

The entire pertinent portion of Gamblin, is as follows:

In Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821, the court held that, where a party seeks the aid of a court to rescind a contract, it is not necessary that he previously attempt a rescission or make any tender to the other party, except where such tender is necessary to put the other party in default. In Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053, it was contended that a restoration or tender should have been made before the action could be brought, but the court held against that contention in the following language: "Authorities in support of respondent's position on this point are abundant, but are foreign to the case, because she has not attempted to abrogate and rescind the mortgage contract by her own act, but by judicial proceedings instead. In such cases, where one seeks the
aid of a court to set aside and rescind a contract, it is not essential that he should have previously attempted a rescission, or should have made any tender to the other party, except when such tender is necessary to put the other party in default. By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted. What such a plaintiff ought to do, and what he must do, to reinstate the other party in statu quo, as a condition for repudiation and rescission, is for the court, which always possesses the necessary power to determine the question.” The same rule is adhered to in Hansen v. Allen, 117 Wis. 61, 93 N. W. 805, and in Ludington v. Patton, 111 Wis. 208, 86 N. W. 571. In the latter case the court clearly draws the distinction between a suit for a rescission of a contract on the ground of fraud and an action at law to recover back that which has been paid upon a contract void for fraud. The latter contemplates a precedent rescission of the contract by act of the plaintiff, and an action in equity to rescind a contract invites and requires equity to effect that end, and looks to the decision in that action to accomplish it and to impose such terms of rescission as may be deemed equitable under all of the facts in the case. The earlier decisions in California, Colorado, and Washington and some other states would indicate that they were made without reference to the distinction above mentioned. See, also, Clark v. O'Toole, 20 Okl. 319, 94 Pac. 547, where the rule here laid down is discussed at length and authorities cited.

18 Idaho 734, 735-36, 112 Idaho P. 213, 213-14. There are several problems relying on Gamblin. First, Gamblin is 100 years old and O'Connor is the most recent case from the Idaho Supreme Court on the issue. O'Connor is clear:

[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. O'Connor dealt with a situation where the court was being asked to rescind a contract. Thus, to the extent Gamblin and O'Connor are inconsistent, O'Connor controls and overrules Gamblin. Second, AED makes the argument that this is not a rescission at law, but rather an equitable rescission based on fraud and tender is not required, only an offer of tender. Response to Summary Judgment, p. 9. That being the case, AED is not entitled to equity as it did not have the requisite West Virginia contractor's license in place. That failure by AED is undisputed.
Additionally, AED may have assigned what they had no right to assign and in so doing committed a fraud upon Barrack and the federal court. Affidavit of Eric J. Kelly in Support of Plaintiff's Opposition to Defendants' Motion to Strike and Defendants' Motion for Summary Judgment, Exhibit A, p. 11, Exhibit B. Counsel for AED objected to this in any event, based on AED's failure to obtain the West Virginia contractor's license at the time of contracting with KDC, AED cannot claim equity be accorded due to AED's own unclean hands.

The clean hands doctrine "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.' " Gilbert v. Nampa Sch. Dist. No. 131, 104 Idaho 137, 145, 657 P.2d 1, 9 (1983) (citing 27 Am.Jur.2d Equity § 136 (1996)).

Ada County Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 370, 179 P.3d 323, 333 (2008). Third, AED claims: "This is an action for rescission based on fraud and also on material breach of contract, and tender is not required, only an offer of tender." Response to Summary Judgment, p. 9. Eric Kelly of AED's email response: "Last chance for you guys to accept a return of your money" (Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29; Exhibit "M") is not sufficient in detail to be an offer of rescission. Fourth, the above quote from Gamblin indicates a pleading requirement is necessary with the language: "By submitting her cause to the court, the plaintiff expressed a willingness to perform such conditions as it may regard necessary to impose as proper terms on which relief shall be granted." This pleading requirement is discussed below in Hayton. In AED's Amended Complaint, AED has not alleged that it is willing to perform all conditions to place the parties back in their original position.

The following is most of the entire opinion on rehearing in Hayton v. Clemens, 30 Idaho 25, 32, 165 P. 994, 996 (1916). It is only the first paragraph which counsel for...
AED quoted in Plaintiff's Reply to Defendants' Response to Motion to Reconsider, p. 3.

The contention of appellant on this point, as I understand it, is that before a party is entitled to rescind a contract he must put, or offer to put, the other party in statu quo by a full restoration of all that he has received. This court has heretofore held that this rule is applicable in cases where a rescission is made before an action is brought, but that such a tender or offer is not necessary as a condition precedent to a suit for rescission, and I feel that such decision is controlling and correct. *Gamblin v. Dickson*, 18 Idaho, 734, 112 Pac. 213.

After the filing of the original complaint in this action, the rights of all the parties hereto in the Walla Walla property were canceled by a decree of the superior court of Washington for Walla Walla county, forfeiting the rights of all parties claiming under the Preston-Kenworthy contract for default in payment of moneys due November 1, 1912, under the terms of the contract. The amended complaint, on which this action was tried, pleads the decree of the Washington court.

*Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity,* do the facts pleaded in relation to the foreclosure of the Washington contract, under which contract both appellants and respondents acquired an interest in the Walla Walla property, obviate the necessity of an offer in the amended complaint to restore the consideration received? I think they do. One of the very purposes of pleading the Washington decree must have been to show that the consideration received by Hayton had gone from his control and could not be returned on account of the decree foreclosing for a default in a payment past due at the time Hayton and Clemans made their contract, which payment Clemans fraudulently and falsely represented had been made. At the time of the filing of the amended or supplemental complaint in this action, Hayton had no interest in the Walla Walla property. His rights had been foreclosed by the Washington decree. He had nothing to tender back to Clemans and was in this condition through no default of his own. Under these circumstances, it would be a futile offer on his part to assign back to Clemans his foreclosed equity in the Walla Walla land.

30 Idaho 25, 32-33, 165 P. 994, 995-96. (italics added). Focusing on the italicized portion: "*Conceding that it is necessary in a suit for rescission that the plaintiff plead his willingness to restore the consideration received by him and to do equity,*" in the present case, AED has not only not offered to tender back the $25,000, nowhere in AED's amended complaint does AED make the claim that it is willing to tender back to KDC the $25,000. Amended Complaint, pp. 1-4. Indeed, all AED claims is: "Because
of Defendant's fraud, Plaintiff is entitled to rescind the contract and to an award of a sum of money as may be required to make it whole in light of the rescission of the parties' contract, in an amount in excess of $10,000 to be proved at trial." Id., p. 3, ¶

17. Not only does AED fail in its Amended Complaint to make the claim that it is willing to tender back to KDC the $25,000, AED doesn't even acknowledge in its complaint that KDC paid AED $25,000 in the first place.

And unlike Hayton in Hayton, who no longer had control of the consideration to return to the other party, AED has at all times had and kept the $25,000. Where Hayton had "nothing to tender back", AED does have $25,000 to tender back, and has not.

KDC argues AED failed to properly preserve a claim for rescission of the purchase agreement by failing to tender the consideration amount underlying that agreement back to KDC. Memorandum in Support of Motion for Summary Judgment, pp. 18-19. KDC refutes AED's argument that O'Connor did away with the valid tender requirement; positing the valid tender requirement in O'Connor was done away with given the specific facts of that case because O'Connor, the party asserting the valid tender requirement, had been the party to file suit for breach of contract against Harger, thereby relieving Harger of his duty to tender O'Connor's deposit. Id., p. 19. KDC correctly argues:

The O'Connor Court did not analyze whether or not Harger completed a valid tender because it determined that "[o]nce O'Connor [the party asserting the valid tender rule] filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order." Id at 912, 854. The Court decided it could fashion its own equitable remedy and it was "not necessary for this Court to determine the sufficiency of Harger's tender in this case." Id.

O'Connor differs from the case at bar in one important respect; KDC, the party asserting the valid tender rule, did not file suit against
AED. Rather, AED filed suit against KDC. KDC is, therefore, still entitled to assert the valid tender rule as a defense. Since AED admittedly failed to make a valid tender, it is not entitled to rescind the Purchase Agreement.

Id.

This Court does not agree with AED's interpretation of O'Conner. No attorney should better know O'Conner than counsel for AED, as counsel for AED argued the losing end of O'Conner on appeal to the Idaho Supreme Court.

No attorney, and certainly not this Court, can overlook the general rule set forth by the Idaho Supreme Court in O'Conner:

[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid. More than a mere offer of the deposit is required; the party must exhibit an actual intent and willingness to pay to constitute a valid tender.

145 Idaho 904, 911, 188 P.3d 846, 853. The reason that general rule did not come into play in O'Conner was: rescission was not pled by either party (Id.), but mutual mistake was pled by Harger and rescission is a remedy for mutual mistake (Id.), and the district court on its own ruled that rescission was the most equitable remedy between the parties (145 Idaho 904, 912, 188 P.3d 846, 854). In O'Conner, counsel for O'Conner (counsel for AED in the instant case), "...argues that Harger never offered to return her deposit; therefore, rescission as a remedy is not available to him." 145 Idaho 904, 911, 188 P.3d 846, 853. It was then that the Idaho Supreme Court reiterated the general rule quoted above, that "[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid" and that more than a mere offer of the deposit is required for a valid tender. Id. Immediately following that pronouncement, the Idaho Supreme Court wrote:

Here, Harger made O'Conner an offer in April of 2005, offering to sell the land or rescind the contract and return her deposit. O'Conner
responded to the offer of rescission and the return of her deposit by filing the lawsuit for breach of contract. O'Connor argues that without the return of her deposit, rescission is an unavailable remedy for Harger. O'Connor is confusing the issues here. The district court did not rule that Harger made a valid rescission by offering to tender O'Connor's deposit. The district court ruled that rescission was the most equitable remedy between the parties. Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order. Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case.

145 Idaho 904, 911-12, 188 P.3d 846, 853-54. In O'Connor, the party seeking to rescind the contract and return the deposit (Harger) (AED in the instant case as argued by AED) was met in response to that offer to return the deposit with a lawsuit by O'Connor, and O'Connor then claimed that since Harger in fact did not return that deposit, rescission was an unavailable remedy for Harger. The party offering the return of deposit and the party seeking rescission (Harger) was rebuffed in that offer not with a "No", but with the filing of a lawsuit by O'Connor against them. Then, the party filing the lawsuit (O'Connor) argued Harger's tender wasn't complete. Not surprisingly, the Idaho Supreme Court held: "Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order." Any exception to the general rule (that "[a] party seeking to rescind a contract ordinarily must return any consideration of the benefit received before the rescission is valid") set forth in O'Connor is clearly peculiar to the facts in O'Connor. Those facts are exactly the opposite of the facts in the present case. The Idaho Supreme Court in O'Connor noted "O'Connor is confusing the issues here." 145 Idaho 904, 912, 188 P.3d 846, 854. In the present case, that same attorney is not
only confusing the issues but is confusing the facts.

AED's contention that when a rescission agreement is not reached and one of the parties goes to court, an offer to tender is all that is required, finds no support in a reading of O'Connor. In O'Connor, the trial court fashioned an equitable remedy, rescission, which had not been pled by any party, let alone the party seeking relief, O'Connor. The Idaho Supreme Court wrote in O'Connor:

O'Connor was on notice that rescission was a possible remedy even though it was not specifically plead. She was given the opportunity to try the issue of whether a mutual mistake of fact existed between the parties, in which one of the potential remedies is rescission. In any event, rescission is ironically in her favor since if the contract is simply held unenforceable she forfeits her $40,000 deposit, whereas if it is rescinded, she is entitled to a refund of her deposit. The district court had the power to grant rescission in this instance. This Court affirms that decision.

145 Idaho 904, 911, 188 P.3d 846, 853. AED's differentiation between rescission as an equitable remedy versus as an action based on parties' reaching an agreement to rescind is of no import. Again, the Idaho Supreme Court wrote in O'Connor:

Here, Harger made O'Connor an offer in April of 2005, offering to sell the land or rescind the contract and return her deposit. O'Connor responded to the offer of rescission and the return of her deposit by filing the lawsuit for breach of contract. O'Connor argues that without the return of her deposit, rescission is an unavailable remedy for Harger. O'Connor is confusing the issues here. The district court did not rule that Harger made a valid rescission by offering to tender O'Connor's deposit. The district court ruled that rescission was the most equitable remedy between the parties. Whether Harger's April 2005 letter constitutes a valid tender of O'Connor's deposit, and whether rescission as an equitable remedy is available are two separate issues. Once O'Connor filed suit for breach of contract against Harger, Harger was relieved of his duty to tender O'Connor's deposit, constituting a valid rescission, absent a court order. Whether Harger completed a valid tender, making rescission outside of court proper does nothing to reduce the equitable powers of the trial court. The district court, in this case was free to fashion an equitable remedy as it saw fit. Therefore it is not necessary for this Court to determine the sufficiency of Harger's tender in this case.

145 Idaho 904, 911-12, 188 P.3d 846, 853-54. The Court in O'Connor never reached
the sufficiency of tender by Harger, precisely because it upheld the District Court's
fashioning an equitable remedy consisting of rescission. Distinguishing the instant
matter from the facts in O'Conner are that the party seeking rescission here was also
the party filing the lawsuit; additionally, this Court has determined at the preliminary
injunction stage that rescission as an equitable remedy is not available to AED.
Nothing before the Court at this time would indicate the Court erred in its previous
holding. There are no law or facts before the Court to support anything but summary
judgment in favor of KDC on the issue of rescission. [Similarly, this Court has evinced
no inclination to grant AED the equitable relief of specific performance either. And, the
very demolition agreement AED seeks specific performance of has been deemed
illegal. See supra.]

In its motion to reconsider, AED cites Watson v. Weick, 141 Idaho 500, 507, 112
P.3d 788, 795 (2005), for the proposition that all that is needed is an offer to rescind.
Plaintiff's Reply to Defendants' Response to Motion to Motion to Reconsider, p. 1. The offer to
rescind in Watson v. Weick certainly went further toward restoring the parties to their
previous position than Kelly's curt statement in an email in the present case: "Last
chance for you guys to accept a return of your money" (discussed immediately below).
This Court is quite familiar with Watson v. Weick. In Watson v. Weick, the Idaho
Supreme Court noted Weick's attorney, in a letter specifically seeking rescission, made
the following offer:

My client seeks to rescind the contract of sale and promissory note and
return the parties to their pre-sale status.

To that end, we tender to you resignations from the Board of Directors, all
stock in each of the companies which were subject to the purchase
agreement referred to in the promissory note attached to your Complaint,
Phoenix Corporation, as well as deeds to the real property purchased
concurrently. This tender shall be in full satisfaction of the provisions of the contract and promissory note and would affect total rescission between the parties.

141 Idaho 500, 507-08, 112 P.3d 788, 795-96. This Court, as the trial court, felt such was not sufficient. The Idaho Supreme Court agreed, and held:

The tender made no mention of obligations incurred by the Watson Agency after the Weicks purchased it including a $150,000 liability to the IRS; 25 to 30 additional employees; a new office in Los Angeles; the purchase of 12 to 14 new vehicles; and the purchase of $10,000 to $15,000 in computers. Tendering back the corporation with those new liabilities did not constitute offering to restore the Watsons to the status quo before the Agreement was formed. The district court did not err in dismissing the claim for rescission.

141 Idaho 500, 508, 112 P.3d 788, 796. There was certainly more to the attempt to tender in *Watson v. Weick* than there was to any attempt “tender” in Kelly’s one sentence in an email in the present case, and in *Weick* it was *still* not enough. As pointed out by counsel for KDC in the January 26, 2011, oral argument on AED’s motion for reconsideration, as of July 13, 2010, when Kelly’s “Last chance for you guys to accept a return of your money” email was authored, KDC had already expended effort and incurred expense furthering demolition of this bridge, so simply offering the $25,000 back (if that is in fact what Kelly was offering), is not sufficient tender.

AED also cites *Lithocraft, Inc. v. Rocky Mountain Marketing, Inc.*, 108 Idaho 247, 248, 697 P.2d 1261, 1262 (Ct.App. 1985), for the proposition that an offer to tender is sufficient. Plaintiff’s Reply to Defendants’ Response to Motion to Reconsider, p. 1. A review of that case shows the Idaho Court of Appeals made short work of the lack of any meaningful offer to tender in that case:

The record here is devoid of any such tender (or offer to tender) by Rocky Mountain which would have restored to Hawes, or to his assignee, the ownership of the *Sun Valley Magazine* trade name. Quite the contrary, Rocky Mountain tells us that it declined to do so because it might not have been able to recover anything back from Hawes. It makes no contention
that Lithocraft is in any way responsible for what Hawes might owe on any accounting on a rescission, nor does it contend that there is any legal theory upon which it could hold Lithocraft so accountable.

108 Idaho 247, 248-49, 697 P.2d 1261, 1262-63. Watson v. Weick and Lithocraft show a valid tender takes a lot, it really must be a full restoration of a parties’ previous position. It certainly requires more than one line in an email by Kelly which reads: “Last chance for you guys to accept a return of your money.”

Now, a discussion of the facts regarding rescission, viewed in the light most favorable to AED.

AED also claims its offer to tender was all that was required and the offer was made July 13, 2010. Id., p. 11. AED claims:

When a party is seeking a judgment for rescission, an offer to tender is all that is required and such was made in this case. On July 13th, 2010, AED informed KDC it was their last chance to accept the return of the money.26 That is an offer to return the consideration provided and sufficient to allow AED to seek rescission.

Response to Summary Judgment, p. 11. Footnote 26 cites to “Affidavit of Eric Kelly at 29”. Paragraph 29 of the Affidavit of Eric J. Kelly in Opposition to Summary Judgment reads:

On July 13th, I offered to return KDC’s purchase money for the bridge. (See Exhibit “M” attached hereto and incorporated herein.) I regret the language I used, however, I was understandably very frustrated with this situation by that point.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29. Exhibit “M” to Kelly’s affidavit is an email, with the heading “Buyout”, sent by Kelly on July 13, 2010, to “deltademo” (Delta Demo is not KDC, Affidavit of Lee Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶ 2, 3, 4), which reads:

Last chance for you guys to accept a return of your money. You’ve been flapping your mouth to the media without knowing the legal facts.
I met with my lawyer and I am moving forward to have you tossed off the job. It will cost you far more than the amount you paid.

I am not going to screw with you liars anymore.

Eric J. Kelly Sr.
Vice-president
Advanced Explosive Demolition, Inc.

Affidavit of Eric J. Kelly in Opposition to Summary Judgment, p. 6, ¶ 29; Exhibit “M”.

This is the only point in Eric J. Kelly’s affidavit where Kelly discusses a “return of your money”. Nowhere in Kelly’s affidavit does Kelly state what “KDC’s purchase money for the bridge” amounted to. Krystal Chaklos states on June 3, 2010, KDC wired payment of $25,000 to AED for payment on the Asset Purchase and Liability Assumption Agreement (“Purchase Agreement”). Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4. Krystal Chaklos states:

In July 2010, AED proposed rescinding the Purchase Agreement as a way to resolve the dispute between AED and KDC concerning demolition of the Bridge. However, at no time did AED actually attempt to return KDC’s payment of $25,000. AED merely offered to return the payment as part of the proposal to rescind the Purchase Agreement.

Id., pp. 3-4, ¶ 15. The “return of your money” statement by Kelly to Delta Demo on July 13, 2010, needs to be put in context. Six days earlier, on July 7, 2010, Kelly’s/AED’s attorney, Arthur Bistline, sent Lee and Krystal Chaklos the following email;

I have been contacted by Eric Kelly regarding the Bellaire Bridge. I have reviewed the contract documents.

The contract provides that the demolition of the bridge is a material term of the parties agreement. The contract also provides that time is of the essence. The contract to demolish the bridge provides, without condition, that you were to pay $30,000 by June 9th, 2010, which you have not done. Since the demolition contract has been breached and the demolition is a material term of the parties contract, Mr. Kelly and/or AED is entitled to rescind the contract. “A material breach by one party will allow the other party to rescind the contract.” Borah v. McCandless, 147
Idaho 72, 79, 205 P.3d 1209, 1215 (2009).

Mr. Kelly has parties interested in taking over your position in this matter. If you fail to make arrangement with me to wire the money by the close of business tomorrow, then suit will be filed here in Kootenai County, as is allowed in the contract, seeking to rescind the contract and for damages occasioned by the delay's your failure to perform have caused, which damages will be an offset against the $25,000 you have paid for the bridge.

Please contact me after you have considered the above.

Arthur Bistline
Bistline Law

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 13, Exhibit “D”. (bold and underlining in original).

This Court finds that Kelly’s one sentence “Last chance for you guys to accept a return of your money” in Kelly’s July 13, 2010, email to Delta Demo, is not a tender. First of all, it is an email to the wrong party, Delta Demo, when KDC paid the money. Second, Kelly doesn’t state how much “money” he is talking about. Third, Kelly does not state that he is ready to pay such funds. Prior to July 13, 2010, KDC was certainly aware that AED was not obtaining any of the necessary permits or licenses to perform operations in West Virginia (Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8), and KDC was aware AED was wanting the mobilization money (Id., Exhibit B), so KDC would have reason to be concerned about AED’s ability to repay what KDC had sent to AED just one month earlier. Fourth, Krystal Chaklos, who is an officer of KDC, had just been told by Kelly/AED’s attorney Bistline that KDC had to wire Bistline $30,000 the next day or he would file a lawsuit against KDC on behalf of AED, in which the $25,000 KDC paid for the bridge would be treated as an “offset.” Regarding the third and fourth reason, keep in mind the Idaho Supreme Court in O’Connor wrote:

145 Idaho 904, 911, 188 P.3d 846, 853. Because Kelly's email statement "Last chance for you guys to accept a return of your money" was to the wrong party, unspecific in amount, did not state Kelly is ready to pay such funds and was totally contrary to what Kelly's lawyer had written just six days prior to Kelly's email, this statement can hardly be considered an *offer*, let alone "...an actual intent and willingness to pay to constitute a valid tender."

KDC is entitled to summary judgment on AED's claims of rescission. The remedy of rescission is simply not available to AED because AED did not tender the $25,000 to KDC when AED had a legal duty to do so. AED did not "offer" to tender the $25,000 to KDC when AED had a legal duty to do so. Both for purposes of KDC's summary judgment motion and for purposes of AED's motion to reconsider, rescission is not available to AED.

4. AED's Claims of Specific Performance.

KDC argues that assuming AED can prove fraud, it is still not entitled to specific performance of the demolition agreement. First of all, this Court has determined, as set forth above, that AED cannot prove fraud and KDC is entitled to summary judgment.

Alternatively, even if AED could prove fraud, or even if AED appeals this Court's decisions on summary judgment, this Court finds that AED is not entitled to specific performance as a remedy.

AED has sued for specific performance. Amended Complaint, p. 4, Count
Three, ¶¶ 21-23. KDC argues Chandler v. Hayden, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009), when discussing the three remedies for fraud: "damages, rescission, or enforcement of the contract according to the defrauding party's representation of the bargain", refers to the proper measure of damages under the benefit of the bargain rule. Memorandum in Support of Motion for Summary Judgment, pp. 19-20. Without reaching that issue, this Court finds that AED would not be entitled to specific performance in any event.


AED argues: "AED is the party on the hook to Roger Barrack, the original owner of the bridge, as well as to the United States Federal District Court to ensure proper removal of the bridge." Response to Summary Judgment, p. 12. AED then claims: KDC's indication that it no longer intends to use AED or to use explosives to demolish the bridge "...increases the risk and costs associated with removal of the bridge" and "This increases the risk that AED will be required to expend money to comply with its obligations to Barrack as well as to the federal court, but no number can be placed on that risk." Id., p. 13. Taking this unsupported argument at face value, the argument
itself establishes that monetary damages are appropriate and adequate. This argument assumes something that has not even occurred, that AED will have “to expend money to comply with its obligations to Barrack”, but even given that assumption, the amount of money AED spends would certainly be simply and readily ascertainable.

The Court is not at all persuaded by AED’s final argument:

AED bargained for and received the consideration that it would participate in the demolition of the bridge to guard against certain identified risks. AED is entitled to what it bargained for and if not entitled to rescission, AED is entitled to specific performance. If KDC does not wish for AED to be involved, KDC should accept AED’s offer of rescission.

Id., p. 13. Given the fact that it was AED which filed this lawsuit, and given the fact that AED’s filing this lawsuit has placed KDC in precarious position to have this bridge demolished on time, the last sentence smacks of financial terrorism. AED is essentially arguing: If KDC cannot demolish this bridge because of this lawsuit, and AED filed this lawsuit, and if KDC wishes AED go to away, then KDC should accept AED’s offer of rescission.

KDC simply responds to AED’s specific performance argument that the Asset Purchase and Liability Assumption Agreement removed any liability AED has regarding demolition of the bridge. Defendant’s Reply Memorandum in Support of Motion for Summary Judgment, p. 10. If that is true, then not only is the remedy of specific performance without legal basis, it would also be lacking any factual basis.

KDC is entitled to summary judgment on AED’s claims of specific performance.

The remedy of specific performance is not available to AED.

5. AED’s Claims Against Lee Chaklos are Dismissed Because Lee Chaklos is not an Owner, Director, Officer or Agent of KDC.

KDC argues AED’s claims against Lee Chaklos must be dismissed because Lee Chaklos is not an owner, director, officer, or agent of KDC. AED concedes this point as
AED states:

KDC is only entitled to summary judgment that Lee Chaklos bears no personal responsibility as an officer, director or shareholder of KDC as he held none of these positions.

Response to Summary Judgment, p. 5. Because AED concedes KDC is entitled to summary judgment of all claims against Lee Chaklos, summary judgment is granted and all claims of AED against Lee Chaklos are dismissed with prejudice.

6. KDC Must be Granted its Requested Quiet Title Action.

KDC claims it is "...entitled to judgment as a matter of law as to all of Plaintiff's claims, and on Defendant's claim to quiet title which is contained in their Amended Counterclaim in this matter." Memorandum in Support of Motion for Summary Judgment, p. 1. KDC's Count III of its Counterclaim in "KDC's Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim," filed November 17, 2010, alleges that "Pursuant to the terms of the Purchase Agreement, and by virtue of the Bill of Sale, KDC Investments is the rightful owner of the Bridge, that AED by filing its Amended Complaint, has claimed an ownership interest in the Bridge", and that "KDC seeks a decree from this Court quieting title to the Bridge in favor of KDC Investments." KDC's Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶¶ 18-21. After KDC made application for default on December 6, 2010, AED filed Plaintiff's Answer to Defendants' Amended Counterclaim on December 8, 2010. In that answer, AED denies that "Pursuant to the terms of the Purchase Agreement, and by virtue of the Bill of Sale, KDC Investments is the rightful owner of the Bridge." Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶ 19;
Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 2, ¶ 8. However, AED admits that “AED, by virtue of filing its Amended Complaint, has claimed an ownership interest in the Bridge”, and “KDC Investments seeks a decree from this Court quieting title to the Bridge in favor of KDC Investments.” Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, Count III, p. 10, ¶¶ 20-21; Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC's Amended Counterclaim, p. 2, ¶ 9.

In its briefing AED does not address KDC's request that title to the bridge be quieted in KDC's name.

In AED's Amended Complaint AED makes a cryptic allegation: "Plaintiff, as owner of the bridge, was and is subject to a non-assignable obligation to demolish and remove the bridge." Amended Complaint, p. 2, ¶ 12. That allegation is unsupported by any evidence. AED has put forth no evidence that it owns this bridge. In its prior briefing, KDC sets forth the problem caused by AED creating the ownership issue:

However, after AED filed suit claiming it owned the Bridge, the Coast Guard issued KDC Investments a letter on September 20, 2010, stating: "We regret to inform you that until final ownership is determined in a court of law; no bridge work of any sort may proceed. Previous approvals issued by this officer are hereby suspended until further notice."

Memorandum in Support of Motion for Mandatory Injunction, p. 7; Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction, filed November 18, 2010, Exhibit 2.

KDC has paid for the bridge. This Court finds the Purchase Agreement and the Bill of Sale are not ambiguous. Those documents state ownership of the bridge was transferred to KDC. The only argument AED has advanced to prevent that transfer of ownership.
ownership is its fraud argument. The Court has granted summary judgment against AED and in favor of KDC on AED’s fraud claims for a variety of reasons. Ultimately, this Court has determined that the remedy of rescission is no longer available to AED, and thus, any claim of AED to ownership of this bridge evaporates. Because AED cannot rescind the Purchase Agreement, the transfer of ownership in this bridge to KDC remains completely valid. KDC is entitled to summary judgment quieting title to the bridge in the name of KDC.

7. KDC’s Standing to Contest AED’s Corporate Status Need Not Be Reached on Summary Judgment.

In this Court’s Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, this Court discussed whether AED, due to it being corporately dissolved, had the ability to enter into any of these contracts, and whether KDC has standing to raise that issue. Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction, pp. 9-11. On summary judgment, AED again raises the issue of standing. Response to Summary Judgment, pp. 7-8. This Court need not decide this issue for purposes of summary judgment, as the Court has already held that AED created an illegal agreement due to its failure to have a valid contractor’s license and failure to obtain the required permit at the time it entered into this demolition agreement with KDC.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED defendant KDC’s Motion to Shorten Time to hear KDC’s Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment is GRANTED.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF AED’S MOTION FOR RECONSIDERATION
IT IS FURTHER ORDERED defendant KDC's Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment is granted and denied as set forth above.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED as to AED's breach of contract claim on the "demolition agreement", and that claim must be dismissed because the demolition agreement was illegal given AED's failure to obtain a valid contractor's license and procure the necessary permits before entering into the demolition agreement with KDC. The demolition agreement is an illegal contract from AED's standpoint. KDC is entitled to summary judgment against AED on AED's breach of contract claims on the demolition agreement.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED as to AED's fraud claims because 1) AED had no right to rely upon any alleged misrepresentations where it did not have a West Virginia Contractor's License; and 2) no evidence exists to demonstrate KDC had no intention of allowing AED to blast the bridge on June 1, 2010.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is DENIED as to AED's fraud claim should be dismissed because those claims were not pled with particularity.

IT IS FURTHER ORDERED defendant KDC's Motion for Summary Judgment is GRANTED on AED's claims of rescission. The remedy of rescission is simply not available to AED because AED did not tender or offer to tender the $25,000 to KDC when it had a legal duty to do so.
IT IS FURTHER ORDERED plaintiff AED’s Motion for Reconsideration is DENIED because the remedy of rescission is not available to AED because AED did not tender or offer to tender the $25,000 to KDC when it had a legal duty to do so.

IT IS FURTHER ORDERED defendant KDC’s Motion for Summary Judgment is GRANTED on AED’s claims of specific performance. The remedy of specific performance is not available to AED.

IT IS FURTHER ORDERED defendant KDC’s Motion for Summary Judgment is GRANTED on AED’s claims against Lee Chaklos. Those claims are dismissed because Lee Chaklos is not an owner, director, officer, or agent of KDC.

IT IS FURTHER ORDERED defendant KDC’s Motion for Summary Judgment is GRANTED and KDC is entitled to judgment as a matter of law as to all of AED’s claims of ownership (all such claims are dismissed), and KDC’s claim of quiet title contained in its Amended Counterclaim is GRANTED.

IT IS FURTHER ORDERED AED’s claims are DISMISSED. Trial remains only on the issues raised in KDC’s Amended Counterclaim.

Entered this 28th day of January, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 31st day of January, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<table>
<thead>
<tr>
<th>Lawyer</th>
<th>Fax #</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arthur Bistline</td>
<td>665-7290</td>
</tr>
<tr>
<td>Randy L. Schmitz</td>
<td>208-395-8585</td>
</tr>
</tbody>
</table>
March 21, 2011

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Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d’Alene ID 83814

RE: AED, INC. v. KDC Investments, LLC, et al
Case No. CV 10-7217 (Kootenai County, Idaho)

Deponents: Eric J. Kelly, Sr. and Lisa A. Kelly
Taken on 1/27/2011
M & M Job No. 5155C2/5156C2

Enclosed find compressed copies of the above-referenced depositions,
along with the original Certificates of Witness and Change Sheets.
Please have the deponents review the transcripts, complete the Change Sheets as
necessary, and sign and date the Certificates of Witness before a Notary
Public.

PLEASE THEN RETURN ALL OF THE ENCLOSED MATERIAL
TO M & M COURT REPORTING SERVICE, INC., 816 E. Sherman
Avenue, Suite 7, Coeur d’Alene, Idaho, 83814. We understand at this
time you are not ordering copies of these transcripts, and therefore are not
authorized to retain or reproduce these copies.

The witnesses are given 30 days from your receipt of this letter to
complete the aforesaid by the Idaho Rules of Civil Procedure.

The sealed original transcripts are being delivered to the custody of the
taking attorney, Mr. Randall L. Schmitz, Boise, Idaho.

Sincerely yours,

M & M COURT REPORTING SERVICE, INC.

Cheryl Barrett Smith

cc: Mr. Randall L. Schmitz, w/sealed original transcripts
Clerk of the District Court, Kootenai County

Enc.
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually.

Defendants.

COME NOW Plaintiff, AED, Inc. ("AED"), and Defendant, KDC Investments, LLC ("KDC"), by and through their respective counsel of record, pursuant to Rule 41 of the Idaho Rules of Civil Procedure, and hereby stipulate and agree that the Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration entered on January 31, 2011, has rendered Counts I and II of

STIPULATION TO DISMISS COUNTS I AND II OF KDC INVESTMENTS, LLC’S COUNTERCLAIM WITHOUT PREJUDICE • 1
KDC's counterclaim moot, and therefore, AED and KDC hereby stipulate and agree to the voluntary dismissal of Counts I and II of KDC's counterclaim without prejudice.

DATED this 3rd day of February, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

Randy L. Schmitz - Of the Firm
Counsel for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

DATED this ___ day of February, 2011.

BISTLINE LAW, PLLC

By

Arthur Bistline - Of the Firm
Counsel for Plaintiff, AED, INC.
KDC's counterclaim moot, and therefore, AED and KDC hereby stipulate and agree to the voluntary dismissal of Counts I and II of KDC's counterclaim without prejudice.

DATED this ___ day of February, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Counsel for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

DATED this ___ day of February, 2011.

BISTLINE LAW, PLLC

By

Arthur Bistline - Of the Firm
Counsel for Plaintiff, AED, INC.
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,

and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned has called up for hearing before The Honorable John T. Mitchell on Monday, February 14, 2011, at 1:30 p.m. or as soon thereafter as counsel may be heard, at the Kootenai County Courthouse, the following matter(s):

MOTION TO SHORTEN TIME

If these matters are resolved, the moving party shall contact the judge's office to cancel this hearing.

DATED this 14th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[  ] Hand-delivered
[  ] Regular mail
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[  ] Overnight mail
[x] Facsimile to (208)395-8585
[  ] Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

[  ] Hand-delivered
[  ] Regular mail
[  ] Certified mail
[  ] Overnight mail
[x] Facsimile to (208)446-1132
[  ] Interoffice Mail

BY: Leanne Villa
LEANNE M. VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,

and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

PLAINTIFF’S MOTION TO SHORTEN TIME

Pursuant to I.R.C.P. 6, Plaintiff, AED, moves this Court for an Order to shortening the required time for notice of hearing on the Motion to Reconsider Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment to allow it to be heard on February 14, 2010, at 1:30 p.m.

This motion is made on the grounds and for the reasons that the required notice cannot be given prior to the hearing to be held on February 14, 2011.

Oral argument is requested hereon.

DATED this ___ day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

PLEASE TAKE NOTICE that the undersigned has called up for hearing before The Honorable
John T. Mitchell on Monday, February 14, 2011, at 1:30 p.m. or as soon thereafter as counsel may be
heard, at the Kootenai County Courthouse, the following matter(s):

MOTION TO RECONSIDER COURT'S MEMORANDUM DECISION AND ORDER
GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT

If these matters are resolved, the moving party shall contact the judge's office to cancel this
hearing.

DATED this ___ day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of February, 2011, I caused to be served a true and correct copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to the following:

Randy L Schmitz
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Honorable John T. Mitchell
Kootenai County Courthouse

[ ] Hand-delivered
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[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: ____________
LEANNE M. VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSAL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

PLAINTIFF'S NOTICE OF FILING IN SUPPORT OF MOTION TO RECONSIDER

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby files the attached copy of pages 762 through 765 of Chapter 18, Misrepresentation and Nondisclosure, Prosser and Keeton on Torts Fifth Edition, as Exhibit "A", together with the attached Westlaw’s Reinstatement of the Law of Contracts retrieved though a search on Westlaw as Exhibit “B”.

DATED this 4th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz  [ ] Hand-delivered
John Burke  [ ] Regular mail
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702 W. Idaho St. Suite 700  [ ] Overnight mail
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Boise, ID 83701  [ ] Interoffice Mail

Honorable John T. Mitchell  [x] Hand-delivered
Kootenai County Courthouse  [ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[ ] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: LEANNE M. VILLA

PLAINTIFF'S NOTICE OF FILING
IN SUPPORT OF MOTION TO RECONSIDER -2-

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011
of information. And for the same reason, where the opinion is that of one who purports to be a disinterested person, not involved in any dealing with the plaintiff, it is generally agreed that there may be reasonable reliance upon it. 79

Prediction and Intention

Ordinarily a prediction as to events to occur in the future is to be regarded as a statement of opinion only, on which the adverse party has no right to rely. 80 It was said very early that "one cannot warrant a thing which will happen in the future," 81 and where the statement is that prices will remain unchanged, 82 that taxes will be reduced, 83 that cattle will reach a given weight within a specified time, 84 that the plaintiff will be able to obtain a position, 85 or that he will have profitable building lots next to a highway, 86 the law has required him to form his own conclusions. Such prophecy does, however, always carry an implied representation that the speaker knows of no facts which will prevent it from being accomplished; 87 and as in the case of any other opinion, it has been held that there may be reasonable reliance upon the assertion where the speaker purports to have special knowledge of facts which would justify the expectations he is raising. 88

On the other hand, statements of intention, whether of the speaker himself or of another, 89 usually are regarded as statements of fact. 90 "The state of a man's mind," said Lord Bowen 91 in 1882, "is as much a fact as the state of his digestion;" and this catch phrase has been repeated ever since in explanation of the distinction between prediction and intention. But any statement of an opinion is at least as much an assertion of the fact of a present state of mind; an assertion must be material or material may rea conduct. 92

82B; Paterson v. Correll, 1931, 92 Ga.App. 214, 8 S.E.2d 264 (predicted income); Alropa Co v. Fidelity, 1938, 226 Wis. 561, 277 N.W. 108 (canal to be constructed).


91. See Sal


94. Asser v. Underwood 1878, 41 Ill. 335 (affirmed in Conn. 1929, 118 Conn. 625). See infra p. 201.

95. See Sal

mind; and the justification of the distinction must be that the intention is regarded as a material fact, by which the adverse party may reasonably be expected to govern his conduct. A promise, which carries an implied representation that there is a present intention to carry it out, is recognized everywhere as a proper basis for reliance; and assertions of intention which are not promissory in form may be, although they are not always, quite as material and persuasive. All but a few courts regard a misstatement of a present intention as a misrepresentation of a material fact; and a promise made without the intent to perform...
frauds, or the statute of limitations, or falls within the parol evidence rule, or a disclaimer of representations.  

One group of cases, undoubtedly in the minority, have held that it cannot, arguing that to allow the action would be to permit an evasion of the particular rule of law which makes the promise unenforceable, or that the promise is not deemed to know the law, and must be held not to have been deceived by such a promise. The prevailing view, however, permits the action to be maintained, considering that the policy which invalidates the promise is not directed at cases of dishonesty in making it, and that it may still reasonably be relied on even where it cannot be enforced. Obviously the parties are never in pari delicto where the promisor does not intend to perform his bargain from the time he made it, and a tort action in deceit should lie, although it is admitted that the opposite conclusion could be supported by a strong argument.

As to infancy of the promisor, see § 134.


10. Maintaining ("Fraud vitiates everything it touches"): Nyquist v. Foster, 1954, 44 Wis.2d 465, 288 conclusion will depend upon the favor with which the particular rule of law is regarded by the court under the circumstances of the case; but the tendency is clearly to treat the misrepresentation action as a separate matter from the contract.

Unless the present state of mind is misrepresented, there is of course no misrepresentation. When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent. It may, however, be inferred from the circumstances that the promisor did not intend to perform his bargain from the time he made it, and a tort action in deceit should lie, although it is admitted that the opposite conclusion could be supported by a strong argument.

As to infancy of the promisor, see § 134.

14. City of San F. 


the circumstances, such as the defendant's insolveney 15 or other reason to know that he cannot pay, or his repudiation of the promise soon after it is made, with no intervening change in the situation, or his failure even to attempt any performance, or his continued assurances after it is clear that he will not do so. 19

So far as estoppel is concerned, the courts have gone to considerable lengths to avoid the injustice which may result from reliance on a broken promise, by developing a doctrine of "promissory estoppel," whose chief function has been to provide a substitute for consideration in enforcing contract liability. Discussion of that doctrine is necessarily beyond the scope of this text.

WESTLAW REFERENCES

misrepresent /s future prediction /s intention /s rely relied reliance
misrepresent /s "state of mind" /s topic(110)
fraud! deceit! false /s "state of mind"

$110. Damages

Since the modern action of deceit is a descendant of the older action on the case, it carries over the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise. 1 Nominal damages are not awarded in deceit, and there can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been, as where for example he receives all the value that he has been promised and has paid for, or is induced to do only what his legal duty would require him to do in any event. The same is undoubtedly true of any negligence action for misrepresentation.

When restitution is sought, either in equity or at law, a much more liberal policy has been adopted. Since the purpose is not to compensate the plaintiff's loss, but to re-

DAMAGES

Predictions and Intention

misrepresent /s future prediction /s intention /s rely relied reliance
misrepresent /s "state of mind" /s topic(110)
fraud! deceit! false /s "state of mind"

$110


2. Alden v. Wright, 1891, 47 Minn. 225, 49 N.W. 797; Bailey v. Oatis, 1911, 85 Kan. 338, 116 P. 830; Castelli v. Abbramo, Mun.Ct.N.Y.1956, 12 Misc.2d 145, 176 N.Y.S.2d 525; and cases cited immediately above in note 15. They may, however, be awarded where there is proof that actual damage has occurred, but no proof as to the amount. Oates v. Glover, 1934, 228 Ala. 656, 154 So. 786.

3. See infra, this section.


§ 184. When Rest Of Agreement Is Enforceable

(1) If less than all of an agreement is unenforceable under the rule stated in § 178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

(2) A court may treat only part of a term an unenforceable under the rule stated in Subsection (1) if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing.

Comment:

a. Refusal to enforce a promise. Under the rule stated in the preceding Section, an agreement may be unenforceable as to corresponding equivalents on each side but enforceable as to the rest. If it is not possible to apportion the parties' performances in this way so that corresponding concessions are made on both sides, a refusal to enforce only part of the agreement will necessarily result in some inequality. If the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable. Under Subsection (1), however, if that performance is not an essential part of the agreed exchange, a court may enforce all but the part that contravenes public policy. For example, a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part. Whether the performance is an essential part of the agreed exchange depends on its relative importance in the light of the entire agreement between the parties. A party who has engaged in such serious misconduct that the entire agreement is unenforceable cannot take advantage of the rule stated in Subsection (1). See Comment d to § 178.

Illustration:

1. A employs B as head bookkeeper of his retail clothing store under an employment agreement in which B promises not to work in the retail clothing business in the same town for three years after the termination of his employment. B works for A for five years but does not deal directly with customers and acquires no confidential information in his work. Although B's promise is unreasonably in restraint of trade and is unenforceable on grounds of public policy, enforcement of the rest of the employment agreement is not precluded on those grounds. See Illustration 8 to § 188.

b. Refusal to enforce part of a term. Sometimes a term is unenforceable on grounds of public policy because it is too broad, even though a narrower term would be enforceable. In such a situation, under Subsection (2), the court may
refuse to enforce only part of the term, while enforcing the other part of the term as well as the rest of the agreement. The court's power in such a case is not a power of reformation, however, and it will not, in the course of determining what part of the term to enforce, add to the scope of the term in any way. A court will not exercise this discretion in favor of a party unless it appears that he made the agreement in good faith and in accordance with reasonable standards of fair dealing. Compare §§ 157, 205. For example, a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term is contained in a standard form supplied by the dominant party argues against aiding him in this request. Whether a particular dispute involves a single term, so that it comes under Subsection (2), or separate terms, so that it comes under Subsection (1), will be determined from the substance of the agreement as well as from its language.

Illustrations:

2. A, who is engaged in business as a baker and confectioner, sells the business to B, and as part of the bargain promises not to engage in the business of "baker, confectioner, or other business" within the same town for three years. The provision is fairly bargained for. A's promise is so broad as to be unreasonably in restraint of trade because A's business is only that of baker and confectioner. Although part of A's promise is unenforceable on grounds of public policy (§ 188), it is enforceable with respect to the business of baker or confectioner.

3. A sells his grocery business to B and as part of the agreement promises not to engage in that business "within the city where the business is situated or within a radius of fifty miles." The provision is fairly bargained for. A's promise involves an unreasonable restraint of trade because the business extends within the city and over a radius of only twenty-five miles. Although part of A's promise is unenforceable on grounds of public policy (§ 188), it is enforceable with respect to the city and twenty-five miles.

4. A and B make an agreement for A to repair B's building under which B promises not to hold A liable for a "willful or negligent breach of contract." The provision is fairly bargained for. Although part of B's promise is unenforceable on grounds of public policy (§ 195), it is enforceable with respect to negligence.

5. A lends B $10,000, taking a promissory note for that sum plus interest. In calculating the rate of interest, the parties make an error so that the amount of interest exceeds the highest permissible legal rate. Although part of B's promise to pay interest would be unenforceable in its entirety, it is enforceable up to the highest permissible rate. If A knew when he made the loan that the amount exceeded the highest permissible legal rate, B's promise to pay interest would be unenforceable in its entirety.

REPORTER'S NOTE

This Section is derived from former § 518. See also former §§ 537, 603. It differs from former § 518 in two respects. First, the present rule is stated so as to apply to terms generally, whereas the former version was limited to promises in restraint of trade. Second, and more important, this Section rejects the so-called "blue-pencil rule" of former § 518, under which a promise in restraint of trade was unenforceable in its entirety if the restraint imposed exceeded what was reasonable and the terms of the agreement indicated no line of division. This rule is rejected because it is now contrary to the weight of authority and has been strongly criticized by scholarly writers. See, e.g., Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948); Ceresia v. Mitchell, 242 S.W.2d 359 (Ky. 1951); Bess v. Bothman, 257 N.W.2d 791 (Minn. 1977); Howard Schultz & Assoc. v. Broniec, 239 Ga. 181, 236 S.E.2d 265 (1977) (citing the Tentative Draft of this Section); Williston & Corbin, On the Doctrine of Beit v. Beit, 23 Conn.B.J. 40 (1949); Blake, Employee Agreements Not to Compete, 73 Harv.L.Rev. 625, 681-83 (1960). That the rule permitting the court to enforce part of an agreement will not be applied where there was bad faith in the negotiating process, see H & R Block, Inc. v. Lovelace, 208 Kan. 538, 493 P.2d 205 (1972). For the potential incentives it will give employers to bargain in bad faith in the future, see Richard P. Rita Personnel Services Int'l v. Kot, 229 Ga. 314, 191 S.E.2d 79 (1972). As to divisibility generally, see 6A Corbin, Contracts §§ 1390, 1520 (1962 & Supp.1980); 14 Williston, Contracts §§ 1647B-48 (3d ed.1972); 15 id. § 1779.

Comment a. Illustration 1 is new; see also Mailand v. Burckle, 20 Cal.3d 367, 143 Cal.Rptr. 1, 572 P.2d 1142 (1978).
Comment b. Illustration 2 is based on Illustration 2 to former § 518. Illustration 3 is based in part on Illustration 1 to former § 518; Eastern Distrib. Co. v. Flynn, 222 Kan. 666, 567 P.2d 1371 (1977). Illustration 4 is supported by former § 574 and Illustration 1 to that section. Illustration 5 is based on Illustration 1 to former § 537.
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYS TAL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff, AED, by and through its attorney of record, ARTHUR M. BISTLINE, and hereby requests that the Court reconsider its Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment entered on January 31, 2011, pursuant to Idaho Rule of Civil Procedure 11, and request that this Court take the following action:

1) Vacate the portion of the Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment which quiets title of the bridge to the Defendants.
OR, in the alternative,

2) Set the matter for Jury Trial on the sole issue of whether AED would have sold the bridge without the agreement that AED perform the blast.

DATED this 4th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
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Honorable John T. Mitchell
Kootenai County Courthouse

[ ] Hand-delivered
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[ ] Interoffice Mail

BY: LEANNE M. VILLA

MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT -2
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

COMES NOW, AED, Inc., by and through its counsel of record, Arthur M. Bistline, and submits the following Memorandum in Support of Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment:

I. The contract to sell the bridge is based on the illegal consideration of the promise to hire AED to perform the blasting work and is therefore illegal. This Court should take no action to assist KDC in enforcing that illegal contract.

"The law is well settled, however, that illegal contracts are void and cannot be enforced."

"In most cases, the Court will leave the parties to an illegal contract as it finds them. Farrell v. Whiteman 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009).

In this case, the agreement to sell the bridge was contingent upon execution and performance of a contact for AED to blast the bridge. KDC did in fact execute a document for AED to perform the work and has clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. The consideration for the sale of the bridge consisted of the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 CENTS ($25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work. Since the sale of the bridge is based on illegal consideration, the sale contract is likewise unenforceable.

In Quiring v. Quiring 130 Idaho 560, 944 P.2d 695 (1997), a husband had given his wife a quitclaim to the family home which recited that the consideration paid for it was EIGHT HUNDRED DOLLARS AND NO/100 CENTS ($800.00). The consideration also consisted of a separate agreement which the Supreme Court found to be illegal. Based on the fact that the consideration for the quitclaim beyond the $800.00 recited was a separate written illegal agreement, the quitclaim deed was likewise unenforceable. Quiring v. Quiring 130 Idaho 560, 567, 944 P.2d 695,702 (1997). The husband would not have signed the quitclaim, but for the separate illegal agreement – the exact circumstance we have in this case. AED would not have gone forward with the sale of the bridge without the separate illegal agreement that AED perform the blast work.

Here, there is no question that the sales contract would not have been signed but for the illegal consideration of the blasting agreement. Quiring is clear that a contract based on illegal consideration is not enforceable.
II. The evidence is undisputed that AED would not have entered into the transaction to sell the bridge absent the illegal agreement that AED perform the blasting work. The blasting portion cannot be severed from the sales portion.

KDC has never disputed that AED blowing the bridge was a material part of the agreement to sell the bridge, and has specifically argued that when it agreed to use AED to blast the bridge, it had the actual present intent to perform that obligation.

The Court ruled that the promise by KDC to hire AED is illegal, but then enforced the remainder of the parties' agreement to sell the bridge. The remainder of the agreement is illegal based on Quiring, but also because the blast portion was material to AED and cannot be separated from the agreement to sell the bridge.

If less than all of an agreement is unenforceable under the rule stated in §178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

Restatement Second of Contracts § 184

Primarily the criterion would appear to be whether the parties would have entered into the agreement irrespective of the offending provisions of the contract. This can usually be determined by weighing equality of the agreed exchange before and after the proposed severance.

Calamari and Perillo on Contracts, Third Edition 1987 at 893, citing Marsh, the Severance of Illegality in Contracts (pts 1 & 2) 64 L.Q.Rev. 230, 347 (1948) and Restatement Second of Contracts, Section 184, Comment a.

At the very least, whether a contractual provision is material is question of fact.

However, this Court would be acting within its discretion to direct a verdict on the matter. “On a motion for a directed verdict a trial judge is faced with the issue of whether, as a matter of law,
the evidence presented would allow reasonable minds to conclude that a verdict in favor of only one of the parties is proper.” Sweitzer v. Dean 118 Idaho 568, 573, 798 P.2d 27, 32 (1990).

Considering Eric Kelly’s e-mails insisting on a blasting contract from early January to Krystal Chaklos’ June promise in her e-mail that AED will do the work in order to get AED to go forward with this sale after KDC had breached the parties’ agreement, and everything in between, no reasonable juror could conclude that AED would have sold the bridge if it would have known that it could not perform the blast work.

In this case, the undisputed evidence is that AED would not have sold the bridge to KDC without the commitment by KDC to hire AED to blast the bridge. The affidavit of Eric Kelly on file in opposition to summary judgment establishes that AED relied on this promise not only for the monetary compensation it provided to AED, but also so AED could make sure the demolition was handled properly.¹ The affidavit of Eric Kelly filed in support of this motion to reconsider establishes that the total benefit to AED, if AED had performed the work, would have been ONE HUNDRED AND FIVE THOUSAND DOLLARS AND NO/100 ($105,000) ($25,000 for sale and $80,000² in profits from the blasting contract).

The benefit to AED of the illegal blasting provisions is more than three times the benefit to AED of the sales provisions, therefore, the agreement that AED blast the bridge was material to AED both from a monetary standpoint as well as the standpoint that AED is still responsible to remove the bridge.

The agreement that AED blast the bridge cannot be separated from the agreement that AED sell the bridge. Both are illegal if the blasting contract is illegal.

¹ Affidavit of Eric Kelly in opposition to summary judgment at paragraph 10.
² The expenses from Kelly's affidavit were $95,000 and the sales price was $75,000.
CONCLUSION

AED’s promise to sell the bridge was based on illegal consideration. The evidence clearly shows that AED would not have sold the bridge, but for the execution of the agreement that AED demolish the bridge. That agreement is illegal and based on Quiring, the sales contract is illegal because it is supported by that consideration. This Court should declare the same and vacate the portion of its' ruling declaring KDC to be the owner of the bridge.

Pursuant to Barry v. Pacific West Const., Inc. 140 Idaho 827, 103 P.3d 440 (2004), this Court should then enter an Order directing AED to return the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 ($25,000.00) KDC paid for the bridge. “Any damages Quality recovers are in the form of restitution, limiting its recovery to the amount by which Pac-West was unjustly enriched.” Barry at 834, 447.

Alternatively, this Court should set this matter for a Jury Trial on the sole issue of whether AED would have sold the bridge if it believes that a reasonable juror could conclude that AED would have sold the bridge without the agreement that AED perform the blast.

DATED this 7th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

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Honorable John T. Mitchell
Kootenai County Courthouse

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[ ] Interoffice Mail

BY: LEANNE M. VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

STATE OF IDAHO )
                 ) ss.
County of Kootenai )

I, Eric Kelly, having been first duly sworn, upon oath depose and state that:

1. I am over the age of eighteen (18) and an individual residing in the state of Idaho;

2. I am the Plaintiff in this matter and familiar with the facts and circumstances surrounding this matter and am competent to testify as to the matters herein contained.

3. The following is a synopsis of the sequence of events involved in the Bellaire Bridge demolition:

   A) Mobilize personnel and equipment to site. Perform Demo Survey per OSHA 29 CFR. Acquire necessary permits.
1) This will require mobilizing the necessary personnel and equipment to begin the preparation of the bridge.

2) Personnel - approximately 8 people and Equipment - various excavators, trucks and marine equipment.

B) Perform environmental remediation.

1) There is some ACM on the Toll House that will require remediation per EPA regulations- subcontractor will do this work.

C) Remove deck, stringers and bed hangers.

1) This will require the necessary personnel to remove the asphalt deck, metal grating and stringers. The bed hangars will also be removed in a specific sequence from West to East.

D) Prepare the Main Span for explosives.

1) This will encompass utilizing personnel and torches to treat certain structural components to facilitate the placement of shape charges. A time frame of 3 days is allowed for this.

2) AED will then apply the explosives per West Virginia Regulations for the use of explosives as we have done on numerous projects in WV before. The detonation and severance of the Main Span will be executed so as to comply with United States Coast Guard regulations to facilitate a 24-hour removal period from the navigable waterway.

3) AED will remove all the steel and place upon the banks of the river for further preparations.

E) Prepare the West Span for explosives.

AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF
PLAINTIFF'S MOTION TO RECONSIDER COURT'S DECISION AND ORDER GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT -2-
1) AED anticipates the same time sequence for preparations as in D. It will not be required to remove the steel in 24-hours as it will be out of the navigation channel.

F) Prepare the East Tower for explosives.

1) AED anticipates the same time sequence for preparations as in D. It will not be required to remove the steel in 24-hours as it will be out of the navigation channel.

As in the past, AED has demolished many structures in similarity. The time allocation is very accurate. There will be time needed for shearing the steel to Mill Specifications which will have no bearing on the explosives operations. Demolishing the approach will commence after all the steel has been prepared from the explosives operation.

4. The following is the cost analysis I have compiled for the Bellaire Bridge Project, these numbers are based on experience in over thirty years of business, blasting hundreds of bridges throughout the United States:

- Mobilization: 4 men at $1000/man round trip $4,000.00
- Permits: Business permit and City of Benwood permit $3,000.00
- Explosives: Main span- 28.00/ft x 600 $16,800.00
  Make ups: 300 x $12/unit $3,600.00
- Explosives: West and East span- 28.00/ft x 800 $22,400.00
  Make ups: 600 x $12/unit $7,200.00
- Detonators: 900 x $4.00/unit $3,600.00
- Det Cord: 2 cases at $500/case $1,000.00
- Labor/hotel/per diems: $15,000/week x 1 ½ weeks $22,500.00

AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF’S MOTION TO RECONSIDER COURT’S DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT

AED Inc. vs. KDC Investments, LLC, et al Supreme Court Case No. 38603-2011
Insurance: lump sum $10,000.00
Miscellaneous: security $900.00
TOTAL: $95,000.00

DATED this 4TH day of February, 2011.

[Signature]
ERIC J. KELLY
Plaintiff

SUBSCRIBED AND SWORN before me this __ day of February, 2011.

[Notary Seal]
Notary in and for the State of Idaho
Residing at: Hayden
Commission Expires: 10/13/2015

AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF
PLAINTIFF’S MOTION TO RECONSIDER COURT’S
DECISION AND ORDER GRANTING DEFENDANT
KDC’S MOTION FOR SUMMARY JUDGMENT -4-
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz  
John Burke  
Hall, Farley, Oberrecht & Blanton, P.A.  
702 W. Idaho St. Suite 700  
P.O. Box 1271  
Boise, ID 83701

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Honorable John T. Mitchell  
Kootenai County Courthouse

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[ ] Facsimile to (208)446-1132  
[ ] Interoffice Mail

BY: [Signature]  
LEANNE VILLA

AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER COURT'S DECISION AND ORDER GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT -5-
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

                         Plaintiff,

vs.  

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually,

                         Defendants.

COME NOW Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos ("KDC"), by and through their undersigned counsel of record, and submit their Objection to Plaintiff's Motion to Shorten Time for its hearing on Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment.

Case No. CV 10-7217

OBJECTION TO Plaintiff's Motion to Shorten Time Re: Hearing on Motion to Reconsider
Around noon on Friday, February 4, 2011, Defendants received Plaintiff’s Motion to Shorten Time and Notice of Hearing, setting the hearing on Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment (“Motion to Reconsider”) for Monday, February 14, 2011. However, Defendants did not receive a copy of Plaintiff’s Motion to Reconsider, supporting memorandum, or supporting affidavit at that time. Plaintiff did not serve its Motion and supporting documents until the close of business on Friday, February 4, 2011, after defense counsel had already left for the day. Accordingly, defense counsel did not have an opportunity to review Plaintiff’s motion and supporting documents until this morning, Monday, February 7, 2011.

Defendants object to Plaintiff’s Motion to Shorten Time for the hearing on its Motion to Reconsider on a couple of grounds. First, it is untimely pursuant to Idaho Rule of Civil Procedure 7(b)(3). Pursuant to Rule 7(b)(3), unless otherwise ordered by the court “for cause shown,” a written motion, memorandum in support, and any affidavits must be served so that they are received no later than fourteen (14) days before the time specified for the hearing. Any responsive briefing shall be filed with the court and served so it is received by the parties no later than seven (7) days before the hearing. Id. In this case, while the motion and supporting documents were technically received ten (10) days before the time specified for hearing, since they were received at the end of the day on a Friday, practically speaking, they were not received until seven (7) days before the hearing. However, in either case, the motion is untimely. This untimely service prejudices the Defendants since under Rule 7(b)(3), any responsive brief must be filed today, February 7, 2011. In its supporting memorandum, Plaintiff raises new arguments to which Defendants cannot reasonably be expected to respond in the course of a single day.
Second, Plaintiff should only be allowed to shorten time under Rule 7(b)(3) if good cause is shown. No good cause has been shown in this case. Plaintiff's Motion to Shorten Time is only based upon the grounds that "the required notice cannot be given prior to the hearing to be held on February 14, 2011." That is a true statement, the consequence of which is that Plaintiff should have chosen a different date for the hearing. Just because Plaintiff chose a hearing date which does not allow it to provide proper notice under Rule 7(b)(3) does not demonstrate good cause to shorten the Rule 7(b)(3) timing requirements. Plaintiff must show why it needs to have a hearing on such short notice, not just that it chose to. As such, no good cause has been shown.

Therefore, Plaintiff's Motion to Shorten Time should be denied and the hearing on its Motion to Reconsider, currently scheduled for Monday, February 14, 2011 at 1:30 p.m., should be vacated and rescheduled for a date and time that allows Plaintiff to comply with Rule 7(b)(3). In the alternative, if the Court is inclined to grant Plaintiff's Motion to Shorten Time, Defendants respectfully request an extension of time to file their brief in response to Plaintiff's Motion to Reconsider. Defendants request the ability to file and serve their response brief by the end of business on Thursday, February 10, 2011. If the Court grants Plaintiff's Motion to Shorten Time, Defendants also request the ability to attend the hearing by telephone.

RESPECTFULLY SUBMITTED this 7th day of February, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

OBJECTION TO PLAINTIFF'S MOTION TO SHORTEN TIME RE: HEARING ON MOTION TO RECONSIDER - 3
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d’Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telexcopy
Email arthurmooneybistline@me.com

X

Randall L. Schmitz

OBJECTION TO PLAINTIFF’S MOTION TO SHORTEN TIME RE: HEARING ON MOTION TO RECONSIDER- 4
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

PLAINTIFF'S REPLY TO DEFENDANTS OBJECTION TO SHORTEN TIME RE: HEARING ON MOTION TO RECONSIDER

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to Defendant's Objection to Shorten Time Re: Hearing on Motion to Reconsider filed with this Court dated February 7, 2011, as follows:

Plaintiff should have included it in the motion to shorten that in light of December date to demolish and remove the bridge, the matter should be heard as it is dispositive. If the Court follows the precedent of the Quiring case, then this matter is finally concluded as KDC cannot appeal a ruling that the blast contract is illegal as it argued it to be illegal below.

DATED this 8th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
ARThUR BiSTLINE
BISTLINE LAW, PLLC
1423 N. Government Way
Coeur d'Alene, Idaho 83814
(208) 665-7270
(208) 665-7290 (fax)
arthurmooneybistline@me.com
ISB: 5216

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYS\AL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

AMENDED PLAINTIFF'S REPLY TO DEFENDANTS OBJECTION TO SHORTEN TIME RE: HEARING ON MOTION TO RECONSIDER

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to Defendant's Objection to Shorten Time Re: Hearing on Motion to Reconsider filed with this Court dated February 7, 2011, as follows:

Plaintiff should have included it in the motion to shorten that in light of December date to demolish and remove the bridge, the matter should be heard as it is dispositive. If the Court follows the precedent of the Quiring case, then this matter is finally concluded as KDC cannot argue a ruling that the blast contract was legal as it argued it to be illegal.

DATED this 8th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2011, I caused to be served a true and correct copy of the foregoing AMENDED PLAINTIFF'S REPLY TO DEFENDANTS OBJECTION TO SHORTEN TIME RE: HEARING ON MOTION TO RECONSIDER by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
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Boise, ID 83701

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BY: Jennifer Jenkins
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYSAL
CHAKLOS, individually,

Defendants.

CASE NO. CV 10-7217

JUDGMENT

BASED UPON the Court’s Memorandum Decision and Order Granting Defendant
KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for
Reconsideration, entered on January 28, 2011, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff’s Amended
Complaint and Demand for Jury Trial is hereby dismissed with prejudice in its entirety and

JUDGMENT - 1
judgment is hereby entered in favor of Defendants, pursuant to Rule 56 of the Idaho Rules of Civil Procedure.

IT IS HEREBY FURTHER ORDERED ADJUDGED AND DECREED that KDC’s title to the Bellair Bridge is quieted.

IT IS SO ORDERED.

DATED this 28th day of February, 2011.

By

District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of February, 2011, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d’Alene, ID 83814

John J. Burke
Randy L. Schmitz
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Deputy Clerk

JUDGMENT - 2
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,  

Plaintiff,  

vs.  

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually,  

Defendants.  

Case No. CV 10-7217

DEFENDANT’S MOTION TO STRIKE AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF’S MOTION TO RECONSIDER COURT’S DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant KDC Investments, LLC, Lee Chaklos, and Krystal Chaklos (collectively “KDC”), by and through their undersigned counsel of record, and pursuant to Idaho Rule of Civil Procedure 12(f), requests an order striking the Affidavit of Eric J. Kelly, dated February 4, 2011, submitted in support of plaintiff AED, Inc’s (“AED”) Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment.
I. ARGUMENT

On February 4, 2011, AED filed its Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment. On reconsideration, AED argues that the “demolition agreement” is inseparable from the Purchase Agreement and since the “demolition agreement” was illegal and void, the Purchase Agreement is also void. In support of this argument, AED submits the affidavit of Eric Kelly. However, the testimony contained in Mr. Kelly’s affidavit concerns the process and estimated expenses for blasting the Bridge. Despite being completely irrelevant to AED’s argument on reconsideration, the testimony lacks sufficient foundation to be admissible.

Mr. Kelly’s affidavit does not lay any foundation for the introduction of his “synopsis of the sequence of events involved in the Bellaire Bridge demolition” contained in paragraph 3. There is also no foundation laid for the introduction of his “cost analysis” contained in paragraph 4. This is even more evident considering the fact that the cost estimate in paragraph 4 differs from his cost estimate produced during discovery. KDC initially requested AED to itemize by description and amount all damages, special or otherwise, it expected to prove at trial of this matter and to identify all documentation available to substantiate such damages. See Affidavit of Randall L. Schmitz in Opposition to Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment (“Schmitz Aff.”), Ex. D (Plaintiff’s Response to Defendants’ First Set of Interrogatories and Requests for Production), p. 4-5. AED responded as follows:

1. Mobilization: $5,000
2. Insurance: $15,000
3. Hotel-Don Jones House Rental: $2,600
4. Per Diems: $2,600
5. Permits: $3,000
6. Labor: $19,000
7. Explosives: $45,000
8. Miscellaneous: $2,800

Total-$95,000 in estimated costs, estimated profit, $80,000.

While the total estimated costs are the same, the itemized costs differ dramatically. The mobilization costs were originally $5,000, but in Mr. Kelly's affidavit, are now $4,000. Mr. Kelly testified that his mobilization costs were based upon the federal government mileage reimbursement rate of 1.53 per mile. Schmitz Aff., Ex. A (P. 233, L. 10 – P. 234 L. 11). He estimated 2300 miles multiplied by 1.53 to arrive at a cost of $3519, which still did not match his estimated cost of $5,000. Id. In his affidavit, he estimates mobilization based upon 4 men at $1,000 per man. Mr. Kelly has not provided any foundation to justify the change in his method of calculating mobilization costs.

In AED's discovery responses, it estimated insurance costs at $15,000. In his affidavit, Mr. Kelly estimates insurance costs at $10,000. Mr. Kelly testified that the insurance expense was based upon actual monthly premiums of $7,500 and an estimated duration on the project of two months. Schmitz Aff., Ex. A (p. 234, L. 14 – p. 237, L. 8). Mr. Kelly has not laid any foundation for the change in his insurance cost estimate.
AED's labor, hotel, and per diems were separately broken out in the discovery responses. Together, they totaled $24,200. In Mr. Kelly's affidavit, he lumps labor/hotel/per diems together at an arbitrary number of $15,000/week for a total of $22,500. Again, no foundation has been laid for Mr. Kelly's estimate.

Even Mr. Kelly's cost for explosives, for which he supposedly had a receipt but has never produced, does not match. In discovery, AED claimed it spent $45,000 on explosives. Mr. Kelly and his wife, Lisa Kelly, both testified that they had a receipt or some documentation proving how much they spent on explosives. Schmitz Aff., Ex. A (P. 246, L. 20 – P. 247, L. 10); Ex. C (P. 33, L. 11 – P. 34, L. 19). However, no documentation has ever been forthcoming. No matter how one adds up the explosive estimates in Mr. Kelly's affidavit, one does not arrive at $45,000.

In short, AED has not produced a single piece of documentary evidence to help establish any of the cost estimates it has provided, either during discovery or in support of Mr. Kelly's affidavit. The numbers are simply pulled out of thin air. These numbers are even more suspect now considering that they have changed dramatically from the estimates produced during discovery. Without laying a foundation for these estimates, they are simply inadmissible.

Furthermore, it does not appear that the information contained in Mr. Kelly's affidavit is relevant for any purpose on reconsideration. Relevant evidence is evidence that tends to make the existence of any material fact more probable or less probable than it would be without the evidence. I.R.E. 401; State v. Hocker, 115 Idaho 544, 768 P.3d 807 (Ct.App. 1989). Evidence that is not relevant is inadmissible. I.R.E. 402. AED's argument on reconsideration is that the Purchase Agreement is void because it is inseparable from the illegal "demolition agreement."
Information as to how AED planned on blasting the Bridge and how much it would cost to blast the Bridge does not appear relevant to AED’s argument.

II. CONCLUSION

Based on the foregoing, the statements contained in the Affidavit of Eric Kelly as outlined above, and all references to the content of his affidavits contained in Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, should be stricken from the record.

RESPECTFULLY SUBMITTED this 10th day of February, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline  
Bistline Law, PLLC  
1423 N. Government Way  
Coeur d'Alene, ID 83814  
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid  
Hand Delivered  
Overnight Mail  
Telecopy  
Email arthurmooneybistline@me.com

DEFENDANT'S MOTION TO STRIKE AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER COURT'S DECISION AND ORDER GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT - 6

DEFENDANT'S MOTION TO STRIKE AFFIDAVIT OF ERIC J. KELLY IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER COURT'S DECISION AND ORDER GRANTING DEFENDANT KDC'S MOTION FOR SUMMARY JUDGMENT - 6

AED Inc. vs. KDC Investments, LLC, et al  
Supreme Court Case No. 38603-2011  
777 of 1046
COME NOW defendants, KDC Investments, LLC, Lee Chaklos and Krystal Chaklos (collectively referred to as “KDC”), by and through their counsel of record, Hall, Farley, Oberrecht & Blanton, P.A., and submit this Memorandum in Opposition to Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment.

DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT - 1
I. INTRODUCTION

On January 12, 2011, the Court heard argument from the parties on KDC’s Motion for Summary Judgment and other related motions. On January 26, 2011, the Court heard argument from the parties on Plaintiff AED, Inc.’s (“AED”) Motion to Reconsider Decision Holding that Plaintiff is Not Entitled to Rescission. On January 31, 2011, the Court issued its Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration (“Summary Judgment Order”). In the Summary Judgment Order, the Court dismissed AED’s claims for fraud and breach of contract and also held that the equitable remedies of specific performance and rescission were unavailable to AED. The Court also quieted title to the Bellaire Toll Bridge (the “Bridge”) in favor of KDC.

AED now asks the Court to reconsider the Summary Judgment Order, not because the Court’s analysis or rulings were incorrect, but rather because the affect of the rulings require a different outcome on the ownership of the Bridge. Specifically, AED argues that the illegal “demolition agreement” was somehow part of the consideration for the Asset Purchase and Liability Assumption Agreement (“Purchase Agreement”) by which KDC purchased the Bridge. AED argues that since part of the consideration for the sale of the Bridge was illegal, the Purchase Agreement was also illegal, rendering it void. If the Purchase Agreement is void, AED argues that it, and not KDC, is the rightful owner of the Bridge. However, the entire premise of AED’s argument (that the “demolition agreement” was consideration for the sale of the Bridge) is directly contrary to all admissible evidence.
II. STANDARD

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Straub v. Smith*, 145 Idaho 65, 175 P. 3d 754 (2007); *Jordan v. Beeks*, 135 Idaho 586, 21 P.3d 908 (2001); *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992). When ruling on a motion for reconsideration, “the trial court should take into account any new facts presented by the moving party that bear on the correctness of the order.” *Coeur d’Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990). “A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.” *Id.* The burden is on the moving party to bring to the trial court’s attention the new facts. *Id.*

III. ARGUMENT

As in its previous motion to reconsider, AED again has not presented any new facts or law for the Court to consider on this motion. Instead, AED relies upon conclusory allegations which are wholly unsupported, and in fact, are directly contrary to the facts of this case.

A. The Purchase Agreement Unambiguously Recites the Consideration and Promises Upon Which it Was Entered

AED claims “the agreement to sell the bridge was contingent upon execution and performance of a contract for AED to blast the bridge.” (Memorandum in Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment (“Reconsideration Memo”), p. 2)(Emphasis added). AED also
claims “[t]he consideration for the sale of the bridge consisted of the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 CENTS ($25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work.”  *Id.*  (Emphasis added). AED is wrong on both counts.

The Purchase Agreement specifically provides that “[t]here are no contingencies” to the Agreement.  (Amended Complaint, Ex. A, ¶ 4, p. 2). The consideration for the Purchase Agreement was also specifically set forth as follows:

> In addition to the promises set forth in this Agreement by the Buyer, which shall constitute the consideration for this Agreement, Buyer shall pay AED $25,000.00 for the Bridge and all associated property transferred by this Agreement upon execution of this Agreement.

*Id.* , at ¶ 2, p. 2. (Emphasis added).

Furthermore, the Purchase Agreement contained the following merger clause:

> This Agreement sets forth the entire agreement among the parties hereto and fully supersedes any and all prior discussions, agreements, or understandings between the parties and cannot be changed except by a written agreement executed by all of the parties. All material representations by the Sellers regarding the Bridge which is relied upon by the Buyer are set forth in this Agreement.

*Id.* , at ¶ 32, p. 11.

According to the plain and unambiguous language of the Purchase Agreement, the consideration for the sale of the Bridge was $25,000 plus those additional promises expressed within the terms of the Purchase Agreement. If the promises are not expressed within the Purchase Agreement, they are not part of the consideration for the sale of the Bridge. Nowhere within the Purchase Agreement is a separate agreement for AED to blast the Bridge discussed or even referenced. Contrary to AED’s assertion, the illegal “demolition agreement” was not part
of the consideration for the purchase and sale of the Bridge, nor was the sale contingent upon anything.

This is consistent with the intent of the parties according to the testimony of Mr. Kelly. The deposition of Mr. Kelly was taken on January 27, 2011. In his deposition, Mr. Kelly testified that the Purchase Agreement and the “demolition agreement” were to be separate agreements. Mr. Kelly was handed Deposition Exhibit No. 8, which he identified as a true and correct copy of an email from him to KDC dated May 19, 2010, setting forth an informal proposal outlining the blasting of the Bridge. (See Affidavit of Randall L. Schmitz in Opposition to Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment (“Schmitz Aff.”), Ex. A, (P. 68, L. 16 – P. 69, L. 9); and Ex. B. Mr. Kelly testified that the parties intended to turn the May 19 informal proposal into a written contract. Schmitz Aff., Ex. A, (P. 78, L. 16 – P. 79, L. 4). But, most importantly, he testified that the purchase of the Bridge was separate from that proposal. Schmitz Aff., Ex. A, (P. 77, Ll. 3-13). Therefore, AED’s argument that the illegal “demolition agreement” cannot be separated from the Purchase Agreement is inconsistent with Mr. Kelly’s own testimony. To the contrary, the Purchase Agreement and any agreement to blast the Bridge were always to be separate agreements. The fact that the “demolition agreement” was illegal has no bearing on the validity of the Purchase Agreement.

B. Extrinsic Evidence is Inadmissible to Contradict, Alter, Vary, or Add To the Terms of the Purchase Agreement

It appears AED is relying upon extrinsic evidence to support its arguments on reconsideration. While it does not identify any particular piece of evidence or testimony, AED
generally refers to emails between AED and KDC from early January to June and “everything in between” as evidence that AED would not have sold the Bridge absent the promise to allow AED to blast the Bridge. See Reconsideration Memo, p. 4. This evidence contradicts and changes the terms of the Purchase Agreement. However, the parol evidence rule prohibits extrinsic evidence of prior or contemporaneous negotiations to contradict, vary, alter, or add to the terms of an unambiguous, integrated contract.

If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. Kimbrough v. Reed, 130 Idaho 512, 943 P.2d 1232 (1997). A written contract that contains a merger clause is complete upon its face. Id; Chambers v. Thomas, 123 Idaho 69, 844 P.2d 698 (1992); Valley Bank v. Christensen, 119 Idaho 496, 808 P.2d 415 (1991). The purpose of a merger clause is to establish that the parties have agreed that the contract contains the parties’ entire agreement. The merger clause is not merely a factor to consider in deciding whether the agreement is integrated; it proves the agreement is integrated. To hold otherwise would require the parties to list in the contract everything upon which they had not agreed and hope that such list covers every possible prior or contemporaneous agreement that could later be alleged.


The Purchase Agreement contained a merger clause which was quoted above. AED has never even alleged the Purchase Agreement is ambiguous in any way. Therefore, the Purchase Agreement is an unambiguous, integrated contract. Until now, AED was allowed to submit extrinsic evidence regarding the negotiations between the parties because of its fraud allegation. However, in the Summary Judgment Order, the Court dismissed AED’s fraud claim. AED has not challenged or sought reconsideration of that ruling. AED has never alleged mistake. Accordingly, absent its fraud claim, AED cannot submit or rely upon previously submitted
extrinsic evidence to contradict, vary, alter, or add to the unambiguous terms of the Purchase Agreement.¹

IV. CONCLUSION

The Purchase Agreement is a fully integrated, unambiguous contract. It clearly provides that the consideration for the purchase and sale of the Bridge consisted of $25,000 and only those additional promises as expressed within the Purchase Agreement. Nowhere within the Purchase Agreement is an agreement for AED to blast the Bridge mentioned. AED cannot now attempt to introduce or argue extrinsic evidence to contradict, vary, alter, or add to the terms of the Purchase Agreement. The Purchase Agreement was always to be separate from any demolition agreement. AED’s argument that the Purchase Agreement and the “demolition agreement” are inseparable, must fail. Therefore, KDC requests the Court deny plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment.

¹ On page 4 of AED’s Reconsideration Memo, it cites to paragraph 10 of Eric Kelly’s affidavit in opposition to summary judgment for the proposition that AED relied upon KDC’s promise to hire it to blast the Bridge because of the monetary compensation and so AED could make sure the demolition was handled properly. First, paragraph 10 of Mr. Kelly’s affidavit in opposition to summary judgment does not contain the testimony for which it was cited. Second, paragraph 10 of Mr. Kelly’s affidavit was stricken by the Court and, therefore, is not even in evidence. (See Summary Judgment Order, p. 11). Third, even if paragraph 10 of Mr. Kelly’s affidavit had not been previously stricken, this testimony would not be admissible now pursuant to the parol evidence rule.
RESPECTFULLY SUBMITTED this 10th day of February, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By
John J. Burke – Of the Firm
Randy L. Schmitz – Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2011, I caused to be served a true copy of the foregoing DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT, by the method indicated below, and addressed to each of the following:

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Bistline Law, PLLC
1423 N. Government Way
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Hand Delivered
Overnight Mail
Telexcopy
Email arthurmooneybistline@me.com

Randall L. Schmitz

DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT - 8
AFFIDAVIT OF RANDALL L. SCHMITZ IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT - 1

AED, INC., an Idaho corporation,  
Plaintiff,  

vs.  

KDC INVESTMENTS, LLC, a Virginia LLC,  
and LEE CHAKLOS and KRISTAL CHAKLOS, individually,  

Defendants.  

STATE OF IDAHO  )  
County of Ada  )  

RANDALL L. SCHMITZ, being duly sworn, deposes and says:

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED:  
AT 2:00 O’CLOCK P.M.  
CLERK, DISTRICT COURT  
DEPUTY
1. That I am an attorney of record for Defendants/Counterclaimants, KDC Investments, LLC, Lee Chaklos and Krystal Chaklos (the "Defendants"), in the above-entitled action, and as such have personal knowledge of the facts set forth herein.

2. Attached hereto as Exhibit "A" is a true and correct copy of the transcript from the deposition of Eric Kelly taken on January 27, 2011.

3. Attached hereto as Exhibit "B" is a true and correct copy of Exhibit 8 to the deposition of Eric Kelly taken on January 27, 2011.

4. Attached hereto as Exhibit "C" is a true and correct copy of the transcript from the deposition of Lisa Kelly taken on January 27, 2011.

5. Attached hereto as Exhibit "D" is a true and correct copy of Plaintiff’s Response to Defendants’ First Set of Interrogatories and Requests for Production.

Randall L. Schmitz

SUBSCRIBED AND SWORN to before me this 10th day of February, 2011.

Randall L. Schmitz

JESSICA L. WITT
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires: 2/20/2015
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d’Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy
Email arthurmooneybistline@me.com

Randall L. Schmitz

AFFIDAVIT OF RANDALL L. SCHMITZ IN OPPOSITION TO PLAINTIFF’S MOTION TO RECONSIDER COURT’S MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT KDC’S MOTION FOR SUMMARY JUDGMENT - 3
Exhibit A
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation, )
    Plaintiff, ) Case No. CV 10-7217
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APPEARANCES

MR. ARTHUR M. BISTLINE, Attorney at Law, of the firm of Bistline Law, PLLC, 1423 North Government Way, Coeur d'Alene, Idaho, 83814, appearing for and on behalf of the Plaintiff;

MR. RANDALL L. SCHMITZ, Attorney at Law, of the firm of Hall, Farley, Oberrecht & Blanton, P.A., 702 West Idaho, Suite 700, P.O. Box 1271, Boise, Idaho 83701, appearing for and on behalf of the Defendants.
### APPEARANCES

MR. ARTHUR M. BISTLINE, Attorney at Law, of the firm of Bistline Law, PLLC, 1423 North Government Way, Coeur d'Alene, Idaho, 83814, appearing for and on behalf of the Plaintiff;

MR. RANDALL L. SCHMITZ, Attorney at Law, of the firm of Hall, Farley, Oberrecht & Blanton, P.A., 702 West Idaho, Suite 700, P.O. Box 1271, Boise, Idaho 83701, appearing for and on behalf of the Defendants.

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<td>No. 36 Plaintiffs response to defendant's First Set of Interrogatories and Requests for Production</td>
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THE DEPOSITION OF ERIC J. KELLY, SR., was taken on behalf of the defendants on this 27th day of January, 2011, at the law offices of Arthur Bistline, Coeur d'Alene, Idaho, before M & M Court Reporting Service, Inc., by Patricia L. Pullo, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the District Court of the First Judicial District for the State of Idaho, in and for the County of Kootenai, said cause being Case No. CV 10-7217 in said Court.

THE WITNESS: Counselor, so that you know, I have difficulty hearing certain syllables. I wear two hearing aids. So make sure that you enunciate clearly, please.

MR. SCHMITZ: Okay. I will do that.

AND THEREUPON, the following testimony was adduced, to wit:

ERIC J. KELLY, SR., having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION QUESTIONS BY MR. SCHMITZ:

Q. Could you please state your name and spell your last name for the record, please.

A. My name is Eric Joseph Kelly, Sr. K-e-I-I-y is my last name.

Q. Mr. Kelly, have you had your deposition taken before?

A. Many times.

Q. How many times?

A. Probably a half a dozen.

Q. When was the last time?

A. I was an expert witness on a failed implosion in Omaha, Nebraska. It was approximately two years ago. Approximately.

Q. Have all of your depositions been as an expert or have you also been deposed as a witness or a party?

A. I was a plaintiff at one time. Art can fill you in on that, if need be, counselor can.

Q. When was that?

THE WITNESS: 2001, Art?

MR. BISTLINE: Yeah, approximately. You need to answer just from your own memory. If you're not dead accurate on these types of things, it's all right.


BY MR. SCHMITZ:

Q. And what was the -- what was that case about?

A. It was a -- to the best of my understanding, it was I was froze out of a company that I had for 23 years that I started.

Q. What company was that?

A. Engineered Demolition.

Q. How were you frozen out of the company?

A. You're a lawyer.

Q. Well, I don't know the first --

A. Without the proper -- you know, there was a certain fiduciary that was given to my partner that was violated. And I trusted that. And I was naive enough to believe it.

Q. To get frozen out, it's simple. Through lack of a shareholder's control agreement and then a controlling share interest, which she had 51 percent and I had the lesser amount, and I was froze out.

Q. Who was your partner?

A. Anna Chong.

Q. I'm sorry?

A. Anna Chong.

Q. Can you spell that last name.

A. C-h-o-n-g.

Q. Was this an Idaho company?

A. Minnesota corporation -- foreign company doing -- foreign company doing business in the state of Idaho.

Q. But it was based out of --

A. Minnesota.

Q. All right. Well, it sounds like you've had some experience with depositions. But I'll just give you a real quick run down on the ground rules since it's been a couple years.

As you know, we have a court reporter that's here taking everything down. So we have to be very careful not to talk over one another. And if you can answer my questions audibly rather than shaking of heads, uh-huhs, uh-uhhs, things of that nature --

A. I understand.

Q. Okay. And then if you don't understand my question --

A. I'll ask.

Q. Perfect. Ask me. Because if you do go ahead and answer, I'm going to assume that you understood my question. Is that fair?

A. If I understand it, I will answer it appropriately. If not, I will ask you to rephrase it.

Q. Perfect. And then if at any time you need a break, just let me know. The only thing I ask is that if there's a question pending you answer the question before we take a break. Is that fair?

A. Reasonably fair, yes.

Q. Okay.
Q. All right. Mr. Kelly, you've been handed what's been marked as Deposition Exhibit No. 1. Have you seen that before today?
A. Can't clearly define it as something I have seen before. I don't know if the content has changed from anything I've seen before, so I can't really say yes or no to that.
Q. Have you received a copy of the deposition notice that requires you to be here today?
A. Yes, sir.
Q. All right. And as I understand it from your counsel before the deposition started, while this notice asks you to bring certain documents with you here today, you have no other documents other than what has already been produced in discovery; is that correct?
A. That is correct.
Q. Mr. Kelly, could you please tell me a little bit about your educational background. What was the highest level of education you attained?
A. High school. I graduated high school.
Q. When did you graduate high school?
A. 1976.
Q. And have you attended any trade schools or anything like that?
A. No.
Q. What type of explosive-related courses have you had?
A. Various state agencies offer refresher courses which bring you through various law -- regulatory changes. I've gone through Washington, Kentucky, Pennsylvania, New Jersey, Florida, New York, British Columbia, Alberta, Nova Scotia. Most of the other times I've been teaching the courses.
Q. And where have you taught courses?
A. All around the world.
Q. What types of courses?
A. What we do is we -- through various state agencies, the Bureau of Alcohol, Tobacco and Firearms; the Drug Enforcement Agency; the FBI; for identification purposes we -- let me say this as best as possible. What we do is we help them to identify certain scenarios related to explosives.
Q. I'm not sure what you mean by that.
A. There are certain explosives that are used that are -- that many state -- many federal agencies are not privy to that we use, so -- I'll give you an example. With the Minneapolis Emergency Management System, or the bomb squad in Minneapolis, we have gone and done numerous situational studies taking explosives through the airport. So we bring certain types of explosives through the airport which allows better identification or certain training to the -- right now it's the TSA, at that time it wasn't, for identifying certain explosives.
Q. To help them detect the explosives?
A. Yeah.
Q. How did you get into the explosives or demolition business?
A. When I was 11 years old, my brother was 14, my father came out of the coal mines in Pennsylvania. And he started blasting stumps, supplementing his income. So he would blast stumps. And that's -- he would show my brother and I what to do. We had a 1946 Ford dump truck. And we would set a certain amount of dynamite under the stumps and touch them off with a battery and blow them up.
Q. And have you had any other jobs besides demolition?
A. None.
Q. So when was the first I guess demolition job that you had after high school?
A. 1976.
somewhat cavalier for them, for what their programming guidelines are. So that's why The Learning Channel chose to pick us up.

Q. And when did you first start filming with The Learning Channel?

A. I couldn't give you the exact date. But our first project with The Learning Channel was -- was it August of 2010 in Phoenix, Arizona.

Q. And what did you -- what did you --

A. I blew down a ten-story building.

Q. I'm sorry. Where was that?

A. Phoenix.

Q. Phoenix.

A. That's a little town in Arizona.

Q. I've heard of it. How many projects did you actually do with The Learning Channel?

A. 23.

Q. When was the last project?

A. Eden, Texas.

Q. When?


Q. Okay. Now --

A. I apologize. We started filming in 2009.

Q. Okay. So August of 2009?

A. Yes, sir.
1 sarcastically. But, you know, that's one of the things
2 that we had learned in dealing with them. It's cable
3 TV. When you ask for more money, well, it's cable TV;
4 it's cable TV; it's cable TV.
5 Q. So who did you deal with from The Learning
6 Channel? Was there a particular -- like a producer or a
7 contact or something?
8 A. No. See, what they do is -- is they -- they
9 contract out the production end of it. And it was Three
10 Roosters Production. Al Edginton.
11 Q. Al what was it?
12 A. Edginton. An English fellow, obviously.
13 Q. All right. Now, before we get into the facts
14 and history of this particular case, I just want to make
15 sure that I understand your claims -- the claims that
16 you're making. And when I say "you" I mean AED. Okay?
17 A. Correct.
18 Q. All right. As I understand it, you have a
19 fraud claim. And basically you're saying that KDC
20 fraudulently induced you to sell it the Bellaire Bridge
21 by promising that AED would blast the bridge when it
22 never actually intended to allow AED to blast the
23 bridge; is that right?
24 MR. BISTLINE: You can answer that.
25 THE WITNESS: I believe that to be correct.

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1 yes.
2 BY MR. SCHMITZ:
3 Q. And you're saying that the promise that
4 induced you was memorialized by signing the June 1,
5 2010, proposal?
6 A. Correct. And it was also orated to Lee
7 Chaklos specifically by Mark Wilburn and myself. The
8 question that he had posed to both of us, because he was
9 trying to divide and conquer, in my opinion, was that,
10 well, if I don't sign this proposal, will I get to keep
11 the bridge? And it was said to him no.
12 Originally it was a simple buy/sell agreement.
13 You'll blast a bridge. We had problems collecting our
14 money from them. And I said --
15 Q. Okay. Hold on.
16 MR. BISTLINE: He'll take you through that.
17 BY MR. SCHMITZ:
18 Q. Yeah. I'm just trying to get the essence of
19 what your claim here is right now, and then we'll go
20 through all that.
21 A. Fine, Counselor.
22 Q. All right. So what you're saying then is that
23 KDC did hire AED by signing that June 1st, 2010,
24 proposal. But you're saying KDC never intended on
25 June 1st, 2010, to actually use AED to blast the bridge?
Q. You read it in the media --
A. Actually, I read it in the media.
Q. You read it in the media --
A. Mark had sent you an e-mail, right?

THE WITNESS: There's approximately five to seven different expositions, if it's the right terminology, Counselor, by Mr. Chaklos that we were not qualified; we didn't meet his insurance requirements --
BY MR. SCHMITZ:
Q. In any of those did they actually say they were not going to use AED to blow --
A. Yes, they did.
Q. -- the bridge? But you don't know the date?
A. No, sir.
A. Jen Hutchins, who's an executive producer at
Reicher Production was -- who also, by the way, was
hired by The Learning Channel as another production arm
because he was -- he sold us, so to say, to The Learning
Channel.

Jen Hutchins had heard about this bridge. And
she had contacted the owner, being Roger Barack. We
hired -- they had originally arranged a meeting. No.
Let me cancel that. That's chronologically wrong. As a
matter of fact, that is so chronologically wrong.

We were contacted by a contractor at one point
to blow this bridge down because he was attempting to
negotiate with the owner, prior to The Learning Channel,
to have this bridge torn down. That fell to the
wayside. When we had entered into the agreement with
The Learning Channel to produce so many shows per year,
they had -- we had offered this up as a possibility.

Jen Hutchins at that time contacted Roger Barack. Roger
Barack listened to her sales pitch. They went out and
had had discussion. I was doing a project in Baie
Verte, Newfoundland.

Driving down to Phoenix, I stopped and met
Roger Barack. We had discussed certain logistics on the
bridge. And then we came to the conclusion that he
would sell the bridge to me.

Q. Okay. Let's back up here. When -- what time
frame are we talking about when TLC -- or, actually,
strike that.

What time frame are we talking about when you
were contacted by the contractor to blow the bridge?
A. It was approximately a year and a half prior
to meeting Roger Barack.

Q. So when did you meet Roger Barack?
A. Again, Counselor, you can beat me up on dates.
I'm not a hundred percent sure on the date in which I --
you know --
Q. I'm not asking you for a specific date. If
you can just give me a general time frame. I'm just
trying to establish --
A. I really don't know. I don't know.
Q. All right.
A. And that's not being -- I really don't know.
We travel so much around the country that you lose track
of time.
Q. I didn't bring these documents with me today.
But in the documents that were produced by AED, there's
a April 9, 2008, fax which looks like it's requesting
bidding on the demolition of the bridge. Would that be
the invitation that you had received from the
contractor --
nothing to do with you being contacted by any of those other contractors?

A. No, sir.

Q. You were there because of TLC's negotiations to film the blasting of the bridge?

A. Basically -- again, I was not privy to all the conversations between TLC and Roger Barack. I had stopped and met Roger Barack just as an introductory meeting. That's all. Because no deals were consummated, to the best of my knowledge. TLC had no deal consummated with him. It was being talked about between TLC and Roger Barack because Roger kept asking me, well, what about TLC? And I kept giving him the American salute; I don't know; I don't know; contact them.

And then there was another film company that -- with Denzel Washington that wanted to film it. And I -- I stay out of that. My job is to design and implement a program specifically, no Hollywood brouhaha to blow that bridge down safely. That's my specific obligation.

Q. Okay. So the only thing you talked to Barack about on that day was how you were going to take down the bridge?

A. Correct. And he said, hey, Eric, I can give you --

you -- I know a guy over here who has a dump; you can dump the concrete. I know a guy over here who can take the asphalt. If you want to sell the scrap to this guy, he's a buddy of mine. That good-old-boy talk.

Q. Okay. So when did this discussion about buying the bridge come up?

A. That day. The day I met Roger Barack.

Q. Okay. So there were other discussions other than just how you were going to take it down?

A. If that's the point, Counselor, yes.

Q. So what were the discussions --

A. I mean, if -- if ...

Q. What were the discussions about buying the bridge?

A. Roger Barack said, I'm trying to sell the bridge. And I said, How much do you want for it? A buck. I said fine. I pulled out a buck out of my pocket and gave it to him. He said I'll get my attorney to give you the paperwork.

And I took nothing serious about it because until I have the contract or -- or et cetera that -- that I would have treated it with any seriousness.

Q. Did you have any other discussions with Roger Barack about the bridge that day?

A. Any discussions I had with Roger Barack were essentially relevant to the bridge or deer hunting. Oh, I'm sorry. We talked about deer hunting in Idaho and Ohio and West Virginia.

Q. Well, I asked about the bridge not about deer hunting.

A. You asked about the discussion.

Q. About the bridge.

A. That was the limit of our conversation about the bridge.

Q. So did you follow up with Roger about trying to buy the bridge for a dollar after this meeting?

A. No, sir. I mean -- followed up? Down the road I had talked, yes.

Q. How long --

A. Five or six months after the fact, I asked him what the status of it was only because I had Lee Chaklos calling me every frigging week of the month, two and three times a week.

Q. So five or six months after that meeting, you get in touch with Barack again. But that's only because Lee Chaklos had contacted you?

A. No, not just because of Lee Chaklos. I mean, I needed to work, and I wanted to do the job.

You know, Counselor, if you want me to give you a specific answer, I'm going to recommend you ask a specific question, because you're --

MR. BISTLINE: Eric, he's doing okay.

MR. SCHMITZ: Yeah.

MR. BISTLINE: So just don't read into his --

THE WITNESS: I don't know about vagueness, Art.

MR. BISTLINE: It's not vague. He asked you what about the bridge did you talk about. Just say he offered to sell it to me for a buck.

MR. SCHMITZ: Now, hold on. Hold on.

MR. BISTLINE: Don't add any extra stuff.

BY MR. SCHMITZ:

Q. What you had said is that you contacted him down the road, five or six months later, only because Lee Chaklos was on your butt every couple weeks. That's basically what you said. That's why I asked you and followed it up and said you contacted him five or six months but only because Lee had contacted you.

A. That is one of the -- one of the reasons why I had contacted him.

My first meeting with Roger Barack, I was suspicious. Okay. He's a man of his word. He shook my hand and said I sell it to you for a dollar. Okay.

When he wants to give me the bridge, he'd give it to me. He shook my hand and I believed -- a cattle rancher, he
1. shaked my hand, your deal's your deal. I took that
2. for - I took him for his word. And his time is his
3. time. But Lee Chaklos was calling me. And I said you
4. know what. Let me just find out what this guy is doing.
5. And as you can see, in the copies of my e-mails,
6. Counselor, I told Lee Chaklos don't bust my balls
7. because I don't have the contract yet.
8. Q. Okay. When did Lee first contact you about
9. this bridge? General time frame --
10. A. I don't recall.
11. Q. I don't need a specific date --
12. A. I don't recall.
13. MR. BISTLINE: Let him finish his question,
15. BY MR. SCHMITZ:
16. Q. How did you first get in touch with Lee? What
17. was the circumstances that brought you two together?
18. A. He had contacted I.
19. Q. Did he call you or did you guys meet? How did
20. that work?
21. A. He called me.
22. Q. And why did he -- what did he -- what was the
23. substance of the conversation when he called you?
24. A. He says I heard you bought the Bellaire
25. Bridge.

1. Q. So he had heard that you actually had bought
2. it at that point?
3. A. Yes, sir. That's what the words were to the
4. best of my knowledge.
5. Q. Did he mention how he heard that you had
6. bought the bridge?
7. A. I don't believe.
8. Q. So, I guess, walk me through the conversation.
9. He calls you, says, hey, I head you bought the Bellaire
10. Bridge. Then where does the conversation go?
11. A. Basically, well, I've seen that bridge since
12. I've been a little boy, and I've always wanted to
13. participate in demolishing the bridge. And then I said,
14. well, how many bridges have you done? Well, I think
15. I've done one in Florida and -- and basically that was
16. it. And I said, well, what would your interest in the
17. project be? He says, well, I can be a sub to you, a
18. subcontractor, or I -- maybe I can buy the bridge from
19. you. And I said, well, let me think about that.
20. Q. And then -- so did you think about it, or did
21. you guys come to any sort of agreement or arrangement at
22. this particular time?
23. A. No, not at that particular time, Counselor.
24. Basically, it was I -- I did not have anything in
25. writing at that time from Sean McCarter who is Ohio

Midland's counselor.

Q. Okay. So you said you were going to think
about it. And then did you call Lee back, or did you
first contact Roger to find out if he was still
agreeable to selling the bridge? What did you do?
A. Oh, I did contact Roger Barack. And he says,
My attorney is working on it. I did not know the nuts
and bolts of his legal complications between the State
of Ohio and, again, his company was called Ohio Midland,
I believe, is whom I bought it from.

Q. Right. Okay. So you contacted Barack,
though, to find out if he was still interested in
selling?
A. Mm-hmm.
Q. And what did he say?
A. He said yeah. Yeah, Eric. It's your bridge.
You gave me a buck.

Q. He kept the dollar?
A. Yeah.
Q. So, he received the dollar.

A. Yeah.
Q. He had received a dollar. I don't know if he
kept it. But he received a dollar from me.
Q. And I'm just going to say -- I mean, I can
find it here if you would like me to. But I believe --
A. I believe I said he had given it back to me.
Q. Exactly.

A. That's right. But he has the dollar,
nonetheless. That's basically ...
Q. Did he give you the dollar back or not?
A. On the bridge he did.
Q. Okay. That's all I'm trying to find out.
So when you contacted him and asked him if he
was still interested in selling the bridge, did you guys
discuss a price?
A. Actually, I didn't discuss with him that --
about is he still interested in selling the bridge.
Based on what he had told me, he said, hey, Eric, my
lawyers are working on the paperwork. My lawyers are
working on the paperwork. He did not disclose to me all
the litigation that he was going through over the
bridge. So I just said fine. That's it.

Ah. In that conversation I had asked him, Has
anybody else approached you about the bridge? And he
did mention Delta. He did mention Delta Demolition, not
KDC Investments.

Q. And this is -- and I want to make sure we're
still talking about the same conversation. This is --
A. Well, it --
Q. Hold on a minute. Because -- this is the
conversation where you called him up after Lee had
contacted you, right? We're still on that conversation?
A. Correct.
Q. Counselor, there's been multiple conversations.

A. Exactly. That's why I'm trying to pin down which conversation you're talking about. I don't want to be jumping around from a conversation one month and then a conversation three months later. So we're still talking about that initial contact with Barack after Lee had contacted you; is that right?
A. Correct.
Q. And in that conversation you asked him if he was still willing to sell the bridge, and he said yes. But he didn't talk to you about any of his legal --
A. I did not ask him if he wanted to sell the bridge. We had already agreed upon that. Okay. I asked him where the contract -- the buy/sell agreement, where's it at; where's it at; where's it at? That's what I had asked him.
Q. Okay. All right. So you guys had agreed on the bridge to sell it for a dollar. You were just waiting for paperwork to come back from his attorneys?
A. Correct. And the complication in that matter, Counselor, was the motion to substitute, which was in the federal court in Columbus, Ohio.
Q. What do you mean by that?

A. They were proceeding along with a motion to -- well, this was down the road. Never mind.
Q. That's kind of what I thought. So -- because at this point in time you don't even you haven't seen a draft agreement. You haven't seen anything from him for you to actually purchase the bridge, right?
A. No, sir.
Q. All right. And then you were saying in this conversation he had mentioned that Delta had also contacted him about buying the bridge?
A. That he was one of the persons that contacted him, yes.
Q. Did he say anything else about that?
A. It wasn't very nice. Because I asked him why didn't you sell it.
Q. And what did he say?
A. He said he did not believe that they had the credibility, curriculum vitae to perform a project of this magnitude.
Q. And that's why he didn't sell them the bridge?
A. Yes, sir.
Q. Okay. So as I understand it, in this time frame, you and Lee didn't have any discussions about pricing or anything like that. But then you called Barack, and he's -- you're still waiting to get the paperwork. Then did you call Lee or what happened next?
A. There's been -- there were some e-mails that had gone back and forth. I was busy doing other work, and it wasn't number one on my list. And Lee had -- you'd have to get his phone records to see how many times he called me. He just kept calling me, calling me. And I think in one of my e-mails I said don't bust my balls anymore; I don't have a contract yet.

(Whereupon, Deposition Exhibit No. 2 was marked for identification.)

BY MR. SCHMITZ:
Q. Mr. Kelly, you have been handed a document that has been marked as Exhibit No. 2. Have you seen that before?
A. Yes, sir.
Q. And what is it?
A. It's an e-mail conversation between Eric Kelly and Delta Demolition.
Q. And this contains both e-mails from you to Delta and also from Delta to you; is that right?
A. Correct.
Q. Now, the date on the first e-mail in that chain is January 13, 2010; is that right?
A. Wednesday, January 13, 2010, at 6:53 a.m.
Q. And that says -- this is an e-mail from you to -- to Lee Chaklos, correct?
A. That is correct.
Q. And the first line says, "I have requested the contract from Roger. Upon agreeing to that contract, AED will henceforth sell the bridge to Delta Group for 25,000 US. That sum is payable upon signing the contract"; correct?
A. Correct.
Q. All right. Now, I'm trying to establish a time frame here. That's January 13, 2010, and you guys have obviously talked about pricing now. Does that help refresh your memory as to when you guys had originally started talking about this?
A. Counselor, the dates don't mean shit to me.
Q. Okay? Because I can very vaguely --

MR. BISTLINE: Hold on a second.

THE WITNESS: Art, I don't want to get stuck on these dates so somebody can say, well, you lied about the dates.
MR. BISTLINE: Can we go off the record real quick, Patty.
(Discussion off the record.)
THE WITNESS: In answering your question --
MR. SCHMITZ: Before you start, let's -- I don't even know what the last question exactly was. So...
AED Inc. vs. KDC Investments, LLC, et al

1. can you read back the last question?
2. (Record read as requested.)
3. MR. SCHMITZ: I'll just ask another question.
4. BY MR. SCHMITZ:
5. Q. You have an e-mail in front of you that's
dated January 13, 2010. And obviously you and Lee had
7. talked about the pricing involved with buying and
8. selling this bridge at this point in time. Does this
9. help you to remember when you and Lee had first started
10. talking about buying or selling the Bellaire Bridge?
11. A. This does -- I had known, Counselor, that we
12. had discussed on various occasions about the buy/sell
13. agreement for the bridge. And this just gives a -- puts
14. a date to it.
15. Q. Okay. That's not my question. My question is
does this help you to remember when you and Lee first
16. started talking about this?
17. A. We have talked on the phone before this. You
18. know, via telephone we've had ...
19. Q. Yes. But do you remember when? If you don't,
20. you can say I don't remember.
21. A. I don't remember.
22. Q. Okay. But at least as on January 13th, 2010,
23. it looks like you guys had come to a general agreement
24. that AED would sell Delta Group the bridge for $25,000.

AED and Delta would then have an agreement for AED
to blast the bridge for $175,000; is that accurate?
A. Yes, sir.
Hey, we're getting progress here.
Q. So at this point you had already talked to
Roger, and Roger had told you he didn't -- he didn't
want to sell the bridge to Delta. Did you tell Roger
that you were going to sell it to Delta?
A. No, sir.
(Whereupon, Deposition Exhibit No. 3 was
marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed what's been marked as
Deposition Exhibit 3. Have you seen that before?
A. Yes, sir.
Q. And what is that?
A. Asset Purchase and Liability Assumption
Agreement.
Q. It's actually some e-mail chains. The e-mails
are dated April 2nd, 2010; is that right?
A. Yes, sir.
Q. And attached to those e-mails is an Asset -- a
document entitled Asset Purchase and Sale (sic)
Agreement; right?
A. Yes, sir.
Q. If we go to -- well, if you go to the first
e-mail in the string, it looks -- it doesn't have a name
as who it's coming from. It says -- it's got a phone
number and says mail to blast@davincivirtual.com. Do
you know who that is?
The first e-mail will be the last in this
string.
A. Which is the one I was looking at right here.
Q. Oh, okay. Yeah, you're right. It's at the
very bottom of page 1. So do you know who this
blast@davincivirtual.com is?
A. That's our toll-free provider, Davinci.
Q. And mark@biggerblast, that is Mark Wilburn?
A. That is correct.
Q. And that looks like Mark Wilburn sent this to
you; is that right?
A. Correct.
Q. And then you sent it to Krystal Chaklos. Now,
is that just who you had entered into as being the
person from deltadem@yahoo.com?
A. Basically I had not talked to Krystal. I was
mostly -- my conversations were with Lee until he told
me the shit's going to hit the fan.
Q. Well, this says, "Lee and Krystal; Be sure to
read the agreement and let me know if you're comfortable
with it."; correct?
A. Mm-hmm, correct.
Q. So what is -- the attachment, this is the
first draft from Roger Barack to sell you the bridge; is
that right?
A. This was a reference that Roger Barack had
sent to me. Here's what I had believed this was. This
was a part of the asset purchase and liability
assumption agreement that was going to be considered in
our overall agreement with Ohio Midland.
Q. Right. This wasn't the final version. This
was just a draft; is that right?
A. Yes, sir.
Q. Okay. And you were forwarding it to Lee and
Krystal?
A. Mm-hmm.
Q. And you asked them to look at it. Why were
you asking them to look at the draft agreement between
you and Roger?
A. Because I was going to copy the same draft --
the same asset purchase and liability assumption
agreement verbatim. Since it was already typed out, I
was -- they were going to be obligatory to the same
agreement that I had signed.
Q. Okay. So whatever agreement you entered into
with Roger, you were just going to change the names and have them sign it?

A. That is correct.

Q. Now, you also say in this e-mail, "I have no problem with the agreement at today's scrap market value." Do you know what the scrap value was back then?

A. Well, and the context of that sentence was -- the scrap market was going down hill at that time. And I was considering not selling the bridge at that time based on the scrap market value.

Q. Why would the scrap market value be of concern to you when you had a flat fee of $175,000 that you were going to get to actually blast the bridge?

A. Actually, because I'm nice guy, Counselor. I'm concerned about everybody making a dollar on the job so that ultimately the bottom line is at some point I can get paid. I was basically looking at my interest for blowing the bridge down so that I can get paid.

Because if the scrap market hit the shitter, most likely, as I have been in 31 years, somebody's going to stick -- who gets -- I'm at the bottom of the food chain, so to say. Because once I push the button, I have no negotiation.

So if he was not getting -- if he had some inability to retrieve a good value of the scrap, then, well, he couldn't pay his first crane, his barges, his oxygen, his propane, his labor. And ultimately, oh, Eric's at the bottom of that food chain. He's not going to get his money.

Q. But the agreement that you attached doesn't even mention scrap value or pricing or anything.

A. It doesn't have to, in my opinion, Counselor. But this is what I'm confused about. You're saying you have no problem with the agreement, referring to the agreement that's attached --

A. Mm-hmm.

Q. -- at today's scrap market value when the agreement that's attached mentions nothing about scrap value. So I just...

A. Did you understand my answer the first time?

Basically, when I do an assessment on the project, the first -- just like you, you want to know how you're going to get paid. Okay. And, again, if the scrap market value -- this agreement, basically, I was selling him the bridge under the pretense that I'm going to blow this bridge down for $175,000. Okay. Well, if he doesn't have the money to do the job, then I'm not going to get paid.

Q. So you were assuming that he was getting the money to do the job and to pay you out of the scrap?

A. Yes, sir.

I wasn't assuming -- let me clarify that answer, please. I was not assuming. I knew for a fact --

Q. And how did you --

A. -- that he was getting that. Because one of the scrap dealers, Strauss Industries, had contacted me and said, Do you know Lee Chaklos? And I said, well, we're considering selling him the bridge. All right. When did Strauss Industries contact you?

A. I don't know.

Q. Was it before April 2nd of 2010?

A. Most likely it was, Counselor.

Q. And what did Strauss Industries tell you?

A. Basically, I asked them what the scrap market was doing. And they had asked me if I knew of a Lee Chaklos with Delta. And I said I'm thinking about selling him the bridge. How's the scrap market look?

That was it.

Q. So what out of that conversation led you to believe that KDC or Lee Chaklos didn't have the money to pay you and was only going to pay you out of the scrap value?

A. There was a conversation immediately thereafter.

Q. Immediately thereafter what?

A. That conversation. That they contacted me and said we have Lee Chaklos here with Delta, and he's asking us about financing the bridge project.

(Brief interruption.)

MR. BISTLINE: Hold on a second. Let him read that real quick.

(Brief pause.)

MR. SCHMITZ: Yeah, apparently Judge Windmill just set a hearing in a matter for 1:00 today.

THE COURT REPORTER: Do you want me to go off the record?

MR. SCHMITZ: Yeah.

(Discussion off the record.)

MR. SCHMITZ: Let's go back on.

BY MR. SCHMITZ:

Q. Before we took our break, you were telling me about a conversation with Strauss Industries that gave you the impression that Delta Demo or KDC was going to pay you out of money they received from scrap; is that right?

A. Yes, sir.

Q. Okay. Go ahead and tell me -- tell me what was said by Strauss Industries.
MR. BISTLINE: That's not the kind of thing you'd have to go off the record for. If you don't know, just say "I don't know."

THE WITNESS: Well, there's 20 different producers within a program, Art. And --

MR. BISTLINE: Well, then just say there's 20 different producers.

THE WITNESS: There's 20 different producers.

BY MR. SCHMITZ:

Q. Individual producers or are you talking about production companies?

A. Individual producers.

Q. Okay. Who is the production company?

A. Well, one was Three Roosters Productions and Reicher Productions.

Q. And they were both involved at this time frame?

A. Yes, sir.

Q. Did you do anything with this draft agreement other than forward it to Lee and Krystal?

A. I reviewed it.

Q. And then did you do anything else? Did you contact Barack and discuss anything about it?

A. No, sir.

Q. So, the producer at that time?

A. No, sir.

Q. Okay. And you believed this conversation occurred before April 2nd of 2010?

A. I believe so.

Q. Back to Exhibit 2 -- or Exhibit 3, and go to the draft agreement. The very first paragraph there --

A. This is the cover letter.

Q. Or, I'm sorry, the cover letter. Yeah, that's what I'm talking about. This is from Roger Barack to you. And it says, "Thank you for the information you sent on March 22, 2010, however we still need a copy of any contracts and/or agreements you have with any producers." What's he talking about there?

A. With -- I believe it's self-explanatory -- with TLC.

Q. So he's referring to any contracts that you have with producers for TLC?

A. Yes, sir.

Q. So at this point were you guys still trying to film the demolition of this bridge?

A. I don't know. Again, that was something that -- that was conversation going on between TLC and Roger Barack.

Q. Okay. But he's asking you for a copy of these agreements. So did you send him any contracts or agreements?

A. I told him to kiss my ass. I said it's none of his business what my contract is with TLC.

Q. So you didn't send him anything?

A. No.

Q. Who was the producer at that time?

A. Off the record just for a second. Counselor,
A. Yes, sir.

Q. And what is Lisa's role?

A. She is the president of the company.

Q. Does she have any -- and what does she do in the role as the president?

A. She runs the company.

Q. Does she -- she takes care of the day-to-day activities?

A. Yes, sir.

Q. You handle the actual blasting portion of it?

A. What I handle is, you know, the estimation, the logistical aspect of it and the implementation.

Q. And Wilburn handles the information, applications, license, that sort of thing. And Lisa does everything else?

A. Yes.

Q. You handle the actual blasting portion of it?

A. Yes, sir.

Q. What contract were you referring to?

A. The ...

Q. Was it the one that was attached in --

A. In Exhibit 3, Counselor.

Q. Okay. So in this e-mail you're telling Mr. McCarter that you'd already received the contract, and it was agreed upon based upon the contract that was attached to Exhibit 3?

A. That's what it says.

Q. But I thought previously you said that you understood that that wasn't the full contract, that that was just -- I can't remember the exact term you used -- basically that was just a draft of something that was going to be turned into a contract?

A. Yes.

Q. Okay. But here you're saying -- you're telling Mr. McCarter that you'd already received a contract?

A. Again, that was the draft. I was told on more than one occasion that there are a bunch of attachments that go with it. So basically what I was alluding to is what kind of surprises am I anticipating. Based on what we had fundamentally talked about, Roger Barack and I what was the responsibilities.

Q. I'm still a little confused because it sounds like in this e-mail to Sean that you're saying you...
already had a contract, and you're surprised that he's
sending you something different.
3 A. Again, in the next paragraph you can see, the
contract -- this contract will be what? I was asking
him the question. I don't -- okay. What else is part
of the contract is basically what I was alluding to.
4 Q. Okay. And if you read the very next sentence,
it says, "Is there something in this draft that will be
contrary to what was agreed upon already."
5 A. Mm-hmm.
6 Q. So did you think that the -- the draft that
was attached to Exhibit 3 was the entire contract that
you were going to have with --
7 A. I had wrongly --
8 Q. -- Mr. Barack?
9 A. -- assumed that, yes.
10 Q. And then you say, "The only exclusion from the
original draft was Roger needed to exclude the verbage
about my agreement with TLC." Why did you put that in
there?
11 A. Because the sale of the bridge would not be
predicated on TLC filming.
12 Q. And the original draft Roger had made it --
predicated it upon --
13 A. No, no.

Q. -- filming?
2 A. No, Counselor. No. It came up in
conversations is what -- Roger kept asking me quite
often in our phone -- well, is TCL going to film it; is
TLC going to film it; is TLC going to film it?
3 Q. So did you get the impression that Roger
wanted TCL to film it?
4 A. Yeah. Yes, sir.
5 Q. Do you have any idea why he would want TCL to
film it?
6 A. No, sir.
7 Q. So at this point in time, we're up to
13 April 30th, and you're still waiting for an actual
14 final agreement to come from Mr. Barack?
15 A. Yes.
16 (Whereupon, Deposition Exhibit No. 6 was
marked for identification.)
18 BY MR. SCHMITZ:
19 Q. You have been handed Depo Exhibit 6. I know
it's a pretty thick packet so take a minute to look
through it. And I'm going to ask you if you've seen
that before.
20 A. No, sir.
21 Q. Okay.
22 A. Well, let me clarify that. I apologize. I

Q. You're looking at it right now. You're
looking at this asset -- Asset Purchase and Liability
Assumption Agreement. Does this look like the draft
that you received?
2 A. Yes, sir.
3 Q. All right. And the next little packet of
information are the exhibits that are referenced in that
asset purchase agreement. I know that they were sent by
separate e-mails, and I have those here. We can go
through them. Or if you would take look at those and
let me know if those look like the exhibits that were
attached, that would be much easier.
4 A. Yes, sir.
5 Q. What did you do after you received the draft
agreement?
6 A. I believe I sent it -- well, it was cc'd to
Mark, my brother-in-law, and I had asked him to review
it.
7 Q. And then did you guys talk about it after he
reviewed it?
8 A. Not -- no, not really. Basically I just
wanted to make sure there were no encumbrances against
the bridge.
9 Q. So did either you or Mr. Wilburn have any
changes that you wanted to have made to that before you
1 signed it?
2 A. Not that I'm aware of.
3 Q. And do you know if you or Mr. Wilburn signed
4 that agreement?
5 A. Yes, sir.
6 Q. Who did?
7 A. I did.
8 Q. You did. Okay.
9 (Whereupon, Deposition Exhibit No. 7 was
10 marked for identification.)
11 MR. BISTLINE: Can we go off the record real
12 quick, Patty.
13 (Discussion off the record.)
14 MR. SCHMITZ: Let's go back on.
15 BY MR. SCHMITZ:
16 Q. You've been handed Deposition Exhibit 7. Have
17 you seen that before?
18 A. Yes, sir.
19 Q. All right. And this is your affidavit in
20 support of plaintiff's opposition to defendants' motion
21 to strike and defendants' motion for summary judgment.
22 correct?
23 A. Yes, sir.
24 Q. And on page 2 there's a signature. Is that
25 your signature?

A. Yes, sir.
B. That's what it says.
Q. So you have attached as Exhibit "A" a
confidentiality agreement, an asset purchase
and liability assumption agreement and that's it, right?
A. Yes, sir.
Q. Okay. Let's go to the first page of Exhibit
"A," the confidentiality agreement.
A. Yes, sir.
Q. And if we go down to the signature at the
bottom, whose signature is that?
A. Mark Wilburn.
Q. And then the next page is your signature; is
that right?
A. Yes, sir.
Q. Okay. And the asset purchase and liability
assumption agreement, there are some initials at the
bottom of each page. Do you know whose those are?
A. Mark Wilburn.
Q. And then at the last page, there's a signature
under Advanced Explosives Demolition, Inc. Whose
signature is that?
A. Mark Wilburn.
Q. So you didn't actually sign the asset purchase
and liability assumption agreement?
A. I believe, Counselor, that was just as
attached -- as an attachment because I did sign the
asset purchase and liability agreement.
Q. With Roger Barack?
A. Yes, sir.
Q. Well --
A. That was on -- it was in Exhibit 6, sir.
Q. In Exhibit 6 is an unsigned draft. What I
have here is your affidavit saying that you've attached
a true and correct copy of the contract. But this true
and correct copy does not have your signature. So are
you saying that this is not a true and correct copy --
A. No, sir.
Q. -- of a contract?
A. I'm not saying that.
Q. Okay. But I don't see your signature on here
anywhere. Do you?
A. It's an administrative oversight is all I can
say.
Q. Well, is there another page that goes with
this?

A. Not to my knowledge.
Q. And I just want to be clear. Are you saying
there is another version of this out there that has your
signature on it?
A. No, sir.
Q. Okay. You're just saying -- what are you
saying?
A. In regards to this affidavit, okay, there is
not a signatory sheet for the asset purchase and
liability agreement. And I don't know why it wasn't
included in there is what I'm saying.
Q. Well, there is a signatory sheet. It's page
13. And it's notarized.
A. Page 18.
Q. The bottom.
MR. BISTLINE: Right there. (Pointing.)
THE WITNESS: Oh. I don't have an answer for
you, Counselor. Sorry.
BY MR. SCHMITZ:
Q. What I'm trying to get -- I'm trying to make
sure we have an actual true and correct copy of this
agreement. Because if you're saying that you believe
you signed it and we don't have a signature page for
you, I'm wondering if there is another version of this
out there somewhere.
A. There is no other version of this, Counselor.
Q. But you recall signing it?
A. Yes, sir.
Q. Okay. I also notice that in this version here, attached as Exhibit "A," there is no signature on it from Roger Barack, is there?
A. No, sir.
Q. Do you have a copy that has Mr. Barack's signature on it?
A. Yes, sir.
Q. Okay. I don't have a copy of that.
A. Okay.
Q. Can you get me a copy of that?
THE WITNESS: Art, can you send Mark a request?
MR. BISTLINE: Yep.
MR. SCHMITZ: Have you seen that, Art?
MR. BISTLINE: I don't believe that I've actually -- because I remember when the affidavit was done, I looked at it and didn't have any reason to think there was anything different than anything else. I mean, I don't think I've ever actually seen one signed by Eric or Roger. But I'll look and make sure here.
MR. SCHMITZ: Yeah, I haven't either. So that's what I'm wondering.

BY MR. SCHMITZ:
Q. In the asset purchase and liability assumption agreement, it basically says you're going to buy it from him for a dollar?
A. Yes, sir.
Q. And you're going to assume all the responsibilities for making sure this thing gets demolished in accordance with all the requirements set out there in paragraph 5 and the subparts to paragraph 5?
A. Yes, sir.
Q. All right. And in paragraph 3, it says "possession." And it provides that possession of the bridge isn't going to be given to you until June 1st of 2010; is that right?
A. That's what it says.
Q. Now, this -- Mark Wilburn signed this on May 13th, right?
A. Mm-hmm.
Q. Why weren't you going to get possession until June 1st?
A. I could only assume, Counselor, that it has something to do with the motion to substitute.
Q. Besides an assumption, do you have any idea why -- I mean, I don't want you to assume unless you have a reason to assume that?
A. It was based on what I -- it says it right in black-and-white, on June 10th.
Q. On June 1st you mean?
A. I mean on June 1st.
Q. I know. But what I'm saying is do you know why when you're signing the agreement -- or Mark Wilburn's signing it on May 13th you're not going to receive possession until June 1st? I mean, there's a two-week time frame there. And if you don't know, you don't know. I'm just asking if you do know.
A. It was something, Counselor, I did not pay particular attention to.
Q. Okay.
(Whereupon, Deposition Exhibit No. 8 was marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed Exhibit 8. Have you seen that before?
A. Yes, sir.
Q. What is it?
A. An informal proposal outlining the blasting of the Bellaire Bridge.
Q. It's e-mail from you to Lee and Krystal, dated May 19, 2010, correct?
A. Yes, sir.
Q. And it, as you said, outlines an informal proposal for the blasting of the Bellaire Bridge, correct?
A. Mm-hmm.
Q. Okay. Does this appear to be a true and correct copy of the e-mail you sent on that date?
A. Yes, sir.
MR. BISTLINE: Randy, in about six minutes can we take a real quick break?
MR. SCHMITZ: Okay.
BY MR. SCHMITZ:
Q. All right. The second sentence here says, "Until we are actually ready to shoot the bridge, I wouldn't tell Roger Barack any of our business. I don't want to give him any reason to toss a wrench in the gears." Why did you say that?
A. Because Roger Barack thought Lee Chaklos was an asshole.
Q. And why do you think Roger Barack thought Lee Chaklos was an asshole?
A. Well, I mean, you know, Roger had obviously done a lot more research into, I guess, Lee Chaklos's business than I had. And he told me he didn't think the
 guy was capable of doing the job.

  Q. Did Roger Barack tell you that he thought Lee Chaklos was an asshole?
  A. Oh, I guarantee.

  Q. He said those words to you?
  A. Well, probably -- there's a young lady here so I won't get into any more of the details on the profanities. I choose not to. He had nothing complimentary to say about Mr. Chaklos.

  Q. But did he tell you that he thought Lee Chaklos was an asshole?
  A. Yes, sir.

  Q. And how do you know he did more research into Delta?
  A. Because he had told me so.

  Q. Did he tell you what kind of research he did?
  A. Yes.

  Q. And he told you this?
  A. Yes.

  Q. And he told you this? 21 Q. So it looks like the first -- the first one is
  A. I believe so, yes. Otherwise I wouldn't have written it.

  Q. Did you tell Lee Chaklos that Roger did research into Delta and didn't think that Delta had the equipment or anything like that?
  A. No.

  Q. Did you tell Lee that Roger did research into Delta? 24 saying that you're going to be -- AED is going to be responsible to get all the licenses and permits it needs
  A. No.

  Q. Did you tell Lee Chaklos that Roger did research into Delta and didn't think that Delta had the wherewithal to do the job?
  A. No.

  Q. Did you tell Lee Chaklos that Roger did research into Delta and didn't think that Delta had the wherewithal to do the job?
  A. No.

  Q. Did you tell Lee that Roger did research into Delta and didn't think that Delta had the wherewithal to do the job?
  A. No.

  BY MR. SCHMITZ:

  Q. What would you like to clarify?
  A. I did tell Lee Chaklos that Roger Barack did not think he had the equipment to do the project.

  Q. And by "equipment," what type of equipment are you referring to?
  A. Marine equipment, barges, cranes, shears.

  Q. And what did Lee say in response, if anything?
  A. He didn't say anything.

  Q. He didn't say I've got the equipment or I can get the equipment or anything like that?
  A. No, sir. Not that I can recall.

  Q. Do you recall when you told -- or approximately when you told Lee that Roger didn't think he had the equipment to do the job?
  A. No, sir.

  Q. All right. Let's go through this proposal a little bit. It starts off with AED's responsibilities.

  It says, "AED will be totally responsible for: No. 1, all licenses and permits to perform blasting work in the State of West Virginia"; is that right?
  A. Yes.

  Q. Okay. Now, the next one says "All Federal permits for transporting and handling explosives"; is that right?
  A. Yes.

  Q. Okay. Why not?
  A. Because it would not include the business license. I have done work in West Virginia before.

  Q. When?
  A. I shot the Holiday Hotel. I shot the pigment plant at Bayer Material Sciences. I really couldn't totally recall. I've done numerous projects in West Virginia.

  Q. You've done numerous blasting projects in West Virginia?
  A. Yes, sir.

  Q. What was the date or year of the last project you did in West Virginia?
  A. I do not know.

  Q. You can't --
  A. It should be on my website.
Q. You can't even tell me a year?
A. Approximately two years -- let's see. It was about 2007.
MR. BISTLINE: Can I go call that guy real quick, Randy?
MR. SCHMITZ: Yeah.
(A short break was taken.)
MR. SCHMITZ: Let's go back on.
BY MR. SCHMITZ:
Q. You were telling me before we took the break about the informal proposal here and why under No. 1 all the licenses and permits to perform blasting work in the state of West Virginia doesn't really include all licenses and permits to perform the blasting work. So can you explain?
A. Well, it did not include a business license.
Q. That's correct. You don't need a business license?
A. Yes, sir.
Q. And what's the bed hanger?
A. The stringer runs longitudinally with the bridge; holds the deck up.
Q. And what's the bed hanger?
A. The bed hanger runs transversely and it holds the stringers up.
Q. So if I could just summarize this. Basically AED is going to do what's necessary to put the explosives on the bridge and actually detonate the explosives?
A. Yes, sir.
Q. And for Delta, they were going to get all the permits related to actual demolition of the Bellaire Bridge --
A. Yes.
Q. -- is that right? And that would be the actual demolition permit from -- well, this would include the demolition permit from the City, right?
A. Yes, sir.
Q. This would also include a permit from the U.S. Coast Guard?
A. If that's all inclusive, yes.
Q. And are there any other permits related to the actual demolition of the Bellaire Bridge that they would need to get?
A. No, sir, not that -- there's none that I'm aware of.
Q. Okay. And it looks like they were going to provide the marine support equipment to make the bridge accessible, under No. 2 there?
A. Mm-hmm.
Q. Is this to allow you to get under the bridge to plant the explosives?
A. Correct.
Q. Is that what you were going to use the 120-foot manlift for?
A. Yes, sir.
Q. And then you guys in this proposal agreed that AED would be paid 175,000 for these services; is that right?
A. Correct.
Q. And then in this proposal, because the payment terms are changed in our formal proposal, "the purchase of the bridge is separate from this proposal"; is that right?
A. Yes.
Q. Okay. And when you're saying "from this proposal," you're referring to this proposal in this e-mail about blasting the bridge?
A. Yes.
Q. And then your payment terms were $30,000 upon mobilization; 90,000 upon blasting the main span and west tower; and then the balance upon blasting the east tower?
A. Yes. For the record, this is the informal proposal, because the payment terms are changed in our formal proposal.
Q. That's right. This was your first proposal to set out the terms of the blasting agreement; is that right?
A. This -- Mr. Chaklos had inquired about what's it going to cost to blast the bridge. This...
Q. Well, didn't you -- before this you guys had already agreed upon the price of 175,000, correct?
A. We had not agreed at -- I'm not sure how the dates coincide with it. But, again, this was for references to the cost and the responsibilities.
Because he -- Mr. Chaklos wanted to know what his responsibilities would be.
Q. Okay. So what I'm going to hand you here again is Deposition Exhibit No. 2, which is dated January 14 -- well, actually, this e-mail is dated January 13, 2010. This is from you to Lee. And in that e-mail don't you guys agree that you're going to sell the bridge for 25,000, and AED is going to get paid 175,000 to blast the bridge?
A. Yes.
Q. Okay. So back on January 13th you'd already discussed the price that you were going to get paid?
A. That is correct.
Q. So until the date in Exhibit 8, which is May 19th; is that correct?
A. Yes, sir.
Q. Your agreement was just 25,000 to purchase the bridge and 175,000 to blast the bridge. This is your first attempt to set out the additional terms for blasting the bridge?
A. Correct.
Q. Okay. And correct me if I'm wrong, but your intent was to turn these terms into an actual contract?
A. Yes, sir.
(Whereupon, Deposition Exhibit No. 9 was marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit No. 9. Have you seen that before?
A. Yes.
Q. And what is it?
A. It's an e-mail transmission from Eric Kelly to Delta Demolition.
Q. And is this when you were sending Delta or Lee and Krystal the agreement to purchase the bridge?
A. I'm not sure. I'm not sure at this time.
Q. Well --
A. But it appears -- based on the content, that's what it does appear. As I said before, we had -- I had just taken the contract that was sent to me, verbatim, sent it to them.
Q. Right. And it looks like when it got sent over, their response is, "Eric, these does we already have from before. We need the new docs between AED and
DDG so we can fix the typo's cuz someone was tired when they typed this from Eric Chaklos to Idaho River."
So it looks like the first set had a couple of errors in it that needed to be fixed; is that right?
A. Yeah, quite evident that they actually read it.
Q. That's not my question. So I'll move to strike as nonresponsive. The question was the first draft appeared to have a couple of typos in it that they requested be changed; is that right?
A. Yes, sir.
Q. All right.
(Whereupon, Deposition Exhibit No. 10 was marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit No. 10. Have you seen that before?
A. Which -- in its entirety, Counselor?
Q. Yes.
A. Yes.
Q. And what is it?
A. Excuse me?
Q. What is it?
A. It's an e-mail transmission from Mark -- from mark@biggerblast to myself, cc Delta.
Have you seen that before?
A. Yes.
Q. And what is it?
A. It's an e-mail transmission -- it's various amount of e-mail transmissions between Delta Demolition and Eric Kelly.
Q. The first one -- in fact I think, actually, all of them are dated May 20th, 2010, correct?
A. Yes, sir.
Q. All right. And the first one is from you to Krystal and Lee providing the information needed for the wire transfer?
A. Correct.
Q. Then the next one is from Delta Demo. It says 25,000 -- or, actually, it says, "25k will be there Tuesday; does the mobilization go to this account as well"; is that right?
A. Yes.
Q. And then you respond by saying, "Yes, it will; I appreciate your efforts"; correct?
A. Yes.
Q. And then Delta responds saying, "Krystal is on her way to notary now; need fax to send you back from notary; only sending you back signed pages"; is that correct?

Exhibit 12 came later in the day after you received the e-mail transmissions in Deposition Exhibit 11; is that correct?
A. Yes.
Q. And then you respond by providing your fax number?
A. Yes.
Q. So it looks like they were going to fax you back just the signed pages of the agreements on May 20th, correct?
A. Can you say that again, please.
Q. It looks like they were -- Krystal was going to sign and fax back to you the signed pages of the agreements on May 20th.
A. Yes.
Q. Do you know if that actually happened?
A. Yes.
Q. On May 20th?
A. No.
Q. Didn't happen on May 20th?
A. I don't know the dates, sir.
Q. Okay. First of all, on this one where they tell you that payment will be 25,000 -- or, actually, it says, "25k will be there Tuesday; does the mobilization go to this account as well"; is that right?
A. Yes, sir.
Q. All right. So did you respond at all when -- to this e-mail where they tell you that payment will be there on Tuesday the 25th?
A. I just said, "I appreciate your efforts."
Q. Okay.
(Whereupon, Deposition Exhibit No. 12 was marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 12.
A. Yes.
Q. Have you seen that before?
A. Yes.
Q. What is it?
A. It's a letter of contingency and an e-mail transition from Mark to Eric Kelly, cc'd to Delta Demolition.
Q. All right. And the date on that is May 20th, 2010, at 3:01 p.m., correct?
A. Yes, sir.
Q. So it looks like -- and if you want to refer to Deposition Exhibit 11 -- but it looks like Deposition Exhibit 12 came later in the day after you received the e-mail transmissions in Deposition Exhibit 11; is that correct?
A. Yes.
Q. If you look at the time of the e-mail transmissions in Deposition Exhibit 11, it looks like the e-mail in Deposition Exhibit 12 -- Deposition Exhibit 12 came later in time, later that day?
A. Well, it doesn't look that way. It is that way based on the printout.
Q. Okay. And that's all I'm trying to establish is Deposition Exhibit No. 12 came after Deposition Exhibit No. 11.
A. Yes, sir.
Q. Okay. In Deposition Exhibit 12 you already said that attached to that is a letter of contingency, correct?
A. Yes, sir.
Q. Before sending that did you have any discussions with Lee or Krystal about the need to sign a letter of contingency?
A. Yes.
Q. Was this done by phone or by e-mail?
A. Phone.
Q. Who initiated the call?
AED Inc. vs. KDC Investments, LLC, et al

Q. So they were -- you guys were having
at can we send it to you two, three weeks; when we start
letter of contingency came up because they were balkin
financial matters of it. And that's the reason why this
A. Well, we had discussions on -- about the
it yet. So what do you mean?
Q. Well, what did -- the time hadn't come to send
it yet. So what do you mean?
A. Well, we had discussions on -- the financial matters of it. And that's the reason why this
letter of contingency came up because they were balkin
at can we send it to you two, three weeks; when we start
the job. So that's why I put this on.
Q. So they were -- you guys were having
discussions about when payment was going to be made.
They wanted to extend it out a little further.
A. Yes.
Q. But eventually you all settled on an agreement
that it would be paid by the 25th?
A. Yes.
Q. Okay. And I don't have the attachment. Can I see that real quick?

(Document tendered.)
BY MR. SCHMITZ:
Q. Okay. Yeah. So this says that the money
would be conveyed to AED no later than the 25th day of
May 2010, correct?
A. Yes, sir.
Q. All right. And it says that if such money is
not recorded by the 26th day of May 2010, any and all
previous agreements are null and void; is that correct?
A. Yes, sir.
Q. And in here it doesn't actually reference what
agreements are included within this letter of
contingency though, does it?
A. It says "any and all." There's no ambiguity
in that, Counselor.
Q. That's not my question, sir. My question is
does it reference any particular agreements by name?
A. It says "any and all."
BY MR. BISTLINE: Just answer his question.
Q. Just answer my question, please.
A. Does it mention any specific agreements?
Q. That's my question. Does it mention any
specific --
A. No.
AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

Q. And what is it?
A. It's a e-mail transmission from Eric Kelly to Delta Demolition.

Q. And what's the date on that?
A. May 25th, 2010; 6:13 p.m.

Q. Okay. It looks like you're telling Lee and Krystal that you contacted your bank at 4:00 o'clock today and there was no posting of a transfer; is that right?
A. Correct.

Q. And you were telling them that if it only posts tomorrow, you're going to return the money because it may not be there until Thursday?
A. That's what it says.

Q. You've been handed Deposition Exhibit 15. Do you recognize that?
A. Yes, sir.

Q. And what is it?
A. It's an e-mail transmission.

Q. From who?
A. Sean McCarter to myself and then from myself to Delta.
THE WITNESS: Yes, he has.

BY MR. SCHMITZ:

Q. Tell me, how do you guys keep your documents for a project? Is there any certain filing system that you use?

A. My brother-in-law has that information.

Q. Okay. You don't deal with it because he's the information guy?

A. Yes, sir.

Q. And you don't know how he keeps track of it?

A. No, sir.

Q. So when you get stuff, do you automatically send it to him?

A. As a rule of thumb, yes.

Q. If you receive an e-mail that's addressed only to you, would you forward that to him?

A. Not always.

Q. Okay. If you get a piece of mail that's addressed just to you, would you forward that to him?

A. Not always.

Q. Have you gone through all your documents in this case to make sure that all the e-mails or any letters, anything like that addressed just to you, have been produced in this case?

MR. SCHMITZ: Yeah. That's fine.

THE WITNESS: Can you excuse me?

MR. SCHMITZ: Back on.

MR. BISTLINE: If he wants to give me one, can he just burn the whole thing onto a CD, then we don't have to plug into the side of your computer.

MR. BISTLINE: I just e-mailed him, Randy, and he uses those little things you plug into the side of your computer.

MR. BISTLINE: If he wants to give me one, that's fine.

(Brief interruption.)

MR. SCHMITZ: Can we go off the record.

MR. SCHMITZ: Okay. We can go back on.

BY MR. SCHMITZ:

Q. According to this letter, it looks like that Sean McCarter -- and Sean McCarter is Roger Barack's attorney; is that right?

A. Yes, sir.

Q. Okay. So it looks like Sean McCarter is at least -- has become aware that Lee Chaklos and Delta Demolition Group are somehow affiliated with this bridge; is that right?

A. I don't know.

Q. Well --

A. I don't know what assumption he -- what conclusion he comes to, Counselor. Sorry.

Q. Okay. So when you -- what did you do when you received this letter, if anything?

A. I believe it was -- I forward it to Delta.

Q. And I believe that is reflected on the first page of this exhibit?

A. Yes, sir.

Q. Did you do anything other than forward it to Delta?

A. Yes. I did call Lee Chaklos.

Q. And what did you say?

A. Told him to shut his pie hole, based on our confidentiality agreement.

Q. And what did he say, if anything?

A. I don't recall.

Q. Did you contact Mr. McCarter?

A. I don't know if I did or not.

Q. Did you contact Roger Barack?

A. No. Roger Barack contacted me.

Q. At this time, May --

A. Probably just after -- after the article was issued.

Q. Okay. And what did -- what did he say?

A. He forewarned me that we have a confidentiality agreement in our contract.

Q. So he's saying, hey, make sure nobody discusses the bridge, basically?

A. Basically.

Q. Did he say anything else?

A. Not that I can recall.

THE WITNESS: Can you excuse me?

MR. SCHMITZ: Yeah. That's fine.

A short break was taken.

MR. SCHMITZ: Back on.

BY MR. SCHMITZ:

Q. So before we took the break, you were saying that Roger Barack had called you shortly after this news article came out around May 26th?

A. Yes, sir.

Q. Is the article actually attached to that?

A. Yes, it is.

Q. So we do have the article. All right.

MR. BISTLINE: See, I told you I had it.

THE WITNESS: You just didn't know it.

MR. SCHMITZ: Oh, it is there. Okay.

THE WITNESS: An administrative oversight.

BY MR. SCHMITZ:

Q. So what did Roger Barack -- he was telling you that -- he was reminding you of the confidentiality agreement, and did he say anything else?
A. Well -- no. He just said basically our business, nobody else is to know it.

Q. Did he ask why Lee Chaklos or Delta Demolition was involved?
A. No, sir.
Q. Did you tell him that Lee Chaklos and Delta Demolition was involved?
A. No.
Q. Did he mention that he had read this article?
A. Yes, he did.
Q. So did you -- obviously if you didn't tell him about Delta, did you tell him that KDC had signed an agreement to purchase the bridge from you?
A. No, sir.
Q. Why not?
A. None of his business.

(Whereupon, Deposition Exhibit No. 16 was marked for identification.)

BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 16. Do you recognize that?
A. May 27, 2010; 1:54 p.m.
Q. And below that is actually an e-mail from you to Krystal; is that correct?
A. That is correct.
Q. And that's also dated May 27, 2010?
A. At 8:59.
Q. And that would be a.m.; is that right?
A. It doesn't say it.
Q. What's that?
A. It doesn't say, believe it or not.
Q. Well, if that's the first e-mail in the string and the next e-mail is 1:54 p.m. --
A. We can assume that.
Q. Okay. And you say here that "AED is presently weighing the opinion to decline to enter into any agreement with KDC Investments"; is that correct?
A. Correct.
Q. And the reason was because as of today, this date, May 27th, KDC had not complied with the contingency agreement of May 20th?
A. Yes.
Q. Meaning they hadn't paid you the $25,000 yet?
A. Not just that. They were giving me a string of bullshit that, well, they went to this bank -- they went to this bank; couldn't do something; we're driving eight hours from Virginia to Pennsylvania --
MR. BISTLINE: Just try to restrict it to just his question.
MR. SCHMITZ: Yeah.
BY MR. SCHMITZ:
Q. What you're saying is the contingency agreement required payment of $25,000 by May 25th, and you hadn't received it yet; is that right?
A. That is correct.
Q. And in response Krystal sends you an e-mail asking you -- or that says, "I seriously hope and pray you really consider our earlier conversation." Do you see that?
A. Yes.
Q. Do you recall what your earlier conversation was involved in?
A. None of his business.
Q. Did you tell him that Lee Chaklos and Delta Demolition to Eric Kelly.
A. Yes, he did.
Q. From who?
A. May 25, 2010; 1:54 p.m.
Q. And what was the substance of those conversations?
A. Basically at that point I gave the phone to my wife, and I said I don't want anything to do with them. And she said give them a chance.
Q. So did she then continue the conversation?
A. Yes, yes, yes.
Q. Okay. So you handed the phone -- who were you speaking to at the time; was it Lee or was it Krystal?
A. It was both of them. They were both driving somewhere.
Q. Okay. And so you gave the phone to your wife, and she continued that conversation?
A. Yes, sir.
Q. Okay. Did she ever give the phone back to
Q. Is that because your wife gave it to them and that's why you don't have an idea how long it was documented?

A. Mm-hmm.

Q. How did you document all the excuses propounded by you and Lee?

A. Mm-hmm.

Q. Okay. Of how long?

A. Correct.

Q. You just don't think that their -- their purse wasn't --

A. They didn't send the money.

Q. Okay. In the last e-mail, it's another e-mail from you to Delta. The third paragraph in that e-mail says that you have documented all the excuses propounded by you and Lee.

A. Yes.

Q. And what is it?

A. Yes.

Q. Okay. So you really didn't have it documented?

A. Well, my mind's a good documenter, isn't it?

Q. Or is yours?

A. No, actually, that is not a document. A piece of paper is a document. So when you say you have it documented, did you mean that you had this stuff written down or saved somewhere?

A. You know what. I may have that on a -- I -- like legal pads like you guys have.

Q. If you go to the first one in the chain, this is an e-mail from you to Krystal and Lee, correct?

A. It's various e-mails from Eric to Delta and Delta to Eric.

Q. All right. And it looks like they're all dated May 27th, the same day we've just been talking about; is that right?

A. Yes.

Q. If you go to the first one in the chain, this is an e-mail from you to Krystal and Lee, correct?

A. Yes.

Q. And it says, "It ain't looking too good. I wouldn't try to acquire the funds for AED at this time; correct?"

A. Mm-hmm.

Q. And you say, "I believe your heart was in the right place but your purse wasn't. I've been there and done that"; correct?

A. Yes.

Q. And "Please rest assured that my prayers are with you and Lee. I will go through my own bank and self perform the project"; correct?

A. Correct.

Q. So it sounds like here what you're saying is you just didn't think they had the money; is that right?

A. Correct.

Q. Yes.

Q. I've got a stack of them. And you know what, I'm going to go through them. And if I can produce that for you, Counselor, I shall.

Q. Well, if you have notes taken regarding this bridge, we have asked for those. So, yes, please produce those. Can you do that?

A. Yes.

MR. BISTLINE: Would they be with Mark or would they be with you?

THE WITNESS: Me.

MR. BISTLINE: Okay.

THE WITNESS: Again, it's in a legal pad like that.

Q. Yeah. You know, the deposition notice duces tecum for today asked you to bring with you all, like, notes, diaries, summaries, anything like that that you've written down about this case and the bridge.

A. I understand that, Counselor. I just drove 2,167 miles to be here.

Q. Sure.

A. And I did not have a chance to stop by my house.
Q. Okay. But if you have anything else like that, like legal pads or if you have calendars that you've kept that have notes written on them, anything like that I'd ask that you produce. Okay?
A. Yes, sir.
Q. Now, the sixth line down -- or sixth paragraph says, "Strauss Industries offered to front $100,000 upon proof of ownership. I have discussed this matter with them and they are on guard"; is that right?
A. Yes.
Q. Did I get that right? Okay. What do you mean there? What do you mean Strauss Industries offered to front $100,000 upon proof of ownership?
A. To Krystal and Lee Chaklos.
Q. And how do you know that?
A. Discussions with them.
Q. With?
A. Travis Nelson.
Q. And what exactly did he tell you?
A. As stated before, he said that Chaklos was in there trying to borrow money against the bridge. And he had heard that we had bought it. Does he own the bridge.
Q. Okay. So he was asking you to verify that they had purchased the bridge?
A. Yes. $100,000
Q. And what did you say?
A. I said, well -- you know what, in the spirit of trying to help them out, I did not attest that they owned the bridge. I said they are working on it right now is what I said to him.
Q. Did you tell him that you guys had a -- you signed the paperwork; they just hadn't made the payment yet?
(Brief interruption.)
THE WITNESS: Please repeat that question.
BY MR. SCHMITZ:
Q. Did you tell Travis Nelson that you guys had signed the agreements to sell the bridge but you were just waiting for payment?
A. I did not convey that to him. Again, that's none of his business, likewise, that -- whether we have an agreement or not with Chaklos.
Q. You just told him that you guys were working on --
A. Yes.
Q. All right. But he told you that if they owned it, he was going to front them a hundred thousand dollars?
A. That's what they were asking.
THE WITNESS: That was on one of the previous.

BY MR. SCHMITZ:
1 Q. No, this is it. Starting right there under
2 the date and time.
3 A. I stand corrected.
4 Q. Okay. So did I read that correctly?
5 A. The response from Delta that the shit will hit
6 the fan started -- blah, blah, blah?
7 Q. Actually, I read the very first paragraph. It
8 says, "The timeframe has expired for the Letter of
9 Contingency. Pursuant to my e-mail of 5/27/10, AED will
10 self perform this project."

BY MR. SCHMITZ:
11 Q. You have been handed Deposition Exhibit 18.
12 Do you recognize that?
13 A. Yes, sir.
14 Q. What is it?
15 A. It's an e-mail transmission between Delta and
16 AED.
17 Q. Dated June 1st, 2010?
18 A. Yes, sir.
19 Q. Let me ask you something. Do you consider KDC
20 and Delta to be the same thing?
21 A. Well, for this particular instance it was --
22 it's assumed that they're the same, but for the legality
23 for this, it is only KDC.
24 Q. Okay.

BY MR. SCHMITZ:
25 A. For the -- and this is my interpretation. I'm
26 not saying this is correct. KDC -- or I'll put it this
27 way. Krystal told me they're just buying the bridge.
28 Delta is doing the demolition of the bridge.
29 Q. And I'm just curious because I want to make
30 sure that when you refer to Delta, I want to know who
31 you're talking about. And if you're making an actual
32 distinction between KDC and Delta or when you say Delta
33 you're just referring to Lee and Krystal.
34 A. Yes, sir.
35 Q. So when you say Delta, you just mean Lee and
36 Krystal?
37 A. Yes, sir.
38 Q. Okay. All right. So this exhibit, the first
39 one is June 1st, and it says, "Mr. Kelly, I am prepared
40 to convey funds this morning. I need you to call or
41 e-mail me so we can accomplish this and put a closer to
42 this deal"; correct?
43 A. Yes, sir.
44 Q. And you respond that same day. And you say,
45 "The timeframe has expired for the Letter of
46 Contingency. Pursuant to my e-mail of 5/27/10, AED
47 will self perform this project"; correct?
48 A. It's not on this ...
49 (Document tendered.)
1 say, well, we're adding all this right before. So I
2 would think though that if I said -- if I tried to bring
3 it and he said I'm not going let you, I don't think I
4 could get res judicata'd on that.
5 MR. SCHMITZ: Well, you know, I don't know.
6 But are you planning on trying to add this?
7 MR. BISTLINE: I haven't decided that just
8 yet. I mean, I think people out there maybe saying some
9 things they shouldn't. But I'd have to develop more of
10 why that matters before I would decide that.
11 MR. SCHMITZ: Okay. So then we're obviously
12 going to leave this deposition open in case you guys are
13 successful in amending the complaint and adding that
14 claim.
15 MR. BISTLINE: Correct.
16 MR. SCHMITZ: Okay.
17 BY MR. SCHMITZ:
18 Q. Now, this report -- this news station report
19 that you're referring to, was this a -- was this like a
20 report on TV? Was it a newspaper report?
21 A. I believe, Counsel, it was a newspaper report.
22 Q. Do you know the date of the report?
23 A. No, I don't, sir. I'm sorry.
24 Q. Do you know which paper it came from?
25 A. Most likely it was the Intelligencer.

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1 MR. SCHMITZ: You're going to try and get copy
2 of that from Mark Wilburn?
3 MR. BISTLINE: Yeah. I'm doing that right
4 now.
5 THE WITNESS: Art, if you can specifically --
6 MR. BISTLINE: I gave him the exact date of
7 the e-mail.
8 THE WITNESS: And the content, because there
9 are quite a few as you can recall.
10 MR. BISTLINE: Yeah.
11 BY MR. SCHMITZ:
12 Q. Quite a few articles or ...
13 A. Quite a few articles; yes, sir.
14 MR. BISTLINE: Yeah, I have an e-mail to him
15 generally saying that -- because I didn't ever see any
16 articles right at that time frame ever saying this. So
17 obviously I would want to.
18 MR. SCHMITZ: Yeah. And I don't have any
19 either. So ...
20 MR. BISTLINE: Yeah. So he said, yeah, he's
21 right. And he was on the road. So he was on his way
22 back. So hopefully we'll see something soon here.
23 MR. SCHMITZ: Okay.
24 BY MR. SCHMITZ:
25 Q. Well, actually, you know what, there's -- at

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1 the end of that Exhibit 18 you say, "This causes a very
2 contentious relationship. That being said, Do Not
3 Execute Any Wire Transfer. Delta did not abide by the
4 terms of the LOC" -- meaning letter of contingency; is
5 that right?
6 A. Yes, sir.
7 Q. (Continuing.) -- "and AED reserved the right
8 to terminate any agreements."
9 A. Yes, sir.
10 (Whereupon, Deposition Exhibit No. 19 was
11 marked for identification.)
12 BY MR. SCHMITZ:
13 Q. You've been handed Deposition Exhibit 19. Do
14 you recognize that?
15 A. Yes, sir.
16 Q. And what is it?
17 A. An e-mail transmission between Eric Kelly and
18 Delta Demo.
19 Q. And that's dated June 1st also, right?
20 A. Yes.
21 Q. All right. If you go to the first e-mail in
22 that string, it says, "Krystal/Lee, I may have an
23 alternate proposal for consideration this afternoon";
24 correct?
25 A. Yes, sir.

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AED Inc. vs. KDC Investments, LLC, et al.

the sale was not consummated at this time, Counselor. Okay. And, likewise, we had nothing even -- we had nothing agreed to, in essence, about the whole shooting match.

Q. Well, you had your informal proposal with your terms of what was going to be included in an eventual blasting agreement, correct?

A. That was a reference, informal proposal for them. I can only assume that they were putting together their budgetary numbers, like you do when you build your house. Okay. When you have your house built, what's it going to cost? So that's the reason that informal proposal was sent to him. He wanted to know how much it was going to cost me.

Q. Well, there was a lot more contained in there besides just costs, correct?

A. Correct.

Q. And as we discussed previously, that was an informal proposal which contained terms that you were expecting to put into a written contract for the blasting?

A. Yes, sir.

Q. Okay. So all I'm saying is at this point in time, as of June 1st, you had a written signed agreement to sell the bridge to KDC -- it hadn't been paid for yet -- but you had no written agreement to blast the bridge?

A. At that time we did not have an agreement to blast the bridge.

Q. All right. And so what you're saying here is that you want to put the terms in your e-mail here into a written agreement to blast the bridge?

A. And to sell the bridge.

Q. Okay. And your proposal is sell the bridge as before. So nothing was changing there?

A. Yes, sir.

Q. But you wanted Delta to sign a contract which will have AED perform the blasting work?

A. Yes, sir.

Q. Require the mobilization fee upon signing of the contract?

A. Yes, sir.

Q. And require the monies for the blasting to be guaranteed by a bank or escrowed?

A. Yes, sir.

Q. Now, it doesn't look like any of the other terms of your previous informal proposal were changing other than the timing of the mobilization fee; is that correct?

A. I don't understand, Counsel.

Q. Well, if you look at Exhibit 19 and you look at the alternate proposal that you have set forth in that e-mail --

A. Yes.

Q. -- and if you compared that to the terms of your informal proposal that you had sent out previously --

A. Yes, sir.

Q. -- it looks to me like the only thing that's really different is the timing of this mobilization fee?

A. The payment terms were different.

Q. Okay. Other than that, the terms were going to be the same?

A. Yes, sir.

Q. Okay. Also in here, in this e-mail, you say "Delta can choose an alternative shooter." What did you mean by that?

A. Now, what I intended by that is if I sold them the bridge, just sold them the bridge, they can get anybody to blow the bridge up, any -- one of my competitors or something like that. So what I was trying to imply is that wouldn't -- it wouldn't -- if I had done that, that would have been poor stewardship. Okay. I see what you're saying.

Q. So -- and essentially I'm -- what I'm -- what I would be doing is giving them $1.3 million in equity for 25,000. I mean, come on; that's stupid.

Q. I see. Okay. So this is what you're saying here where you say "as it stands." So at this point in time, if you go forward with the sale but there's no contract for AED, then there's nothing to stop KDC from going out and hiring somebody else to blast the bridge?

A. Correct.

Q. All right. And then Krystal responds by saying, "You have my word that AED will do the blast as long as you are still receptive to doing"; correct?

A. Yes, sir.

Q. And then you respond, this is still June 1st, by saying, "I am having my office draft a solution which will have to be endorsed prior to any other
commitments."
1. A. Correct.
2. Q. All right. And at the bottom you say, "The
3. original proposal" -- yeah, there it is -- "The original
4. proposal will be the same except for payment." And what
5. you mean there, the original proposal is that informal
6. proposal that you had written out previously?
7. A. Yes, sir.
8. Q. Okay.
9. (Whereupon, Deposition Exhibit No. 20 was
10. marked for identification.)
11. BY MR. SCHMITZ:
12. Q. You've been handed Deposition Exhibit 20. Do
13. you recognize that?
14. A. Yes, sir.
15. Q. And what is this?
16. A. An e-mail between Eric and Delta Demolition.
17. Q. All right. And this e-mail string is also
18. dated June 1st, correct?
19. A. Yes, sir.
20. Q. And the first e-mail in this string is your
21. alternate proposal, the one we just talked about.
22. A. Mm-hmm.
23. Q. And then there is a reply from Lee, which
24. says, "Eric and Lisa, Here is our offer as to your
25. alternate proposal"; do you see that?

1. alternate proposal"; do you see that?
2. A. Yes, sir.
3. Q. So it looks like Lee was proposing some
4. alternate terms here; is that right?
5. A. It looks like he is proposing, yes.
6. Q. Okay. And at the end there's a paragraph, he
7. says, "We hold no animosity towards AED and are
8. anxiously awaiting to meet you both. We look forward to
9. doing this hand in hand together"; correct?
10. A. Yes.
11. Q. And the last sentence says, "The only thing I
12. would also ask (sic) to add to the contract between AED
13. and Delta for the blasting is that AED must" -- he says
14. preform; but I think that's a spelling error -- "perform
15. the blasting"; do you see that?
16. A. Yes, sir.
17. Q. And then you respond to that e-mail and say,
18. "My office will be sending the solution as AED wishes it
19. to be"; correct?
20. A. Yes, sir.
21. Q. "You guys have to agree or not"; correct?
22. A. Yes.
23. Q. Okay. So basically what you're saying is I'm
24. going to come up with the agreement here, and you guys
25. are going to take it or leave it, right?

1. A. Yes, sir.
2. Q. Okay. And then who -- who prepared the
3. proposal, what the terms that you said you were having
4. your office draft?
5. A. I have compiled -- I had compiled the
6. verbiage, and Mark Wilburn compiled the -- it's
7. basically templated. He compiled the actual draft that
8. was sent to them.
9. Q. I guess I'm not quite sure what you mean by
10. you compiled the verbiage. Meaning you wrote it out,
11. and he just put it into a certain form?
12. A. Yes.
13. Q. Okay. So you wrote what the terms needed to
14. be, and Mark put it into the final form for you?
15. A. Yes, sir.
16. (Whereupon, Deposition Exhibit No. 21 was
17. marked for identification.)
18. (Brief interruption.)
19. BY MR. SCHMITZ: Let's keep going.
20. Q. You have been handed Deposition Exhibit 21.
21. Do you recognize that?
22. A. Yes, sir.
23. Q. And what is it?
24. A. It's e-mail transmissions from
25. mark@biggerblast to Delta.

1. mark@biggerblast to Delta.
2. Q. And these are all dated June 1st, 2010,
3. correct?
4. A. I'm looking. Yes, sir.
5. Q. This looks like -- I mean, this is further
6. e-mail communications between you guys regarding this
7. alternate proposal that you were going to come up with.
8. This includes Eric and Lisa's alternate proposal. And
9. then there is a response by Mark Wilburn where he says
10. "Krystal & Lee, I have reviewed the information and
11. compiled the attached."
12. And if you look on -- well, the attached isn't
13. included in this e-mail. But what do you believe he was
14. attaching?
15. A. Which transmission is that?
16. Q. This is on page -- there's a Bates stamp on
17. the bottom. This would be on ADC873.
18. A. 873.
19. Q. And right at the top of that page it says,
20. "Krystal & Lee, I have reviewed the information and
21. compiled the attached. Please review and if in
22. agreement, please sign and fax" -- and then he provides
23. a number.
24. A. Yes.
25. Q. Do you know what he was attaching?
A. I can only -- no. I don't know in fact what he's faxing, Counsel.
Q. Would you believe that it would be the draft of ... 
A. The revised proposal; yes, sir.
Q. The revised proposal. Okay.
A. Correct.
Q. And she asks him to revise. And he responds and says, "Will do."

Do you remember having a conversation with either Krystal or Lee about having mobilization money due on June 9th?
A. Yes.
Q. And what was discussed?
A. Paying the mobilization money per the agreement on June 9th, sir.

Mr. Schmitz: Okay. Some of these you were not included on. It looks like they're just between Mark and Krystal. I'll ask him about those.

But attached to those e-mails is a document.
Is that a -- you know what. Let's do it this way. Let's just make a separate document of this. (Whereupon, Deposition Exhibit No. 22 was marked for identification.)

By Mr. Schmitz:
Q. You have been handed Exhibit 22. Do you recognize that?
A. Yes, sir.
Q. What is it?
A. It's our proposal with additional terms.
Q. Okay. And is this what, as you said, you had come up with the verbiage or the terms, and Mark compiled this into this form for you?
A. Yes, sir.
Q. And then Mark sent this over to Krystal to have signed; is that right?
A. Yes.
Q. So this is the actual written alternate proposal that you had referred to in your previous e-mails?
A. Yes, sir.
Q. And it looks like everything -- scratch that. The payment term of 175,000 is the same. In paragraph 3 it makes 30,000 due on June 9th but uses the term "deposit" rather than "mobilization," correct?
A. Yes.
Q. Paragraph 4 entitles AED to stop work if not timely paid on any of the above installments, correct?
A. Yes.
Q. Paragraph 8 says, "AED will execute a contract directly with KDC"; is that right?
A. Yes.
Q. Was that a typo? Did that mean to say that AED will execute a contract directly with Delta?
A. Yes, sir. You know, this comes from a template. And I don't understand that in this context right now.
Q. Okay. Because it would seem to make sense that it would be Delta, because Delta was going to be the general and AED was going to be a subcontractor for Delta for the blasting, correct?
A. That's what it appears.
Mr. Bistline: Randy, I was going to just offer -- I'm not testifying for him. But I don't know if you've seen it. But there's -- that language looks like it was pulled out of an e-mail, the ones you were just going through, where they say that. And so it looks like they just kind of ...  
Mr. Schmitz: Cut and paste.
Mr. Bistline: Yeah.
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1. limit only -- that AED would only be responsible to get explosive permits?
2. A. That is how it was meant.
3. Q. So you were now taking off the table that AED was going to go get any other permits or licenses required to actually perform blasting in the state of West Virginia?
4. A. No, sir.
5. Q. Okay. So you were still intending AED to get those permits and licenses?
6. A. Yes, sir. It says both federal and state. I interpret that for federal and state.

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1. Q. Okay. So when it says supply the necessary explosives permits to perform operations in the state of West Virginia, you don't read that language as limiting it just to explosives, but it actually includes getting whatever other permits and licenses you need to do the work?
2. A. No. That's strictly for the explosives permits.
3. Q. Okay. Is there another paragraph in here that includes AED's responsibility to get permits and licenses to perform the work?
4. A. Again, any of the permits or licenses that are required, federal and state, okay, we will apply them.

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1. required by KDC or a governmental entity as long as KDC reimburses AED for any extra costs associated therewith?
2. A. Yes.
3. Q. And at the -- on the last page, can you tell me whose signature that is?
4. A. It's mine.
5. Q. This one is yours? It's not Mark Wilburn's?
6. A. It looks like mine. Couldn't say for sure if it was, actually. I'm not sure if I had actually endorsed this or not.
7. Q. This could be Mark Wilburn's?
8. A. It could be.
9. Q. But you're saying he has authority to sign on your behalf?
10. A. Anything that Mr. Wilburn endorses, he has to have permission.
11. Q. He has to have permission?
12. A. Yeah. Well, he -- generally what happens, Mark will say -- like, I'll have the contract. And, again, the printer's puked, the fax machine's puked. And he'll e-mail -- he'll scan and e-mail this and say read it; can I sign it? And I say yes.
13. Q. Do you remember him asking for permission to sign this particular document?
14. A. Yes, sir.

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1. Q. And you gave him permission?
2. A. Yes, sir.
3. Q. So then it's not your signature on the bottom? 
4. A. You know what, it does not look like my signature. He's getting good at it if it's his.
5. Q. Okay. Then after June 1st, KDC paid to AED the $25,000 for the purchase of the bridge on June 3rd is that right?
6. A. I'm not sure of what date, Counselor. I'm sorry.
7. Q. Who would know that?
8. A. Lisa.
9. Q. All right.
10. A. You're married.
11. Q. Let me ask you. Do you have any recordings at all? Did you record any conversations, telephone conversations?
12. A. No.
13. Q. Did you save any voice mails from either Lee or Krystal?
14. A. Not that I'm aware of.
15. Q. I have a -- and I don't really want to make this an exhibit. But I'm just going to read from this. It's an e-mail from you dated June 2nd to Krystal and Lee. And you say, "I saved a voice mail from Lee that
A. Yes, sir.

THE WITNESS: I'm going to go to the rest room real quick.

MR. SCHMITZ: Okay. That's fine.

(A short break was taken.)

(Whereupon, Deposition Exhibit No. 24 was marked for identification.)

BY MR. SCHMITZ:

Q. You have been handed Deposition Exhibit 24.

Do you recognize that?

A. Yes, sir.

Q. What is it?

A. It looks like our standard operating procedure.

Q. There's an e-mail that is from Mark Wilburn to Pete Sambor at the U.S. Coast Guard dated June 6, 2010, correct?

A. Yes.

Q. And you are listed as one of the recipients on the cc line; is that right?

A. Yes, sir.

Q. Do you remember receiving this e-mail?

A. Yes, sir.

Q. And what Mark says is, "Mr. Sambor, per your recent conversation with Eric Kelly, attached is the AED information binder for your review."

So is what is attached to this e-mail here in this exhibit is that your information binder?

A. It's our standard operating procedure, slash, informational binder, yes.

Q. He's referring to a recent conversation between you and Mr. Sambor.

A. Yes, sir.

Q. Do you know what conversation he's talking about?

A. I sure do.

Q. And what conversation was that?

A. Initially Mark on his inquiry with the Coast Guard, seeing what the turnaround time was for this project, was talking to Mr. Sambor. And Mr. Sambor had at one time received some type of documentation from Delta. And for the record, I have done a lot of work with the Coast Guard over the years. So I am well known in that circle.

Q. Okay. I'm just asking what conversation did you have with Mr. Sambor?

A. I'm getting to that.

Q. Okay. I don't need your history with the Coast Guard though. I just want to know what you were talking about.
A. Mr. Sambor called me. And he says, Eric, I understand you were the owner of the bridge. You supposedly sold it to Delta. Help these guys out because the sh*t they submitted to me isn't worth the paper it's written on. End of story.

Q. He used those exact words?
A. Very close to it, yes.

Q. Did he say what he was referring to? What did they submit?
A. They were submitting paperwork for the permit to do the demolition of the bridge.

Q. Did he say why he thought they had submitted was inadequate and why they needed your help?
A. It was insufficient for the criteria of the Coast Guard. And he said, Eric, you have done this many times; can you help them?

Q. So is that why Mark was submitting this information binder?
A. Yes, sir.

Q. This was a packet of information to help KDC get a permit from the Coast Guard?
A. This was submitted to the Coast Guard for -- you know, at any point to reference it into what KDC wanted to do. What we were trying to do is give KDC a little credibility about doing this bridge because the

Coast Guard had never heard of KDC -- or I'm sorry -- of Delta Demolition.

Q. Oh, and Delta as the general contractor was submitting the information to get the permit?
A. Yes, sir.

Q. The date on that e-mail is June 6th, right?
A. Yes, sir.

Q. Okay. If you go into the actual information binder, there's a letter right at the very beginning. It starts off with "Based upon the AED site visit and a review of the supplied documents"; do you see that?
A. Yes, sir.

Q. What's the date on that letter?
A. June 7th.

Q. Why is it dated June 7th?
A. No idea. But if you look at it, it's carbon copied from most of the other letters that are -- the letter that was submitted with the proposal to KDC/ Delta.

Q. I'm not sure what you're referring to.
A. If you look at the context or the -- the way it's compiled, if you look at the verbiage, it comes from a template that we -- that is generalization the letter.

Q. Okay. But what I'm saying is the e-mail that attaches this information binder is dated June 6th, but the date on the binder that it's sending is dated June 7th. So why is it dated June 7 instead of June 6?
A. I have -- I'm sorry. I can't answer that, Counselor.

Q. Who prepared this?
A. The SSWP and Mark Wilburn.

Q. And this is part of his job is he's the information guy; he puts this stuff together?
A. Yes, sir.

Q. And on there you have the previous owner is Roger Barack?
A. Yes.

Q. Well, why shouldn't it be in this file? Don't all the parties were expected to play on this project?
A. They are what the roles that were assumed.

Q. Okay.
A. But not validated.

Q. Well, I'll object to that as nonresponsive.
A. If I could have you turn to the page marked KDC108.

Q. All right. And there's also some other contacts on there. So that is -- those are the roles that all the parties were expected to play on this project?
A. Mm-hmm.

Q. The general contractor is Delta Demolition?
A. Yes.

Q. And the explosive contractor is AED?
A. Yes.

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1. transport and purchase explosives.
2. Q. Okay. I guess I don't understand. Why are you worried that this is --
3. A. This becomes public information, Counselor.
4. Q. Okay.
5. A. Okay? And, again, we were advised on more than one occasion by the BATF to protect this number.
6. Q. Oh, because it has your user number?
7. A. That's correct. My license number.
8. Q. Your license number. Your permit number. But Mr. Wilburn included this in the packet that was sent to the U.S. Coast Guard?
10. Q. So anybody that did a Freedom of Information Act request --
12. Q. So they're good for about 30 years?
13. A. Yes, sir.
14. Q. Okay. This particular license here says it expired on 2012 it expires. This says in 2012 it expires.
15. A. Mm-hmm.
16. Q. So the difference between the two is the other one was for possessing, transporting and using the explosives, and this one allows you to actually manufacture the explosives?
17. A. When you use a two-component explosive, this allows -- every -- the same privileges on the Type 33. The difference is this will allow you to use two-component explosives, which is a binary. The minute you start taking that tube of that ammonium nitrate and putting the nitromethane in it makes you a manufacturer.
18. Q. Were you going to be doing that type of explosives on the Bellaire Bridge?
20. Q. Okay. That looks like another permit. But this says in 2012 it expires. But this says it's a permit to manufacture high explosives; is that right?
21. A. Yes, sir.
22. Q. Did you --
23. A. But it's not expired.
24. Q. Why isn't it expired?
25. A. This becomes public information, Counselor.

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1. it's a permit to manufacture high explosives; is that right?
2. A. Yes, sir.
3. Q. So the difference between the two is the other one was for possessing, transporting and using the explosives, and this one allows you to actually manufacture the explosives?
4. A. When you use a two-component explosive, this allows -- every -- the same privileges on the Type 33. The difference is this will allow you to use two-component explosives, which is a binary. The minute you start taking that tube of that ammonium nitrate and putting the nitromethane in it makes you a manufacturer.
5. Q. Were you going to be doing that type of explosives on the Bellaire Bridge?
6. A. Potentially on the piers.
7. Q. Okay. That looks like another permit. But this says it's a permit to manufacture high explosives; is that right?
8. A. Yes, sir.
9. Q. Did you --
10. A. But it's not expired.
11. Q. Why isn't it expired?

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1. allows you to purchase, transport and possess explosives in interstate commerce.
2. Q. Okay. How long are those licenses good for?
3. A. Varies, from state to state, agency to agency.
4. This says in 2012 it expires.
5. Q. Yeah. But it doesn't say when you had received it.
6. A. I received it in 19 -- what do you mean I received it?
7. Q. Well, I'm asking you how long these are good for. It expires on 2012, but when did you receive it?
9. Q. So they're good for about 30 years?
10. A. Well, it's continuous. This is the most --
11. one of the most important licenses that we have to maintain. This is not one that you can let expire and then go and say, oops, my license expired. No, because then it takes a year and a half for you to get this license. So biannual -- or every two years you reapply.
12. Q. That's what I was asking. They're good for two years, and you have to reapply to keep them current?
13. A. Yes.
14. Q. So if you go to page KDC111.
15. A. Yes.
16. Q. That looks like another permit. But this says...
West Virginia permit to use explosives? Yes, but I'm asking.

A. I'm looking to see the date on this, when this was issued. What was the date on that?

Q. This is submitted on June 6, 2010.

A. At that time did not have the license renewed.

Q. Okay. And if you --

THE WITNESS: Do you want to have your girl copy that?

MR. BISTLINE: Yeah, do want me to make copies.

MR. SCHMITZ: Sure. Do you want me to wait or keep going?

MR. SCHMITZ: You can keep going.

BY MR. SCHMITZ:

Q. If you'd go to page KDC116.

A. Yes.

Q. And that appears to be a declaration sheet for certificate of liability insurance; is that right?

A. Yes, sir.

Q. But this wasn't a sheet for actual insurance, was it? I mean, if you look down at the very bottom left-hand corner, it says "sample."

A. That is correct.

Q. So why was -- do you know why Mark was going to the meeting? Did you go --

THE WITNESS: I had food with Krystal and Lee Chaklos.

Q. Was it lunch or dinner?

A. My wife and daughter were there. Lee Chaklos and his wife were there with their child.

Q. Okay. And then after you guys ate, you went to the meeting, is that right, that you went to and attended?

A. I believe that's what it was.

Q. And do you recall the date?

A. Not the date, no.

Q. Does June 8, 2010, sound about right?

A. I just don't recall the date, Counselor.

Q. Okay. And if you --

THE WITNESS: The $30,000 was submitted, so it was not submitted at that time.
A. The demolition of the Bellaire Bridge.
Q. And who presented to the council how it was going to be demolished?
A. Nobody.
Q. Nobody did?
A. It was a discussion for the application of the permit that was the prerequisite.
Q. Who described what was needed for -- to obtain the permit?
A. I don't know the individual -- there was an individual with the City of Benwood that had outlined -- or said -- basically said you're just going to have to apply certain criteria for the permit.
Q. Did they have this written down anywhere, or was this just them talking?
A. It was a bunch of drunken councilmen in a Podunk town in West Virginia that decided to have a get-together.

MR. SCHMITZ: All right. I'm going to object and move to strike as nonresponsive.
MR. BISTLINE: Yeah, I'll move to strike too.

LET'S NOT INSULT THE COUNCILMEN IN CASE WE MAY NEED --
THE WITNESS: Half of them were drunk, Art.

MR. BISTLINE: Okay. That's now slander, so I'll move to strike too.
MR. SCHMITZ: Okay, I'm going to object, Mr. Bistline.

Q. Okay. When he was at the podium, did he describe to the council members what was going to take place with this bridge?
A. He was at the podium.
Q. Okay. Let me finish. ;
A. Off to the side.
Q. And you said it was Captain ... 
A. David McLaughlin.
Q. And who else?
A. The fire chief. I don't recall his name.

Q. Who were they discussing it with?
A. Not in -- not in the front of the room. We were in the back of the room to people who basically had the say on the final -- the final issuance of the permit.
Q. Okay. So Lee was up at the front of the room?
A. He was at the podium.
Q. Okay. When he was at the podium, did he describe to the council members what was going to take place with this bridge?
A. Goodbye is all I said.
Q. Was it during the meeting or after?
A. It was during the meeting.
Q. Was it as part of the official meeting or are you off to the side?
A. Off to the side.
Q. And you said it was Captain ... 
A. David McLaughlin.
Q. And what did you guys talk about?
A. Logistics.
Q. Just how the bridge was going to be blasted?
A. Yes.
Q. Did they mention anything to you about what was required in order to get to that point?
A. No, sir.
Q. What was -- you don't remember the name of the council member that was describing what needed to happen before this bridge could be blasted?
A. Well, nobody had mentioned what the criteria was.
Q. You said they were outlining what was needed to -- you said outline certain criteria. That's what you said.
A. That's right.
Q. Okay. So what -- I'm asking you. Do you remember which council member --
A. They didn't have any criteria.
Q. Let me finish.
MR. BISTLINE: Let him finish his question.
BY MR. SCHMITZ:
Q. I'm asking you if you remember which councilman was outlining this criteria?
A. The mayor.
Q. And what did he say? What did he outline?
MR. BISTLINE: What are you looking at there?
I need to have you focusing on this so we can ...
THE WITNESS: Stuff he's sending to you.
MR. BISTLINE: Oh, don't worry about that. I
get it here. I'll forward it to you, Randy, if it comes
in.
THE WITNESS: So that I'm not sounding
redundant or as a derogatory witness here, they --
everybody was saying that there is criteria, but nobody
had the criteria in front of them.
BY MR. SCHMITZ:
Q. Do you remember how long this meeting lasted?
A. 15 minutes.
Q. Okay. So what happened after the meeting?
A. Met with -- well, there was a TV interview
that Lee did, describing how he was going to do wonders
and shit thunders. And then I said, Lee, you wasted
four days of my time. Talk to you later.
Q. How did he waste four days of your time?
A. Four days driving.
Essentially he said I had to be at that
meeting. It was imperative. I can't do this without
you, Eric. I don't know nothing about the blasting,
nothing whatsoever. You got to be there. There will be
tons of questions.
Q. And then you didn't get any questions?
A. None.
Q. That may not necessarily be Lee's fault that
you didn't get any questions?
A. Well, this I can tell you. It wasn't based on
his presentation. That's for sure.
Q. I thought you said there wasn't a
presentation?
A. He sat at the podium, and he was talking about
we're finally demolishing the -- the good-boy talk. You
know, we're demolishing the bridge. We want everybody's
cooperation.
Q. So the whole purpose was just to -- for you to
go there to be at the meeting? There was nothing else
you were going to do while you were there?
A. I don't understand the context of that
question.
Q. Well, didn't Lee want you to actually walk the
bridge with him?
A. I did not walk that bridge with Lee.
Q. I know you didn't. But didn't he ask you to
walk that bridge with him? Weren't you guys supposed to
do it the day after the meeting?
A. No.
A. No.
Q. You don't recall him doing that?
A. No, sir.
Q. And you don't recall telling him, well, hey,
I've spoken to the West Virginia fire marshal, and they
said we don't need one?
A. I believe my brother-in-law had done that and
had stated those remarks.
(Whereupon, Deposition Exhibit No. 26 was
marked for identification.)
BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 26
Do you recognize that?
A. Not per se, no.
Q. This is a June 9, 2010, e-mail from Mark
Wilburn to Delta, and it's cc'd to you, isn't it?
A. Yes, sir.
Q. You're saying you don't recall actually
receiving this?
A. I don't recall this particular document,
Mr. Bistline.
Q. This says, "Lee, per Eric, I spoke to the West
Virginia fire marshal"; correct?
A. Mm-hmm.
Q. So this sounds like you directed Lee -- or I'm

BY MR. SCHMITZ:
Q. Around this time, June 9th, had you read the
West Virginia Contractors Licensing Act?
A. No, sir.
Q. Have you ever read the West Virginia
Contractors Licensing Act?
A. No, sir.
Q. So where were you getting your information to
support your contention that you did not need a West
Virginia contractors license unless you had an actual
contract?
A. Oh, it was --
THE WITNESS: Did you send that to me, Art?
MR. BISTLINE: That's -- I'm not even talking
to you at this point.
THE WITNESS: Thanks. Throw me under the bus.
I do believe it was the documentation -- actually, it
came from my brother Mark Wilburn -- my brother-in-law.
BY MR. SCHMITZ:
Q. He's the one that said you don't need a
contractors license?
A. Unless you had a contract. And the reasoning
behind that is you don't spend money unless you don't
have to.
Q. So you didn't -- do you recall Lee calling you
up on June 9th and telling you, hey, I got this list
here, referring to Exhibit No. 25, and it says you got
to have a West Virginia contractors license?
Q. Okay. And was this in response to Lee calling you up and saying, hey, they're telling me you got to have a contractors license?
A. It was in response to talking with Dave McLaughlin who says, You need a contractors license, Eric.
Q. Okay. And when was this conversation?
A. Unknown at this time.
Q. Was it a day after the meeting that you had?
A. No.
Q. Was it within a week after that --
A. It might have been within the week, yes.
Q. So in that time frame though, Dave McLaughlin told you that you do need a contractors license?
A. In order to get the blasting permit, I was supposed to have had the contract license and business license for -- contractors license for the state of West Virginia and a business license for the City of Benwood.
Q. Did you disagree with him and say, hey, we already looked into this, and I don't need one?
A. Well, Mark and Mr. McLaughlin exchanged -- I think they exchanged e-mails. You can check with Mark on that. And ultimately we just went and got the contractors license and business license.
Q. That wasn't until several months down the road, correct?
A. I'm not sure of the time frame, Counselor.
Q. Well, according to your responses to discovery, you didn't get those until mid-August of 2010. And we're in June. So that would have been --
A. I don't believe I responded in that because I really don't know when we acquired those licenses, unless I read it right off the piece of paper there.
Q. So you didn't help prepare the responses to our discovery requests?
A. What was relevant for me to respond to, I did. The informational stuff, again, I asked for Mr. Wilburn.
Q. So any of this information needs to be taken up with Mr. Wilburn?
A. As far as the dates for the application of the licenses, yes, sir.
Q. And, basically, it sounds like anything to do with permits, applications or licenses, I need to talk to him?
A. Yes, sir.
(Whereupon, Deposition Exhibit No. 27 was marked for identification.)
BY MR. SCHMITZ:
Q. You've been handed Deposition Exhibit 27. Do you know if Mark Wilburn has?
A. Find out if we -- about the contractors license.
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. No.
Q. Do you know if Mark Wilburn has?
A. I cannot answer that for him.
Q. Did you even -- had you even heard or had any information that West Virginia actually had a contractors license act?
A. Correct.
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
Q. Do you know if Mark Wilburn has?
A. Correct.
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
Q. Okay. Have you ever actually read the West Virginia Contractors Licensing Act?
A. \(\text{Nodding.}\)
A. Yes, sir.
2
Q. And what is it?
3
A. It's an e-mail transmission between Eric and Delta Demolition.
4
Q. And it's dated June 14, 2010?
5
A. Yes, sir, at 11:54 a.m.
6
Q. And as of June 14, obviously the June 9th date had come and gone, and you had not received the $30,000 payment; is that correct?
7
A. That is correct.
8
Q. And so what you're doing here is you send an e-mail to Krystal and you say, "AED is presently acquiring the necessary licenses to be a subcontractor pursuant to the laws of the state of West Virginia"; is that right?
9
A. That is correct.
10
Q. What were you doing to acquire the necessary licenses, or is that something I need to ask Mark?
11
A. Mark Wilburn will know that.
12
Q. Okay. And you mentioned that the payment is already a week late. And you say, "I will not go further until that part of the contract is honored"; correct?
13
A. That is correct.
14
Q. Do you have any other documents relating to the acquisition of explosives?
15
A. No, sir.
16
Q. More than one?
17
A. I said I had no idea how many phone calls.
18
Q. I mean, you don't even know if it was more than one phone call though?
19
A. I really don't know.
20
Q. Okay. And what did you have to do for the acquisition of explosives?
21
A. There's only one manufacturer in the United States, that's Accurate Energetic Solutions. So you have to give them specifics as to size, grain loading, lengths, in order to have them order the tubing, get the product loaded into PETN or RDX, roll it, form it, cut it to the specifics that we issue to them.
22
Q. Is this something you issue to them in writing?
23
A. I believe I did, yes.
24
Q. Do you have a copy of that?
25
A. And I knew you were going to ask that. But I know I don't because that computer puked.

MR. SCHMITZ: Yeah, I asked for that specifically also.

BY MR. SCHMITLIN: Actually, I'll e-mail Mark and I'll deal with it.

Q. You have no document showing what you ordered as far as explosives?

A. I have a bill of lading.

Q. You do have that?

A. Yes.

Q. Okay. We don't have a copy of that.

A. Well, that was something my counsel and I have been debating about as far as the dissemination of information.

MR. SCHMITZ: Well, there's not much to debate about that. That is certainly discoverable information.

MR. BISTLINE: Yeah, it is. And don't worry about it. I'll deal with it.

MR. SCHMITZ: Okay.

MR. BISTLINE: Actually, I'll e-mail Mark and make sure that I have it right now.

BY MR. SCHMITZ:

Q. Do you have any other documents relating to your ordering, purchasing of explosives for this job other than the bill of lading?

A. No, sir.

(Whereupon, Deposition Exhibit No. 28 was marked for identification.)

BY MR. SCHMITZ:

Q. You have been handed Deposition Exhibit 28. Do you recognize that?

A. It's a letter to the City of Benwood from AED.
1 I recognize the letter.
2 Q. Okay. Did you write this letter?
3 A. No, sir.
4 Q. Who did?
5 A. Most probably Mark Wilburn.
6 Q. All right. But it says, at the end, "God bless" and then it has "Eric Kelly," right?
7 A. Mm-hmm.
8 Q. But you didn't write it?
9 A. No, sir.
10 Q. And there's no signature on it, correct?
11 A. That's correct.
12 Q. Is it customary for Mark Wilburn to write letters in your name and then send them out without any signature?
13 A. Quite often it does, especially of this nature.
14 Q. Were you aware that he was writing this letter?
15 A. Yes, sir.
16 Q. Did you read it before he sent it?
17 A. Yes, sir.
18 Q. Do you know if he actually sent it?
19 A. No, sir.
20 Q. Did you agree with the contents in the letter?
21 A. Yes, sir.
22 Q. It looks like apparently the City had brought to you guys's attention that some of the permits and things in the previous information binder were outdated.
23 expired certificates, permits, things of that nature, right?
24 A. Yes, sir.
25 Q. Okay. So this looks like this is a letter in response to that concern?
26 A. Yes, sir.
27 Q. And so you say some of the dates and times were just samples; they're subject to change; you're in the process of getting certain things updated, basically?
28 A. Essentially, yes.
29 Q. Okay. It says, "In addition I have filed with the Secretary of State for corporate authority, scheduled the specialty contractor's exam for the 5th of July, filed for registration with West Virginia department of revenue and completed the business registration and surety bond forms." And then it says, "All of these applications are included in the attached PDF"; correct?
30 A. Yes, sir.
31 Q. All right. So did you talk with Mark Wilburn about the need to actually get these items that he just listed?
32 A. Actually, Mr. Wilburn contacted me and said this is what we need.
33 Q. Okay. So he told you you do need these things?
34 A. That's what he had indicated, yes.
35 Q. And further in the letter you describe that "At the time of this writing AED has a signed contract with KDC/Delta Demolition; however, the payment terms of this contract have not been met."
36 Now, you didn't have a written signed contract with Delta Demolition though, correct?
37 A. I have what I believe is a signed contract.
38 Q. From Delta Demolition or KDC?
39 A. I just think that's just a matter of definition, Counselor. It doesn't matter. With Chaklos.
40 Q. To you it doesn't matter. They're all one in the same.
41 A. Correct.
42 Q. It says, "The initial retainer due 6/9 is actually, Mr. Wilburn contacted me and said this is what we need."
43 Q. And then you -- basically what you say in the next paragraph is although all these applications are being submitted, you're not going to pay the fees until you get payment from -- or actually until Delta Demolition has obtained their permit; is that right?
44 A. That's what it says. Yes.
45 Q. If you're submitting the applications and you know you need them, why are you withholding payment to the City until Delta gets its permit?
46 A. Because Delta had dicked me around for so long on the other money, I was not going to throw good money after bad.
47 Q. And "on the other money," you're talking about the $25,000 for the purchase of the contract. 
48 A. And the $30,000 for the contract.
49 Q. Okay. But why are you withholding payment from the City because of that?
50 A. I really don't understand that question. I mean, it seems pretty simple. I just said I'm not going to throw good money after bad.
51 At this point I did not believe Delta had the wherewithal to either get the permit or pay me. So I am not about to go spend money for something and try to represent Delta, okay, with our reputation when they...
Q. All right. But you're conditioning payment upon Delta Demolition getting their permit, right?
A. I was being polite, Counselor.
Q. This is what it says, "Once Delta Demolition has obtained their permit and AED receives the funds to validate our contract, you will have all the AED forms on hand and I will pay the fees required by the City of Benwood"; correct?
A. That's what it says.
Q. All right. So you're going to wait until Delta Demolition gets its permit before you make a payment?
A. That was not the intent of that. Again, I was being kind to them. They had not paid me, Counselor.

And I was not -- am I going to tell the City of Benwood to cast negative aspersions on KDC/Delta, tell them they're a bunch of deadbeats; it's hard to get money out of them, that I don't want to pay five cents because they've been jerking me around? No. I specifically tried to be kind. Hey, listen, guys; we're just waiting for Delta to get the permit.

Because just by, you know, implying that, well, that was what we were anticipating, well, we'll wait for them to get their payments. Well, first of all, I did not agree with Krystal Chaklos's letter that wait until we get our permits, then you'll get your money. That was not the terms of the contract. The contract was give us the money and we'll help you along. They have not been giving us the money, so we don't help them along.

Q. But, again, the letter says "Once Delta Demolition has obtained their permit." Are you denying it says that?
A. I am not.
Q. So you're telling the City that once Delta Demolition has their permit and you guys get paid then you will pay the City; isn't that right?
A. That's what it says.
Q. Okay. Now, did you understand at this point in time that Delta Demolition can't get a permit until it provides proof that its subcontractors had a license?
A. No.
Q. You didn't understand that?
A. I did not understand that. They should --
Q. Okay.
A. They should have had the horsepower enough to say we are doing -- no, I didn't.
Q. If you did understand that Delta Demolition could not get a permit unless and until they submitted proof to the City that their subcontractors had all the necessary licenses, would you have said that?
A. Counselor, I don't understand your question.

But my bottom line is until I receive the funds, I was not about to do anything more for Delta Demolition.
Q. My question is if you had understood at that time that Delta Demolition could not get a demo permit unless it submitted proof that you had a contractors license, would you have told the City that you wouldn't pay them for these fees unless and until demo got its permit -- that Delta got its permit?
A. Refuse to answer on speculation.

MR. BISTLINE: No, no. Just --

THE WITNESS: No, Art. I don't understand it.

Would I have? I don't know. It didn't happen. So I cannot speculate on the answer. Would I have helped them? Well, if they would have paid me the money, I would have helped them. That's the bottom line. But they didn't pay me the money so you're floating on your own, Jack.

BY MR. SCHMITZ:
Q. So you consider getting necessary permits and licenses from the City that are required for you to do the job helping Delta Demolition?

A. My responsibility, as I understand it, Counselor, was to acquire the blasting permit not the demolition permit.
Q. No, but -- you're not responsible for the demolition permit. But you're responsible to get a West Virginia contractors license and to get a business registration, correct?
A. Of course.
Q. Okay. And you're considering getting those necessary licenses and registrations helping Delta Demo?
A. Without a contract -- you know, and I know we're going back and forth at this, Counselor. Without a contract, there is nothing I could do. There was nothing I should have done. Not helped them, not anything at this point because of the contentious relationship that was developing. Okay. There was nothing I could -- there was nothing I had responsibility to do as far as a demolition permit.
Nothing. Zero.
Q. And that's your opinion of the matter, correct?
A. That is a factual matter.
Q. It's a matter of interpretation.
A. An opinion.

THE WITNESS: Let me ask you this ---
MR. BISTLINE: No, no, no. Don’t ask him anything.

BY MR. SCHMITZ:
Q. The contentiousness of this relationship was supposed to, right?
A. That started -- that was the fuse.
Q. Okay. I mean, what else was there? I mean, as far as I can tell going --
A. We just saw some newspaper articles,
Counselor, that --
Q. Actually, we haven’t seen any newspaper articles yet because I don’t have them. But the e-mails and stuff that we’ve been going through, sounds like you're upset because they’re not paying you; is that right?
A. That’s a fact.
Q. Okay.
(Whereupon, Deposition Exhibit No. 29 was marked for identification.)

BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 29.
Do you recognize that?
A. Yes, sir.
Q. And what is it?

A. It’s an e-mail transmission.
Q. There’s actually a string of e-mails in there, correct?
A. I just handed it to Art to read, that’s why I didn’t answer totally. There are e-mail transmissions from Mark Wilburn to Dave McLaughlin, cc’d to Eric Kelly.
Q. Who is Judy; do you know?
A. No, sir.
Q. So this -- okay. This is just -- you were just cc’d on this. This is discussions from Mark -- between Mark Wilburn and is that Dave McLaughlin?
A. Yes, sir.
Q. Do you know who the address -- or do you know who Erin is?
A. Counsel for the City of Benwood.
Q. Do you know what Erin’s last name is? There’s an e-mail address it says "ebonar."
A. Bonar.
Q. Is that Erin Bonar?
A. Unknown.
Q. But that’s the City’s attorney?
A. I believe so.
Q. Okay. Do you know why Mark was sending these e-mails?

A. No, sir.
Q. Okay.
(Whereupon, Deposition Exhibit No. 30 was marked for identification.)

BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 30.
Do you recognize that?
A. Yes, sir.
Q. What is it?
A. It is a letter -- or it’s e-mail transmissions from Krystal to Eric Kelly, Eric Kelly to Delta Demo.
Q. Both dated June 16, 2010?
A. Yes, sir.
Q. Do you recall receiving these and sending these e-mails?
A. Yes, sir.
Q. Krystal sent you an e-mail that says, "You will need a West Virginia contractors license"; correct?
A. To participate in this project.
Q. Right.
A. Yes.
Q. Okay. And she says, "Your mobility advance will be given to you once Delta has achieved the city of Benwood’s permit to proceed"; correct?
A. That’s what it says.

Q. Okay. Do you know why Mark was sending this?
A. Hell no.
BY MR. SCHMITZ:
Q. So when they say you need a West Virginia contractors license and your mobility advance will be given to you once we get the permit, you’re not tying those two together?
A. Hell no.
(Whereupon, Deposition Exhibit No. 31 was marked for identification.)

BY MR. SCHMITZ:
Q. You have been handed Deposition Exhibit 31.

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011
AED Inc. vs. KDC Investments, LLC, et al

I mean, the only thing I can say is you gave what the law had stated about contractors license, correct?

Q. And Mark's e-mail says, "Attached is a written response from Mr. Kelly"; correct?

A. Yes.

Q. Why is Mark Wilburn attaching a written response from you rather than you doing it yourself?

A. Because Mark does a lot of -- since I am not a prolific person on the keyboard, he basic -- I send it to him. He'll proofread it to make sure my typos and content is reasonable and accurate.

Q. All right. And this looks like it is in response to a June 16 e-mail, the one we just talked about, where Krystal said you needed a West Virginia contractors license, correct?

A. Yes, sir.

Q. And that's kind of what I'm confused about. Did they ever ask you to provide some additional marine-type insurance?

A. This letter was in response to her statement which is dated June 17th. Could be obtained?

Q. June 18 when the e-mail is dated June 17 -- yeah, June 17 agreement between two parties.

A. And there is a letter in content with this that says we do not need a contractors license or is this another sample of what was sent to Lee or Krystal?

Q. But do you know why there's a discrepancy between the dates? Why is the letter dated June 18th?

A. No idea. No idea.

Q. Do you know if in fact that letter dated June 18 was sent to Lee or Krystal?

A. I could not answer that.

Q. Do you recall writing this letter?

A. Yes, sir.

If we're looking at that June 18 letter, there's a third paragraph. It says, "At your request, you asked for an insurance certificate for the project prior to funding the monetary contractual obligation on June 9, as good faith I complied, and that ship sailed." What do you mean you complied? Did you -- you gave them --

A. They were issued a certificate of insurance specifically for this project.

Q. And for how much?

A. Five -- in accordance with the specifications with the City of Benwood, for $5 million.

Q. This was an actual -- you'd already actually gotten the insurance or is this another sample of what could be obtained?

A. I couldn't answer that accurately at this time. But I do believe at some point there was a certificate issued to the City of Benwood for the insurance.

Q. But did you give it to Delta or KDC?

A. I could not answer that accurately at this time.

Q. Did they ever ask you to provide some additional marine-type insurance?

A. No, sir.
Q. Never?
A. Never.
Q. You say "The ability of Delta Demolition & KDC to acquire the Coast Guard permit was based on the information provided by AED to Mr. Sambor." Are you referring to the information binder that was submitted?
A. Yes, sir.
Q. "The information provided to the City of Benwood also worked favorably for Delta Demolition."
What information are you referring to?
A. The same one that was sent to the Coast Guard.
Q. And how do you know that worked favorably for Delta Demolition?
A. Because they haven't -- at that time, to my knowledge, they had not submitted rip to the City.
Q. But how do you know that the information you provided helped them out in any way?
A. Because we have a good reputation, Counselor, in that area.
Q. Did anybody from the City actually say, hey, thanks for submitting this stuff; it's really helpful --
A. Actually they did, yes.
Q. Who?
A. Most likely Dave McLaughlin. It could have been Judy. I would best say answer that -- ask that of

Mark Wilburn, please.
Q. Okay. So you never actually had any conversations with anybody from the City of Benwood where they told you that the information you provided worked favorably for Delta Demolition?
A. Yes, I did.
Q. Who?
A. Oh, Chief -- oh, I'm having a brain fart.
Longwell. Frank Longwell.
Q. Frank Longwell. He's a police chief.
A. Yes, sir.
Q. What does the police chief have to do with what you're submitting to the City of Benwood to demolish the bridge?
A. It's Mayberry R.F.D. there. Everybody has multiple -- wears many hats. McLaughlin was actually a captain in the police force who doubles as a code enforcer. They sit together at the council meeting and they all have a -- they have a meeting to agree on it.
Chief Longwell has been there the longest, has the longest tenure in the city. So he has the most horsepower to say yes or no.
Q. So he's a city council member; is that right?
A. I could not answer that.

Q. The next paragraph, it says, "It seems from your e-mail that you cannot fund till you oblige to the City of Benwood the requirements for permits." Why do you say that the e-mail seems to indicate they cannot fund?
A. That was referring to the contract.
Q. I understand what it's referring to. But what in the e-mail gave you the impression that they cannot fund until they get the City of Benwood permit?
A. It was from the letter from Krystal that says you're not going to get any money until we get the permit from the City.
Q. Okay. So by them saying you're not going to get any money, you took that to mean that KDC can't get money until it gets the permit?
A. No. I -- this is explicit. We're not going to give you your money until we get the permit from the City of Benwood.
Q. Yeah. And in this letter you're saying that KDC cannot fund -- okay. So let me ask you this. Maybe I'm reading this wrong. You're saying that KDC cannot pay you until they get the permit from the City of Benwood?
A. Yes, sir.
Q. Okay. You're not saying that KDC can't get the funds to do this project until it gets the permits from the City of Benwood?
A. I did not imply that.
Q. All right. That's the way I was reading it.
So that's my mistake.
Well, now, wait a minute: though. The next sentence says, "Is this a requirement by your funding source?"
A. Mm-hmm.
Q. So...
A. I was being sarcastic, Counselor. Sorry.
Q. Oh, that's sarcasm?
A. Yes, sir. I do that every now and then.
Sorry. I'm working on it.
Q. Then you say, "According to U.S. Federal and State of West Virginia law, there is no requirement for a West Virginia contractors license in order to enter into a contractual agreement between two parties"; is that right?
A. That is correct.
Q. Where did you get that information?
A. Off the Internet.
Q. Where on the Internet does it say that?
A. I couldn't answer that at this time.
Q. You actually went out and did a search,
AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

Kelly, Sr., Eric J.

1/27/2011

www.mmcourt.com
23 A. My wife has developed a hyperthyroid from the
2 3 A. My wife has developed a hyperthyroid from the
25 Q. That's your wife. I'm asking you. What kind
22 subjected to?
21 Q. What kind of pain and suffering were you being
20 the stress, the sadness, the grief that my wife
19 Q. -- being subjected to?
18 (Whereupon, Deposition Exhibit No. 32 was
17 A. That is correct.
16 Q. And that's what's really driving the wedge
15 MR. SCHMITZ: Okay. So what pain and suffering were you
14 A. The pain and suffering that I was experiencing
13 going through?
12 Q. SO moving on from receiving the $25,000, it
11 A. No. It was my pain and suffering.
10 referring to Lisa's pain and suffering?
9 Q. All right. Notwithstanding the fact that you
8 Q. Did you go see a doctor about this? I
7 hyperthyroid. I see her -- her mental joyfulness as she
6 MR. BISTLINE: To make it clear, Randy --
5 A. Hemorrhoids.
4 Q. Did you go see a doctor about this?
3 MR. SCHMITZ: Are you making any sort of claim
2 for pain and suffering?
1 MR. SCHMITZ: On behalf of either one of them?
0 Q. This is an e-mail from you dated June 23rd,
-1 Q. Notice that it's addressed To Whom It May
0 Q. Notice that it's addressed To Whom It May
-2 Q. This is an e-mail from you dated June 23rd,
-3 Q. This is an e-mail from you dated June 23rd,
-4 Q. This is an e-mail from you dated June 23rd,
-5 Q. This is an e-mail from you dated June 23rd,
-6 Q. This is an e-mail from you dated June 23rd,
-7 Q. This is an e-mail from you dated June 23rd,
-8 Q. This is an e-mail from you dated June 23rd,
MR. BISTLINE: It's just the rules, man. Just the rules.

THE WITNESS: What we have been reviewing over the past couple of hours, Counsel, is quite indicative of they're not being a people of their word. Okay. They said they were going to issue money on specific days. They never did. They promised to enter into an agreement with -- you know, into me, under the terms of it, they never did it. So...

BY MR. SCHMITZ:

Q. Okay. So the documentation that you're referring to here is that a payment was due on a certain date, and they didn't make it by that certain date.

A. That's one of them. There was a multitude of phone calls where we were promised the moon.

Q. But that's not a documentation. I'm wondering about the actual documentation.

A. The documentation is before you, Counsel.

Q. So just all the documents in this case is what you're referring to?

A. The documents mostly referring to the payment terms and the agreement on the contract.

Q. Okay.

MR. BISTLINE: Do you want to go to the bathroom now, Eric?

THE WITNESS: Yeah, I do.

(A short break was taken.)

(Whereupon, Deposition Exhibit No. 33 was marked for identification.)

BY MR. SCHMITZ:

Q. You have been handed Deposition Exhibit 33. Do you recognize that?

A. Yes, sir.

Q. And what is it?

A. It's an e-mail transmission from Eric to Mark Wilburn to Delta.

Q. The first e-mail is from Lee to you, and it's cc'd Mark. And it just says, "Please see attached requirements. Once all requests are in compliance, Delta will sign approval"; right?

A. Yes.

Q. And what was attached was a -- was that, which is a subcontractor form, correct?

A. Yes, it is, sir.

Q. And then you forward that to Mark Wilburn on June 27, 2010, correct?

A. Yes.

Q. All right. And I forgot to mention that the e-mail from Lee to you was dated June 25th, 2010, correct?

A. Yes.

Q. And what gave you the impression that this subcontract form was attempting to supersede the AED proposal?

A. Because it was -- it was not submitted in a timely fashion. It should have been an attachment when we were negotiating through the proposal, this should have been an attachment to it at that time, not after we had already agreed to...

Q. Okay. What gave you the impression that this subcontract agreement was attempting to supersede the AED proposal?

A. Well, with the payment terms on it and if -- it's whether I thought it was trying to supersede it. My intention by that statement was if we sign this, what -- what does that do with our contract?

Q. What payment terms are included in that subcontract form?

A. On line 3 all it says is "Contractor agrees to pay Subcontractor the Contract sum of." That's it.

Q. And then there's a blank, correct?

A. That is correct.

Q. That's right. So this by itself isn't attempting to change any payment terms, is it?

A. Yes, it is, subject to additions and deduction as herein provided.

Q. Where do you see this?

A. In line 3.

Q. Which has a -- there is no sum contained on that line, is there?

A. No, there is not.

Q. Right. So how is this attempting to change any payment terms?

A. Because we already have an agreement.

Q. I understand. Your -- your e-mail said that you thought that this subcontract form was attempting to supersede the AED proposal. And you said you thought the payment terms were trying to be changed. And I'm still trying to find out how you believe this was trying to change any payment terms.
A. Well, just by listening to your question, Counselor, you said I was -- was saying that this would supersede it. I did not say that. I said this proposal -- the AED proposal will not be superseded by any other agreement. It will not. I didn't -- not that I thought it would. It just will not be superseded by any other agreement.

Q. So your -- okay. You say, "The AED proposal will not be superseded by any other agreement" as you're forwarding an agreement to Mark Wilburn, but you're saying that you didn't think the subcontract agreement was actually attempting to supersede the AED proposal?

A. Well, you know what. In reading further into this -- into this -- what was sent to them, Counselor, it's basically -- the first part of this was fluff.

Hey, it's not going to be superseded by any other agreement. The bottom line is these people are looking to stall time by simply saying, well, you're not signing to stall time by simply saying, well, you're not signing.

Q. All right. Now, as we talked about before, it was always contemplated that Delta Demolition would have an agreement with AED because AED was going to be a subcontractor to Delta Demolition, correct?

A. I had agreed that we would have an agreement with Delta Demolition, yes.

Q. Okay. And this is Delta Demolition providing you with a form agreement for you guys to come to a contract, correct?

A. No.

Q. It's not. It's being --

A. Not in my opinion. Not in my opinion, Counselor. Okay?

Q. Okay. But it's being forwarded by Lee Chaklos on behalf of Delta Demolition to AED for purposes of a contract to blast this bridge, correct?

A. No, sir.

Q. It's not?

A. This says nothing. This says fill in the blanks.

Q. This is the -- the start of the process to negotiate a contract, is it not?

A. No. It is not. When we go to negotiate a contract, Counselor, you tell me something other than this standard AIA form. Hey, here's what you're going to do. Here's the terms that were in the other -- in the exhibit of the contract should have been transformed to this, instead of them thinking that I'm going to do paperwork and tell -- and tell them on their subcontract what I have to do. It doesn't -- no.
A. Nothing.

Q. I'm going to go down to the second paragraph from the end. It says, "Just so there are no ambiguities, AED does not agree to this Mickey Mouse form. It has no foundation to precede an already endorsed contract."

So, again, you're -- from your e-mail, it seems to be that your -- your thought process was that this contract was an attempt to supersede or precede the AED proposal that you had; is that right?

A. Based on that sentence right there, "It has no foundation to precede an already endorsed contract."

Q. And that's what you thought they were trying to do by giving you this form was to precede or supersede the AED proposal, correct?

A. No.

MR. SCHMITZ: Okay. Do you have those newspaper articles yet?

MR. BISTLINE: I'll go check.

(Brief pause.)

(Whereupon, Deposition Exhibit No. 34 was marked for identification.)

BY MR. SCHMITZ:

Q. You have been handed Depo Exhibit 34. Do you recognize that?

A. Yes, sir.

Q. What is it?

A. It's an e-mail transmission from Eric Kelly to Delta Demo.

Q. So this is an e-mail from you to Delta, dated June 29, 2010, correct?

A. Correct.

Q. Do you remember sending this e-mail?

A. Yes, sir.

Q. Again, it's addressed To Whom It May Concern. "It was brought to my attention that Delta has not submitted any of the necessary paperwork for the Phase I permit;" correct?

A. Correct.

Q. How was that brought to your attention?

A. In communications with the City of Benwood.

Q. Who from the City of Benwood?

A. Chief Longwell.

Q. Did you have that conversation with Chief Longwell?

A. Yes, sir.

Q. Who initiated the contact?

A. I did.

Q. So you called Chief Longwell and asked him if Delta had submitted anything?

A. Yes, sir.

Q. And he said they hadn't submitted anything?

A. That's correct.

Q. All right. Then you ask if there's a problem with resources. "The City of Benwood wants to work with you as I'm told." Is that what Chief Longwell told you in this same conversation?

A. Everybody has stated that. Everybody within the City of Benwood said they want to work -- they want to get the bridge down; they want to work with us. And in here it says the City of Benwood wants to work with you. Are you drawing a distinction between AED and KDC or Delta there?

A. Mm-hmm.

Q. Or is --

A. The City wants to work -- the City wanted the bridge down. Okay. They wanted to work with Delta. They wanted to work with AED. They wanted to work with you, you, me. The City wanted this bridge down and wants it down bad.

Q. Okay. All right. The last sentence says, "You guys had all the best intentions and it seems they've gone to the wayside. Is there any way we can help?" And why do you say that they've gone to the wayside?

A. Well, in concluding there, is there any way we can help. I mean, it appears that they were in such a big hurry -- come on; I'm going to buy the bridge; I want to buy the bridge from you; come on; buy it -- for a year he pestered me. And then when I sold it to him, his zeal seemed to have faded to the wayside. Like, okay, I want to go do this next week. Well, shit or get off the pot here, guy.

How can we help you? That was the bottom line. How can we help you get along? I was willing to send my brother-in-law out there to sit down with him, compile everything that was necessary to help him along. Okay. Because it was quite evident, based on what I was hearing from the City of Benwood, that they were not submitting anything.

Q. Do you think they were over their head on this project?

A. Personally, yes, sir.

Q. Do you think that they -- once they got it, they realized that they were over their head?
going to -- they were so anxious to work with The Imploders. Okay. And all of a sudden we weren't going to be filming this one, so the shine wore off of it. It didn't -- it didn't become an item of spectacle as they were anticipating it would be. It was just another bridge.

Q. So it's not that they didn't have the ability to do it --
A. Well, you know what. In just talking with Lee, I would ask Lee how many bridges like this have you done? Well, I did a concrete bridge in Florida. We're looking at one in Louisiana. It was all fluff that he would say. You know, oh, I'm doing a barge, the Becky Thatcher, right up the river here. So I can get all the marine equipment here real fast and cheap, and we can really get this going fast, Eric.

Well, the Becky Thatcher still laying on the bottom of the river that he started on over a year and a half ago. And nothing, to my knowledge at this time, has been submitted that can substantiate his zeal to get this job done.

Whereas, from my perspective, I went there. I sent my brother-in-law there. I sent my project manager there. I went to the people, to CSX, to this person, to the Coast Guard, to the Corps of Engineers.

Sat in the City of Benwood's office for days, for days. Went to every individual around that jobsite getting sign-offs from them. That was my -- I want to do this job.

Q. When did you do this?
A. Hmm?

Q. When did you do this?
A. Mark can tell you the dates on that. You got me on these dates, I tell you. But both him -- I mean, Rick Slavick (phonetic). It cost me $15,000.

Q. For what?
A. Getting the asbestos guy there. We had an asbestos survey done on the toll house. Okay. Had to pay. The guy said, well, we already did one for Chaklos, but that son of a bitch didn't pay me. So we gave the guy the 300 bucks for the survey.

Q. All right. So you're just saying that you think they lost interest in this job?
A. I really -- you know, my opinion is just what it was just repeated, Counsel. I mean, I don't know. I don't know their thought process. I don't know another man's thoughts. But, again, if you want to do something, you have such a desire to do something that bad, by golly you do it.

Q. But you don't know what contacts that they have had with the City or discussions that they've had with the City or the Coast Guard or anything like that, do you? You don't know what efforts that they have actually made to get this done?
A. Well, you know, as of recently, I was led to believe they were submitting something to the Coast Guard, submitting something to the City of Benwood, but I do not know exactly what they have or have not submitted.

Q. Right.

(Whereupon, Deposition Exhibit No. 35 was marked for identification.)

BY MR. SCHMITZ:
Q. You have been handed Depo Exhibit 35. Do you recognize that?
A. Yeah, I thought we just did one of these.
Q. This is a different one.
A. Yes, I do.
Q. And what is it?
A. It's an informational binder for Bellaire Bridge demolition.

Q. Who prepared this?
A. Definitely not me. Mark Wilburn.
Q. Okay. This is similar to Exhibit 24. This is what we looked at before, Exhibit 24.

A. Yes.
Q. Which was the informational binder that you guys had submitted to the Coast Guard and others on June 7, 2010.
A. Yes, sir.
Q. And if you go into that one a couple pages, page Bates stamped AED145.
A. Mm-hmm.
Q. There's a date on that document. Do you see that?
A. August 23rd, 2010.
Q. Okay. So this one is being submitted on August 23rd, 2010, correct?
A. Mm-hmm.
Q. And why is this being submitted on August 23rd, 2010?
A. AED is intending to serve as the owner and general contractor on the project and to self-perform the explosive demolition of the spans.

Q. So at this time AED is asserting ownership over the bridge?
A. Yes, sir.
Q. All right. Even though admittedly legally, AED is not the owner of the bridge, correct?
A. I do not agree with that, no.
1 Q. Okay. You have been handed Deposition Exhibit No. 36 which is Plaintiff's Response to Defendant's First Set of Interrogatories and Requests for Production. Have you seen those before?
2 A. Yes, sir.
3 Q. Have you reviewed them? Is there two?
4 A. There's two copies here, sir.
5 Q. Oh, I'm sorry. You just need one of them. Did you review these answers before they went out?
6 A. Yes, sir.
7 Q. Did you agree with them?
8 A. I can't answer that accurately right now.
9 Q. Do you recall having any objection to the answers after you reviewed them?
10 A. Again, I can't answer that accurately right now until I...
11 MR. BISTLINE: No, no. He's asking you the first time you read them, did you say to me, hey, Art, this is wrong?
12 THE WITNESS: I don't recall. I know, Art, I had sent you some notes regarding them.
13 MR. BISTLINE: He's asking you not about how we prepared them. He's saying when you read the document you're holding, which is the final product, did you have any objections to its contents or think it was inaccurate?
14 THE WITNESS: No.
15 BY MR. SCHMITZ:
16 Q. Okay.
17 A. I don't object to its contents.
18 Q. Okay. If you would go to interrogatory No. 14, please.
19 A. Mm-hmm.
20 Q. The question is: "Identify each and every owner of the Bridge as alleged in paragraph 12 of your Amended Complaint."
21 Your answer was, "AED is not legal owner of the bridge at this point, but holds on equitable right in the bridge based on its claim for rescission"; correct?
22 A. I didn't write that one. I didn't write that answer.
23 Q. Ah.
24 THE WITNESS: I think you did, Art, didn't you?
25 BY MR. SCHMITZ:
1 A. That is correct.
2 Q. At the last paragraph here, it says, "According to the contract signed June 1st, 2010, AED shall be resuming ownership of the asset and will not be performing as agreed." Where in the June 1st, 2010, contract does it say you have the right to resume ownership of the asset?
3 A. It was verbally orated to the Chaklos client. It does not say it in writing.
4 Q. The contract itself does not say that you can resume ownership of the asset; is that right?
5 A. I'm not sure. I'm not sure if it -- if there was a termination clause in there or not.
6 Q. But here you're saying that there is. But you don't know what you were talking about?
7 A. Proverbially, yes -- at this time, yes.
8 Q. At this time what?
9 A. I can't accurately reference what the contract says.
10 Q. I'm going to hand you Exhibit 22, which was previously marked. And this is the AED proposal that was signed on June 1st, 2010. And if you can just point to me in there the section of the contract you were referring to in this August 10th letter.
11 (Witness examining document.)

1 THE WITNESS: It does not say it in this contract.
2 BY MR. SCHMITZ:
3 Q. Okay.
4 A. But I probably was referring to one of the e-mail transmittals prior that says if you don't pay --
5 Q. Actually, this says --
6 A. -- terminates any previous -- any agreements.
7 Q. Actually, this says, "According to the contracts signed June 1st, 2010" --
8 A. Mm-hmm.
9 Q. -- "AED shall be resuming ownership of the asset"; correct?
10 A. Correct.
11 Q. Okay. But as we just found out, there is no provision in there that provides for you to resume ownership of the asset, correct?
12 A. Correct.
13 Q. Okay. Let's go to 156. Have you seen that page before?
14 A. Yes, sir.
15 Q. Is this something you prepared or is this prepared by Mark Wilburn?
16 A. Mark Wilburn.
17 Q. Do you know where he got the language that he included in this letter?
18 A. What language is that?
19 Q. All of it.
20 A. I don't know where he got the language. It looks to be a carbon copy of the one that was scratched on.
21 Q. Exactly. The June 9th letter from Dave McLaughlin to Delta Demolition, correct?
22 A. Mm-hmm.
23 Q. Yeah. But you don't know when Mark received a letter with that language in it?
24 A. No, sir.
25 Q. Now, in this submittal by AED, if you go to the next page, it appears that on item No. 11 where it requests you to list all subcontractors which include the West Virginia state business license, West Virginia state contractors license and West Virginia state workers' compensation certificate, under that it says "done"; right?
26 A. Mm-hmm.
27 Q. So it looks like AED was submitting all of that information for its subcontractors in this one packet, correct?
28 A. So that you understand to try to -- there's always a gray area for something like that, Counsel. So we were going to self-perform all the work.
29 Q. You still had subcontractors that were going to help you with this job, correct?
30 A. No, sir.
31 Q. Okay. Let's go to another page then.
32 A. And even though I did list Cambria as one of them --
33 Q. Can I just see this real quick?
34 (Document tendered.)
35 MR. SCHMITZ: This will be easier.
36 BY MR. SCHMITZ:
37 Q. On page AED361, you guys have included subcontractor information --
38 A. Mm-hmm.
39 Q. -- correct? And in here you have information from Cambria as a subcontractor, correct?
40 A. Correct.
41 Q. And you were including business registration certificate, correct?
42 A. For who?
43 Q. For Cambria --
44 A. Okay.
45 Q. -- Contracting, Inc., correct? Business registration?
46 A. Mm-hmm, correct.
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I've been in the business for 30 years,
Counselor. I've had buildings fall the wrong way. I've
had smokestacks fall the wrong way. You know, after you
shoot thousands of structures, they don't always go
perfect.

Q. Okay. So you don't consider something going
wrong, an implosion going wrong and damaging nearby
property or injuring a person to be an accident?
A. And I have OSHA to agree with me with that
also, by the way.

Q. And I just want to make sure. You don't
classify that as an accident?
A. I do not consider that an accident.

Q. So this is a report that was actually done on
behalf of Delta Demolition by -- but it wasn't done by
Rick Slavick, was it?
A. No.

Q. It was done by Michael Beegle?
A. Yes, sir.

Q. So who is Rick Slavick?
A. He was my project manager.

Q. This is a letter to the City of Benwood. It
says, "This section covers general questions that are
often asked by local authorities and the general
public." The last paragraph says, "AED and I are
committed to safety, and I carry a 29-year zero-accident
record."

Do you still carry a zero-accident record?
A. Yes, sir.

Q. In all your years you've never had any
accidents at all?
A. No, sir.

Q. Okay.

A. Define "accidents."

Q. Well, I would think that if an implosion
didn't go correctly and damaged property or injured
somebody that would probably be considered an accident.

A. An accident in my opinion, and that's
referred to, is in lost man-hours.

Q. What does that mean?
A. That means when you go to your OSHA 300 log,
you document any lost man-hours, where the guy gets a
cut on his finger, gets his eye poked out, something
like that, that's lost man-hours. That's what that was
specifically referring to. Because if I were to sit
there and put that on that we had no accidents, I'd be a
flat-slap liar.
A. Yes, sir. At that time.

Q. Did he say they refused to pay for it?

A. I did not get in depth.

Q. Did he say why they hadn't paid for it?

A. I did not get into depth.

Q. He just told you it had not been paid for?

A. Yes, sir.

Q. Page AED255, this is a copy of AED's West Virginia contractors license; is that right?

A. Yes, sir.

Q. All right. And what is the date that that was issued?

A. August 17th.

Q. Was this issued to you or to Mark Wilburn; do you know?

A. It was issued to Advanced Explosives Demolition.

Q. But do you know who received a copy of this?

A. No, sir.

Q. Which one of you actually received a copy of this? I mean, did they send it out? Did you have to request a copy? How did that all work?

A. It probably -- it could have gone to our Tennessee office. Mark probably received the license.

Q. All right. Now, have you looked at this carefully?

A. No.

Q. Have you read the fine print down here at the --

A. No, sir.

Q. It says, "This license or a copy thereof must be posted in a conspicuous place at every construction site where work is being performed. This license number must appear in all advertisements, on all bid submissions, and on all fully executed and binding contracts. This license cannot be assigned or transferred by licensee. Issued under provisions of West Virginia Code, Chapter 21 Article 11."

Do you want to read that and verify that I read it correctly, please.

A. (Complying.) Yes, sir. You read it correctly.

Q. Thank you. Was this license number included on AED's proposal which was dated June 1, 2010?

A. No, it was not.

Q. The very next page, AED255, is a State of West Virginia exemption certificate. Again, do you recall seeing this or is this something Mark --

A. This is something Mark had.

Q. Okay. I'll ask him about it.

Page AED261 is another license permit for AED, but this is Lisa's license for manufacturer high explosives permit. Class 20 -- what do you call that?

A. Class 20.

Q. It is a class 20. Okay. I just want to make sure I'm using the right terminology.

A. You know, and in recollecting my question (sic) so I can correct the record, we will not be using two component on this project, because two component only comes in small cartridge size on the piers. We'll use a NG-based product.

Q. Then why would you submit this at all?

A. Fluff.

Q. Okay. Here's a -- AED266 is a certificate of liability insurance that says the policy effective date is September 1st, 2010. Did you guys have any insurance policy in effect for this bridge work prior to September 1st, 2010?

A. We have an annual policy. Okay. For bridge specific, no. That means, as you can see in the description of operations, work with explosives and explosive work. And it shows that the Bellaire Bridge was specifically identified in -- well, actually, this

one is the one that was given to the City of Benwood, so it was in effect.

Q. So if you had -- the certificate we saw before showed that your -- your insurance was going to expire on May 27, 2010.

A. Mm-hmm.

Q. And now you have this one that says the policy is effective September 1st, 2010.

A. Mm-hmm.

Q. Was there any insurance policy in effect between May 27 and September 1st?

A. There probably was. I couldn't answer that accurately. But, you know, on the professional basis, does it matter? No.

MR. BISTLINE: No, no. Don't worry about that. Just --

THE WITNESS: Okay.

MR. BISTLINE: Either you know the answer or you don't.

BY MR. SCHMITZ:

Q. Is this something that Mark's responsible for too, or is -- who's responsible for the insurance?

A. Mark.

Q. Okay.

MR. SCHMITZ: Give me one second to look

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through these real quick. You can take a quick break.

MR. BISTLINE: Sure.

(A short break was taken.)

MR. SCHMITZ: We can go back on.

BY MR. SCHMITZ:

Q. All right. Mr. Kelly, I have just read

through all of the newspaper articles that were just

recently here provided to me. When we first started the

day, we were talking about that you had read it in the

media that KDC or Delta no longer intended to use AED to

implode the bridge.

A. Mm-hmm.

Q. And what I have here is I've separated out

these articles. Because these are -- this stack here,

none of these have -- you know, we don't have any source

codes on them or anything. But what I did is this one

is July 13th, 2010, through January 12th, 2011. I'm

taken those out of the mix because in July of 2010 is

when the attorneys got involved and KDC had said they're

terminating the agreement and all that.

So what I have here is a stack that's

everything from May 19th, 2010, to June 22nd, 2010. And

I don't see in here anywhere where they say they're not

going to use you. So maybe you could find the article

that you were referring to and show me.

THE WITNESS: I'd have to read every one of

these.

(Witness examining documents.)

THE WITNESS: This is not all the documents,

Counselor.

BY MR. SCHMITZ:

Q. Well, those are all the ones that you have

provided to me.

A. Again, I will -- I'd just like to reserve the

right to produce that document to you.

Q. Okay. But in any event, can we agree that in

documentation that you have provided to me today and

that you have just reviewed, it is not contained in any

of those?

A. I did not see it in the documents that were

provided to you.

Q. Okay.

THE WITNESS: And those were given by Mark?

MR. BISTLINE: Mm-hmm.

THE WITNESS: Yeah. That isn't -- that

definitely is not the full scale of documents, because

it is specifically noted that they -- in some of the

newspaper articles that they would not use AED nor would

they actually use explosives.

BY MR. SCHMITZ:

Q. Now, could you be recalling an article that

was written after July of 2010?

A. I'm not sure, Counsel, on that.

Q. Is that possible?

A. Well, all things are possible.

Q. I want to take you back to your answers to our

interrogatories. Let me give you that number real

quick. There you go. What number is that?

A. 36.

Q. Go to interrogatory No. 5, please. Okay. In

interrogatory No. 5 we asked for you to "Itemize by

description and amount all damages, special or

otherwise, which you expect to prove at trial and

identify the documentation that is available to

substantiate all alleged damages." And there is an

answer here. Did you assist in preparing the answer to

this interrogatory?

A. I prepared the answers.

Q. Okay. So tell me here -- let's just go

through each one. You have mobilization of $5,000.

A. Mm-hmm.

Q. Is this what you're saying it would cost to

mobilize?

A. Yes.

Q. And what is this number based on? How did you
AED Inc. vs. KDC Investments, LLC, et al
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1. What's the multiplier?
2. A. Actually, it's 2300 miles. 1.53.
3. Q. And how did you come up with 1.53 as a multiplier?
4. A. That's what's allowed by the federal government. It's based on the actual monthly premium of $7,500 times potential for two months duration over the project.
5. Q. So do you have -- is there anything that -- let me start over.
6. You're saying that's an approximate number that's based upon dividing the actual cost of your insurance by the months?
7. A. We pay approximately $7,500 per month. And our potential participation is two months on the project.
8. Q. Doesn't your premium depend upon the type and the amount of insurance you obtain?
9. A. I'm not following your question, Counsel. We pay $7,500 per month for our insurance. If we had four jobs at that time, four jobs would get cost at $7,500 per month.
10. Q. Each?
11. A. Each.
12. Q. So you would be -- so -- because you have to get a policy for each job?
13. A. No. It's just because you issue a certificate for it. It does not matter how many projects you do or whatever, your gross revenue. But you also have to put -- acquire money in a reserve for your next year's premium.
14. Q. What I want to know is how much does your insurance premium cost you per month? What do you actually pay?
15. A. Wow. $7,500, Counsel.
16. Q. Okay. And that doesn't -- so you pay $7500.

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1. And it doesn't matter what you're doing or how many jobs you're doing, it's a flat $7500 per month?
2. A. Yes, sir.
3. Q. And so you're -- I guess by including $15,000 here, you're saying it's going to take you two months to do this project?
4. A. We will be involved in two separate months for being on the project.
5. Q. And if you were involved in multiple projects, you would then prorate that per project, would you not?
6. A. No, I would not. I charge it to every project. That's --
7. Q. So let me just get this straight. If you pay -- you actually pay $7500 a month. But if you did four projects that month, you would charge each project $7500 for insurance?
8. A. That's correct.
9. Q. So you would be making over $20,000 extra?
10. A. Oh, we would. But you know what. For the six months of the year that I don't work, that money goes into a reserve to pay for those six or seven months a year that you don't work.
11. Q. So this $7500 isn't going back to simply reimburse you for your insurance --
12. A. Oh, no. That $7500 per month goes to -- what is it -- Insurance Premium Finance Company. That's the name of the company.
13. Q. And then any extra, if you get multiple jobs in that month, just goes into your pocket?
14. A. It goes into a reserve. Because as -- like last year, I did one project last year. That's it. One project. It was a bad year for us. But you still have to pay so much for that insurance.
15. Q. Do you have any idea, as you sit here today, that if you were allowed to go and do this demolition project, would you have any other projects going on at the same time?
16. A. I don't know that.
17. Q. Okay. And do you have any documentation that shows how much you pay for insurance each month?
18. A. Yes, I do.
19. Q. Can you provide that because we don't have a copy of that.
20. MR. BISTLINE: I'll e-mail Mark.
21. THE WITNESS: Just get Mark to ...
22. BY MR. SCHMITZ:
23. Q. All right. Item No. 3 is your -- it says Hotel, Don Jones --
24. A. Don Jones is the --
25. Q. -- house?

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1. (Pages 234 to 237)
A. He was the plant manager for Bayer Material Sciences who has a couple of houses about 20 miles from there that we rent from him when we do work in that area.

Q. And it's 2600 a month or is that times two there for -- so it's 1300 a month?

A. It's about 2600 a month.

Q. Well, your insurance number was 15,000, which you said was $7500 a month times two. So wouldn't it stand to reason that this house rental would be 2600 divided by two for 1300 per month?

A. It could be that. It could be that. Again, this is an estimate. Okay? I mean, that's why they call it -- you don't go -- there's an estimator that works for a construction company. And this is just an estimate.

Q. Yeah, I understand that you're saying this is an estimate. But you're asserting this as damages. And damages have to be proven with certainty, sir.

A. That's the standard that we pay our employees. And if that was the case, then that cost would be about 20,600 because you'd have to pay out the a-zoo for hotels.

Q. Do you have any document that shows how much it costs you to rent this Don Jones house?

A. We have rented it before.

Q. When was the last time you rented it?

A. About two years ago when I did Bayer Material Sciences. You just ask Lisa that question, and she'll be able to justify.

Q. She will have the documentation that --

A. She should -- yeah, she should.

Q. Did you go back and look at these documents when you came up with this number of 2600?

A. At her documents?

Q. Yes.

A. I asked her to call Don Jones.

Q. Okay. So she called Don Jones and told you what?

A. He said -- it most likely is 1300 per month is the approximate cost for renting the house.

Q. And she will have his number.

A. No. 4 is per diems of 2600. How did you come up with that?

A. It's $30 per day per man.

Q. And how many men are you going to have on this?

A. It was estimated at five. Oh, let's see. I'm going to a calculator.

(Brief pause.)

BY MR. SCHMITZ:

Q. You're sitting there doing something with your phone. What are you doing?

A. What I'm doing is I'm going on the calculator on how -- basically it was anticipated for three weeks of time -- of time. It actually comes to $2520.

Q. Why did you use three weeks of time?

A. Because that would be the approximate total duration.

Q. All right. If it's going to take you three weeks, why is the insurance and the hotel based upon two months?

A. You base it on -- this is based on man-hours.

Q. Okay. In total man-hours.

A. Of total duration. It may be two days this week, two days two weeks after that, two days two weeks after that. So that was the total duration of man days.

Q. So you're saying 15 days of actual work time, three weeks?

A. Yes, approximately.

Q. How did you come up with $30 per day per man?

A. That's the standard that we pay our employees per diem for food.

Q. And that's a company policy?

A. Yes, sir.

Q. Is there a written policy that says this?

A. No.

Q. Is there any documentation from AED anywhere that says that they pay $30 a day per diem?

A. You have to ask Lisa that.

Q. How did you come up with 15 work days?

A. That's the approximate time for us to do what -- what we were going to be doing in the area.
preparation of the bridge, placement of explosives and
detonation.
Q. On Exhibit 22, which is the June 1st
proposal --
A. Mm-hmm.
Q. -- this says, "It will take AED no longer than
14 days to load and set up each span for implosion."
it -- so is it 14 days or is there additional work that
you're not including in this 14 days?
A. I work again uneven. Usually try to get even
days. You give yourself a little bit of time one way or
the other. You know, if I do it in 16 days, shame on
me. If I do it in 11 days, hooray for me.
Q. So --
A. That's one of the things that you cannot -- I
mean, you get up on top of the bridge and a lightning
storm comes; what do you do?
Q. Right. So you don't really know how long it's
going to take to do it?
A. Oh, no, no, no, no, no, no, no, no, no. I mean, after
30 years, 30 years in this business, I better damn well
know. But that's the thing -- that's the thing. If you
were to come to me, as you are now, and say, well,
exactly. I'd say I'm sorry. There is nothing exact in
this world, other than dying and paying taxes.

Q. So the 14 or 15 days, though, is a best-case
scenario, no problems foreseen?
A. Correct.
Q. No. 5 says permits for $3,000?
A. Mm-hmm.
Q. Now, you should have actual receipts for
permits that were purchased, right?
A. That's correct. That will come from Mark
Wilburn.
Q. Okay.
A. And, actually, there was one that was not in
there. And that was for CS --
MR. BISTLINE: He said he gave me all the
receipts he had for this.
MR. SCHMITZ: We don't have a single -- well,
unless it's included on the permit itself. Some of them
do mention on the permits or the application. But we
don't have a receipt that actually shows anything was
ever paid.
BY MR. SCHMITZ:
Q. All right. No. 6 is labor of $19,000.
A. Mm-hmm.
Q. How did you come up with that?
A. It cost us about $6,000 a week. 1500 per week
times four times three weeks is $18,000.
not available, I have to go to a -- say I'll go to another demo contractor and say, hey, have you got any guys -- good burners that I can use? Fine. Then I'll go to him and that's what I'll do.

Q. Okay. If you have to go to somebody else, though, then the price of your labor is going to change?
A. No. It's the same.
Q. It's always the same no matter --
A. It's always the same.
Q. Another contractor doesn't pay his employees a different amount?
A. I don't care if they do. If he works on my job, that's what he gets paid.
Q. Everybody -- every employee that works for you gets paid $1500 a week, no -- no exceptions?
A. Everybody in the field does, yes.
Q. Do you have any old pay stubs from, let's just say, your last job of what you paid your employees?
A. I don't know. You'll have to ask Lisa that.
Q. Okay. No. 7 is explosives.
A. Mm-hmm.
Q. $45,000. How did you come up with that number?
A. Based on the approximate severances in the bridge.
Q. Okay. Now, I thought you guys had actually contacted your explosives supplier, manufacturer, whatever you want to call them --
A. You want to drive to St. Mary's, Counsel?
I'll show you $45,000 of explosives sitting in my magazine.
Q. Okay. So you've already purchased them?
A. Yes.
Q. Do you have a receipt for them?
A. Yes. I said that previously. Yes.
Q. Actually, you hadn't said that previously because I never asked.

MR. SCHMITZ: That receipt has not been produced. Can we get a copy of that receipt?
THE WITNESS: Art, the one thing that --
there's some proprietary information on the receipt with our permits and stuff like that, but I will -- if I have to black them out, I will.
MR. SCHMITZ: You can redact out the permit numbers. I just want to see the date they were ordered and who they were ordered from and how much it cost.
THE WITNESS: Sure.

BY MR. SCHMITZ:
Q. Does it say on the receipt what -- for like what job or what purpose or anything?
A. It should not.
Q. So you don't send them an invoice -- like in the contracting world that I deal with, the contractor will send an invoice to a supplier, and it will ask for delivery of something for a certain project. You don't do that?
A. If it was delivered to that job, it would be.
But our use is reflected in our blast log. That will reflect the -- that specific lot used for that specific project.
Q. Okay. So you track the explosives used ...
A. As we use them.
Q. As you use them. So you have a warehouse or -- is it a warehouse?
A. Magazine it's called.
Q. Okay. So you have a magazine with explosives sitting in it right now?
A. Yes.
Q. Do you have explosives sitting in there that are supposed to be earmarked for other jobs?
A. No.
Q. Just this job?
A. Just this job.
Q. Do you have any other jobs lined up at this point in time?
A. I'm not sure right now. There's a lot of work pending. That's all. But there's none right now.
Q. But you're not under contract?
A. None.
Q. No. 8 is for miscellaneous for $2800. How did you come up with that?
A. You know, that comes for doing printouts to deliver to the neighborhood, any seismic work, pre-blast survey. You have to go buy stand-off -- not stand-off material -- cap holders, electrical tape, rubber bands.
Q. So did you price out all of this --
A. No, sir.
Q. -- information? You just picked a number out of the air for miscellaneous?
A. No, you don't -- usually -- you know what...
Q. Well, I need to know how you came up with $2800.
A. How did I come up with 175,000? But I agree with you. Okay. I don't have an answer for that right now. I'm not going to stress over it.
Q. Well, this is my chance to ask you questions.
And I need an answer from you while you're sitting here.
A. Well, you have another chance, too, Counselor, in front of the judge.
Q. No.
MR. BISTLINE: Well, he can ask you now. Just answer the best you can. How did you come up with --
THE WITNESS: I said I don't have an answer for that right now. Art, I just drove 2,167 frigging miles to be here. Because I don't have my sheets in front of me --
MR. BISTLINE: Eric, Eric, Eric. She's writing all this down and it costs money. If you don't know how you came up with it, then that's your answer.
THE WITNESS: At this time I don't know how came up with it.
BY MR. SCHMITZ:
Q. All right. So to arrive at your total estimated profit, what you did was you totaled up the estimated costs that you have listed here in items 1 through 8 and subtracted that from 175,000; is that right?
A. That's correct.
Q. Okay. Do you have any other costs, expenses or anything that you are including as part of your damage calculation for this case, other than what has been listed here in answer to interrogatory No. 5?
A. There's nothing else.
Q. So if a jury comes back and says, all right, you are entitled to $80,000 in profit, you will have been fully compensated for the money you lost for blowing this bridge; is that right?
A. I'm not a lawyer. I don't know.
Q. Well, your profit here is -- you're saying you missed out on $80,000 profit, right?
A. Correct.
Q. So if you're awarded $80,000 in damages, you would have been fully compensated for missing out on blowing the bridge; is that right?
A. Based on this, yes.
Q. Okay.
MR. BISTLINE: And I'll just add, there's one little wrinkle there, Randy, is the -- the calculation of profit would necessarily assume the full payment of the 175. And the 175 then would be used to buy those explosives. But the explosives were bought. And of all the items of cost, that's the only actual one, other than maybe the insurance expense. But since they're bought and they're useless, I think those would be added back. Because ordinarily you would have a big sum of money, that sum would pay off the explosives, the profit would be left.
MR. SCHMITZ: So these explosives -- and let me ask him. That's a good point. Let me ask you that. BY MR. SCHMITZ:

CERTIFICATE OF WITNESS

I, ERIC J. KELLY, SR., being first duly sworn, depose and say:

That I am the witness named in the foregoing deposition; that I have read said deposition and know the contents thereof; that the questions contained therein were propounded to me; and that the answers therein contained are true and correct except for any changes that I may have listed on the Change Sheet attached hereto.

DATED this ___ day of __, 20__.

ERIC J. KELLY, SR.

SUBSCRIBED AND SWORN to before me this ___ day of __, 20__.

NAME OF NOTARY PUBLIC

NOTARY PUBLIC FOR __________

RESIDING AT _______________

MY COMMISSION EXPIRES __________

REPORTER'S CERTIFICATE

I, Patricia L. Pullo, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of January, 2011.

PATRICIA L. PULLO, C.S.R. #697
Notary Public
816 Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814

This informal proposal outlines the blasting of the Bellaire Bridge.

Until we are actually ready to shoot the bridge, I wouldn’t tell Roger Barack any of our business. I don’t want to give him any reason to toss a wrench in the gears.

AED will be totally responsible for:

1. All licenses and permits to perform blasting work in the State of West Virginia.

2. All Federal permits for transporting and handling explosives.

3. All the necessary competent personnel to perform the supervision and layout of the deck, stringer, bed hanger and miscellaneous materials removal to lighten the structure up as much as safely possible.

4. The necessary personnel to execute the pre-burning for explosives placement.

5. The necessary explosives and related materials to perform 7 severances on the West Tower, 14 severances on the Main Span and 4 severances on the East Tower.
Additional severances can be made for an additional fee.

6. Pre-blast surveys and seismic monitoring as necessary.

DDS will be totally responsible for:

1. All permits related to the actual demolition of the Bellaire Bridge.

2. All marine support equipment to make the bridge accessible. This includes the necessary vessel to go to and from shore. All marine equipment will be manned by DDS.

3. 1 – 120' manlift to access the bridge.

4. The necessary liquid oxygen and propane for AED to perform the pre-cutting.

5. Protecting any of the adjacent utilities and buildings. There are some electric lines that will have to be moved under the East Tower. You can use the deck material to protect the gas line to the North of the East Tower.

6. Site security during the loading operations.

7. Perimeter security during the actual shot.

8. Coordinate with the US Coast Guard and ACOE all related activities necessary to allow for the shot to occur.

DDS will pay AED the sum of $175,000 to perform this service. The purchase of the bridge is separate from this proposal.

Payment terms are as follows:

1. $30,000 upon mobilization

2. $90,000 upon blasting the Main Span and West Tower.

3. Balance upon blasting the East Tower

You can call or e-mail me with any questions.

Kinest Regards,

Eric J. Kelly Sr.

Advanced Explosives Demolition, Inc.
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation, ) Case No. CV 10-7217
   Plaintiff, )

vs. )

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSTAL CHAKLOS, individually, )
   Defendants. )

DEPOSITION OF LISA A. KELLY
TAKEN ON BEHALF OF THE DEFENDANTS
AT COEUR D'ALENE, IDAHO
JANUARY 27, 2011, AT 5:23 P.M.

REPORTED BY:

PATRICIA L. PULLO, CSR
Notary Public
APPEARANCES

MR. ARTHUR M. BISTLINE, Attorney at Law, of the firm of Bistline Law, PLLC, 1423 North Government Way, Coeur d'Alene, Idaho, 83814, appearing for and on behalf of the Plaintiff;

MR. RANDALL L. SCHMITZ, Attorney at Law, of the firm of Hall, Farley, Oberrecht & Blanton, P.A., 702 West Idaho, Suite 700, P.O. Box 1271, Boise, Idaho 83701, appearing for and on behalf of the Defendants.
THE DEPOSITION OF LISA A. KELLY, was taken on behalf of the defendants on this 27th day of January, 2011, at the law offices of Arthur Bistline, Coeur d'Alene, Idaho, before M & M Court Reporting Service, Inc., by Patricia L. Pullo, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the District Court of the First Judicial District for the State of Idaho, in and for the County of Kootenai, said cause being Case No. CV 10-7217 in said Court.

AND THEREUPON, the following testimony was adduced, to wit:

LISA A. KELLY,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION

QUESTIONS BY MR. SCHMITZ:

Q. Ms. Kelly, would you please state your name for the record and spell your last name.


Q. We met just a minute ago. My name is Randy Schmitz. I represent KDC and the Chakloses in this matter. You mentioned that you have done depositions before; is that right?

A. Yes.

Q. Perfect. And then if you would let me finish my question before you start your answer, and I'll afford you the same courtesy, it will make the record much more clear. Okay?

A. Yes.

Q. And if at any time you don't understand my question, please ask me to rephrase it. Because if you answer it, I'm going to assume that you understood it.

A. Yes.

Q. And, again, if -- hopefully this isn't going to take too long. But if you need a break, just let me know. But the only thing I ask is if there's a question pending you answer the question first. Is that fair?

A. Yes.

1/27/2011
Q. I just want to get some real brief background information. I understand you are the president of AED?
A. This is correct.
Q. And how long have you been the president?
A. Ten years.
Q. Before --
A. Give or take a day.
Q. That's fine. Before that did you have any demolition experience?
A. Not in the demolition industry, no.
Management, yes. Ownership, yes.
Q. So you had managed or owned other businesses?
A. Yes.
Q. But not demolition companies?
A. No.
Q. And you got into the business because of your husband; is that right?
A. Yes.
Q. And what are your duties as the president of AED?
A. I have a wide facet of duties that I handle for AED. At the time I have pulled back a little bit due to stress and health issues. However, I still pretty much just oversee the finalizing of every event that happens.

Q. Okay. And just to try and get some detail into what you mean with that. As I understand it, Mark Wilburn handles a lot of the permitting, applications, licenses for jobs; is that right?
A. Correct.
Q. And so when you say -- when you say -- what do you mean by you oversee every event?
A. If in the event a question would arise from that that needed to have an answer or be guided into a different direction or potentially even need assistance or a final approval, I would handle that.
Q. You so you kind of -- you're the final decision maker?
A. That would be correct.
Q. The buck stops there; is that right?
A. (Nodding.)
Q. Is that a yes?
A. That would be a yes.
Q. Okay. Now, with respect to this case, one of the -- one of the claims is that -- and I went through this with your husband. One of the claims that's being asserted is fraud in that KDC fraudulently induced AED to sell the Bellaire Bridge by promising to allow AED to blast the bridge. And in return they reject -- you know, they pulled out of that agreement and changed the details.
Q. Okay. Okay. And so what I hear you saying now is that you guys -- you believe you had an agreement for AED to blast the bridge, but KDC pulled out of that agreement?
A. What KDC did was sold us a false bill of sale. The fact that we were going to do all the work, the explosive work on that bridge, and even to the point that they had discussed us being the project managers and supervising it due to lack of knowledge of how to do it.
Q. Okay. Okay. So the contract that I'm assuming you're referring to is the June 1st, 2010, proposal that AED sent to them; is that right?
A. I don't have the date correct. But if it is the original agreement that you are discussing, that would be correct.
Q. Let me get one for you. I'm handing you Deposition Exhibit 22. Take a quick look at that.
A. Eyes anybody?
Q. You need glasses?
A. It makes you go blind.
Q. Oh.
A. That hyperthyroid. Yeah, it's getting worse daily. But it's okay. I'll work through it.
Q. Yes, this would be correct.
Q. Okay. Okay. So my understanding is that AED is saying that when KDC signed this June 1 agreement, which is Deposition Exhibit 22, it never really had the intention to allow AED to blast the bridge; is that right?
A. That would be a speculated statement. So I really don't have a clue. All I know is that we engaged into a contract that all four persons involved at that point in time fully understood, 100 percent, that they would have a two payment to us in order to own the bridge. And with the owning of the bridge, there was a signing of a contract that stated AED is to execute all the implosion work.
Q. And Exhibit 22 is the agreement you're...
referring to to do the implosion work, right?
A. Let me read the back pages. I don’t know
exactly all of this offhand. But I will go through it
and --
Q. And just so you know, when you’re saying
contracts or agreements but not identifying which ones,
then that leads -- that causes me some confusion. So
that’s why I’m putting this in front of you to put some
corpus to your answer.
(Witness examining document.)
THE WITNESS: And is this the signed -- when
get to the back, is this the signed contract?
BY MR. SCHMITZ:
Q. Yeah. You can look at the back page there.
A. And this is the -- this is the original
contract then, which also describes each party’s duties
and responsibilities, which does state that we would be
the implosion company.
Q. Okay.
A. So to my knowledge, yes, this is it.
Q. Okay. Yeah. I just wanted to make sure I
knew which contract you were referring to.
A. Correct. And the verbal agreement came before
that actual in-print contract.
Q. That AED would do the blasting?
A. Yes.
Q. All right. But what I don’t hear you saying
is that on June 1st, when you guys signed that contract,
that you believe KDC did not have the intention to
follow through and allow you guys to blast the bridge;
that right?
A. It was my belief that when we agreed to this,
yes, we were and always going to be the one and only
implosion company.
Q. Right.
A. Yes.
Q. Right. And that was also KDC’s intention at
the time of June 1st, 2010?
A. That’s what I was told. For face value, yes,
I believe that to be true.
Q. Okay. Now, what I’m going to do is try and
find my notes where Eric asked me to follow up with you
on certain items. Okay?
A. Go for it.
Q. I’m going to hand you Deposition Exhibit 16
and have you read through that.
A. (Complying.)
Q. Have you ever seen this e-mail before -- or
these e-mails before?
A. I don’t recall if I’ve seen this or not

before, but I had this conversation.
Q. Okay.
A. We had a verbal on it.
Q. Okay. And what your husband had said is that
you guys were driving down the road and he was on the
phone and he was talking to both Lee and Krystal about
this payment. And then he gave the phone to you, and
you had a conversation with them. Do you recall that
event?
A. Yes. At the time -- and, again, my dates are
not a hundred percent accurate on this. When -- I spoke
with Krystal. I didn’t speak with Lee.
Q. Okay.
A. Okay. At least to my knowledge I don’t
remember speaking with him.
When I spoke with Krystal, she -- they were
having a very difficult time coming up with some funds
They had -- she had spoke to me, Krystal, had said that
they were receiving what they called tickets from
another job. And I said I don’t know what these tickets
are. Please explain yourself. And she told me that
they were tickets that she can take to the bank and get
money with. Could I please give them blank amount of
hours, you know, some extended time.
And if I had a calendar in front of me, I
probably could closer narrow those dates for you.
At that time I told her, you know, here --
here’s the bottom line is that you have to come up with
money in order for us to go forward. And if you can’t
come up with the money, we are not going to be able to
carry this any further, because we have other buyers
that -- Dan Hellickson, he was very interested in
purchasing it.
Eric was ready to move on. He was done
because it was every day, The money will be in there
tomorrow morning at 9:00 o’clock; the money will be
there tomorrow morning at 9:00 o’clock; tomorrow morning
on the morning at 9:00 o’clock. This went on for weeks. After they
had already pursued us for months in order to buy this
bridge.
So at that time I told Krystal that would be
the last extension that I would agree to. I’m an
extremely nice person and a giving person. I said,
look, you know, the difference between Friday evening
and Monday morning is not going to make or break my day.
You have the weekend to come up with the money. She
said we are in I believe West Virginia or Virginia. We
are driving to Pennsylvania to go to a bank right now to
get the money. But we won’t make it there before the
close of the day.
I said, Krystal, look, you do what you got to do. Time will tell. The money will either be in the bank or it won't be in the bank, period. Let your yes be yes or your no be no. And that was the end of our conversation.

MR. SCHMITZ: Art, on your ipad there, can you pull up a calendar of this time frame?

MR. BISTLINE: Mn-hmm.

MR. SCHMITZ: Because I would do it but I can't get on the Internet.

THE WITNESS: I can pull it up on mine.

BY MR. SCHMITZ:

Q. I'm just, you know, wondering if we can look at a calendar and maybe help give you some context to the time frame there. Because Exhibit 16 is dated May -- what is it -- that's May 27.

A. So May 27th was on a Thursday.

Q. Yeah.

A. Okay. So we spoke that evening. And it was -- it was already, I'm going to say, 5:00 or 6:00 o'clock, maybe even later East Coast time. And we were coming into the close -- well, first of all, there was no way a wire could be done --

Q. That late.

A. -- that day. It was just not going to happen.

So that being Thursday, on Friday she had until the close of their business day to have the wire go through in order to be there first thing Monday morning. So that was -- the grace period was a whole 'nother day to Friday. Don't tell me it's going to be there at 9:00 o'clock Friday morning is basically what I'm saying. And then it would be there Monday morning.

Q. So it would post to your bank on Monday morning?

A. Well, the way a wire works, it's within minutes. 90 percent of the time in ten minutes you've got money in your bank. But the grace was -- we're talking Thursday. You have all the way till Friday at 2:00 o'clock your time East Coast. If you still don't make it, I'm giving you until Monday morning at 9:00 o'clock.

Q. Okay. Okay. So the grace period is extended --

A. So whatever your story is -- because every every stinking day there was another lie. Every day.

You know, the baby's crying on the side of the road; I got to change diapers; I can't get to the bank.

Whatever the deal was, the bottom line is there was a gazillion excuses as to why they didn't have any funds.

Q. So the grace period extended till 9:00 a.m.

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Q. I'll let you look at Exhibit 19 and see if
that just helps refresh your memory at all.
A. I would have to say I really don't remember
reading this one.
Q. Okay. That's fine. Did you have many
discussions yourself with Krystal or Lee?
A. I don't think I've had any with Lee. And I
could be having a memory lapse. It's also part of the
issue. However, with Krystal I did have a couple.

At one point -- and I don't remember the
dates, but it was in early May. They were coming to our
house for the whole entire weekend and bringing their
child and wanted to make sure I had a bed, you know,
accommodations for the baby and whatnot. And of course
the doors were open. We're very open and loving people.

And I was like, yeah, for sure, come out. You know,
we'll get to know each other. We're great adventurers.
This is all -- you know, it's going to be a good thing.
And I would have to say that was probably before we
were being tripped up on the payment on a regular basis.
And even during that time, my extension of, I
understand, was over and over and over and over and
over. I could not understand why they were saying they
had the money in one sentence and then the next sentence
we have to get the money. It never made sense. Even to

the point that I did tell Eric I think they're full of
crap.
Q. Okay. Now are you talking about the $25,000
payment or the $30,000 payment?
A. The first one.
Q. Okay.
A. Because my fear was that -- and Eric really
had it worse than me. He was like, look, if they can't
come up with the first, they are never going to come up
with the second.

And I said, well, they -- you know, they keep
saying they're doing this other job and they're going to
get these tickets which is to be paid. And you go to
the bank and you collect it. However that works, I have
no -- I don't know. I just know what they were telling
me. And, you know, I said -- it kind of came back down
to that Thursday conversation. A few days is not going
to make the difference. I will give you until that
date.
Q. Okay.
A. You know, and then at that point we had
already lined up other people who were financially set
and ready to go forward.

Because here's the bottom line. The federal
court wanted the bridge down. There was a deadline.

There was water issues with the river that -- the rise
and flow of it and when you need to do the work and the
time frame. I mean, it was pretty simple that we need
to get moving on this and it needs to be done.

And our job is to keep working and to stay
afloat. So of course we were very excited to get this
bridge down.
Q. Did you have any other -- were you under
contract to do any other jobs at the time?
A. I believe so. I couldn't tell you right
offhand which one. But I do believe so.
Q. Do you recall when you were supposed to go
perform --
A. Well, at that time for sure we were because we
went to Milwaukee, I believe it was, and we shot two
smokestacks. And then during that time, Lee, maybe
Krystal, had communication with Eric. Please come --
you know, I -- it's adamant that you -- that we have you
here for the city council meeting. Like you need to be
here. And Eric was like I'm not wasting my time, you
know.
Q. Okay. The city council meeting was June 8th.

Does that sound about right to you?
A. Yeah, 7th or 8th. It was a Tuesday night. So
I think it -- yeah, it was a Tuesday night.
there. They showed up. They ordered I think a pizza
and a salad or something. The child was quite out of
control, very irritable, crying, whatever. We didn't
eat. We left the food because it was time to go. And
he was -- he was sweating. He was very nervous. He was
not ready to engage into a city council meeting at all.
He was very unprepared.

Q. What happened at the meeting?
A. At the meeting, they shot a ton of questions
to him. And he didn't have the answers for any of them.
And he kept having to refer to either myself or Eric.

BY MR. SCHMITZ:

Q. SO did you guys --
A. We did.

Q. All right. So did you get up and speak?
A. We did.

Q. All right.
A. We were not allowed to go to the ... Q. Podium?
A. Yes. We spoke from the back. And the fire
department also spoke, and the Coast Guard spoke.

And it was -- basically they shut him down and
said, look, you need to go and get all -- you have yet
to provide any of the information that we have been
asking for for weeks. You have nothing. Absolutely
zero. Which at that time we didn't know he did not
have -- he had told us he had permits. He told us he
had everything ready to go. And when we came to that
meeting, he was completely unprepared. He did not have
any of the right knowledge, nor did he have any permits
in place to do anything.

Q. Okay.
A. And Krystal was feeding him information to
say. He did not know what to say at all.

Q. All right. So you're saying that the city
council members at this point at this meeting were
complaining that he hadn't turned in information --
A. Correct.

Q. -- that they had been asking for?
A. Yes. I believe it was -- the numbers come
to my mind are either 9 or 14 items. And he had not
tackled any of them, not a one. And at that point I
believe there should be or is possibly an e-mail that
says can Mark do the work for us.

Q. Yeah, I haven't seen an e-mail like that.

A. And I will see if I can ...
1. I don't know, what should I say. I can run it -- I think she
2. walked up, and if I remember right, she had written
3. something down on paper and gave it to Lee so that he
4. could speak. And I believe that was the final time that
5. they told him they really -- at this time it wasn't
6. necessary for him to, you know, say anything else. And
7. I did not speak to anybody else. But Eric did speak to
8. a few people.

9. Q. I'm sorry. I kind of missed your answer
10. there. Did you say somebody handed him -- handed --
11. A. Krystal handed Lee an answer to a question --
12. Q. Oh, okay.
13. A. -- that he did not know, that she had asked
14. me. But I don't remember -- I just remember telling
15. her, yes, this can be done, whatever -- you know,
16. whatever it was.
17. Q. All right. And then what did you do guys do
18. after the meeting?
19. A. After the meeting, when we walked out of
20. there, there was a media. And they wanted to do an
21. interview. And there's a -- I don't know if this is the
22. right terminology or not -- but I believe a gag order
23. that it cannot be spoke about. And we suggested that
24. Lee not talk to media. And he chose to.
25. Q. "He" who?

1. A. Lee. And we said goodbyes and that was it.
2. Q. Did you listen to his interview?
3. A. Oh, man. I think I heard a tiny bit of it,
4. but I don't remember -- I don't know if I heard all of
5. it.
6. Q. Did you hear him say anything inappropriate?
7. A. I don't think I paid attention to that. Not
8. that I can remember offhand. And I don't know if I
9. would understand the term "inappropriate" anyways.
10. Q. Well, anything that struck you as being
11. inappropriate, something that he should not have said.
12. A. Well, he shouldn't have been talking, period.
13. Q. But did he say --
14. A. So the whole thing was inappropriate in my
15. opinion.
16. Q. Okay.
17. A. Because we were instructed to not speak about
18. it. And then he was instructed not to speak about it.
19. And yet he had already made arrangements for multiple
20. interviews to be done.
21. Q. How do you know he made the arrangements for
22. the --
23. A. He told us.
24. Q. He did.
25. A. Mm-hmm. "He" being Lee.

1. (Brief interruption.)
2. BY MR. SCHMITZ:
3. Q. Okay. The other thing that I wanted to talk
4. to you about is the damage calculations. I'm going to
5. hand you Deposition Exhibit 36. And I'll direct your
6. attention to interrogatory No. 5. Have you seen that
7. document before?
8. A. I would have to say I have not actually seen
9. it. However, this is a standard procedure for AED.
10. Q. What is a standard procedure?
11. A. Breaking down our costs.
12. Q. Did you have any input in this answer to
13. interrogatory No. 5?
14. A. The only input I possibly could have had was I
15. did contact Don Jones to make sure that the rentals were
16. still available. And he did say it would be based on
17. the time frame.
18. Q. Availability?
19. A. Yes.
20. Q. Okay.
21. A. And he then told -- I told him that we were
22. thinking approximately -- I think it was September we
23. said. And he said it should not be a problem.
24. Q. All right. And he quoted you a price?
25. A. I think he might have just said it was the
Q. If there is something in writing for a company policy that -- to support that you guys pay $210 a week per diem, would you provide that to your counsel?
A. Yes. Now, you have to remember we don't have any employees, per se. But if somebody came to work on the job, usually it can be the other company, depending on what facet it is, that they can provide people or if it's a job that we're going to provide the burners or the handling of the explosives, it -- each job in our business is individual. Every single job --
Q. Okay.
A. -- is different.
Q. So it's --
A. So if we speculated on how many people would be needed based on what the other person was not able to provide, that is the number. If the other person can provide a number, then we have a counter number.

There are certain things that we strictly handle and do. And the time frame would be based on the size of the project, and it would be an estimated number that would say, well, it's going to take -- and this is -- this has nothing to do with this bridge. The job's going to take six weeks, we would calculate six weeks' worth of per diem for the subcontractors to be able to put that into the lump that we owe them in order to get the job accomplished.

Q. Okay. So it's difficult to say for any particular project how much the per diems are going to be?
A. It would not be difficult for -- it would be difficult for me, but it would not be difficult for Eric. That is something that Eric would strictly handle.

Q. Okay. Now, he referred me to you as far as any paperwork that would help support the per diem calculations.
A. If I -- well, it's just -- I guess it's kind of like a blanket in the industry. People -- every company pays a little bit different. Some guys get all their money up front. And that -- that per diem might be $270 or $350, but they pay their own hotel, they pay their own gas, they pay their own expenses and that's it. Other companies give -- we pay hotel and they pay -- we pay out for food. So no matter what the hotel cost is, it's my burden, not the subcontractor's.

Q. So the per diem that AED pays out --
A. Is for food. It's 30 bucks a day for food.
Q. Okay. Otherwise it depends on which contractor you're working with?
A. It varies -- yeah, it totally varies.
Q. Okay.

A. The simplest way to put it is that AED provides the hotel accommodations, and we give the money for food, the 210.
Q. What about labor costs. Do those also vary depending upon which contractor is doing which job?
A. The dollar amount?
Q. Yeah.
A. The dollar amount is standard. It's 1500 a week.
Q. Okay. And is there -- how do you -- I guess how do you come up with $1500 a week. Is there some sort of a --
A. Again, it's kind of set by the industry. And I really don't have an answer for that. I really don't.
Q. So no matter what job you guys are working on,
MR. SCHMITZ: (Nodding.)
THE WITNESS: I think it was Accurate.
MR. BISTLINE: Yeah, I thought that's what he did say.
MR. SCHMITZ: Well, maybe it was. I don't have it written down.
THE WITNESS: Yeah, I believe it's called Accurate -- I am so sorry. You know, unfortunately the thing has -- it's caused this, the hyperthyroidism. But I believe it's called Accurate Systems, possibility. And my rep is Jerry.
BY MR. SCHMITZ:
Q. Do you have a receipt for that purchase?
A. I would. I'd have to either find it or locate it or ask him or something. But, yeah, there is a -- somewhere.
Q. Could you find that and give it to your counsel?
A. Mm-hmm.
MR. SCHMITZ: Okay. I think that's it.
That's all I need.
MR. SCHMITZ: Nope, nope. That's longer than I actually expected to go, so ...
THE WITNESS: I want to say his last name is Rice, but I can't -- I'm drawing a blank.
MR. SCHMITZ: It can't be Jerry Rice.
(Discussion off the record.)
THE COURT REPORTER: Read and sign?
MR. BISTLINE: Yes.
(Whereupon, the deposition was concluded at 6:02 p.m.)
(Signature requested.)

CERTIFICATE OF WITNESS
I, LISA A. KELLY, being first duly sworn, deprecate and say:
That I am the witness named in the foregoing deposition; that I have read said deposition and know the contents thereof; that the questions contained therein were propounded to me; and that the answers therein contained are true and correct except for any changes that I may have listed on the Change Sheet attached hereto.
DATED this _____ day of __________, 20__.

LISA A. KELLY
SUBSCRIBED AND SWORN to before me this _____ day of __________, 20__.
NAME OF NOTARY PUBLIC
NOTARY PUBLIC FOR ____________________________________________
RESIDING AT _________________________________________________
MY COMMISSION EXPIRES _______________________________________

REPORTER'S CERTIFICATE
I, Patricia L. Pullo, Certified Shorthand Reporter, do hereby certify:
That the foregoing proceedings were taken before me at the time and place therein set forth, at which time any witnesses were placed under oath;
That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;
That the foregoing is a true and correct record of all testimony given, to the best of my ability;
That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action.
IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of January, 2011.

PATRICIA L. PULLO, C.S.R. #697
Notary Public
816 Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814

www.mmcourt.com KELLY, LISA A. 1/27/2011
Exhibit D
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, individually.

Defendants.

Case No. CV-10-7217

PLAINTIFF'S RESPONSE TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

INTERROGATORIES

INTERROGATORY NO. 1: Identify each person who may have any knowledge concerning the facts and circumstances underlying the allegations of your Amended Complaint, along with their last known address and telephone number, and provide a summary of the knowledge or information that such person may possess.

ANSWER:

Lisa Kelly can testify regarding the contacts between Defendant and Plaintiff's agents.
Eric Kelly can testify regarding AED's purchase of the bridge from Roger Barrack, AED's negotiations with Defendants, and such other matters as may be later identified.

Mark Wilburn can testify regarding the matters with Barrack, Defendants, as well as AED's acquisition of required permitting, etc., necessary to complete the job in question.

Representatives of the US Coast Guard can testify regarding that agencies requirements as those requirements relate to the removal of the bridge.

Lee and Krystal Chaklos.

**INTERROGATORY NO. 2:** Identify each person you may call as a lay witness at the trial of this matter and, as to each, state the substance of the facts to which the witness may testify.

**ANSWER:** See answer to Interrogatory No. 1.

Travis Nelson, Strauss Industries Witnessed KDC/Delta attempt to borrow against equity of bridge.

**INTERROGATORY NO. 3:** Identify each person you may call as an expert witness at the trial of this matter and, as to each, please state the following:

(a) Provide each expert's name and address;

(b) Provide a complete history of each expert's educational and employment background, including his/her present occupation;

(c) Provide a listing of each expert's qualifications, including a list of all publications authored by the expert within the last ten (10) years;
(d) Provide a listing of any other cases in which each expert identified herein has testified as an expert at trial or by deposition within the last four (4) years:

(e) Provide a complete statement of all opinions to be expressed by each expert identified herein and the basis and reasons for each opinion;

(f) Provide a listing identifying any and all data, facts, or other information considered by each expert in forming his/her opinion; and

(g) Provide a listing identifying any exhibits to be used as a summary of or as support for each opinion to be expressed by each expert.

ANSWER:


(b) Please see attached resume.

(c) Philip Hart is licensed as a civil and structural engineer in twelve states and two Canadian provinces. He has had twenty-five years of continuous experience as structural engineer working with concrete, masonry, steel and wood.

(d) List of cases where testimony was given in either a deposition or trial in last four years: Lukenhouse v. Real Log Homes, Truckee, California.

Expert witness cases where an expert witness report was prepared for counsel:

Allen v. Hardison, Bonner County, Idaho;
Parmelee v. Callaway, Kittitas County, Washington;
Sheffield v. Farmers, Stevens County, Washington;
Hester v. Day, Kootenai County, Idaho;
Gleason v. Pacific Northwest Consultants, Spokane County, Washington;
Shultz v. Cramer, Kootenai County, Idaho;
(e) Please see attached letter prepared by Philip Hart dated December 3, 2010, directed to Eric Kelly.

(f) The existing bridge uses a steel truss design, which is a highly efficient way to use steel as a structural member. Most structural members will have been designed to be loaded close to their capacity. Removal of any structural member will increase the load on the remaining structural members. Because the bridge has been out of service for thirty years and has not been maintained for this same thirty year period, it is unknown if the bridge can accommodate the removal of any structural member without failing. An unscheduled collapse of the bridge constitutes a hazard to river traffic and will likely close the river for more than the allowed twenty-four hour period.

(g) He will also testify to all matters contained in any expert witness disclosure, which matters are incorporated here as if set forth in full.

INTERROGATORY NO. 4: Identify each exhibit you may introduce into evidence at the trial of this case.

ANSWER: Exhibits have not been identified in this case.

INTERROGATORY NO. 5: Itemize by description and amount all damages, special or otherwise, which you expect to prove at trial and identify the documentation that is available to substantiate all alleged damages.

ANSWER: 1. Mobilization: $5,000
2. Insurance: $15,000
3. Hotel - Don Jones House Rental: $2,600
4. Per Diems: $2,600
5. Permits: $3,000
6. Labor: 19,000
7. Explosives: $45,000
8. Miscellaneous: $2,800

Total - $95,000 in estimated costs, estimated profit, $80,000.

INTERROGATORY NO. 6: Have you made any statements to anyone regarding the events described in your Amended Complaint? If so, please state the following:

(a) When each statement was made;
(b) To whom each statement was made;
(c) The contents of each statement; and
(d) Whether a record of the statement was made.

ANSWER: No statements have been made.

INTERROGATORY NO. 7: Identify and state with particularity each and every statement or representation you contend fraudulently induced you to enter into the Asset Purchase and Liability Assumption Agreement (“Purchase Agreement”). For each statement, provide:

(a) The date when each statement was made;
(b) To whom each statement was made;
(c) By whom each statement was made;
(d) The contents of each statement; and
(e) Whether the statement was oral or written.
ANSWER: On January 14th, 2010, we agreed that AED would blow the bridge if KDC purchased it. This was understood all through the process and again re-affirmed when Krystal Chaklos returned the signed agreement for the sale of the bridge with a fax coversheet which indicated that she looked forward to working with AED on the blast of the bridge. Then, after KDC breached the purchase and sale agreement, AED required that KDC execute a contract to blast the bridge which is attached to the amended complaint. This contract was executed on June 15th, 2010.

INTERROGATORY NO. 8: Identify each and every fact which supports your contention that “Plaintiff and Defendants did in fact enter into an agreement whereby Plaintiff would demolish the bridge” as alleged in Paragraph 10 of your Amended Complaint. In answering the interrogatories, please identify which Defendant(s) you contend entered this agreement.

ANSWER: The executed contact is attached to the amended complaint.

INTERROGATORY NO. 9: Identify each and every fact which supports your contention that “Defendants made said promise with the intent of never fulfilling it and with the intent that Plaintiff rely on said promise in determining to sell the bridge” as alleged in paragraph 11 of your Amended Complaint.

ANSWER: The time frames from when they executed the agreement to its breach, together with the reasons given for the breach lead to the conclusion that KDC never had any intention of performing its agreement with AED.

INTERROGATORY NO. 10: State whether you contend Krystal Chaklos has any personal responsibilities under the Purchase Agreement. If so, please set forth each and every fact which supports your contention.
**ANSWER:** None. however, to the extent that AED is harmed by KDC’s breach of the basting contract because KDC does not properly remove the bridge and perform proper clean up, then she will be liable for damages occasioned by her fraudulent conduct of entering into a contract which she had no intention of keeping to induce AED with going forward with the transaction. She will also be held accountable if KDC is financially unable to pay any judgment AED obtains against KDC as AED would not have a judgment, it would have the bridge, but for the fraud of Ms. Chaklos.

**INTERROGATORY NO. 11:** State whether you contend Lee Chaklos has any personal responsibilities under the Purchase Agreement. If so, please set forth each and every fact which supports your contention.

**ANSWER:** None.

**INTERROGATORY NO. 12:** State whether you contend Krystal Chaklos has any personal responsibilities under the “demolition agreement.” If so, please set forth each and every fact which supports your contention.

**ANSWER:** See answer to Interrogatory No. 10 above.

**INTERROGATORY NO. 13:** State whether you contend Lee Chaklos has any personal responsibilities under the “demolition agreement.” If so, please set forth each and every fact which supports your contention.

**ANSWER:** None.

**INTERROGATORY NO. 14:** Identify each and every fact which supports your contention that you are the owner of the Bridge as alleged in paragraph 12 of your Amended Complaint.
**ANSWER:** AED is not legal owner of the bridge at this point, but holds an equitable right in the bridge based on its claim for rescission.

**INTERROGATORY NO. 15:** Identify each and every fact which supports your contention that you are “subject to a non-assignable obligation to demolish and remove the bridge” as alleged in paragraph 12 of your Amended Complaint.

**ANSWER:** Paragraph 34 of the contract between Roger Barack and AED.

**INTERROGATORY NO. 16:** Identify each and every fact which supports your contention that “Defendants have indicated their intention to demolish the bridge by the deconstruction of (as opposed to implosion of) the bridge.”

**ANSWER:** An e-mail from Jeremy Domozick to counsel for AED stated the same.

**INTERROGATORY NO. 17:** Identify each and every tortious [sic] act you contend was committed by Krystal and/or Lee Chaklos as alleged in paragraph 16 of your Amended Complaint. In answering this interrogatory, for each alleged tortious [sic] act, identify the company on which behalf the act was committed.

**ANSWER:** Please see answer to Interrogatory No 7.

**INTERROGATORY NO. 18:** Identify which “agreement” you contend was breached as alleged in paragraph 19 of your Amended Complaint. In answering this interrogatory, set forth specifically how each defendant breached said “agreement.”

**ANSWER:** Defendant’s breached the agreement for AED to blast the bridge which was part and parcel of the agreement to sell the bridge so a breach of that agreement is a material breach of the agreement to sell the bridge agreement.
INTERROGATORY NO. 19: Identify which “contract” you are seeking to rescind in paragraph 20 of your Amended Complaint.

ANSWER: The purchase and sale agreement for the bridge.

INTERROGATORY NO. 20: Identify each and every permit you obtained in order to demolish the Bridge. In answering this interrogatory, identify:

(a) The date application for the permit was made;
(b) The entity or agency issuing the permit; and
(c) The date the permit was issued.

ANSWER: West Virginia's Contractor's License: (a) August 16, 2010 (b) State of West Virginia (c) August 18, 2010.

Out of State-Exemption: (a) August 16, 2010 (b) State of West Virginia (c) August 18, 2010.

Bus Registration Certification: (a) August 16, 2010 (b) State of West Virginia (c) August 18, 2010.

Permit to Use Explosives: (a) 2006 (b) State of West Virginia (c) renewed August 18, 2010.

Benwood City License: (a) August 18, 2010 (b) City of Benwood (c) August 25, 2010.

Demolition Permit: (a) August 18, 2010 (b) City of Benwood (c) Held due to lawsuit.

CSX-Right to Entry: (a) August 18, 2010 (b) CSX Railroad (c) Held due to lawsuit.

Columbia Gas- Line Protection: (a) August 18, 2010 (b) Columbia Gas (c) Held due to lawsuit.

Coast Guard-Demolition Permit: (a) August 18, 2010 (b) United States Coast Guard (c) Held due to lawsuit.
INTERROGATORY NO. 21: State whether you possess a West Virginia Contractor’s License. If so, state the date you applied for said license and the date you received said license.

ANSWER: AED possess a West Virginia Contractor’s License. AED applied for said license on August 16, 2010, and received it on August 18, 2010.

INTERROGATORY NO. 22: If any of your responses to the Requests for Admission below are anything other than unqualified admissions, set forth each and every fact and identify each document which support your denial for each request.

ANSWER: Please see answers to request for admissions.

INTERROGATORY NO. 23: Identify all officers, directors, managers, and employees of AED, Inc., and state the title or job description for each person identified.

ANSWER: Lisa Kelly, President. Eric Kelly, Vice, President: performs all estimating and blast design. Mark Wilburn, Director of Operations: obtains all permits and licenses.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Please produce a copy of all documents, items or things which you referred to in answering the above interrogatories, including all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE: Please see response to Request for Production No. 2.
REQUEST FOR PRODUCTION NO. 2: Please produce a copy of all documents, notes, records, files, statements, bills, diaries and writings which you contend support your claims and/or defenses in this matter.

RESPONSE: Please see attached.

REQUEST FOR PRODUCTION NO. 3: Please produce a copy of all statements made or taken by you concerning the events described in your Amended Complaint.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 4: Please produce a copy of any statements, reports or other documentation prepared by or taken from any person listed in your response to Interrogatory No. 1.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 5: Please produce a copy of all of the exhibits or other demonstrative evidence which you may offer for introduction into evidence or utilize at the trial of this matter.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 6: Please produce a copy of all reports prepared by any expert you intend to call to testify at trial, as well as all notes, documents and writings by the expert relating to the subject of his or her opinion, all documents and writings reviewed and all documents and writings relied upon for any opinion he or she may have on any issue pertaining to this case.

RESPONSE: Please see response to Request for Production No. 2.
REQUEST FOR PRODUCTION NO. 7: Please produce a copy of all journals, diaries, summaries, notes, e-mails or other written material prepared by you which document or reference in any manner any facts or matters related to the facts or circumstances surrounding this litigation or your claim for damages.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 8: Please produce all documents which document, demonstrate or prove your damages in this matter.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 9: Please produce a copy of all correspondence between you and any of the Defendants, including any and all electronic correspondence.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 10: Please produce a copy of all written correspondence or documents between, from, or to you and any person, entity, association, municipality, or governmental agency pertaining to your purchase of the Bridge and preparations to demolish and remove the Bridge.

REQUEST FOR PRODUCTION NO. 11: Please produce a copy of your West Virginia Contractor’s License, if any.

RESPONSE: Please see response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 12: Please produce a copy of any and all permits you obtained in order to demolish and remove the Bridge.

RESPONSE: Please see response to Request for Production No. 2.
REQUEST FOR PRODUCTION NO. 13: Please produce a copy of any demolition plan(s) prepared by you to demolish and remove the Bridge.

RESPONSE: Objection, will be provided upon execution of a protective order prohibiting use for any other purpose than for litigation or by any other third party whatsoever.

REQUEST FOR PRODUCTION NO. 14: Please produce a certified copy of any insurance policy in effect that would provide coverage for your actions while demolishing and removing the Bridge.

ANSWER: See AED Binder Final in response to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 15: If any of your responses to the Requests for Admission below are anything other than unqualified admissions, please produce each and every document which you contend support your denial for each request.

RESPONSE: Please see response to Request for Production No. 2.

DATED this ___ day of January, 2011.

______________________________
ARTHUR M. BISTLINE
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L. Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[x] Email
[ ] Interoffice Mail

BY: ____________________________
LEANNE VILLA
RESPONSE TO INTERROGATORY NO. 3 (b)
PHILIP L. HART, S.E.
Post Office Box 1988
Hayden, Idaho 83835
208-772-2522

EDUCATION


University of Utah – Bachelor of Science in Civil Engineering, 1980 Dean’s List, editorial staff student newspaper.

State Representative to the 58th through 61st Idaho Legislature, House of Representatives; Legislative District 3, Seat B for the 2005 - 2012 Legislative Sessions. 2005 - 2008 Board of Directors/Legislative Advisor, Idaho Housing and Finance Association, Boise, Idaho. 2009 - 2011, Board Member and Vice Chairman of the Western States Transportation Agreement.

EXPERIENCE

ALPINE ENGINEERING
Coeur d’Alene, Idaho
Principal
July 1995 – Present

Working as a civil and structural engineer in the Coeur d’Alene, Idaho area. Our activities in Coeur d’Alene are similar to that of Hart Engineering Group, Inc.’s listed below. Currently we now have more emphasis on commercial, multi-family, luxury residential, institutional and industrial projects. Have participated as a structural engineering expert witness in numerous cases.

HART ENGINEERING GROUP, INC.
Truckee, California
Principal, President
July 1984 - Present

Primarily performed structural engineering in heavy snow load areas on timber structures. Much of our work was with “high end” complicated residences. Have also worked on site development projects and steel and concrete structures throughout California and Northern Nevada. On structural projects, we typically check every member from the roof rafters to the foundation. Structures are engineered for wind, snow and seismic loads. Site development projects included engineering for road design, storm runoff systems, sewer lines and lift stations and utility service.

Another area of expertise was forensic studies on damaged structures. At times this activity represented up to one third of our workload. We also specialize in log home design and engineering, and we worked on log homes and other log structures throughout the western United States.
MAJOR ENGINEERING 1981-1982
Incline Village, Nevada
Business Manager, Chief Engineer
Returned to a former employer to take over and supervise the business and technical operations of a Civil Engineer Consulting Firm. Began with a staff of four and built up the organization to eight staff members. Was responsible for entering a new market area; writing environmental impact reports. Lobbied extensively with regulatory agencies at all levels of government.

BOEING COMMERCIAL AIRPLANE COMPANY 1980-1981
Seattle, Washington
Engineer, Structures Technology Group
Was responsible for checking changes in the 767's structure as a member of the stress group. Was also responsible for supervising a test program where composite panel structures were tested to verify panel design assumptions.

MAJOR ENGINEERING 4-10 / 1979
Incline Village, Nevada
Office Manager, Chief Engineer
Managed a branch office in Truckee, California. Responsibilities included bidding jobs, writing contracts, billing and collections, and establishing new clientele. Also responsible for structural calculations on buildings for snow and seismic loads.

Engineer 4-10 / 1977-78
Was responsible for structural calculations on buildings for snow and seismic loads. Also interacted closely with the client, acted as job captain on all assignments. Worked six months per year while working on an engineering degree.

Carpenter 4-10 / 1974-76
Worked as a carpenter on new construction and remodeling of existing buildings. Worked on all phases of each project from the foundation to finish work.

PERSONAL
Registered Structural Engineer in California, Idaho and Nevada;
Registered Civil Engineer in Arizona, California, Colorado, Idaho, Illinois, Missouri, Montana, Nevada, Oregon, Utah, Washington and Wyoming; British Columbia and Alberta.
Professional ski racer 2 years, USCF category II bicycle racer, track and ski team in college, private pilot.
RESPONSE TO INTERROGATORY NO. 3 (e)
December 3, 2010

Mr. Eric Kelly
Advanced Explosives Demolition
6645 N. Gavilan Lane
Coeur d'Alene, Idaho 83815

Re: Bellaire Toll Bridge, Bellaire, Ohio.

Dear Mr. Kelley:

At your request, I have reviewed my file on the Bellaire Toll Bridge which spans the Ohio River between Bellaire, Ohio and Benwood, West Virginia. The question you wanted me to address is the feasibility of removing the bridge by dismantling it one member at a time, or a section at a time versus using an explosive demolition approach, where large portions of the bridge come down all at once.

The explosive demolition approach is your preferred method of removing the bridge, and is the method that we first discussed for which my office has prepared a Site Specific Work Plan. It is my opinion that this method is the most cost effective and resource efficient method of taking down the bridge.

The other approach, dismantling the bridge without explosives, in my opinion will be a more expensive method to remove the bridge. Dismantling the bridge member by member or section by section may also prove to be not only impracticable, cost prohibitive but also logistically impossible. Below I will discuss my concerns using this slower dismantling approach.

A truss bridge uses its structural members in an efficient way. In the case of the Bellaire Toll Bridge, steel is the preferred material and the bridge is designed to use these steel members in such a way that a minimum poundage of steel will be required for the bridge to provide the service and load carrying capacity for which it is designed for.

Typically, a structure such as the Bellaire Toll Bridge is designed with a factor of safety. Yet beyond that, a good designer will keep to a minimum any extra material that may provide strength over and above what the design criteria is. And should the structural integrity of the bridge be diminished in any way, there will be a structural deficit in the load carrying capability of the bridge.

The Bellaire Toll Bridge as been sitting idle for 30 years. It is my understanding that the bridge has had no maintenance done to it during these last 30 years. In this time frame, portions of the structural steel have literally been rotting from rust and corrosion. This is evident from the
December 3, 2010
Mr. Eric Kelly, Advanced Explosives Demolition
Page 2

photos that you sent me. You can see in some of the photos weeds growing in the bridge deck many feet above the ground and/or river.

Your demolition plan proposes to use explosives to remove the bridge in 5 stages. Each stage of the demolition, after the explosives are placed, will only take a few seconds to remove that portion of the bridge. And this scheme will be phased so that those portions of the bridge that remain, after a portion of the bridge is removed by your explosive means, will be self supporting. And these remaining self supporting structures will be loaded at a level equal to or less than the loads that they experience today.

However, should the bridge be dismantled one member or section of the bridge at a time, it will be necessary to load up the portions of the bridge structure that remain with loads that exceed the loads that these structural members currently experience today as the bridge sits idle.

The question than must be answered, “Can the bridge be slowly dismantled one member or section of the bridge at a time without causing a catastrophic failure of what remains of the bridge after various structural members have been removed?” And if not, “Is this a problem?

The answer to the second question is “Yes. it is a problem.”

The bridge spans the Ohio River. At this location, the Ohio River is a navigable river with a lot of river traffic. The United States Coast Guard has required that the river be closed for no more than 24 hours at a time during the demolition process for the Bellaire Toll Bridge. Your plan to use explosives requires that the river be closed only once for 24 hours. This closure would be for shooting the center portion of the bridge.

However, using the dismantling approach, we can not think of a methodology that will allow the bridge to be taken apart in such a way that the river can be closed for only 24 hours. The dismantling process is just too slow. Should there be a need to discuss various dismantling processes, we can do that in a future letter.

But even if closure of the river for more than 24 hours was not a consideration, it remains unknown at this time if the bridge possesses the necessary strength to allow for the slow dismantling of the bridge when existing members will be required to carry loads in excess of what they experience today.

There are no as-built drawings of the bridge as the bridge was built in 1926. Nor has there been any assessment of the existing structural strength of the bridge any time recently. Today we do not know how much load this bridge can accommodate. In order to be certain that the bridge could be slowly dismantled without collapsing into the river, a thorough structural study and analysis of the existing condition of the bridge would need to be performed.
The concern is we don't want the bridge to collapse onto a barge or other river vessel while it is passing under the bridge, nor do we want parts of the bridge to unexpectedly fall into the river causing an unscheduled closure of the river.

Before we will know if the bridge could handle a dismantling process, the prior mentioned study and analysis of the bridge would have to be done by a structural engineering firm. It would take well over a thousand man-hours to produce the drawings and reports necessary to determine if the bridge could be successfully dismantled using this slow deconstruction process. As a preliminary estimate, I believe the time and budget required for this study would be $210,000 and three months to complete. However, before I would firm up a contract to provide these services, I would want to investigate this situation further.

The following would need to be prepared in order to determine the existing strength of the bridge and whether or not dismantling the bridge piece by piece was feasible:

- Prepare as-built drawings of the portions of the bridge structure that would be of concern in this situation.
- Analyze the structure to determine the original load carrying capacity of those portions of the bridge critical to the piece by piece dismantling of the bridge.
- Develop a deconstruction plan including methodology and sequence of removal of various parts of the bridge.
- Survey the critical structural members of the bridge for corrosion and make an assessment as to the degree of degradation of each structural member and structural connection in question.
- Make a final determination as to whether or not the existing condition of the bridge can accommodate a slow dismantling process.

In looking at various photos of the bridge you sent me, it is obvious to the naked eye that the Ohio end of the bridge is sagging between the abutment and the first pier. This is a tired bridge, and it is obvious that there exists today substantial corrosion problems with the structure. I believe the most cost effective way to demolish this bridge is to use explosives and get the job over quickly.

Sincerely,

Philip L. Hart, P.E.
RESPONSE TO REQUEST
FOR PRODUCTION NO. 2
IS CONTAINED ON CD PROVIDED
VIA FED-EX
<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
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<tr>
<td>Jan 07</td>
<td>04:50p</td>
<td>Fax Sent</td>
<td>12083958585</td>
<td>7:34</td>
<td>22</td>
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Case No. CV-10-7217

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE ON MOTION TO RECONSIDER

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby replies to Defendants' Response on Motion to Reconsider filed with this Court dated February 10, 2011, as follows:

KDC argues that this Court should not consider the fact that the agreement to sell the bridge was entirely dependent on the agreement that AED be allowed to blast the bridge because this Court ruled that AED could not prove that KDC entered into the blast agreement without having any intention to perform that agreement.

Whether or not AED can prove fraud in the inducement does not impact the admissibility of the evidence. The evidence is admissible, whether or not it meets the required level of proof.
Furthermore, KDC has admitted the existence of the blast agreement and has never denied that it was material to the parties' agreement to sell KDC the bridge.


In Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997, just as here, there was a signed contract (the quit claim) which said nothing of a separate agreement not to report the father's abuse. The Supreme Court considered parol evidence which rendered the quit claim void - that evidence being the fact that the quit claim would not exist but for the illegal agreement not to report the abuse.

Quiring is directly on point and because the execution of the sales contract was entirely dependent on the illegal blast contract, the sales contract is also illegal.

DATED this 11th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2011, I caused to be served a true and correct copy of the foregoing PLAIN\r\nTIF’S REPLY TO DEFENDANTS’ RESPONSE ON MOTION TO RECONSIDER by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: Jennifer Jenkins

JENNIFER JENKINS
<table>
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<tr>
<th>Time</th>
<th>Speaker</th>
<th>Note</th>
</tr>
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<tr>
<td>01:25:08 PM</td>
<td>Judge</td>
<td>Calls case - Mr. Bistline is present in courtroom; Mr. Schmitz is present telephonically. Plf's 2nd motion for reconsideration. Motion to shorten time and motion to strike affd of Kelly.</td>
</tr>
<tr>
<td>01:26:01 PM</td>
<td>Mr. Schmitz</td>
<td>Motion to strike hasn't been noticed it up. Simply filed a motion to strike, but didn't file a notice of hearing.</td>
</tr>
<tr>
<td>01:26:35 PM</td>
<td>Judge</td>
<td>Plf position on def motion to strike.</td>
</tr>
<tr>
<td>01:26:45 PM</td>
<td>Mr. Bistline</td>
<td>Need to to have motion to strike. No objection.</td>
</tr>
<tr>
<td>01:27:24 PM</td>
<td>Mr. Schmitz</td>
<td>Reset on briefing.</td>
</tr>
<tr>
<td>01:27:33 PM</td>
<td>Mr. Bistline</td>
<td>4 objections. Relevancy - object no foundation laid. 40 yrs of experience. Credibility vs. admissiability. Don't see that anything in affidavit is subject to striking.</td>
</tr>
<tr>
<td>01:28:45 PM</td>
<td>Judge</td>
<td>Will take this under advisement. Have read all briefing on motion to reconsider.</td>
</tr>
<tr>
<td>01:29:12 PM</td>
<td>Mr. Bistline</td>
<td>This court has granted relief by KDC. No question of fact that KDC hired AED to blast bridge. Quaring v. Quaring. Agreement to sell bridge is illegal.</td>
</tr>
<tr>
<td>01:32:11 PM</td>
<td>Judge</td>
<td>Read deposition of client, so don't know how you come about this.</td>
</tr>
<tr>
<td>01:32:37 PM</td>
<td>Mr. Bistline</td>
<td>What are you looking at?</td>
</tr>
<tr>
<td>01:32:58 PM</td>
<td>Judge</td>
<td>Read deposition of your client.</td>
</tr>
<tr>
<td>01:33:09 PM</td>
<td>Mr. Bistline</td>
<td>2 separate written agreements. Affd filed in opposition to Summary Judgment. Looked at depo Mr. Schmitz asked a specific question. Mr. Kelly states KDC can hire whoever they want to do blasting. He also said there needed to be a contract in place. 2 things were contingent open each other. AED seeking to rescind. Trying to rely upon confusing statements. Entire thing is illegal. Can't sever one from the other. Entire agreement is invalid.</td>
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</table>
| 01:37:41 PM | Mr. Bistline             | We have never admitted that blasting of bridge is material to blasting of bridge. Never admitted that it is part and parcel. Only vacate SJ as to quick claim. Evidence reciting occurred before sales and purchase agreement were entered into. Blasting bridge isn't part of that consideration. Consistent with Mr. Kelly's
Mr. Schmitz testimony. Sales agreement is separate from Blasting agreement. Exhibit B in my affd in opposition to this motion. Two separate and distinct things. Nothing illegal to purchase agreement. Asking court to look at everything outside purchase agreement. Cite to Quering vs. Quering and isn't same as what we have here. AED is trying to use extrinsic evidence to change terms. They cite of Settle v Sterling. This case is 150 yrs old as to parole evidence. Howard v. Perry is case used now. Fraud claim is gone. Unambiguous contract. Parole evidence bars everything they are trying to do here. That is what prevents them for prevailing on SJ. Exhibit B attached to recent affd.

<table>
<thead>
<tr>
<th>Time</th>
<th>Participant</th>
<th>Statement</th>
</tr>
</thead>
<tbody>
<tr>
<td>01:45:32 PM</td>
<td>Mr. Bistline</td>
<td>Fighting about disputed material fact.</td>
</tr>
<tr>
<td>01:45:45 PM</td>
<td>Judge</td>
<td>Admissiable evidence</td>
</tr>
<tr>
<td>01:46:05 PM</td>
<td>Mr. Bistline</td>
<td>Evidence doesn't go away. Brief on motion to reconsider. Been a law of state before it was a state and is still law of state. Can't prove that KDC wasn't going to go thru with contract. Blast contract is found illegal which makes sales contract illegal. Evidence came in thru other side. Would've done this if it was illegal. Quering case is directly on point. Don't discuss parole evidence. Deed is executed. Just because it wasn't discussed doesn't mean that it was irrelevant.</td>
</tr>
<tr>
<td>01:49:35 PM</td>
<td>Judge</td>
<td>Take this under advisement.</td>
</tr>
<tr>
<td>01:49:42 PM</td>
<td>Mr. Bistline</td>
<td>Nothing further.</td>
</tr>
<tr>
<td>01:49:49 PM</td>
<td>Mr. Schmitz</td>
<td>What are we going to do with trial date. Stip to dismiss our remaining claim from counterclaim.</td>
</tr>
<tr>
<td>01:50:12 PM</td>
<td>Judge</td>
<td>Hinges on my motion to reconsider.</td>
</tr>
<tr>
<td>01:50:36 PM</td>
<td>Mr. Bistline</td>
<td>Agrees.</td>
</tr>
<tr>
<td>01:50:41 PM</td>
<td>Mr. Schmitz</td>
<td>Agrees. Hard for us to get ready for this trial date.</td>
</tr>
<tr>
<td>01:51:24 PM</td>
<td>Judge</td>
<td>If I grant motion to reconsider, will entertain motion to continue trial.</td>
</tr>
</tbody>
</table>

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I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This litigation started by plaintiff AED on August 23, 2010, involves the sale and future demolition of a bridge over the Ohio River. AED sold this bridge to defendant KDC via a written agreement entered into on May 20, 2010. AED claims eleven days later, on June 1, 2010, KDC entered into an agreement with AED to have AED perform the demolition work on the same bridge AED had just sold to KDC. This Court quieted title to the bridge in KDC based on the purchase agreement.

Because there is an Order from a federal district judge to have the bridge demolished by December 2011, and because AED's filing of this instant lawsuit brought a halt to KDC's bridge demolition process, KDC has at all times sought to speed this litigation along. Due to the utter lack of basis for this second motion to reconsider filed by AED on February 4, 2011, (AED's "Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment"), this
motion appears to be nothing more than AED’s attempt to filibuster KDC’s ability to demolish the bridge. This is AED’s second “motion for reconsideration” within six weeks. AED now argues that since “The Court ruled that the promise by KDC to hire AED [to demolish the bridge] is illegal...the remainder of the agreement [the purchase agreement] is illegal based on Quiring...” Memorandum in Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, p. 3. This new argument is not based on any new admissible evidence, and misinterprets the Idaho Supreme Court decision in Quiring v. Quiring, 130 Idaho 560, 944 P.2d 695 (1997).

This Court has set forth the factual and procedural history of this case in its December 15, 2010, Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction:

This matter is before the Court on defendant KDC Investments LLC’s (KDC) Motion for Preliminary Injunction filed November 17, 2010. This Court finds there are too many unanswered questions to grant such relief.

This lawsuit involves the sale of a bridge across the Ohio River on the Ohio/West Virginia border. Due to a December 23, 2009, Order from Federal District Court in Ohio, that bridge must be demolished no later than December 21, 2011. Affidavit of Krystal Chaklos in Support of Motion for Expedited Hearing, filed October 6, 2010, Exhibit C, p. 1. Defendant KDC bought the bridge from plaintiff AED, Inc. (AED) via what will be referred to as the “purchase agreement”, a document signed May 20, 2010. Amended Complaint, Exhibit A. Under the terms of that purchase agreement, KDC assumed responsibility for “proper demolition and removal [of the bridge] on or before June 1, 2011.” Id., p. 1. Subsequently, a separate “demolition agreement” between the parties was at least discussed, if not executed. At the end of the “demolition agreement” AED’s Eric J. Kelly, Sr. signed the document on June 1, 2010, as did KDC’s Krystal Chaklos, also on June 1, 2010. However, the “demolition agreement” which is titled a “proposal” lacks a signature by any person from KDC on the first page “accepting” the agreement. The “purchase agreement” clearly places the responsibility to demolish the bridge on KDC. The “demolition agreement”, if it was in fact executed by KDC, places that responsibility on AED. AED filed this lawsuit, and KDC claims the moment AED filed this lawsuit KDC’s efforts to demolish the bridge stopped as a result of a letter sent the United States Coast Guard “...until
the court sorts out ownership of the Bellaire Bridge.” Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010, Exhibit 2. KDC then moved for a preliminary injunction “…prohibiting AED from repudiating the Purchase Agreement so that KDC Investments can continue its efforts to demolish and remove the Bridge…” Memorandum in Support of Motion for Mandatory Injunction, p. 20.

AED, an Idaho corporation, filed its Complaint and Jury Demand in the instant matter on August 23, 2010. AED alleged defendant KDC Investments, LLC, a Virginia LLC, and defendants Lee Chaklos and Krystal Chaklos individually (hereinafter “KDC” collectively) induced AED to enter into an agreement to sell a bridge to KDC via a promise that AED would be hired to later demolish said bridge. Complaint, p. 1, ¶ 6; Amended Complaint, p. 2, ¶ 9. AED alleges: “Said promise was material to the parties’ transaction and Plaintiff would not have agreed to sell the bridge without the promise that Plaintiff would be allowed to demolish the bridge.” Amended Complaint, p. 2, ¶ 9. This allegation is completely contrary to the written language found in the “purchase agreement.” The “purchase agreement” places the responsibility for demolition of the bridge squarely and solely upon KDC. Amended Complaint, Exhibit A. AED would only have the right to demolish the bridge if KDC failed to do so. Amended Complaint, p. 2, ¶ 7. AED’s Amended Complaint alleges fraud in the inducement and breach of contract, and seeks rescission, damages, or specific performance. Amended Complaint, pp. 3-4. In the Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC’s Amended Counterclaim, filed on November 9, 2010, KDC counterclaims fraud, breach of contract, and seeks a declaratory judgment to quiet title to the bridge. Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC’s Amended Counterclaim, pp. 8-10.

On November 17, 2010, KDC filed its motion for preliminary injunction and memorandum and affidavits in support thereof, asking this Court to enjoin “AED from continuing to breach the sale agreement by repudiating its validity and seeking to rescind the agreement so that KDC Investments may continue the demolition process in order to demolish and remove the Bridge by June 1, 2011.” Memorandum in Support of Motion for Mandatory Injunction, p. 2. KDC noticed a hearing for November 24, 2010. AED filed its Objection to Defendants’ Motion for Preliminary Injunction on November 18, 2010, arguing only procedural, not substantive, issues with regard to KDC’s motion.

On November 22, 2010, KDC filed its Reply to Plaintiff’s Objection to Defendant KDC Investments, LLC’s Motion for Mandatory Injunction. At oral argument on November 24, 2010, the Court indicated its frustration with both sides: with KDC for not filing its motion for preliminary injunction until November 17, 2010, in spite of the fact that at a hearing held October 22, 2010, this Court set aside that November 17, 2010, date for hearing additional motions; and with AED for not making any substantive argument opposing the preliminary injunction, choosing instead to simply complain that KDC had violated I.R.C.P. 7(b)(3)(A) by not providing written notice of the motion fourteen days prior to the hearing. At the
November 24, 2010, hearing, the Court re-scheduled oral argument on KDC’s motion for preliminary injunction to December 6, 2010, providing AED with more than the requisite notice under I.R.C.P. 7(b)(3)(A). At the November 24, 2010, hearing, due to the time-sensitive nature of this case, and with the agreement of counsel for both sides, this Court also scheduled this case for a three-day jury trial beginning February 22, 2011. Following the hearing on November 24, 2010, AED filed a “Motion to Strike Portions of Krystal Chaklos Affidavit.” On November 24, 2010, AED also filed the “Affidavit of Mark Wilburn in Support of Plaintiff’s Objection to Issuance [sic] of Preliminary Injunction” and the “Affidavit of Eric J. Kelly in Support of Plaintiff’s Objection to Issuance [sic] of Preliminary Injunction.” On November 29, 2010, AED filed “Plaintiff’s Response to Issuance of Preliminary Injunction”, providing the Court with AED’s substantive arguments regarding KDC’s motion for preliminary injunction. On December 2, 2010, KDC filed “Defendant KDC Investments, LLC’s Reply in Support of Motion for Preliminary Injunction.” Also on December 2, 2010, KDC filed “Defendant KDC Investments, LLC’s Motion to Strike Affidavits of Eric J. Kelly and Mark Wilburn.” On December 3, 2010, KDC filed an “Affidavit of Lee Chaklos in Support of Motion for Preliminary Injunction” and an “Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction”.

On December 6, 2010, the same day scheduled for oral argument, AED filed a “Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos” and a motion to shorten time to hear such motion at the hearing scheduled for December 6, 2010. Also on December 6, 2010, AED filed a pleading entitled “Plaintiff’s Notice of Filing” to which was attached the Idaho Secretary of State’s Corporation Reinstatement Certificate dated December 3, 2010. Oral argument was held on December 6, 2010. At that hearing, counsel for KDC had no objection to AED’s motion to shorten time to hear AED’s Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos. Argument was then heard on that motion to strike, at the conclusion of which this Court denied AED’s Motion to Strike Affidavits of Krystal Chaklos and Lee Chaklos.

Next, argument was heard on KDC’s motion to strike the affidavits of Eric J. Kelly and Mark Wilburn. At the conclusion of that argument, the Court granted KDC’s motion to strike the affidavit of Eric J. Kelly as to all paragraphs except paragraphs 15-22 and the exhibits attached referred to in those paragraphs, and the Court granted KDC’s motion to strike the affidavit of Mark Wilburn in its entirety. The Court then heard oral argument on KDC’s motion for preliminary injunction, following which the Court took said motion under advisement.

The bridge at issue is the Bellaire Toll Bridge which spans the Ohio River on the border of Ohio and West Virginia, connecting the towns of Bellaire, Ohio and Benwood, West Virginia. Memorandum in Support of Motion for Preliminary Injunction, p. 1. Demolition of the bridge was the subject of a federal lawsuit resulting in an Order requiring AED to demolish and remove the bridge by December 11, 2011. Amended Complaint, p. 1, ¶ 5.
KDC and AED entered into an Asset Purchase and Liability Assumption Agreement (purchase agreement) on May 20, 2010, in which AED sold the bridge to KDC for $25,000. Memorandum in Support of Motion for Mandatory Injunction, p. 2. AED's initiation of this litigation in Idaho has brought demolition efforts to a halt, according to KDC. Id. KDC now seeks a preliminary injunction "to prohibit AED from continuing to breach the Purchase Agreement by repudiating its validity and seeking to rescind the Agreement." Reply to Plaintiff's Objection to Defendant KDC Investment, LLC's Motion for Mandatory Injunction, p. 4.

Memorandum Decision and Order on Defendant KDC's Motion for Preliminary Injunction, pp. 1-6. This Court determined the remaining questions of fact and unresolved issues of law precluded it from granting KDC the injunctive relief it sought. Id., pp. 27-28.

On December 15, 2010, KDC filed its Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, and the Affidavits of Randall Schmitz, Lee Chaklos, and Krystal Chaklos in support of the motion. This Court's Pretrial Order, dated November 24, 2010, required the party opposing any motion for summary judgment to serve and file materials objecting thereto no later than 14 days before hearing on the motion. Hearing on KDC's motion for summary judgment was held on January 12, 2011. This Court heard oral argument on AED's motion to reconsider the Court's ruling that AED was not entitled to rescission of the contract on January 26, 2011. On January 31, 2011, the Court issued its Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration. On February 3, 2011, the parties stipulated to dismiss Counts I and II of KDC's counterclaim without prejudice. On February 4, 2011, AED filed the motion for reconsideration now before the Court. AED now asks this Court to vacate its earlier decision quieting title of the bridge in KDC, or alternatively, "set the matter for Jury Trial on the sole issue of whether AED would have sold the bridge without the agreement that AED perform the blast."
Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's
Motion for Summary Judgment, pp. 1-2.

Oral argument on AED's "Motion to Reconsider Court's Memorandum Decision
and Order Granting Defendant KDC's Motion for Summary Judgment" was held on
February 14, 2011. At oral argument, this Court took under advisement KDC's Motion
to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff's Motion to Reconsider
Court's Decision and Order Granting Defendant KDC's Motion for Summary Judgment.
That affidavit of Kelly, filed on February 4, 2011, sets forth how much AED would have
spent blasting the bridge, and AED's memorandum makes the argument as to how
much profit AED would have made from blasting the bridge, in an effort to show how
important the demolition agreement was to the purchase agreement. As shown below,
this is simply more extrinsic evidence that is not admissible, thus, it is not relevant.
Additionally, Kelly's affidavit lacked foundation.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed
(2001). A party making a motion for reconsideration is permitted to present new
evidence, but is not required to do so. Johnson v. Lambros, 143 Idaho 468, 147 P.3d
100 (Ct.App. 2006).

III. ANALYSIS.

In its Memorandum in Support of Motion for Reconsideration, AED argues the
purchase agreement between the parties is illegal because the consideration upon
which the agreement was based is illegal. Memorandum in Support of Plaintiff's Motion
to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's
Motion for Summary Judgment, p. 1. AED argues:
In this case, the agreement to sell the bridge was contingent upon execution and performance of a contact [sic] for AED to blast the bridge. KDC did in fact execute a document for AED to perform the work and has clearly stated that it had a present intent to perform that obligation incident to the agreement to buy the bridge. This consideration for the sale of the bridge consisted of the TWENTY-FIVE THOUSAND DOLLARS AND NO/100 CENTS ($25,000.00) recited in the contract, as well as the illegal agreement to perform the blasting work.

Id., p. 2. It is important to note that there is no citation given to the record for these three sentences written by counsel for AED. Perhaps the reason for a lack of citation is the fact that there is nothing in the record which supports any of these three sentences. The purchase agreement does not reference the demolition agreement in any way, and the purchase agreement contains a merger clause. The purchase agreement was entered into eleven days before the demolition agreement, if the demolition agreement was even entered into. Since the purchase agreement is clear and unambiguous and contains a merger clause, any extrinsic evidence is barred by parol evidence. Additionally, any extrinsic evidence would not be allowed because AED has not asked this Court to reconsider its dismissal of AED’s fraud claims. But, the ultimate frustration the Court has with AED’s counsel’s failure to cite any portion of the record comes from the fact that even if there were some basis to allow extrinsic evidence (there isn’t), AED’s counsel’s own client, Eric J. Kelly, Jr., testified that AED’s proposal to blast the bridge was just that, a “proposal”, and that the proposal was separate from sale of the bridge. Deposition of Eric J. Kelly, Sr., January 27, 2011, p. 76, L. 24 – p. 77, L. 13. AED’s counsel then makes the following claim: “Here, there is no question that the sales contract would not have been signed but for the illegal consideration of the blasting agreement.” Memorandum in Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment, p. 1. Counsel for AED repeats this mantra: “In this case, the
undisputed evidence is that AED would not have sold the bridge to KDC without the commitment by KDC to hire AED to blast the bridge." *Id.*, p. 4. Repetition does not make something true. Repetition does not create admissible evidence. Again, there is no citation to support these claims by AED's counsel and these bald claims are completely unsupported by any admissible evidence, and, in fact are contradicted by AED's own client Eric J. Kelly, Sr. AED states it would not have entered into the purchase agreement to sell the bridge to KDC but for the agreement that AED would perform blasting work. *Id.*, p. 3. AED argues the demolition agreement cannot be separated from the purchase agreement; "[b]oth are illegal if the blasting contract is illegal." *Id.*, p. 4. AED cites *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997), as support for its contention that because the sale of the bridge was based on illegal consideration (the demolition contract determined by this Court to be an illegal contract), the purchase agreement is unenforceable and the Court should vacate the portion of its Order declaring KDC the owner of the bridge. *Id.*, p. 5. In the alternative, AED requests the Court set for jury trial the sole issue of whether AED would have sold the bridge without the agreement that AED would perform demolition of the bridge. *Id.* But the issue of "whether AED would have sold the bridge without the agreement that AED would perform the demolition of the bridge" is completely irrelevant given the contract language in the purchase agreement.

KDC responds AED's argument that the demolition agreement was consideration for the purchase agreement is directly contrary to all admissible evidence. Defendants' Memorandum in Opposition to Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 2. KDC argues the purchase agreement itself recites the consideration which supported it
(which does not include the demolition agreement later determined by this Court to be illegal). *Id.*, pp. 3-4. KDC also notes the purchase agreement contains a merger clause, which limits the parties' agreement to that set forth in the purchase agreement itself. *Id.*, p. 4. KDC argues:

According to the plain and unambiguous language of the Purchase Agreement, the consideration for the Bridge was $25,000 plus those additional promises expressed within the terms of the Purchase Agreement. If the promises are not expressed within the Purchase Agreement, they are not part of the consideration for the sale of the Bridge. Nowhere within the Purchase Agreement is a separate agreement for AED to blast the Bridge discussed or even referenced. Contrary to AED's assertion, the illegal "demolition agreement" was not part of the consideration for the purchase and sale of the Bridge, nor was the sale contingent upon anything.

*Id.*, pp. 4-5. KDC notes Eric Kelly's deposition testimony in which he stated the purchase and demolitions agreements were separate; KDC posits the demolition agreement's being illegal has no bearing on the validity of the purchase agreement. *Id.*, p. 5. Finally, KDC argues AED appears to rely on extrinsic evidence to change the terms of the purchase agreement (which AED does not claim is ambiguous), in violation of the parol evidence rule. *Id.*, p. 6.

AED replies:

KDC argues that this Court should not consider the fact that the agreement to sell the bridge was entirely dependent on the agreement that AED be allowed to blast the bridge because this Court ruled that AED could not prove that KDC entered in the blast agreement without having any intention to perform that agreement.

Plaintiff's Reply to Defendants' Response on Motion to Reconsider, p. 1. AED goes on to state that parol evidence is always admissible to show the illegality of a contract. *Id.*, p. 2.

AED claims the issue of illegality can be raised at any time. Case law supports that proposition, even in light of a merger clause. ("parol evidence rule does not apply to
averments of fraud, misrepresentation, mutual mistake, or other matters which render a contract void or voidable.” *Tusch Enterprises v. Coffin*, 113 Idaho 37, 45, 740 P.2d 1022, 1030 (1987)). Here, AED argues since the “demolition agreement” has been found to be illegal, and since the demolition agreement formed the consideration for the “purchase agreement”, the purchase agreement is thus, illegal, and the purchase agreement should be set aside and title in the bridge quieted in AED. In making that argument, AED asks this Court to make unsupported inferential leaps and simultaneously ignore evidence. To buy into AED’s argument, the Court would have to infer the demolition agreement formed *the* consideration of the purchase agreement. That inference would ignore the fact that the according to the language of the purchase agreement, the purchase agreement is supported *solely* by $25,000.00 in consideration. The consideration is in fact just the opposite of what AED now claims. This Court would have to ignore the fact that the purchase agreement does not make one reference or even an implication that AED could blast the bridge, nor does it infer that a demolition agreement is in the making or is in any way being contemplated by the parties. This Court would have to ignore the fact that the purchase agreement was entered into before the demolition agreement, but after any discussions about the possibility of AED blasting the bridge had occurred, and yet, the purchase agreement is completely silent on the issue. Had the purchase agreement been entirely supported by illegal consideration, AED might be able to bring in parol evidence. But here, the purchase agreement is still supported by significant consideration in the amount of $25,000.00. That alone makes the purchase agreement “legal”. If other *additional* consideration turns out to be illegal, that does not turn the “legal” consideration (the $25,000.00) into illegal consideration. Had the illegal demolition agreement been
entered into before the purchase agreement, then there might be more to AED’s argument. But here, the demolition agreement did not even exist at the time the purchase agreement was entered into.

If AED’s counsel truly thought the purchase agreement was illegal due to a lack of consideration due to the demolition agreement being illegal, AED should have specifically raised such issue in its complaint or its amended complaint. It did not. There has never even been a prior argument that the purchase agreement was ambiguous, let alone illegal.

What has happened is, a couple of weeks ago this Court found the demolition agreement to be illegal (due to AED’s failure to obtain the proper licensing in West Virginia), then, AED’s counsel took that new legal determination, overlayed it on the Quiring case, and came up with this creative argument. The truly disturbing feature to AED’s argument is it ignores the fact that it was AED’s own foibles that caused the demolition agreement to be illegal. In essence, AED argues: “We screwed up and didn’t get a valid contractor’s license, which caused the demolition agreement to be invalid, and even though the purchase agreement doesn’t reference the demolition agreement or our [AED’s] ability to blast, and even though we’ve kept the $25,000 consideration for the purchase agreement, we would in any event like this Court to find that the purchase agreement the consideration of the demolition agreement, and since it was illegal, find the purchase agreement was illegal, and give us the bridge back.” That takes some nerve. To understand the complete irrationality of AED’s argument, this Court’s decision on the illegality of the demolition agreement must be reviewed.

This Court wrote, just over two weeks ago:

KDC argues AED’s breach of contract claim on the “demolition agreement” must be dismissed because the demolition contract was illegal given AED’s failure to obtain a valid contractor’s license before
entering into the demolition agreement. Memorandum in Support of Motion for Summary Judgment, pp. 9-12. KDC claims: “It is undisputed that AED did not have its West Virginia contractor’s license at the time of entering into the demolition agreement and did not receive it until October 17, 2010.” Id., p. 11. No citation is given for this claim. The Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8, places the fact in the record, and places the burden on AED to rebut the claim. Krystal Chaklos of KDC states:

KDC did not pay the $30,000 to AED because AED never supplied any of the necessary permits or licenses to perform operations in West Virginia. KDC repeatedly informed AED that it needed a West Virginia contractor’s license to perform the blasting. However, at no time did AED ever provide proof that it obtained a West Virginia contractor’s license.

Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment, p. 3, ¶ 8.

It is KDC’s contention that the demolition agreement between the parties is illegal, and therefore void, because it amounts to a contract to perform an act prohibited by law; that is, AED entered into the demolition agreement without the required West Virginia contractor’s license. Id., p. 9. AED does not deny it lacked a contractor’s license when it entered into the contract. AED instead argues the purpose of the contract was not illegal, thus, the contract itself is not rendered illegal. Response to Motion for Summary Judgment, p. 5. AED states it had the ability to obtain a valid West Virginia contractor’s license (and eventually did so), and further, West Virginia law does not render a contract illegal for failure to obtain proper government approval. Id., p. 6.

KDC cites for this Court the Idaho Supreme Court case Trees v. Kersey, 138 Idaho 3, 56 P.3d 765 (2002), as being factually similar. Id., p. 10. AED states the purpose of the agreement here, unlike the one in Trees, was not to break the law. Response to Summary Judgment, p. 5. In Trees, the general contractor plaintiff lost its public works license and bonding capacity, but entered into an agreement with a second general contractor, “which provided that the Kerseys would bid on the project in their name, procure the bond, insurance, and pay the bills, and Trees would be responsible for everything else, including acting as the general contractor on the job.” 138 Idaho 3, 5, 56 P.3d 765, 767. In Idaho, an illegal contract is one which “rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy.” Trees, 138 Idaho 3, 6, 56 P.3d 765, 768, citing Quiring v. Quiring, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). As quoted by KDC, a contract “made for the purpose of furthering any matter or thing which is prohibited by statute...is void.” Kunz v. Lobo Lodge, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App. 1999). Memorandum in Support of Motion for Summary Judgment, p. 11. The District Court in Trees had enforced the illegal contract between the parties, finding that a joint venture existed. The Idaho Supreme Court found this to be error. 138 Idaho 3, 9-10, 56 P.3d 765, 771-72. However, because of the unique facts of the case,
particularly the District Court's finding that Kerseys had committed many instances of fraud independent of the wrong committed to the public, the Idaho Supreme Court opted not to strictly apply the illegality doctrine, but rather applied a fraud exception. 138 Idaho 3, 10, 56 P.3d 765, 772. (holding the Kerseys could not benefit from the joint venture agreement, engage in fraudulent conduct, and then seek to avoid enforcement of the agreement.)

In their Purchase Agreement in this case, AED and KDC agreed the terms of the agreement be controlled and interpreted according to Idaho law. Purchase Agreement, p. 11, ¶ 36. Such choice of law provisions are addressed by Idaho Code § 28-1-105:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or such other state or nation shall cover their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to the state.

I.C. § 28-105(1). The requirements of the Idaho Contractor Registration Act (and/or the Idaho Public Works Contractors Act) and the West Virginia Contractor Licensing Act are substantially similar. Both require a contractor to be registered or licensed in order to engage in the business or act in the capacity of a contractor or when holding himself out as a contractor. See I.C. § 54-1902(1); I.C. § 54-5201(1); W.Va.Code § 21-11-1. Both the Idaho and West Virginia Codes contemplate the licensing and registration requirements to apply when a person submits a bid to perform construction; there is no requirement that actual construction be performed. I.C. § 54-1901(b); I.C. § 54-5203(4)(a); W.Va. Code § 21-11-3(c). Because of the choice of law provision in the Purchase Agreement, Idaho law controls regarding submission of bids and entering into contracts to perform construction while not properly licensed and/or registered.

A court has a duty to sua sponte raise the issue of illegality of a contract. Barry v. Pacific West Construction, Inc., 140 Idaho 827, 832, 103 P.3d 440, 445 (2004) (holding a contract between a general contractor and subcontractor on a public works project was void for failure of the subcontractor to have a public works license and that both the district courts and Appellate Courts of Idaho have a duty to raise the issue of illegality); ParkWest Homes, LLC v. Barnson, 149 Idaho 603, ___, 238 P.3d 203, 208 (2010). In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, “because the contract constituted an agreement to perform an illegal act.” Barry, 140 Idaho 827, 832, 103 P.3d 440, 445. The Idaho Supreme Court in Barry found the contract between a general contractor and the illegally unlicensed subcontractor to be illegal and therefore unenforceable, but then went on to determine whether either party was entitled to its...
damages outside the existence of a legal contract; the Court held the illegally unlicensed subcontractor was entitled to recover under the theory of unjust enrichment. 140 Idaho 827, 833, 103 P.3d 440, 446. The Trees decision, as argued by AED, is likely inapposite as the purpose of the contract in Trees was from its inception to engage in illegal behavior.

Here, the facts are more similar to those in Barry. The contract would have been illegal by virtue of AED’s failure to properly register/and or be licensed. In the instant matter, KDC’s repudiation of the contract was based, at least in part, upon AED’s failure to obtain the necessary licensing/registration. The date on which precisely AED obtained its West Virginia contractor’s license is unclear, but likely did not happen until October 17, 2010. It is undisputed that AED did not have its West Virginia contractor’s license at the time of contracting. In his affidavit, dated November 24, 2010, Mark Wilburn testifies AED “has acquired all necessary permits to demolish the bridge, other than permission of the United States Coast Guard.” Affidavit of Mark Wilburn, p. 1, ¶ 3. But November 24, 2010, is not the relevant time period.

Even in the light most favorable to AED, the non-moving party, the motion for summary judgment by KDC on the issue of illegality of the underlying demolition agreement must be granted. Because a contractor must be licensed at the time a bid is submitted, and AED has presented this Court with no evidence as to what precise date upon which it became licensed, AED could not have properly submitted the bid in spring of 2010 and then later secure appropriate licensing in the fall of 2010. At the time of actual performance of this executory contract, it is likely that AED could have had, or perhaps even would have had, any necessary licensing/registration to perform the contract as agreed upon by the parties. However, there is simply nothing before the Court to indicate that this licensing/registration was in place at the time AED submitted the bid which gave rise to the demolition agreement.

KDC is entitled to summary judgment on its claim that AED lacked the required license and lacked the required permits at the time it entered into the demolition agreement. The demolition agreement is an illegal contract. KDC is entitled to summary judgment against AED on its breach of contract claims on that agreement.

Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration, pp. 12-16. After re-reading this decision, in addition to the obvious fact that it was AED’s mistake in not obtaining the proper licensing that cause the demolition agreement to be illegal, another fact should jump out at the reader. The purpose of the demolition agreement was to, oddly enough, demolish a bridge. AED didn’t have the proper licensing to do that job at
the time it entered into the demolition agreement, which meant, by law, AED lacked the ability to enter into that demolition agreement. The purpose of the purchase agreement was to sell the bridge to AED. No special licensing is required to sell the bridge. As just mentioned, this Court wrote:

In Idaho, where a public works contractor does not fall within an exemption listed in I.C. § 54-1903, and is required to have a public works license, the failure by a subcontractor to have the requisite license will render its contract with a general contractor illegal, “because the contract constituted an agreement to perform an illegal act.” Barry, 140 Idaho 827, 832, 103 P.3d 440, 445.

Id., p. 15. Thus, AED’s demolition agreement with KDC is an agreement to perform an illegal act (due solely to AED’s own negligent act in failing to get the proper licensing, an issue only AED controlled), and thus, an illegal agreement. However, nothing about AED’s negligent act caused AED to be unable to convey title to the bridge eleven days before any demolition agreement was entered into. Nothing about AED’s own negligent act in failing to obtain the proper licensing caused AED to lack the capacity to contract with KDC to sell KDC the bridge.

To allow AED the ability to use AED’s own error in failing to get the required licensing (which seven months later this Court determined caused the demolition agreement to be illegal), to now have this Court also declare the purchase agreement illegal, would allow AED, only with the benefit of hindsight (this Court’s decision two weeks ago) to transcend both space and time, as only AED knew at the time that it lacked the required license, to invalidate the sale of the bridge. This would allow any party in AED’s position to surreptitiously create its own poison pill, to be used later when that party finds such position advantageous. This Court, and all of contract law, will not countenance such an absurd result.
AED contends that Quiring is directly on point as it also dealt with a signed contract making no mention of a separate, illegal agreement, but which would not exist but for the separate illegal agreement. “Quiring is directly on point and because the execution of the sales contract was entirely dependent on the illegal blast contract, the sales contract is also illegal.” Plaintiff’s Reply to Defendants’ Response on Motion to Reconsider, p. 2.

In Quiring, the case relied upon by AED, divorcing spouses appeared before a notary at a title company in Nampa, Idaho and signed an agreement (later held to be illegal as against public policy) and a quitclaim deed. 130 Idaho 560, 562, 944 P.2d 695, 697. Lynn Quiring (Lynn) had accused Ron Quiring (Ron) of sexual impropriety and allegedly threatened to contact law enforcement if Ron did not quitclaim the couple’s residence to her. Ron drafted a handwritten agreement stating he would relinquish his interest in the residence so long as: any and all past differences be forgotten, the parties part amicably with no further contact, Ron would pay no further compensation as his amount of equity in the home compensated his wife and children for any support until the children reached an age where no further support was required, and that a divorce was pending and the details of personal property in the home would be separately agreed upon. Id. The Idaho Supreme Court found the consideration to be that “Ron’s acquiescence in the quitclaim deed was supported by Lynn’s acquiescence in the agreement. 130 Idaho 560, 567, 944 P.2d 695, 702. The Court held the agreement was unenforceable as against public policy for two reasons: (1) Lynn could not contract to refrain from contacting law enforcement regarding allegations of sexual improprieties with a child, and (2) the quitclaim deed conveyed property to Lynn based on consideration that amounted to obtaining the transfer of
property by threat of arrest or exposure to hatred, contempt, or ridicule. *Id.* Ron testified that the agreement meant Lynn would not report the alleged sexual improprieties to law enforcement, amounting to theft by extortion. *Id.* Because the Agreement was held illegal, and the agreement formed the sole consideration for the quitclaim deed, the magistrate’s distribution of property according to the agreement was reversed and the determination giving Lynn sole title to the property through the quitclaim deed was reversed. 130 Idaho 560, 568, 944 P.2d 695, 703. In the present case, the purchase agreement is supported by consideration (the $25,000.00), the purchase agreement specifically states the consideration is limited to what is expressed to be consideration in the purchase agreement and nowhere in the purchase agreement is the demolition agreement ever discussed.

*Quiring* is not on point. First of all, *Quiring* is distinguishable from the instant matter temporally. In *Quiring*, the agreements to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed by threat in violation of I.C. § 18-2403 were entered into *at the same time*. The agreements were executed before the same notary at the same time. In the present case, on the other hand, it is undisputed that the purchase agreement was entered into on May 10, 2010. A separate demolition agreement *may* have been entered into by the parties on June 1, 2010, although even that is unclear because the demolition agreement is entitled a “proposal” and no agent of KDC’s signed the demolition agreement’s first page, accepting the agreement, there may remain some question regarding the propriety of the agreement. Nonetheless, because the two agreements in the instant matter are dated over three weeks apart, and the two agreements in *Quiring* occurred simultaneously, *Quiring* is simply not instructive. Second, in addition to the
temporal distinction, the instant matter is distinguishable from *Quiring* factually. In *Quiring*, the agreement to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed, were consideration for each other. The two agreements were two sides of the same coin. In the present case, there is no reference in the purchase agreement to allow AED to perform the demolition of the bridge it was selling to KDC.

It is patently obvious AED believes it had a promise by KDC that KDC would use AED to blast the bridge. AED has a three-fold problem promulgating this belief. First, AED has no admissible evidence to prove such "belief" because the purchase agreement it entered into is not ambiguous. Second, Kelly's deposition cited above shows the "belief" is at the very least internally contradicted by AED, if not unfounded. Third, from a legal standpoint, this belief is irrelevant. The intention of the parties to a contract is determined by what intention is expressed by the language used; the issue is not the intention existing in the minds of the parties. *Tapper v. Idaho Irr. Co.*, 36 Idaho 78, 210 P. 591 (1922). See also *Boesiger v. DeModena*, 88 Idaho 337, 399 P.2d 635 (1965) (intent of parties to written agreement is to be ascertained from the language contained therein); *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160, 349 P.2d 986 (1960) (a contract must be construed according to the plain language used by the parties); *Wood v. Simonson*, 108 Idaho 699, 701 P.2d 319 (Ct.App.1985) (when the language of a contract is clear, the meaning of that contract and the intent of the parties must be determined from the plain meaning of the contract's own words).

What KDC argues, and what has not been properly disputed by AED, is that the purchase agreement was a separate agreement from the demolition agreement. Thus, there is no reference in the purchase agreement to any existing or future demolition
agreement. This Court has found the purchase agreement is not ambiguous. Absent a showing by AED that the purchase agreement was ambiguous (which AED has failed to do), this Court cannot consider parol evidence and alter the written agreement of the parties. See Cannon v. Perry, 144 Idaho 728, 170 P.3d 393 (2007) (parol evidence is admissible to clarify an ambiguous contract). This Court has not determined the purchase agreement to be illegal, and there is simply nothing before the Court (other than Eric Kelly's arguably self-serving affidavit) to indicate that the demolition agreement was to form a portion of the consideration supporting the purchase agreement, which was entered into more than one week prior to the demolition agreement and makes no reference to it.

IV. CONCLUSION AND ORDER.

For the reasons set forth above,

IT IS HEREBY ORDERED AED's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED KDC'S Motion to Strike the Affidavit of Eric J. Kelly in Support of Plaintiff's Motion to Reconsider Court's Decision and Order Granting Defendant KDC's Motion for Summary Judgment is GRANTED.

Entered this 14th day of February, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 15 day of February, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

[Signatures and contact information]
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho Corporation, ) CASE NO. CV2010-7217
Plaintiff, ) ORDER VACATING JURY TRIAL
vs. )
KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRISTAL CHAKLOS, )
Defendant. )

________________________________________

Based upon the Memorandum Decision and Order Denying Plaintiff AED's (Second) Motion for Reconsideration having been filed,

IT IS HEREBY ORDERED that the Jury Trial scheduled for February 22, 2011 is vacated.

ENTERED this 15th day of February, 2011.

JOHN T. MITCHELL
DISTRICT JUDGE
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of Feb., 2011, a true and correct copy of the foregoing Order was faxed to:

Arthur Bistline
665-7290✓

Randy L. Schmitz
208-395-8585 ✓

CLIFFORD T. HAYES
CLERK OF THE COURT

By
Deputy Clerk
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRYS TAL CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned has called up for hearing before The Honorable John T. Mitchell on Wednesday, March 23, 2011, at 2:30 p.m. or as soon thereafter as counsel may be heard, at the Kootenai County Courthouse, the following matter(s):

MOTION TO ALTER OR AMEND

If these matters are resolved, the moving party shall contact the judge's office to cancel this hearing.

DATED this 15th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,

and LEE CHAKLOS and KRYSTAL

CHAKLOS, individually,

Defendants.

COMES NOW defendants, KDC Investments, LLC, Lee Chaklos and Krystal Chaklos ("Defendants") by and through their counsel of record, and respectfully submit the following
Verified Memorandum of Costs and Fees.
I. INTRODUCTION AND PROCEDURAL HISTORY

As this Court is well aware, this case involves the ownership and demolition of the Bellaire Toll Bridge which crosses the Ohio River from Bellaire, Ohio, to Benwood, West Virginia (the “Bridge”). On May 20, 2010, Plaintiff AED, Inc. (“AED”) sold the Bridge to Defendant KDC Investments, LLC (“KDC”).

On August 23, 2010, AED filed its Complaint and Demand for Jury Trial (“Complaint”). The Complaint was vague, ambiguous and did not set for a single cause of action. On September 15, 2010, Defendants filed their Motion for More Definitive Statement seeking an Order from the Court directing AED to amend its Complaint and specifically identify its allegations and causes of action. After oral argument on Defendants’ Motion, the Court issued its Order regarding Defendants’ Motion for More Definitive Statement on October 26, 2010.

On October 29, 2010, AED filed its Amended Complaint and Demand for Jury Trial (“Amended Complaint”) naming not only KDC as a defendant, but also Krystal Chaklos and Lee Chaklos as defendants in their individual capacity. In its Amended Complaint, AED alleged fraud in the inducement, breach of contract, and specific performance.

On November 9, 2010, KDC filed its Amended Answer to Amended Complaint and Demand for Jury Trial and Defendant KDC Investments, LLC’s Amended Counterclaim (“Amended Answer” or “Amended Counterclaim”). As part of its Amended Counterclaim, KDC asserted a cause of action to quiet title to the Bridge in KDC’s name.

On November 17, 2010, KDC filed a motion for preliminary injunction. Argument on the motion was heard on December 6, 2010. On December 15, 2010, the Court issued its ruling denying KDC’s motion for preliminary injunction.
On December 15, 2010, KDC filed its Motion for Summary Judgment along with supporting pleadings. On January 28, 2011, the Court entered its Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration (“Decision”). The numerous filings submitted by the parties between December 15, 2010 and the Court’s January 28, 2011 are fully detailed in the Court’s Decision, and will not be repeated here.

On February 4, 2011, AED filed its Motion to Reconsider the Court’s Decision. On February 8, 2011, the Court entered Judgment in favor of the Defendants. On February 15, 2011, the Court entered its Memorandum Decision and Order Denying Plaintiff AED’s (Second) motion for Reconsideration.

II. COSTS

A. Defendants are the Prevailing Party in this Action

Idaho Rule of Civil Procedure 54(d)(1)(B) defines a “Prevailing Party” as follows:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

The determination of whether there is a prevailing party for purposes of an award of costs or attorney’s fees, and if so to what extent, is committed to the sound discretion of the trial court.

“In reaching the decision as to whether a party ‘prevailed,’ Rule 54(d)(1)(B) requires the court to consider three areas of inquiry: (a) the final judgment or result obtained in the action in relation to the relief sought by the respective parties; (b) whether there were multiple claims or issues between the parties; and (c) the extent to which each of the parties prevailed on each of the issues or claims.” Chadderdon v. King, 104 Idaho 406, 411, 659 P.2d 160, 165 (Ct. App. 1983).

The “result obtained” may be the product of a court judgment or of a settlement reached by the parties. Sainsbury Construction Co., Inc. v. Quinn, 137 Idaho 269, 274, 47 P.3d 72, 777 (2002).

As the Court is fully aware, this matter involved two separate agreements (or alleged agreements), one for the purchase and sale of the Bridge ("Purchase Agreement"), and one to blow the Bridge up ("Demolition Agreement"). AED was attempting to rescind the purchase Agreement and recover lost profits for the alleged Demolition Agreement. In granting KDC’s Motion for Summary Judgment, the Court ruled: AED admittedly failed to assert any claim against Lee Chaklos upon which relief can be granted; that the alleged demolition agreement was illegal and, therefore, void; that AED’s claim for fraud failed as a matter of law because AED had no right to rely on any alleged misrepresentations of KDC when AED was not licensed as a contractor in West Virginia and, therefore, could not enter into any such contract as of June 1, 2010, as well as because it failed to present any evidence that at the time of entering into the alleged demolition agreement, KDC had any intent to defraud AED; that AED was not entitled to rescind the Purchase Agreement because it failed to make a valid tender prior to filing the instant lawsuit; AED was not entitled to specific performance due to the fact the alleged demolition agreement was void and because legal damages would have sufficiently made AED whole; and that KDC’s title to the Bridge shall be quieted. As such, AED’s claims were denied in whole and

DEFENDANTS KDC INVESTMENTS, LLC AND LEE CHAKLOS AND KRYSAL CHAKLOS'S VERIFIED MEMORANDUM OF COSTS AND FEES - 4
KDC received everything it sought in this action. Therefore, Defendants are the prevailing party of this action.

B. **Defendants are Entitled to Costs Outlined in I.R.C.P. 54(d)(1) as a Matter of Right**

1. **COSTS AS A MATTER OF RIGHT - Idaho Rule of Civil Procedure 54(d)(1)(C)**

   a) **COURT FILING FEES 54(d)(1)(C)(1)**

   - Appearance Fee
   - Total claimed pursuant to 54(d)(1)(C)(1) $62.95

   b) **CHARGES FOR REPORTING AND TRANSCRIPTIONS 54(d)(1)(C)(9) and (10)**

   - Deposition of Eric Kelly, January 27, 2011
   - Deposition Lisa Kelly, January 27, 2011
   - Total claimed pursuant to 54(d)(1)(C)(9)(10): $2,447.45

   **TOTAL OF COSTS AS A MATTER OF RIGHT** $5,670.56

C. **Defendants are Entitled to Discretionary Costs as This Case was Exceptional**

   Idaho Rule of Civil Procedure 54(d)(1)(D) provides “[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.” A cost is necessary and exceptional and reasonably incurred, where such costs are justified by the complexity and nature of the case. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 474, 36 P.3d

**DEFENDANTS KDC INVESTMENTS, LLC AND LEE CHAKLOS AND KRISTAL CHAKLOS'S VERIFIED MEMORANDUM OF COSTS AND FEES - 5**
218, 227 (2001). A cost is also exceptional when it is incurred because the case was itself exceptional given the magnitude and nature of the case. Hayden Lake Fire Protection District v. Alcorn, 141 Idaho 307, 313, 109 P.3d 161, 168 (2005). Discretionary costs may include costs for photocopying, travel expenses, and additional costs for expert witnesses. Id.

The determination of whether to award costs pursuant to Idaho Rule of Civil Procedure 54(d)(1)(D) is a matter of discretion with the trial court. Roe v. Harris, 128 Idaho 569, 917 P.2d 403 (1996). As for the requirement that discretionary costs be exceptional, the Idaho Supreme Court has held that costs may be exceptional based on the nature of the case itself, i.e. if the case itself is exceptional. Id. For example, in Great West Plaines Equipment v. Northwest Pipeline Corporation, it was determined that the district court properly awarded discretionary costs to the prevailing party for items such as photocopying, travel, exhibit preparation and expert witness fees on the grounds that such costs were reasonable, necessary and exceptional "given the complexity and nature of the case." 136 Idaho at 474-75, 36 P.3d at 226-27. In Richard J. and Esther E. Wooley Trust v. Debest Plumbing, Inc., 133 Idaho 180, 983 P.2d 834 (1999), the Supreme Court of Idaho upheld the trial court's granting of discretionary costs, including costs for experts over and above the amount allowed as a matter of right as well as travel expenses for attorneys to attend depositions, in a negligence action. Id. at 136 Idaho at 180, 186-187, 983 P.2d at 840-841. In Puckett v. Verska, 144 Idaho 161, 158 P.3d 937, (2007), the plaintiff recovered damages from defendant in a medical malpractice action. The trial court awarded the plaintiff $120,714.85 in discretionary costs, which included the entirety of plaintiff's expert fees in excess of amounts allowed as a matter of right and travel expenses. Id. Puckett, 158 P.3d at 945.

DEFENDANTS KDC INVESTMENTS, LLC AND LEE CHAKLOS AND KRYSAL CHAKLOS'S VERIFIED MEMORANDUM OF COSTS AND FEES - 6
The instant action was exceptional based upon the exigent circumstances surrounding the case. Establishing ownership of the Bridge, and establishing ownership of the Bridge quickly, was of utmost importance in this matter. As the Court is aware, the parties were subjected to deadlines for the demolition of the Bridge and pressure from the United States Coast Guard, the City of Benwood and the Federal Courts. As such, the instant action was tried extremely aggressively and urgently resulting in extensive travel, online research and motion practice. Specifically, AED filed its initial Complaint on August 23, 2010. Between August 23, 2010 and the date of the Court's motion for summary judgment decision, Defendants filed the following motions or pleadings:

- Motion for More Definite Statement with a Motion for Expedited hearing;
- Answer and Counterclaim;
- Motion for Preliminary Injunction with several supporting affidavits;
- Motion to Strike the Affidavits of Eric Kelly and Mark Wilburn filed in Opposition to Motion for Preliminary Injunction;
- Application for Default;
- Motion for Summary Judgment with supporting affidavits;
- Motion to Strike the Affidavits of Mr. Bistline, Mr. Wilburn and Mr. Kelly in Opposition to Motion for Summary Judgment and a Motion to Shorten Time;
- Objection to Plaintiff's Motion to Shorten Time re: Hearing on Motion to Reconsider; and
• Motion to Strike the Affidavit of Eric Kelly in Support of Plaintiff's Motion to Reconsider Court's Decision and Order Granting Defendant KDC's Motion for Summary Judgment.

Similarly, AED filed several motions as well:

• Motion to Strike Portions of Krystal Chaklos's and Lee Chaklos's Affidavits, with accompanying Motion to Shorten Time;
• Expert Witness List;
• Notice of Filing Corporate Reinstatement with Secretary of State;
• Motion to Reconsider Memorandum Decision on Preliminary Injunction with accompanying Motion to Shorten Time;
• Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment with accompanying Motion to Shorten Time; and
• Plaintiff's Notice of Filing in Support of Motion to Reconsider.

The extensive motion practice required of this case and the preparation for a trial set for February 22, 2011, made the instant action exceptional.

1) TRAVEL EXPENSES:


Defendants' counsel incurred travel expenses that were required to attend depositions of plaintiffs in Coeur d'Alene as well as attend several hearings in Coeur d'Alene. These costs
were reasonable, necessary and exceptional. In particular, Defendants’ counsel was required to
make an additional trip to Coeur d’Alene to argue plaintiff’s first Motion for Reconsideration, as
plaintiff failed to properly notice the motion to be heard at the same time as the Motion for
Summary Judgment.

Air fare to Coeur d’Alene to Argue Motion for Preliminary Inj.,  
-Lodging, meals, and auto rental 
$299.40  
$352.99

Air fare to Coeur d’Alene to Argue Motion for Summary Judgment,  
-Lodging, meals, and auto rental 
$305.40  
$331.91

Air fare to Coeur d’Alene to Argue Motion to Reconsider  
Memorandum Decision holding that Plaintiff is Not Entitled  
to Rescission, and to take deposition(s) of Eric Kelly and Lisa Kelly  
-Lodging, meals, and auto rental 
$313.40  
$645.49

Total discretionary amount for travel expenses  
$2,248.59

2) Westlaw Research

As addressed above, the instant matter included significant motion practice, and the
motions at issue involved numerous complex legal issues. As such, Defendants were required to
prepare extensive legal research for purposes of defending itself in this lawsuit and against the
allegations and legal theories brought forth by plaintiff. Defendants’ electronic legal research
was exceptional and necessary and Defendants request the following amounts as discretionary
costs:

Westlaw Expenditures for September 2010  
$ 425.20

Westlaw Expenditures for November 2010  
$1,573.68

Westlaw Expenditures for December 2010  
$ 932.83

Westlaw Expenditures for January 2011  
$ 428.07

DEFENDANTS KDC INVESTMENTS, LLC AND LEE CHAKLOS AND KRYSTAL CHAKLOS’S
VERIFIED MEMORANDUM OF COSTS AND FEES - 9
Total for Westlaw Research $3,359.78

III. ATTORNEY AND PARALEGAL FEES

A. Defendants are Entitled to Attorney and Paralegal Fees Pursuant to I.C. § 12-120(3).

In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court, to be taxed and collected as costs.

Under Idaho Code §12-120(3), the prevailing party in a civil action involving a commercial transaction is entitled to an award of reasonable attorney fees. A commercial transaction is any transaction except those for personal or household purposes. I.C. § 12-120(3).

There is a two-stage analysis necessary to determine whether a prevailing party is entitled to an award of attorney fees under Idaho Code § 12-120(3). Great Plains Equip. Inc. v. Northwest Pipeline Corp., 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (citing Brooks v. Gigray Ranches, 128 Idaho 72, 910 P.2d 744 (1996)). First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery. Id.

In Idaho, the underlying basis for the action must be a commercial transaction; it is not enough that a commercial transaction is tangentially involved. See, e.g., Idaho Newspaper Foundation v. City of Cascade, 117 Idaho 422, 424, 788 P.2d 237, 239 (Ct. App. 1990). As the Idaho Supreme Court has stated:

[T]he award of attorney’s fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney’s fees
from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.


In the instant matter, plaintiff's claims arose directly out of two contracts entered into with KDC. The lawsuit involved attempts to rescind the Purchase Agreement, as well as numerous issues related to the demolition agreement, including, whether the agreement was induced by fraud, whether it met all the requirements for a valid contract, whether it was breached, and finally, whether it was illegal and therefore void. Furthermore, KDC had to bring a claim to enforce the Purchase Agreement and quiet title to the Bridge in its name.

As such, Defendants are entitled to an award of attorneys' fees and expenses incurred to defend against those claims pursued by plaintiff and prosecute KDC's counterclaim pursuant to Idaho Code § 12-120(3).

In determining the amount of attorney fees to award a party in a civil action, the Court shall consider the following factors pursuant to Rule 54(e)(3), I.R.C.P.:

a. The time and labor required

b. The novelty and difficulty of the questions

c. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law

d. The prevailing charges for like work

e. Whether the fee is fixed or contingent

f. The time limitations imposed by the client or the circumstances of the case

g. The amount involved and the results obtained

h. The undesirability of the case
i. The nature and length of the professional relationship with the client

j. Awards in similar cases

k. The reasonable cost of automated legal research (Computer Assisted Legal Research); and

l. Any other factor which the court deems appropriate in the particular case.

Defendants incurred $68,327.50 in attorney and paralegal fees in defending and prosecuting this matter. (See Affidavit of Counsel in Support of Defendants' Verified Motion for Costs, (“Counsel Aff.”), ¶ 2) The $68,327.50 in fees incurred by Defendants in defending this action and prosecuting ADC’s counterclaim is reasonable when the above factors and the overall circumstances of this case are considered.

First, the attorneys’ hourly rates are commensurate with the experience and qualifications of each attorney. Mr. Schmitz’s hourly rate of $190 per hour is reasonable for an attorney who has over 11 years of experience as a private attorney. (Counsel Aff., ¶ 5.) Mr. Burke’s hourly rate of $225 is reasonable for an attorney who has 19 years of experience as a private attorney and litigator. (Counsel Aff., ¶ 4.) Mr. Comstock’s hourly rate of $190 is also reasonable given that he has been in private practice for over 7 years. (Counsel Aff., ¶ 6.) Ms. French’s rate of $160 an hour is reasonable as an attorney with two years experience as a clerk to an Idaho Supreme Court Justice and recently joined the firm. (Counsel Aff., ¶ 7.) The hourly rates charged for paralegal work $50-$100 per hour is reasonable. (Counsel Aff., ¶ 8.) The hourly rate of all attorneys and paralegals is also reasonable and customary for this area. (Counsel Aff., ¶ 4-8.)

Second, the background and context of this case, and actions that the attorneys needed to take, justify the fees incurred. Specifically, substantial motion practice was required from the
outset of this case based upon the fact plaintiff's original claims were somewhat challenging to comprehend and fully understand, the time sensitive pressure of this case which required Defendants to file several motions in an attempt to expeditiously determine the ownership of the Bridge even prior to the February 2011 trial date. Defendants were also forced to file numerous motions to strike various affidavits submitted by AED that were untimely, replete with hearsay lacked foundation, or were irrelevant. Further, as a result of the extensive motion practice engaged in by Defendants, then defeated all of AED's claims on summary judgment and had title to the Bridge quieted in KDC's name.

In summary, the attorneys' fees and paralegal's fees in the amount of $68,327.50 should be deemed by this Court as reasonably and necessarily incurred, and this Court should order plaintiff to pay these fees in their entirety to Defendants.

IV. CONCLUSION

Based upon the foregoing, Defendants respectfully request the Court award them costs and fees in this matter as outlined above.

RESPECTFULLY SUBMITTED this 22nd day of February, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By

John J. Burke - Of the Firm
Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 2011, I caused to be served a true copy of the foregoing DEFENDANTS KDC INVESTMENTS, LLC, LEE CHAKLOS AND KRISTAL CHAKLOS'S VERIFIED MEMORANDUM OF COSTS AND FEES, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

Honorable John T. Mitchell
Kootenai County Courthouse
Coeur d'Alene, ID 83814

Attention: Arthur Bistline

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy (208) 665-7290
Email arthurmooneybistline@me.com

Hand Delivered
Overnight Mail
Telecopy (208) 446-1132

Randall L. Schmitz
RANDALL L. SCHMITZ, being duly sworn, deposes and says:

1. I am one of the attorneys representing the Defendants, KDC Investments, LLC, Krystal Chaklos and Lee Chaklos ("Defendants"), in the above-captioned case. I have personal
knowledge of the costs and expenses incurred by Defendants in this matter. The costs and expenses set forth in Defendants' Verified Memorandum of Costs and Fees, filed contemporaneously herewith and incorporated by this reference, are reasonable costs that were actually incurred by Defendants in this litigation, and to the best of my knowledge and belief, the costs are correct and reasonable and necessary and in compliance with Rule 54(d) of the Idaho Rules of Civil Procedure.

2. Attached hereto as Exhibit “A,” and incorporated herein by this reference, is a true and accurate copy of my firm’s Detail Fee Transaction File List, reflecting the total fees incurred by Defendants in this litigation, in the amount of $68,327.50.

3. The attorneys and paralegals with their corresponding hourly rates are as follows:

   John J. Burke                  $225/hour
   Randall L. Schmitz            $190/hour
   Chris D. Comstock             $190/hour
   Mikela A. French              $160/hour
   Julie A. Shipley (paralegal)  $100/hour
   Baxter Q. Andrews-Knight (paralegal) $100/hour

4. Mr. Burke’s hourly rate is reasonable and customary in the area for an attorney who has 19 years of experience as a private attorney and litigator.

5. Mr. Schmitz’s hourly rate is reasonable and customary in the area for an attorney who has 11 years of experience as a private attorney and litigator.

6. Mr. Comstock’s hourly rate is reasonable and customary in the area for an attorney who has 7 years of experience as a private attorney and litigator.
7. Ms. French's hourly rate is reasonable and customary in the area for an attorney who has two years experience as a clerk to an Idaho Supreme Court Justice and who has recently joined our firm.

8. The hourly rates charged for paralegal work is reasonable in the Idaho Legal market.

9. Attached hereto as Exhibit "B," and incorporated herein by this reference, is a true and accurate copy of my firm's Detail Cost Transaction File List, reflecting the various costs incurred and paid/to be paid by Defendants in this litigation.

10. Attached hereto as Exhibit "C," and incorporated herein by this reference, are true and accurate copies of invoices for court reporting services at depositions and transcripts of deposition testimony for those depositions that were noticed by Defendants in the following amounts:

| Deposition of Eric Kelly, January 27, 2011       | $2,147.70 |
| (original plus one copy)                         |           |
| Deposition Lisa Kelly, January 27, 2011          | $299.75   |
| Total:                                           | $2,447.45 |

11. Attached hereto as Exhibit "D," and incorporated herein by this reference, is a true and correct copy of Travel Expense Account, with attached receipts, reflecting travel related to the hearing on Defendants' Motion for Preliminary Injunction, for the dates December 6, 2010 and December 7, 2010, as follows:

| RLS (12/6-12/7/2010) (airfare)                  | $299.40   |
| RLS (12/6/2010) (lodging, auto rental, meals, fuel, parking) | $352.99 |

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' VERIFIED MEMORANDUM OF COSTS - 3
12. Attached hereto as Exhibit “E,” and incorporated herein by this reference, is a true and correct copy of a Travel Expense Account, with attached receipts, reflecting travel related to the hearing on Defendants’ Motion for Summary Judgment, for the dates January 11, 2011 and January 12, 2011, as follows:

RLS (1/11-1/12/2011) (airfare) $305.40
RLS (1/12/2011) (lodging, auto rental, meals, fuel, parking) $331.91

13. Attached hereto as Exhibit “F,” and incorporated herein by this reference, is a true and correct copy of Travel Expense Account, with attached receipts, reflecting travel related to the hearing on Plaintiff’s First Motion for Reconsideration and the depositions of Eric Kelly and Lisa Kelly for the dates January 26, January 27, and January 28, 2011, as follows:

RLS (1/26-1/28/2011) (airfare) $313.40
RLS (1/26-1/28/2011) (lodging, auto rental, meals, fuel, parking) $645.49

FURTHER YOUR AFFIANT SAYETH NAUGHT.

SUBSCRIBED AND SWORN to before me this 22nd day of February, 2011.

Randall L. Schmitz

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires: 3/30/12

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS’ VERIFIED MEMORANDUM OF COSTS - 4
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 2011, I caused to be served a true copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' VERIFIED MEMORANDUM OF COSTS, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814

Honorable John T. Mitchell
Kootenai County Courthouse
Courtesy Copy

Arthurmooneybistline@ms.com

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy (208) 665-7290
Email arthurmooneybistline@ms.com

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy (208) 446-1132

Randall L. Schantz

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' VERIFIED MEMORANDUM OF COSTS - 5
### Timekeeper: Julie Shipley

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Telephone conference with J. Domozick regarding retention and defense planning; KDC INVESTMENTS, LLC

 Correspondence to J. Domozick regarding retention agreement and requested documents; KDC INVESTMENTS, LLC

 Develop strategy for discovery and trial (February trial setting); KDC INVESTMENTS, LLC

 Analysis of plaintiff's response to motion for summary judgment and motion for reconsideration; KDC INVESTMENTS, LLC

 Review reply memorandum in support of supplemental submission to Court, review notice of deposition for plaintiffs; KDC INVESTMENTS, LLC

 Review defendants' responses to plaintiff's first set of discovery; KDC INVESTMENTS, LLC

 Strategy conference regarding case management issues; KDC INVESTMENTS, LLC

 Analyze over 120 e-mails and organize same for attorney review; KDC INVESTMENTS, LLC

 Additional analysis of documents received from client; KDC INVESTMENTS, LLC

 Strategy conference regarding upcoming motion for summary judgment and production issues; KDC INVESTMENTS, LLC

 Analyze e-mails and identify e-mails forwarded by Mr. Domozick to be Bates numbered and processed in preparation for future production and use in summary judgment filings; KDC INVESTMENTS, LLC

 Begin preparation of cast of characters and association to case; KDC INVESTMENTS, LLC

 Redact attorney-client information in e-mails for production purposes; KDC INVESTMENTS, LLC

 Analyze database and new e-mails received from clients to ascertain which are new and should be processed for production;
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**KDC INVESTMENTS, LLC**
*RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review electronic correspondence from Jeremy Domozick regarding retention fee and engagement letter;
- Prepare notice of hearing on motion for more definitive statement;
- Review letter from Krystal Chaklos requesting wire transfer information;
- Review correspondence from Jeremy Domozick forwarding electronic correspondence from plaintiffs attorney requesting release of hearing date;
- Review correspondence from Jeremy Domozick forwarding electronic correspondence from AED's attorney regarding response to application for more definitive statement and proposed judgment;
- Prepare letter to Krystal and Lee Chaklos regarding wiring instructions for retention;
- Review electronic correspondence from Jeremy Domozick regarding settlement discussions with AED;
- Telephone conference with Jeremy Domozick regarding his telephone conference with plaintiffs attorney concerning settlement and vacating motion for more definitive statement hearing;
- Telephone conference with plaintiffs attorney regarding motion for definitive statement hearing;
- Prepare for hearing on motion for more definitive statement.
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KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Telephone conference with AED's attorney regarding hearing on motion for more definitive statement;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Attend hearing on motion for more definitive statement;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare electronic correspondence to Jeremy Domanick regarding nature of hearing on motion for more definitive statement;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare order regarding defendant's motion for more definitive statement;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review and prepare electronic correspondence with plaintiff's attorney regarding proposed order;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review and analyze plaintiff's amended complaint;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Analyze issues regarding affirmative defenses to plaintiff's claims and possible counterclaim;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Analyze issues regarding strategy for an affirmative injunction;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Telephone conference with Jeremy Domanick regarding plaintiff's amended complaint, possible counterclaim and strategy for an affirmative injunction;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare answer to plaintiff's amended complaint and counterclaim;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research Idaho case law regarding requirements for specific performance;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research Idaho Secretary of State's records regarding status of AED;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research Idaho statutes regarding effect of administrative dissolution on corporation's ability to transact business;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research Idaho Rules of Civil Procedure regarding mandatory injunction;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research Idaho case law and previous
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- decisions by Judge Mitchell regarding preliminary injunction;
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- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare motion regarding memorandum in support of motion for mandatory injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with Lee and Crystal Chilklos regarding factual background and steps taken so far to demolish the bridge;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare oral argument of Crystal Chilklos in support of mandatory injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research Idaho case law regarding preliminary, permanent and mandatory injunctions;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Further preparation of affidavit of Crystal Chilklos in support of mandatory injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research other states case law regarding enjoining breach of contract;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Continue preparing memorandum in support of motion for mandatory injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare electronic correspondence with Jeremy Demczak regarding vacating and rescheduling preliminary injunction hearing;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Continue preparing memorandum in support of motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research Idaho case law regarding requirements for rescission.
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research Idaho statutes regarding effect of administrative dissolution.
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Continue preparing memorandum in support of motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Further preparation of affidavit of Crystal Chilklos in support of motion for preliminary injunction;
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KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare and review electronic correspondence with Jeremy Domozick regarding draft affidavit for Krystal Chaklos in support of motion for preliminary injunction;
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*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Further preparation of affidavit of Krystal Chaklos in support of motion for preliminary injunction;
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*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare electronic correspondence to Jeremy Domozick regarding revised affidavit of Krystal Chaklos;
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*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Final preparation of memorandum in support of motion for preliminary injunction;
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Final preparation of affidavit of MAF in support of motion for preliminary injunction;
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Final preparation of motion for preliminary injunction;
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*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare electronic correspondence to Jeremy Domozick regarding draft memorandum in support of motion for preliminary injunction;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review electronic correspondence from Nicole Hamilton attaching signed affidavit of Krystal Chaklos;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review and analyze plaintiff's objection to preliminary injunction hearing;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Telephone conference with Jeremy Domozick regarding same;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Telephone conference with Lee Chaklos regarding plaintiff's objection and demolition plan submitted to the Coast Guard;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review demolition plan and letter from Delta Domo to the US Coast Guard;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
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AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

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951 of 1046

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- Standing to assert lack of corporate capacity to contract;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with Norfolk Railroad's attorney regarding status of injunction and litigation proceeding;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Analyze issues regarding reply to AED's response to preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with Jeremy Domozick regarding AED's motion for preliminary injunction and obtaining additional affidavits from Lee and Krystal Chaklos;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research case law and treatises regarding corporation's ulus vires acts as distinguished from illegal contracts and who has standing to assert a claim for each against the corporation;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research case law and treatises regarding ability to seek preliminary injunction against breach or repudiation of a contract;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Begin reviewing email correspondence between the parties forwarded by Jeremy Domozick;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Review electronic correspondence from Jeremy Domozick and attached affidavits of Krystal Chaklos;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Analyze issues regarding motion to strike affidavit of Eric Kelly;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with Lee Chaklos regarding status and AED's objection to motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare outline of arguments for reply in support of motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare reply memorandum in support of motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Further preparation of reply memorandum in support of motion for preliminary injunction;
- KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare motion to strike affidavit of Eric Kelly and Mark Wilburn.
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- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Prepare defendant’s first set of interrogatories, requests for production and requests for admission;
  - 285.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Prepare defendant’s first set of interrogatories, requests for production and requests for admission;
  - 114.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Continental review and analysis of e-mails and documents forwarded by Jeremy Domozick;
  - 665.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Review and analyze plaintiff’s expert witness disclosure;
  - 38.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Prepare outline of arguments, review case law and prepare for preliminary injunction hearing;
  - 855.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Travel to Coeur d’Alene for preliminary injunction hearing;
  - 589.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Attend preliminary injunction hearing;
  - 247.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Return travel to Boise;
  - 627.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Telephone conference with Jeremy Domozick regarding preliminary injunction hearing;
  - 95.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Analyze issues regarding documents retention, organization and production for discovery;
  - 57.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Review and analyze plaintiff’s answer to amended counterclaim;
  - 19.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Analyze issues and arguments for motion for summary judgment;
  - 95.00

- **KDC INVESTMENTS, LLC**
  - *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
  - Prepare and review electronic correspondence with Jeremy Domozick regarding formation and officer information for KDC and Delta Demo;
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*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare and review electronic correspondence with Jeremy Domozick regarding whether expert testimony is necessary;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research regarding corporate officers' liability for fraud in the inducement;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare memorandum in support of motion for summary judgment;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Research remedies and requirements for fraud claim in preparation for summary judgment argument;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare memorandum in support of motion for summary judgment;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Further research regarding pleading requirements, applicability to promises of future events, and damages for plaintiff's fraud claim for arguments in support of summary judgment;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Review documents produced by Jeremy Domozick and prepare timeline of events;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Further preparation of memorandum in support of motion for summary judgment;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Prepare and review electronic correspondence with Jeremy Domozick following up on request for all documents associated with the Bridge;

KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
Telephone conference with West Virginia Division of Labor Contractor Licensing regarding when AED obtained its West Virginia contractor's license;

KDC INVESTMENTS, LLC
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Prepare and review electronic correspondence with Jeremy Domozick regarding determining when AED received its West Virginia contractor's license;
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- Prepare and review electronic correspondence with Kathy Rucker from the West Virginia Division of Labor regarding when AED received its West Virginia contractor's license; KDC INVESTMENTS, LLC
- Telephone conference with Lee and Krystal Chaklos regarding when AED received its West Virginia contractor's license and events concerning issuance of permit by City of Benwood; KDC INVESTMENTS, LLC
- Research West Virginia statutes and case law regarding contractor licensing; KDC INVESTMENTS, LLC
- Research requirements to prove fraud claim for future events; KDC INVESTMENTS, LLC
- Continue preparing memorandum in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Prepare affidavit of Krystal Chaklos in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Prepare affidavit of Lee Chaklos in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Prepare affidavit of RLS in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Analysis issues regarding exhibits to use in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Final preparation of memorandum in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Review and analyze Court's order denying motion for preliminary injunction; KDC INVESTMENTS, LLC
- Telephone conference with Jeremy Domnick regarding Court's order denying motion for preliminary injunction; KDC INVESTMENTS, LLC
- Prepare letter to opposing counsel requesting available dates to depose Eric Kelly, Lisa Kelly and Mark Willburn; KDC INVESTMENTS, LLC
- Review plaintiffs' first set of interrogatories and requests for production; KDC INVESTMENTS, LLC
**Detail Fee Transaction File List**

**HALLFARLEY**

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- **ARCH**: Review electronic correspondence from plaintiff's attorney regarding scheduling deposition of Mark Wilburn by telephone;
- **ARCH**: Review e-mails forwarded by Crystal Chaklos;
- **ARCH**: Conference with CDC regarding reply memorandum in support of motion for summary judgment and response to plaintiff's motion for reconsideration;
- **ARCH**: Review e-mails between the parties forwarded by Crystal Chaklos;
- **ARCH**: Review electronic correspondence from plaintiff's attorney regarding mediation;
- **ARCH**: Prepare electronic correspondence to Jeremy Domozick and clients regarding possible mediation;
- **ARCH**: Review electronic correspondence from Jeremy Domozick regarding mediation strategy and when clients need to be in Idaho;
- **ARCH**: Telephone conference with plaintiff's attorney regarding mediation;
- **ARCH**: Review letter from plaintiff's attorney promising to provide discovery responses and documents in a few days;
- **ARCH**: Review and analyze plaintiff's responses to requests for admission;
- **ARCH**: Review electronic correspondence from plaintiff's attorney regarding settlement;

**AED Inc. vs. KDC Investments, LLC, et al**

Supreme Court Case No. 38603-2011

956 of 1046
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- **Amounts:**
  - 57.00 Review and analyze affidavit of Eric Kelly in support of plaintiff's opposition to defendant's motion to strike and defend's motion for summary judgment; KDC INVESTMENTS, LLC
  - 228.00 Review and analyze plaintiff's reply to defendant's response to motion to reconsider; KDC INVESTMENTS, LLC
  - 930.00 Prepare for hearing on motion for summary judgment and motion to reconsider; KDC INVESTMENTS, LLC
  - 570.00 Travel to Coeur d'Alene for hearing on motion for summary judgment and motion to reconsider; KDC INVESTMENTS, LLC
  - 665.00 Prepare for and attend hearing on motion for summary judgment; KDC INVESTMENTS, LLC
  - 627.00 Return travel to Boise; KDC INVESTMENTS, LLC
  - 57.00 Prepare supplemental affidavit of Lee Chaklos in support of motion for summary judgment; KDC INVESTMENTS, LLC
  - 19.00 Review and prepare electronic correspondence with Jeremy Donozick regarding motion for summary judgment hearing; KDC INVESTMENTS, LLC
  - 19.00 Prepare and review electronic correspondence with Jeremy Donozick regarding motion for summary judgment hearing; KDC INVESTMENTS, LLC
  - 19.00 Review and prepare electronic correspondence with plaintiff's attorney regarding scheduling depositions; KDC INVESTMENTS, LLC
  - 19.00 Prepare motion in support of supplemental affidavit; KDC INVESTMENTS, LLC
  - 19.00 Telephone conference with Lee Chaklos regarding outcome of motion for summary judgment hearing, upcoming hearing on plaintiff's motion for reconsideration and possible options for settlement; KDC INVESTMENTS, LLC

**Client:** AED Inc. vs. KDC Investments, LLC, et al

**Task Code:** 66 A 61

**Task Description:**
- Review and analyze affidavit of Eric Kelly in support of plaintiff's opposition to defendant's motion to strike and defend's motion for summary judgment; KDC INVESTMENTS, LLC
- Review and analyze plaintiff's reply to defendant's response to motion to reconsider; KDC INVESTMENTS, LLC
- Prepare for hearing on motion for summary judgment and motion to reconsider; KDC INVESTMENTS, LLC
- Travel to Coeur d'Alene for hearing on motion for summary judgment and motion to reconsider; KDC INVESTMENTS, LLC
- Prepare for and attend hearing on motion for summary judgment; KDC INVESTMENTS, LLC
- Review and prepare electronic correspondence with Jeremy Donozick regarding motion for summary judgment hearing; KDC INVESTMENTS, LLC
- Return travel to Boise; KDC INVESTMENTS, LLC
- Prepare supplemental affidavit of Lee Chaklos in support of motion for summary judgment; KDC INVESTMENTS, LLC
- Review and prepare electronic correspondence with Jeremy Donozick regarding motion for summary judgment hearing; KDC INVESTMENTS, LLC
- Review and prepare electronic correspondence with plaintiff's attorney regarding scheduling depositions; KDC INVESTMENTS, LLC
- Prepare motion in support of supplemental affidavit; KDC INVESTMENTS, LLC
- Telephone conference with Lee Chaklos regarding outcome of motion for summary judgment hearing, upcoming hearing on plaintiff's motion for reconsideration and possible options for settlement; KDC INVESTMENTS, LLC
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**HALL, FARLEY, OBERRECHT & BLANTON, P.A.**

**Supreme Court Case No. 38603-2011**

- Correspondence with plaintiff's attorney regarding needed supplemental discovery responses before depositions of Eric and Lisa Kelly; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Telephone conference with Lee and Krysta Chaklos regarding responses to plaintiff's discovery requests and additional documents supporting damages; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review electronic correspondence forwarded from Krysta Chaklos regarding Bellaire Bridge; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review electronic correspondence from plaintiff's attorney with copy of AED's insurance policy and contact information for witnesses; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review and analyze documents for important key documents and possible deposition exhibits; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review letter from plaintiff's attorney responding to discovery issues; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Review and analyze plaintiff's argument regarding affidavit of Lee Chaklos pertaining to subcontractor proposal; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Prepare reply memorandum in support of supplemental affidavit of Lee Chaklos; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Telephone conference with Roger Barwick's attorney regarding sale of bridge; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Telephone conference with Peter Sambor at the U.S. Coast Guard regarding permitting; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Further preparation of answers and responses to plaintiff's first set of interrogatories and requests for production of documents; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Prepare deposition notice duces tecum for Eric Kelly; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Prepare deposition notice duces tecum for Lisa Kelly; KDC INVESTMENTS, LLC
- *RE: AED, Inc. v. KDC INVESTMENTS, LLC*
- Continue reviewing and analyzing documents for important key documents and possible deposition exhibits; KDC INVESTMENTS, LLC
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- AED Inc. vs. KDC Investments, LLC, et al
- Supreme Court Case No. 38603-2011
- 961 of 1046

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**HALL, FARLEY, OBERSCHT & BLANTON, P.A.**
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- Prepare letter to plaintiff's attorney regarding demolition plan and documents supporting damage calculations; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research case law cited by plaintiff in support of motion for reconsideration; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare for hearing on plaintiff's motion for reconsideration; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Travel to Coeur d'Alene for hearing and depositions; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare for and amend hearing on plaintiff's motion for reconsideration; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with Lee and Krystal Chaklos regarding hearing; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare for depositions of Eric Kelly and Lisa Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Prepare for depositions of Eric Kelly and Lisa Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Take deposition of Eric Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Take deposition of Lisa Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Return travel to Boise; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Telephone conference with CDC regarding depositions of Eric and Lisa Kelly and strategy for motions in limine, jury instructions and trial; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Analyze issues for deposition of Mark Wiburn; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Analyze issues regarding defenses to plaintiff's breach of contract claim in light of deposition testimony of Eric and Lisa Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Analyze issues regarding testimony needed from City of Benwood officials and U.S. Coast Guard in light of deposition testimony from Eric Kelly; KDC INVESTMENTS, LLC
- RE: AED, Inc. v. KDC INVESTMENTS, LLC
- Research Idaho case law and treatises; KDC INVESTMENTS, LLC
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- Task Code: 66
- Rate: 190.00
- Hours to Bill: 0.20
- Amount: 38.00
- Ref #: ARCH
- Details include:
  - Analyze issues regarding traveling to Virginia and Tennessee for depositions of Mark Wilburn, Lee Chaklos, and Krystal Chaklos.
  - Review and analyze Court's memorandum regarding granting summary judgment.
  - Telephone conference with Lee and Krystal Chaklos regarding Court's summary judgment decision.
  - Telephone conference with Jeremy Domozick regarding same.
  - Prepare stipulation to dismiss without prejudice counts 1 and 2 of KDC's counterclaim.
  - Review and prepare electronic correspondence with Jeremy Domozick regarding online posts by AED and its attorney stating legal position and intent to appeal judgment.
  - Telephone conference with Norfolk Southern's attorney regarding summary judgment decision.
  - Review letter from US Coast Guard.
  - Telephone conference with Lee and Krystal Chaklos.
  - Review and prepare electronic correspondence with Jeremy Domozick regarding Idaho appellate process.
  - Prepare and review electronic correspondence with plaintiff's attorney regarding AED filing motion to.
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Jeremy Domostick, Krystal and Lee Chaklos
attaching judgment;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Telephone conference with Lee Chaklos
regarding AED's motion for reconsideration;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Research case law cited in AED's
memorandum in support of motion for reconsideration;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Research case law regarding
parol evidence rule;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Analyze strategy regarding arguments in
opposition to AED's motion to reconsider
in anticipation of AED filing an appeal;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Further preparation of memorandum in
opposition to AED's motion for reconsideration;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Prepare and review electronic correspondence with Lee and Krystal
Chaklos
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Further preparation of motion in
opposition to AED's motion to reconsider;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Prepare motion to strike affidavit of
Eric Kelly in support of AED's motion to reconsider;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Prepare affidavit of RLS in opposition
to AED's motion to reconsider;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Meet with CDC and discuss strategy for
responding to plaintiff's motion to reconsider in anticipation of appeal;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Prepare for and attend telephonic
hearing on AED's motion to reconsider;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Review and analyze memorandum decision
and order denying plaintiff's
(second) motion for reconsideration;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC

Prepare electronic correspondence to
Jeremy Domostick, and Krystal & Lee
Chaklos regarding same;
KDC INVESTMENTS, LLC
*RE: AED, Inc. v. KDC INVESTMENTS, LLC
### Transaction File List

**Date:** 02/22/2011

**Client:** Timekeeper 66 Randall L. Schmidt

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**Date:** 02/22/2011

**Client:** Timekeeper 76 Chris D. Comstock

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**Date:** 02/22/2011

**Client:** Timekeeper 72 Baxter Q. Andrews-Knight

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**Date:** 02/22/2011

**Client:** HALL, FARLEY, OBERRECHT & BLANTON, P.A.

**Date:** 02/22/2011

**Client:** Timekeeper 76 Chris D. Comstock

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Research case law cited and relied upon by AED involving rescission and summary judgment for purposes of preparing reply brief in support of motion for summary judgment and opposition to motion for reconsideration;

KDC INVESTMENTS, LLC

*RE: AED, Inc. v. KDC INVESTMENTS, LLC

**Date:** 02/22/2011

**Client:** Timekeeper 72 Baxter Q. Andrews-Knight

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Research case law regarding rescission and need for physical tender when rescission is sought as remedy and when rescission is pleaded as a cause of action;

KDC INVESTMENTS, LLC

*RE: AED, Inc. v. KDC INVESTMENTS, LLC

**Date:** 02/22/2011

**Client:** HALL, FARLEY, OBERRECHT & BLANTON, P.A.

**Date:** 02/22/2011

**Client:** Timekeeper 76 Chris D. Comstock

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Meeting with RLS to discuss case strategy, witnesses, motions in limine, evidentiary issues, exhibits, jury instructions and plaintiff's deposition;

KDC INVESTMENTS, LLC

*RE: AED, Inc. v. KDC INVESTMENTS, LLC

**Date:** 02/22/2011

**Client:** HALL, FARLEY, OBERRECHT & BLANTON, P.A.

**Date:** 02/22/2011

**Client:** Timekeeper 76 Chris D. Comstock

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**Date:** 02/22/2011

**Client:** HALL, FARLEY, OBERRECHT & BLANTON, P.A.

**Date:** 02/22/2011

**Client:** Timekeeper 76 Chris D. Comstock

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Supreme Court Case No. 38603-2011
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<td>336.00</td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td>12/08/2010</td>
<td>86 A 1</td>
<td>160.00</td>
<td>1.20</td>
<td>192.00</td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td>12/10/2010</td>
<td>86 A 1</td>
<td>160.00</td>
<td>0.20</td>
<td>32.00</td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td>12/13/2010</td>
<td>86 A 1</td>
<td>160.00</td>
<td>2.00</td>
<td>320.00</td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td>12/15/2010</td>
<td>86 A 1</td>
<td>160.00</td>
<td>1.00</td>
<td>160.00</td>
<td>ARCH</td>
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<tr>
<td></td>
<td>12/15/2010</td>
<td>86 A 1</td>
<td>160.00</td>
<td>0.60</td>
<td>96.00</td>
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<tr>
<td></td>
<td>01/04/2011</td>
<td>86 A 220</td>
<td>160.00</td>
<td>4.20</td>
<td>672.00</td>
<td>ARCH</td>
</tr>
</tbody>
</table>

**Total for Timekeeper Mikela French:**

- **Billable:** 371.30
- **Non-billable:** 2.50
- **Total:** 373.80

---

AED Inc. vs. KDC Investments, LLC, et al  
Supreme Court Case No. 38603-2011

Page: 27
Exhibit B
## Detail Cost Transaction File List

**HALLFARLEY, OBERCECH & BLANTON, P.A.**

**Date: 02/18/2011**

### Expense Type 4: Telecopy

<table>
<thead>
<tr>
<th>Class</th>
<th>Description</th>
<th>Date</th>
<th>Hour</th>
<th>Task Code</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>4715.000</td>
<td>Telecopy to Kootenai County; KDC INVESTMENTS, LLC</td>
<td>01/24/2011</td>
<td>26 A 531</td>
<td>0.500</td>
<td>12.50</td>
<td></td>
</tr>
<tr>
<td>4715.000</td>
<td>Telecopy to Arthur Bladian; KDC INVESTMENTS, LLC</td>
<td>01/24/2011</td>
<td>26 A 531</td>
<td>0.500</td>
<td>12.50</td>
<td></td>
</tr>
<tr>
<td>4715.000</td>
<td>Telecopy to Kootenai County; KDC INVESTMENTS, LLC</td>
<td>02/10/2011</td>
<td>26 A 531</td>
<td>0.500</td>
<td>12.50</td>
<td></td>
</tr>
</tbody>
</table>

### Expense Type 5: Photocopy

<table>
<thead>
<tr>
<th>Class</th>
<th>Description</th>
<th>Date</th>
<th>Hour</th>
<th>Task Code</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>4715.000</td>
<td>Photocopies/Images for the month of November (40 @ 35); KDC INVESTMENTS, LLC</td>
<td>12/22/2010</td>
<td>26 A 532</td>
<td>0.250</td>
<td>10.00</td>
<td></td>
</tr>
<tr>
<td>4715.000</td>
<td>Photocopies/Images for the month of December 2010 (200 @ 25); KDC INVESTMENTS, LLC</td>
<td>12/24/2010</td>
<td>26 A 532</td>
<td>0.250</td>
<td>50.00</td>
<td></td>
</tr>
<tr>
<td>4715.000</td>
<td>Photocopies/Images for the month of January (110 @ 25); KDC INVESTMENTS, LLC</td>
<td>01/24/2011</td>
<td>26 A 532</td>
<td>0.250</td>
<td>27.50</td>
<td></td>
</tr>
</tbody>
</table>

### Advance Type 3: Federal Express

<table>
<thead>
<tr>
<th>Class</th>
<th>Description</th>
<th>Date</th>
<th>Hour</th>
<th>Task Code</th>
<th>Rate</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>4715.000</td>
<td>Federal shipment to Arthur Bladian; KDC INVESTMENTS, LLC</td>
<td>01/24/2011</td>
<td>26 A 501</td>
<td>18.50</td>
<td>18.50</td>
<td></td>
</tr>
</tbody>
</table>
### Detail Cost Transaction File List

**HALLFARLEY**

**Date:** 02/18/2011

**Page:** 2

<table>
<thead>
<tr>
<th>Client</th>
<th>Type</th>
<th>Date</th>
<th>Code</th>
<th>Total</th>
<th>Subtotal</th>
<th>Rate</th>
<th>Amount</th>
<th>Ref #</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>09/10/2010</td>
<td>26 A</td>
<td>504</td>
<td>425.20</td>
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<td>ARCH</td>
</tr>
<tr>
<td></td>
<td></td>
<td>11/20/2010</td>
<td>26 A</td>
<td>504</td>
<td>1,573.68</td>
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<td></td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12/21/2010</td>
<td>26 A</td>
<td>504</td>
<td>932.83</td>
<td></td>
<td></td>
<td>ARCH</td>
</tr>
<tr>
<td></td>
<td></td>
<td>01/31/2011</td>
<td>26 A</td>
<td>504</td>
<td>428.07</td>
<td></td>
<td></td>
<td>ARCH</td>
</tr>
</tbody>
</table>

**Billable:** 5,299.65

---

**AED Inc. vs. KDC Investments, LLC, et al**

Supreme Court Case No. 38603-2011

972 of 1046
Exhibit C
Billed to:
Randall L. Schmitz
Hall Farley Oberrecht & Blanton
702 West Idaho, Ste. 700
P. O. Box 1271
Boise, ID 83701-1271

Job # (5155C2) Invoice # 9973C1 Claim #

Case: AED, INC. v. KDC Investments, LLC, et al
Witness: Eric J. Kelly, Sr.
Date: 1/27/2011 9:00:00 AM

Charges:
- O&I Two-Day Delivery Electronic Only $6.75 255 $1,721.25
- Hourly Appearance Fee $40.00 8 $320.00
- Exhibits - Electronic Access Only $0.15 643 $96.45
- Shipping & Handling $10.00 1 $10.00
- M&M to obtain signature $0.00 1 $0.00

Sub Total $2,147.70
Payments $0.00
Balance Due $2,147.70

We accept Visa and MasterCard

(Return this section with check)

Billed to: Randall L. Schmitz
Invoice # 9973C1
Billed: 2/1/2011
Amount Due: $2,147.70

SOUTHERN OFFICE
421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
cmail m-and-m@qwestoffice.net

NORTHERN OFFICE
816 E. Sherman Ave, Ste. 7
Coeur d'Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
cmail csmith@mmcourt.com

Remit Payment [ ]
AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

Remit Payment [ ]
Supreme Court Case No. 38603-2011
974 of 1046
M & M COURT REPORTING SERVICE, INC.
FED ID NO. 82-0298125

"Excellence in Court Reporting Since 1970"

Billed to: Randall L. Schmitz
Hall Farley Oberrecht & Blanton
702 West Idaho, Ste. 700
P. O. Box 1271
Boise, ID 83701-1271

Billed: 2/1/2011

Job # (5156C2) Invoice # 9974C1 Claim #

Case: AED. INC. v. KOC Investments, LLC, et al
Witness: Lisa A. Kelly
Date: 1/27/2011 5:23:00 PM

Charges:
O&I Two-Day Delivery Electronic Only $6.75 37 $249.75
Hourly Appearance Fee $50.00 1 $50.00
No Exhibits $0.00 1 $0.00
M&M to obtain signature $0.00 1 $0.00

Sub Total $299.75
Payments $0.00
Balance Due $299.75

We accept Visa and MasterCard

(Return this section with check) Billed to: Randall L. Schmitz
Invoice # 9974C1
Billed: 2/1/2011
Amount Due: $299.75

SOUTHERN OFFICE
421 W. Franklin Street
P.O. Box 2636 Boise, ID 83701-2636
208-345-9611 208-345-8800 (fax)
1-800-234-9611
email m-and-m@qwestoffice.net

Remit Payment [ ]
AED Inc. vs. KOC Investments, LLC, et al
Supreme Court Case No. 38603-2011

NORTHERN OFFICE
816 E. Sherman Ave, Ste. 7
Coeur d’Alene, ID 83814-4921
208-765-1700 208-765-8097 (fax)
1-800-879-1700
email csmith@mmcourt.com

Remit Payment [ ]
Exhibit D
### Travel Expense Account

<table>
<thead>
<tr>
<th>Name</th>
<th>RLS</th>
<th>Date of Report</th>
<th>12/8/10</th>
</tr>
</thead>
</table>

#### Travel Day(s) 12/6-12/7/10

City or Cities: Spokane

Expense Details:

- **Lodging Hampton Inn**
  - (Name of Hotel)
  - 128.52

- Meals
  - 33.14

- Meals

- Meals

- **Airfare**
  - 299.40

  - miles at .55 per mile
  - (Effective 01/01/09)
  - miles at .455 per mile
  - (Effective 01/01/09 - State of Idaho)
  - miles at .50 per mile
  - (Effective 01/01/10)

- **Auto rental**
  - 167.07

- **Taxi fares**

- **Internet Fees/Telephone Calls**

- **Entertainment expense**
  - Attached entertainment record

- **Other -- Fuel**
  - 7.51

- **Airport Parking**
  - 16.75

#### Daily Totals:

- **Client to charge:** 1 715
- **Total for trip:** $652.39

#### Subject Matter:

- **AED v. KDC Investments**
- Paid directly by firm: 299.40

#### General Purpose:

- **Attend Preliminary Injunction Hearing**
- Amount to be reimbursed: 352.99

- **Departure date:** 12/6/10
- **Return date:** 12/7/10
- **Total days away:** 2
- **No. of business days:** 1

---

**ATTACH A RECEIPT FOR ALL EXPENDITURES. ATTACH DETAIL RECEIPTS FOR ALL LODGING EXPENSES.**
### Hampton Inn & Suites - Coeur d'Alene
1500 Riverstone Dr, Coeur d'Alene, ID 83814
Phone (208) 769-7900 • Fax (208) 769-9300

---

**CONFIRMATION NUMBER:** 87855508

**12/7/2010** PAGES: 1

---

**Room & Tax Report**

<table>
<thead>
<tr>
<th>Date</th>
<th>Account</th>
<th>Gues Room</th>
<th>RM-State Tax</th>
<th>RM-Lodging Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/6/2010</td>
<td>235299</td>
<td>GUEST ROOM</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12/6/2010</td>
<td>235299</td>
<td>RM-Lodging Tax</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total**

<table>
<thead>
<tr>
<th>Stay Total</th>
<th>Daily Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>$128.52</td>
<td>$128.52</td>
</tr>
</tbody>
</table>

---

**EXPENSE REPORT SUMMARY**

- **Room & Tax**
  - **Stay Total:** $128.52
  - **Daily Total:** $128.52

---

**Rate Plan:** L-CON

**Card Member Name:**

**Establishment No. and Location:**

**Signature of Card Member:**

---

**Establishment agrees to transact to cardholder for payment:**

- Purchases & Services
- Taxes
- Tips & Misc.

---

**Account No.:**

**Date of Charge:**

**Folio/Check No.:** AED Inc. vs. KDC Investments, LLC, et al

Supreme Court Case No. 38603-2011

AED Inc. vs. KDC Investments, LLC, et al

979 of 1046
THIS ITINERARY WAS ISSUED AT
SCHMITZ/BANDELL E-4-715
GLOBAL TRAVEL - CORPORATE DEPT
900 W JEFFERSON - BOISE ID
PHONE: 208-387-1001
--- OR ---
TOLL FREE AT 1-800-388-3238

HALL FARLEY OBERRECHT AND BLANTON
PO BOX 1271
BOISE ID 83701

JNY, NO.215603316
GOVT ISSUED PHOTO-ID REQUIRED

IMPORTANT: VERIFY YOUR ITINERARY
WWW.US.COM

CHECKED BAGGAGE POLICIES VARY BY AIRLINE. ASK YOUR AGENT FOR DETAILS.
GOVT ISSUED PHOTO-ID REQUIRED FOR ALL PASSENGERS OVER AGE 18
IMPORTANT: VERIFY YOUR ITINERARY
USE WWW.VIEWTRIP.COM TO RECONFIRM - REFER TO RESERVATION NUMBER ABOVE
THANK YOU FOR SELECTING GLOBAL TRAVEL

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011
THIS ITINERARY WAS ISSUED AT* SCHMITZ/RANDALL L\x4-715
GLOBAL TRAVEL - CORPORATE DEPT
900 W JEFFERSON - BOISE ID
PHONE: 208-387-1001
----- OR ------
TOLL FREE AT 1-800-388-3238

HALLFARLEY OBERRECHT AND BLANTON
PO BOX 1271
BOISE ID 83701

INV. NO.215603326 DATE DEC 02 '2010 RESERVATION NUMBER...KB634Y

TICKET NUMBER/S:
SCHMITZ/RANDALL L 5261 2140985665 269.40

AIR TRANSPORTATION 269.40 TAX 00 TTL. 269.40
TRANSACTION FEE-NON REFUNDABLE 30.00
SUB TOTAL .899.40
AMOUNT DUE 299.40
Thank you for your purchase!

Air Confirmation: X6BCF7
Boise, ID to Spokane, WA (01/26/2011 - 01/28/2011)

<table>
<thead>
<tr>
<th>Air</th>
<th>Car</th>
<th>Hotel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conf # X6BCF7</td>
<td>Choose from 14 different rental companies.</td>
<td>Shop over 40,000 hotels</td>
</tr>
<tr>
<td>Air Total $313.40</td>
<td>Browse cars</td>
<td>Browse hotels</td>
</tr>
</tbody>
</table>

Total Paid Now $313.40
Trip Total $313.40

**Air**

<table>
<thead>
<tr>
<th>Passenger Type</th>
<th>Name</th>
<th>Confirmation Number</th>
<th>Rapid Rewards Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADULT</td>
<td>RANDY SCHMITZ</td>
<td>X6BCF7</td>
<td>0000015741520</td>
</tr>
</tbody>
</table>

**ITINERARY**

**DEPART**
Boise, ID to Spokane, WA
Wednesday, January 26, 2011
Travel Time 1 h 00 m
Depart Boise, ID (BOI)
Arrive in Spokane, WA (GEG) 11:05 AM

**RETURN**
Spokane, WA to Boise, ID
Monday, January 28, 2011
Travel Time 1 h 00 m
Depart Spokane, WA (GEG) 2:15 PM
Arrive in Boise, ID (BOI) 4:15 PM

**PRICE**

<table>
<thead>
<tr>
<th>Passenger Type</th>
<th>Trip</th>
<th>Routing</th>
<th>Fare Type</th>
<th>Base Fare</th>
<th>Govt. Taxes and Fees</th>
<th>Quantity</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult</td>
<td>Depart</td>
<td>BOI-GEG</td>
<td>Business Roundtrip</td>
<td>$155.81</td>
<td>$20.69</td>
<td>1</td>
<td>$176.50</td>
</tr>
<tr>
<td>Adult</td>
<td>Return</td>
<td>GEG-BOI</td>
<td>Business Roundtrip</td>
<td>$155.81</td>
<td>$20.69</td>
<td>1</td>
<td>$176.50</td>
</tr>
</tbody>
</table>

Please read the fare rules associated with this purchase.
Effective January 28, 2011, unused travel funds may only be applied toward the purchase of future travel for the individual named on the ticket.

Total $313.40

**Billing**

<table>
<thead>
<tr>
<th>Purchaser Name</th>
<th>Billing Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Randy Schmitz</td>
<td>1229 W. Oldham Ct.</td>
</tr>
<tr>
<td></td>
<td>Boise, ID 83709</td>
</tr>
</tbody>
</table>

Form of Payment
Visa - XXXXXXXXXXXX-6934
Amount Applied $313.40

Total Paid Now $313.40

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011
https://www.southwest.com/reservations/confirm-reservations.html?disc=0%3A16%3A12... 1/21/2011
# Travel Expense Account

<table>
<thead>
<tr>
<th>Name</th>
<th>RLS</th>
<th>Date of Report</th>
<th>1/17/11</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Travel Day(s)</strong></td>
<td>1/11 to 1/12/11</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>City or Cities</strong></td>
<td>Spokane</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Expense Details:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lodging: Hampton Inn</td>
<td>128.52</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Meals</td>
<td>20.27</td>
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<td></td>
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<tr>
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</tr>
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<td>Airfare</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>- miles at .55 per mile</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Effective 01/01/09)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- miles at .455 per mile</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Effective 01/01/09 - State of Idaho)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- miles at .50 per mile</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(Effective 01/01/10)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auto rental</td>
<td>160.27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxi fares</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Internet Fees/Telephone Calls</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entertainment expense</td>
<td></td>
<td></td>
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<tr>
<td>(explain on attached entertainment record)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other: Gas for rental car</td>
<td>11.35</td>
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<td></td>
</tr>
<tr>
<td>Airport Parking</td>
<td>11.50</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Daily Totals:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Client to charge:</strong></td>
<td>4-715</td>
<td></td>
<td>$ 637.31</td>
</tr>
<tr>
<td><strong>Total for trip:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Subject Matter:</strong></td>
<td>AED v. KDC Investments</td>
<td></td>
<td>Paid directly by firm</td>
</tr>
<tr>
<td><strong>General Purpose:</strong></td>
<td>Attend MSJ hearing</td>
<td></td>
<td>Amount to be reimbursed 637.31</td>
</tr>
<tr>
<td><strong>Departure date:</strong></td>
<td>1/11/11</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Return date:</strong></td>
<td>1/12/11</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total days away:</strong></td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>No. of business days:</strong></td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**ATTACH A RECEIPT FOR ALL EXPENDITURES. ATTACH DETAILED RECEIPTS FOR ALL LODGING EXPENSES.**

**JAN 17 2011**

AED Inc. vs. KDC Investments, LLC, et al

Supreme Court Case No. 38603-2011
02/22/2011 14:59 FAX 2088958585

AED Inc. vs. KDC Investments, LLC, et al

HMSHOST QUIZNO'S SUBS
SPOKANE INT'L AIRPORT

933 MATTHEW

CHECK 2273 JAN12'11 12:47PM

1 TRPL MEAT CLUB 8 7.09
WHEAT BREAD
NO RED ONION
NO RANCH
SUB MAYO

1 SODA FTN 21 2.09

1.VICKIES CHIPS 1.39

SUBTOTAL 10.57
TAX 0.92
AMOUNT 11.49

10.87

11.49

VISA 11.49

Your order number is: 2273

-------------------

HOW WAS YOUR EXPERIENCE?
WE'D LIKE YOUR FEEDBACK.

Call 1-800-675-3420, or Visit www.hertzsurvey.com
Enter Access Code: 95465
Take Brief 4 Question Survey

Thank You for Renting from HERTZ

-------------------

BOISE AIRPORT
Operated By
AMPCO SYSTEM PARKING
RECEIPT
TRAN IN TIME OUT TIME FEE CC#

AED Inc. vs. KDC Investments, LLC, et al

HALLFARLEY

CHK 2623 JAN11'11 7:02PM

1 TRPL MEAT CLUB 8 6.29
WHEAT BREAD
NO RED ONION
SUB MAYO

1 SODA FTN 21 1.99

SUBTOTAL 8.28
TAX 0.50
AMOUNT 8.78

VISA 8.78

Your order number is: 2623

-------------------

*** REPRINT *** REPRINT *** REPRINT ***

1520 N Argonne
Spokane Valley WA 99206

SHELL
1520 N ARGONNE
SPOKANE WA 99212

01/12/2011 11:51:32 AM 293071422

XXXX XXXX XXXX 6934 VISA
INVOICE 035006
AUTH 01470C

PUM# 5
REGULAR
PRICE/GAL

3.5946
3.159

FUEL TOTAL
$ 11.35

Subtotal = $ 11.35
Tax = $ 0.00

*** REPRINT *** REPRINT *** REPRINT ***
**Hampton Inn & Suites - Coeur d' Alene**

1500 Riverstone Dr. • Coeur d' Alene, ID 83814
Phone (208) 769-7900 • Fax (208) 769-5900

---

**SCHMITZ, RANDY**

702 W IDAHO

Suite 700

BOISE, ID 83702

US

---

**CONFIRMATION NUMBER:** 85645941

1/12/2011 PAGE 1

---

**RATES & PLAN:**

- **LV0**
- **AL:** USA
- **BONUS AL:** CAR

**ROOM & TAXES:**

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<td>1/11/2011</td>
<td>239604</td>
<td>RM-LODGING TAX</td>
<td>$2.38</td>
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**TOTAL:**

- **WILL BE SETTLED TO VS 6934**
- **EFFECTIVE BALANCE OF 0.00**

---

**EXPENSE REPORT SUMMARY:**

- **STAY TOTAL:** $128.52
- **DAILY TOTAL:** $128.52

---

**HALLFARLEY**

© 065/070

---

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011

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968 of 1046

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**USA**

Official Sponsor

---

02/22/2011 15:00 FAX 2083955855

---

**BOISE. 10 83702**

**CONFIRMATION NUMBER:** 85645941

**700 WIDAHO**

**StJITE**

**us**

**1/12/2011**

**15:00 FAX 2083958585 HALLFARLEY**

**$128.52**

**0.00**

---

**signature**
Kelly A. Tonkin

From: Southwest Airlines [SouthwestAirlines@luv.southwest.com]
Sent: Monday, January 17, 2011 1:56 PM
To: Kelly A. Tonkin
Subject: Air Confirmation SCHMITZ/RANDY L - X58NKA

Confirmation Email

From: Southwest Airlines [SouthwestAirlines@luv.southwest.com]
Sent: Monday, January 17, 2011 1:56 PM
To: Kelly A. Tonkin
Subject: Air Confirmation SCHMITZ/RANDY L - X58NKA

SOUTHWEST.COM

Confirmation Date: January 4, 2011
Confirmation Number: X58NKA

Passenger Information

Passenger(s)       Account Number       Ticket #       Expiration
SCHMITZ/RANDY L    00000157411520       5262146156822  Jan 4, 2012

1 All travel involving funds from this Confirmation Number must be completed by the expiration date.

Itinerary

Depart: BOISE ID TO SPOKANE WA  (Travel Time: 1 hrs 0 mins)
Date       Flight Flight Information
Tue Jan 11 248  Depart BOISE ID (BOI) at 8:45 PM
           Arrive in SPOKANE WA (GEG) at 8:45 PM
Return: SPOKANE WA TO BOISE ID  (Travel Time: 1 hrs 0 mins)
Date       Flight Flight Information
Wed Jan 12 1131 Depart SPOKANE WA (GEG) at 2:15 PM
             Arrive in BOISE ID (BOI) at 4:15 PM

Cost and Payment Summary

Base Fare                   $264.18
+ Excise Taxes              $19.82
Advertised Fare             $284.00
+ Segment Fee               $7.40
+ Passenger Facility Charge  $9.00
+ Security Fee               $5.00
Total Payment               $305.40

Current Payment(s):
Jan 4, 2011 Visa XXXXXXXXXXXX6934 $305.40

2 Security Fee is the government-imposed September 11th Security Fee.
Travel Expense Account

Name: Randy L. Schmitz  
Date of Report: 02/01/11

Travel Day(s): 01/26/11-01/28/11

City or Cities: Coeur d'Alene, ID

Expense Details:
- **Lodging**: Hampton Inn & Suites  
  (Name of Hotel)  
  $257.04
- **Meals**: $40.92  
  $15.50
- **Meals**: $11.49
- **Meals**: $29.33
- **Airfare**: $313.40 (miles at .455 per mile  
  (Effective 01/01/09 - State of Idaho)  
  miles at .50 per mile (Effective 01/01/10)  
  miles at .51 per mile (Effective 01/01/11)
- **Auto rental**: $280.13
- **Taxi fares**
- **Internet Fees/Telephone Calls**
- **Entertainment expense**: (explain on attached entertainment record)
- **Other**
- **Fuel**: $11.08

Daily Totals:

**Client to charge: 4-715**  
**Total for trip**: $958.89

**Subject Matter: AED v. KDC**  
**Paid directly by firm**: $0

**General Purpose: Depositions of Eric Kelly and Lisa Kelly**  
**Amount to be reimbursed**: $958.89

**Departure date**

**Return date**

**Total days away**

**No. of business days**

ATTACH A RECEIPT FOR ALL EXPENDITURES.  
ATTACH DETAILED RECEIPTS FOR ALL LODGING EXPENSES.
### Rental Receipt

**Spokane International Airport**

**Hertz System Licensee**

**Rental Record:** L-5298426-1

- **Location:** Spokane International Airport
- **Rental:** Spokane International Airport
- **Start Date:** 01/26/2011
- **End Date:** 02/22/2011
- **Vehicle:** 10-TOYOTA-HIGHLANDER-4WD-Red
- **Miles:** IN: 14445, OUT: 14358
- **Miles Driven:** 87
- **Class:** L
- **Total Amount:** $15.50

**Credit Card Details**

- **Type:** VISA
- **Card #: XXXXXXXXXX6934
- **Approval:** 03475C
- **Amount:** $12.50
- **Tip:** $3.00
- **Total:** $15.50

---

### Survey

**How was your experience?**

We'd like your feedback.

1. Call 1-800-675-3420, or visit www.hertzsurvey.com
2. Enter Access Code: 95465
3. Take Brief 4 Question Survey

---

**Thank You for Dining!**

Red Robin Gourmet Burgers

1501 West Riverstone Drive

Coeur d'Alene, ID 83814

208-765-2421

**spokane valley WA 99206-5206**

**Server:** JENNIFER

**DOB:** 01/26/2011

**Table:** 109/1

**Date:** Jan 28, 11

**Time:** 12:59 PM

**Invoice Number:** 178991

**Auth No:** 019044

**Card #: XXXXXXXXXX6934
- **Type:** VISA
- **Approval:** 07151C
- **Amount:** $12.50

---

**THE WINE CELLAR**

313 E SHERMAN AVE

COEUR D'ALENE, ID 83814

589-664-9463

**Table:** 46/1

**Server:** Christian

**DOB:** 01/26/2011

**Table:** 46/1

**Date:** Jan 27, 11

**Time:** 5:00 PM

**Sales Record:** 12

**IN #: 000012
- **Date:** Jan 27, 11
- **Time:** 20121

**Auth #: 05132C
- **BASE:** $33.92
- **Tip:** $7.00
- **Total:** $40.92

**Quinns Subs**

**Spokane Int'l Airport**

**CHK 6184 JAN 28'11 12:05PM**

---

**Menu Items**

1. **TRPL MEAT CLUB:** $7.09
2. **WHEAT BREAD**
3. **NO RED ONION**
4. **NO RANCH**
5. **SUB MAYO**
6. **VICKIES CHIPS:** $1.39
7. **SODA FTN 21:** $2.09

**Subtotal:** $10.57

**Tax:** $0.92

**Amount:** $11.49

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**Notes**

- Customer Copy

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**Monday thru Sunday**

11:00 am to close
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**WILL BE SETTLED TO VISA 6934**
**EFFECTIVE BALANCE OF**

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**EXPENSE REPORT SUMMARY**

for reservations call 1-800-HAMPTON or visit us online at hampton.com

thanks,

- account no.
- date of charge
- folio/check no.
- card member name
- initial
- establishment no. and location
- purchases & services
- taxes
- tips & misc.
- signature of card member
- total amount

---

1500 Riverstone Dr. • Coeur d' Alene, ID 83814
Phone (208) 769-7900 • Fax (208) 769-9300

**HAMPTON**

Hampton Suites Coeur d’Alene

**CONFIRMATION NUMBER:** 83481563

1/26/2011 PAGE 1
John J. Burke  
ISB #4619; jjb@hallfarley.com  
Randy L. Schmitz  
ISB #5600; rls@hallfarley.com  
HALL, FARLEY, OBERRECHT & BLANTON, P.A.  
702 West Idaho, Suite 700  
Post Office Box 1271  
Boise, Idaho 83701  
Telephone: (208) 395-8500  
Facsimile: (208) 395-8585  
W:\4\4.715\pleadinss\Cosi-HFOB-NOH 3-23-11.doe

Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,  
Plaintiff,  

vs.  

KDC INVESTMENTS, LLC, a Virginia LLC,  
and LEE CHAKLOS and KRISTAL CHAKLOS, individually,  

Defendants.

YOU WILL PLEASE TAKE NOTICE that defendants, by and through their attorneys of record, Hall, Farley, Oberrecht & Blanton, P.A., will bring on for telephonic hearing their Motion for Costs and Fees before the above-entitled Court on Wednesday, March 23, 2011, at 2:30 p.m. (Pacific Time), at the Kootenai Count Courthouse, before the Honorable John T. Mitchell.

NOTICE OF TELEPHONIC HEARING RE DEFENDANTS’ MOTION FOR COSTS AND FEES - 1
DATED this 25 day of February, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By

Randall L. Schmitz Of the Firm
Defendants KDC Investments, LLC,
Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of February, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy 208/665-7290
Email arthurmooneybistline@me.com

Randall L. Schmitz

NOTICE OF TELEPHONIC HEARING RE DEFENDANTS' MOTION FOR COSTS AND FEES - 2
ARThUR BISTLINE
BISTLINE LAW, PLLC
1423 N. Government Way
Coeur d’Alene, Idaho 83814
(208) 665-7270
(208) 665-7290 (fax)
arthurmooneybistline@me.com
ISB: 5216
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to the
Court’s Memorandum Decision and Order Denying Plaintiff’s (Second) Motion for
Reconsideration filed with this Court dated February 14, 2011, as follows:

“Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact
or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action

I. AED never plead that the purchase agreement is illegal because that is not the case.
The purchase contract is legal because the blast contract is likewise legal.

This Court’s ruling that the blast contract is illegal is in error, however, if the Court
refuses to reverse that ruling, then the Court is required to address the principles of
contract law which pertain to the effect of its finding of illegality.
If AED's counsel truly thought the purchase agreement was illegal due to a lack of consideration due to the demolition agreement being illegal, **AED should have specifically raised such issue in its complaint or its amended complaint.** It did not. There has never even been a prior argument that the purchase agreement was ambiguous, let alone illegal. Opinion at 11.

"We screwed up and didn't get a valid contractor's license, which caused the demolition agreement to be invalid, and even though the purchase agreement doesn't reference the demolition agreement or our [AED's] ability to blast, and even though we've kept the $25,000 consideration for the purchase agreement, we would in any event like this Court to find that the purchase agreement the consideration of the demolition agreement, and since it was illegal, find the purchase agreement was illegal, and give us the bridge back.” **That takes some nerve.** Opinion at 11.

This would allow any party in AED's position to surreptitiously create its own poison pill, to be used later when that party finds such position advantageous. This Court, and all of contract law, will not countenance such an absurd result. Opinion at 15.

From the tenor of the Court's comments, it would appear that the Court believes that AED is attempting to pull a fast one, for lack of a better term, by pointing out that if the blast contract is illegal and void, then the purchase agreement is illegal and void. **AED does not now and never has believed the blast contract to be illegal.** However, the Court ruled otherwise and that ruling has consequences for the purchase contract that are controlled by contract law principles, which were competently briefed and not adequately addressed by this Court.

**II. This Court's entire opinion is premised on the fact that the blast contract and sales contract were not executed at the same time. This factual finding is incorrect and is a jury question anyway.**

The Court's opinion rests heavily on the Court's finding that the blast contract and sales contract were entered into at different times.

Nonetheless, because the two agreements in the instant matter are dated over three weeks apart, and the two agreements in **Quiring** occurred simultaneously, **Quiring** is simply not instructive.

Opinion at 17.
The purchase agreement was entered into eleven days before the demolition agreement... Opinion at 9.

This Court has not determined the purchase agreement to be illegal, and there is simply nothing before the Court (other than Eric Kelly's arguably self-serving affidavit) to indicate that the demolition agreement was to form a portion of the consideration supporting the purchase agreement, which was entered into more than one week prior to the demolition agreement and makes no reference to it. Opinion at 18.

Had the illegal demolition agreement been entered into before the purchase agreement, then there might be more to AED's argument. But here, the demolition agreement did not even exist at the time the purchase agreement was entered into. Opinion at 10-11.

These statements are incorrect, and this Court is invading the province of the jury on this subject. Since this Court has dismissed all AED's claims on summary judgment, the facts are as follows:

1) The Sales Agreement was entered into on May 20, 2010.1

2) It was then terminated on May 27, 2010.2

3) The parties then agreed on June 1, 2010, that AED would go forward with the sale of the bridge under the same terms as the May 20, 2010, contract provided KDC execute the demolition contract.3

4) That blast contract was executed and then the $25,000 was paid and accepted for the bridge.4

5) AED would not have sold the bridge but for the promise that it be allowed to blast the bridge because to sell the bridge for $25,000 and no other consideration would have been "stupid."5
These are the facts on summary judgment. On June 1, 2010, no agreement was in place to sell the bridge. That agreement had been terminated. A second agreement to sell the bridge was reached which was that the terms of the old agreement would apply as soon as, and only when, KDC executed the blasting contract, which it did. Therefore, the purchase contract came into existence at the exact same time as the blasting agreement. This Court is not free to find any other facts on summary judgment.

If this Court is going to rely so heavily upon the finding of fact that the purchase contract came into existence well before the blast contract, then the Court needs to explain how it can take that determination from the jury in light of the evidence before this Court.

III. The Court is incorrectly applying the law and misstates the facts of Quiring

a. To buy into AED's argument, the Court would have to infer the demolition agreement formed the consideration of the purchase agreement. Opinion at 8.

This is an incorrect statement of the law. As set forth in the last motion to reconsider, all AED has to prove is that the demolition agreement was material to the agreement to sell the bridge. As set forth above, that point is established for summary judgment purposes. This Court is not free to reach its own conclusions on this.

b. Had the purchase agreement been entirely supported by illegal consideration, AED might be able to bring in parol evidence. But here, the purchase agreement is still supported by significant consideration in the amount of $25,000.00. That alone makes the purchase agreement "legal". If other additional consideration turns out to be illegal, that does not turn the "legal" consideration (the $25,000.00) into illegal consideration. Opinion at 10.
The emphasized language is directly contrary to all law on this subject, and wholly unsupported by any authority in the United States and the Court has provided no authority for that statement.

The law is that if the "illegal consideration" is a material part of the bargain, then the illegal part cannot be separated from the legal part. See the citations in AED's last motion to reconsider which are incorporated herein by this reference as though fully set forth. The Court is wrong on this point of law and should either identify the authority for the holding that partial "legal" consideration makes the whole contract legal, even if the illegal consideration is material to the transaction, or declare that it is making new law.

Furthermore, the Court ignores the actual facts of *Quiring*. That case recited a whole separate consideration for the quit claim in two different places. The quit claim recited it was in exchange for EIGHT HUNDRED DOLLARS AND NO/100 CENTS ($800.00). More importantly, the agreement "That any and all past differences be forgotten and not brought up by Lynn or either of the two children" stated the transfer (quit claim) was as in lieu of support. *Quiring* had two separate and equally valid recitations of consideration for the quit claim and at no point did anything in writing ever mention that the quit claim had anything whatsoever to do with the agreement not to report. The fact that part of the consideration was legal did not save the agreement.

This Court avoids the question by excluding the evidence of the blasting agreement based on the parol evidence rule. This Court acknowledges that parol evidence is always admissible to show illegality. This Court then holds that it is not admissible here because the sale contract is legal because it is supported by a separately stated consideration that cannot be contradicted by

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parol evidence. The separate consideration is less than a 1/3 of the profit AED would have earned from the blast contract. More importantly, as set forth above, the existence of separate consideration does not prevent the admission of evidence of other illegal aspects of the parties' agreement.

The quit claim in Quiring was ruled illegal, but nothing about that agreement standing alone was illegal, and in fact recited a separate consideration. The existence of separate legal consideration did not save the parties' total agreement from being found illegal, which is exactly the opposite of what this Court ruled here when it said separate consideration which is legal validates the entire agreement.

c. In Quiring, the agreement to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed, were consideration for each other. The two agreements were two sides of the same coin. In the present case, there is no reference in the purchase agreement to allow AED to perform the demolition of the bridge it was selling to KDC. Opinion at 18.

The quit claim deed in Quiring made no reference whatsoever to the separate agreement regarding the forgiveness of “all past differences” or to not report the incidents to the police, yet the factual situation was that one did have something to do with the other. This Court’s has made a finding of fact that the blast contract did not have anything to do with the purchase contract. This is against the weight of the evidence, but this Court is not supposed to be weighing evidence. This is a factual finding for the jury not this Court. If the Court disagrees, it should explain its reasoning for the Appellate Court.

d. Additionally, any extrinsic evidence would not be allowed because AED has not asked this Court to reconsider its dismissal of AED’s fraud claims. Opinion at 7.

This statement is in direct contravention of this Court’s acknowledgment at page 9 that evidence showing illegality is admissible despite a merger clause. “AED claims the issue of
illegality can be raised at any time. Case law supports that proposition, even in light of a merger clause."

This Court should explain how the failure of the fraudulent inducement claim amounts to an inability to admit parol evidence of a separate illegal agreement that was a material inducement for the purchase agreement.

e. The truly disturbing feature to AED's argument is it ignores the fact that it was AED's own foibles that caused the demolition agreement to be illegal. Opinion at 11.

This Court should explain the relevance of this finding of fact to the contract law principles raised in the first motion to reconsider.

If this fact is relevant to the analysis, then this Court should further explain why this finding of fact should not have been made by a jury.

f. Quiring is not on point. First of all, Quiring is distinguishable from the instant matter temporally. In Quiring, the agreements to refrain from contacting law enforcement in violation of I.C. § 16-1619 and the agreement to transfer a quitclaim deed by threat in violation of I.C. § 18-2403 were entered into at the same time. The agreements were executed before the same notary at the same time. In the present case, on the other hand, it is undisputed that the purchase agreement was entered into on May 10, 2010. Opinion at 17.

As set forth above, the agreement to sell and the agreement to blast came into existence at the same time and this Court is not free to find any other fact on summary judgment.

CONCLUSION

The Court's ruling that the blasting contract is illegal is incorrect and will be appealed. However, at this point, that is the law of this case and that ruling has consequences for the purchase contract that are well established principles of contract law.
This Court has avoided the argued contract principles by making a finding of fact that the blast contract and purchase contract did not come into existence at the same time, and therefore, the blast contract was unrelated to the purchase contract. The determination of when and if the parties had a meeting of the minds is a question of fact for the trier of fact, *Harkness v. City of Burley*, 110 Idaho 353, 359, 715 P.2d 1283, 1289 (1986), not for this Court on summary judgment.

This Court has also held that partial legal consideration validates a contract that is supported by partial illegal consideration. This is an incorrect statement of the law.

If less than all of an agreement is unenforceable under the rule stated in §178, a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.

Restatement Second of Contracts § 184

Primarily the criterion would appear to be whether the parties would have entered into the agreement irrespective of the offending provisions of the contract. This can usually be determined by weighing equality of the agreed exchange before and after the proposed severance.

Calamari and Perillo on Contracts, Third Edition 1987 at 893, citing Marsh, the Severance of Illegality in Contracts (pts 1 & 2) 64 L.Q.Rev. 230, 347 (1948) and Restatement Second of Contracts, Section 184, Comment a.

This Court's only attempt to address these principles was the Court's findings of fact regarding when these agreements came into existence and then from that factual finding made the factual finding that the blast contract was not material to the purchase contract. Factual
findings on summary judgment are not proper unless the evidence is uncontroverted, which it clearly is here.

This Court should either:

1) Reverse the prior incorrect ruling on illegality for the reasons set forth in AED's response to summary judgment; or

2) Declare the entire agreement (sale and blast) void and unenforceable; or

3) Address the issues raised above so the Appellate Court can properly evaluate this Court's decision.

DATED this 28th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2011, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT by the method indicated below, and addressed to the following:

Randy L Schmitz  
John Burke  
Hall, Farley, Oberrecht & Blanton, P.A.  
702 W. Idaho St. Suite 700  
P.O. Box 1271  
Boise, ID 83701

John Burke  
Honorable John T. Mitchell  
Kootenai County Courthouse

[ ] Hand-delivered  
[ ] Regular mail  
[ ] Certified mail  
[ ] Overnight mail  
[x] Facsimile to (208)395-8585  
[ ] Interoffice Mail

[ ] Hand-delivered  
[ ] Regular mail  
[ ] Certified mail  
[ ] Overnight mail  
[x] Facsimile to (208)446-1132  
[ ] Interoffice Mail

BY: LEANNE VILLA

LEANNE VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL CHAKLOS, individually,

Defendants.

Plaintiff, AED, Inc., pursuant to Idaho Rule of Civil Procedure 59(e) requests that this Court alter and/or amend its judgment as set forth in the memorandum in support of this motion.

Oral argument is requested on this motion.

DATED this 28th day of February, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff

MOTION TO ALTER OR AMEND JUDGMENT - 1 -

AED Inc. vs. KDC Investments, LLC, et al Supreme Court Case No. 38603-2011 1004 of 1046
CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2011, I caused to be served a true and correct copy of the foregoing MOTION TO ALTER OR AMEND JUDGMENT by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
P.O. Box 1271
Boise, ID 83701

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)395-8585
[ ] Interoffice Mail

Honorable John T. Mitchell
Kootenai County Courthouse

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[x] Facsimile to (208)446-1132
[ ] Interoffice Mail

BY: LEANNE M. VILLA
Plaintiff/Appellant, AED, Inc., appeals from the First Judicial District, the Honorable John T. Mitchell, presiding.

I. Judgments and Orders Appealed

A. Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction entered December 15, 2010, by the Honorable John T. Mitchell;

C. The Memorandum Decision and Order Denying Plaintiff AED’s (Second) Motion for Reconsideration; entered February 14, 2011, by the Honorable John T. Mitchell.


II. Issues on Appeal

A. Did the Trial Court error by holding that AED could not seek rescission because it had not tendered to KDC the consideration KDC had paid for the bridge?

B. Did the Trial Court commit error by holding that the contract between AED and KDC for AED to implode the subject bridge illegal?

C. Did the Trial Court commit error by enforcing the sales contract in light of the fact that blast contract was illegal?

D. Did the Trial Court commit error by making findings of fact on disputed factual issues on summary judgment in order to reach its determination that the sale contract was legal even though the blast contract was illegal?

III. Statement of Jurisdiction

A. The matter is a final and appealable pursuant to Idaho Appellate Rule 11(a)(1).

IV. No transcript is requested.

V. The standard record is requested together with the following:

A. Motion for Preliminary Injunction filed November 17, 2010;

B. Memorandum In Support of Motion for Mandatory Injunction filed November 17, 2010;

C. Affidavit of Mikela A. French in Support of Motion for Preliminary Injunction filed November 17, 2010;
D. Plaintiff’s Objection to Defendant’s Motion for Preliminary Injunction filed November 18, 2010;
E. Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010;
F. Reply to Plaintiff’s Objection to Defendant KDC Investments, LLC’s Motion for Mandatory Injunction filed November 22, 2010;
G. Affidavit of Mark Wilburn in Support of Plaintiff’s Objection to Issuance of Preliminary Injunction filed November 24, 2010;
H. Affidavit of Eric J. Kelly in Support of Plaintiff’s Objection to Issuance of Preliminary Injunction filed November 24, 2010;
I. Plaintiff’s Objection to Issuance of Preliminary Injunction filed November 24, 2010;
J. Plaintiff’s Response to Issuance of Preliminary Injunction filed November 29, 2010;
K. Defendant KDC Investments LLC’s Reply in Support of Motion for Preliminary Injunction filed December 2, 2010;
L. Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction filed December 15, 2010;
M. Motion for Summary Judgment filed December 15, 2010;
N. Memorandum in Support of Motion for Summary Judgment filed December 15, 2010;
O. Affidavit of Randall L. Schmitz in Support of Motion for Summary Judgment filed December 15, 2010;
P. Affidavit of Lee Chaklos in Support of Motion for Summary Judgment filed December 15, 2010;
Q. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment filed December 15, 2010;
R. Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission filed December 30, 2010;
S. Affidavit of Eric J. Kelly in Opposition to Summary Judgment filed December 30, 2010;
T. Affidavit of Mark Wilburn in Support of Plaintiff’s Opposition to Summary Judgment filed December 30, 2010;
U. Affidavit of Arthur Bistline in Opposition to Summary Judgment filed December 30, 2010;
V. Response to Summary Judgment filed December 30, 2010;
W. Defendants Memorandum in Opposition to Plaintiff’s Motion to Reconsider Decision Holding that Plaintiff is Not Entitled to Rescission filed January 5, 2011;
X. Memorandum in Support of Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment filed January 5, 2011;
Y. Motion to Strike Affidavits of Arthur M. Bistline, Eric J. Kelly, and Mark Wilburn Filed in Support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment filed January 5, 2011;
Z. Motion to Shorten Time filed January 5, 2011;
AA. Defendants’ Reply Memorandum In Support of Motion for Summary Judgment filed January 5, 2011;

BB. Plaintiff’s Reply to Defendants Response to Motion to Reconsider filed January 7, 2011;

CC. Plaintiff’s Response to Defendants Motion to Strike Plaintiff’s Affidavits Filed in Support of Plaintiff’s Opposition to Motion for Summary Judgment filed January 7, 2011;

DD. Affidavit of Eric J. Kelly In Support of Plaintiff’s Opposition to Defendants Motion to Strike & Defendants Motion for Summary Judgment filed January 10, 2011;

EE. Supplemental Affidavit of Lee Chaklos In Support of Motion for Summary Judgment filed January 13, 2011;

FF. Memorandum in Support of Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment filed January 13, 2011;

GG. Plaintiff’s Argument Regarding Affidavit of Lee Chaklos Pertaining to Subcontractor Proposal filed January 20, 2011;

HH. Reply in Support of Supplemental Affidavit of Lee Chaklos in Support of Motion for Summary Judgment filed January 21, 2011;

II. Plaintiff’s Response to Defendant’s Reply Regarding Supplemental Affidavit of Lee Chaklos filed January 24, 2011;

JJ. Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration filed January 31, 2011;
KK. Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment filed February 4, 2011;

LL. Memorandum In Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary filed February 4, 2011;

MM. Affidavit of Eric J. Kelly in Support of Plaintiff’s Motion to Reconsider Court’s Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary filed February 4, 2011;

NN. Plaintiff’s Reply to Defendant’s Objection to Shorten Time Re: Hearing on Motion to Reconsider filed February 8, 2011;

OO. Defendant’s Motion to Strike Affidavit of Eric J. Kelly in Support of Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment filed February 11, 2011;

PP. Defendant’s Memorandum in Opposition to Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment filed February 11, 2011;

QQ. Affidavit of Randall L. Schmitz in Opposition to Plaintiff’s Motion to Reconsider Court’s Decision and Order Granting Defendant KDC’s Motion for Summary Judgment filed February 11, 2011;

RR. Plaintiff’s Reply to Defendant’s Response on Motion to Reconsider filed February 11, 2011;

SS. Memorandum Decision and Order Denying Plaintiff AED’s Second Motion for Reconsideration filed February 14, 2011;
TT. Memorandum in Support of Motion to Alter or Amend Judgment filed March 1, 2011;

UU. Motion to Amend or Alter Judgment filed March 1, 2011.

VI. Certification of Attorney

A. Service of the Notice of Appeal has been served on the Court Reporter.

B. The estimated fees for the reporter's transcript have been paid.

C. All appellate filing fees have been paid.

D. Service of this Notice of Appeal has been filed on all parties.

DATED this 4th day of March, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz  
John Burke  
Hall, Farley, Oberrecht & Blanton, P.A.  
702 W. Idaho St. Suite 700  
P.O. Box 1271  
Boise, ID 83701

[ ] Hand-delivered  
[ ] Regular mail  
[ ] Certified mail  
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[x] Facsimile to (208)395-8585  
[ ] Interoffice Mail

Honorable John T. Mitchell  
Kootenai County Courthouse

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[ ] Certified mail  
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[x] Facsimile to (208)446-1132  
[ ] Interoffice Mail

Julie Folland  
Court Reporter for Judge Mitchell  
PO Box 9000  
Coeur d'Alene, ID 83816-9000

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[ ] Interoffice Mail

BY: LEANNE VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

Case No. CV-10-7217

PLAINTIFF’S OBJECTION TO DEFENDANTS’ COSTS AND FEES

Plaintiff, AED, Inc., by and through its undersigned counsel, hereby responds to Defendant’s Application for Costs and Fees as follows:

I. KDC is Not Entitled to Any Discretionary Costs as this Case Was Not “Exceptional.”

In Idaho, in order for a cost to be considered “exceptional,” the costs must be a cost not normally associated with the particular type of case.

“The trial court concluded: ‘This is the very ‘nature’ of these sorts of cases. Similarly, travel and lodging expenses for expert witnesses and attorneys and photocopy expenses are not exceptional but, on the contrary, are common ‘in a case of this nature.’ This demonstrates the trial court’s understanding of the meaning of ‘exceptional’ as contained in I.R.C.P. 54(d)(1)(D).’"

The only argument that this case is "exceptional" is that it was going to be litigated in a very compressed time frame. The only impact of this fact is how quickly the costs are incurred, not whether they are customary and ordinary costs which are incurred in this type of case. The discretionary costs sought are exactly the same costs that would have been incurred in this case if it were not on a "fast track" and the case is not exceptional.

If this Court is going to make a finding that this case was exceptional it should:

1) Disallow any expenses associated with travel expenses as KCD chose a South Idaho lawyer and AED should not have to pay for that decision. $2,248.59.

2) Disallow Westlaw because KDC has not explained what those Westlaw charges were for. A firm such as Hall Farley likely has a Westlaw plan which is a flat fee other than those items which are outside of that plan, which have not been identified. $3,359.00.

II. The Amount of Fees Claimed is Excessive for the Nature of the Case.

This case was a simple breach of contract/fraud case that was litigated in a short time frame. The total attorney's fees charges in excess of $68,000 for a little over five (5) months of work is excessive.

III. Challenged Attorneys Fees Charges.

1) 12/6/10 Travel to Coeur d'Alene for a hearing. KDC chose to use a lawyer located at the South end of Idaho and AED should not be required to pay for that decision. $589.00.

2) 12/7/10 Return Travel from Coeur d'Alene. See objection contained in item 2 above. $627.00.
3) 1/11/11 Travel to Coeur d’Alene for a hearing. See objection contained in item 2 above. $570.00.

4) 1/12/11 Return Travel from Coeur d’Alene. See objection contained in item 2 above. $627.00.

5) 1/25/11 A meeting between Mr. Schmitz (2.5 hours) and Mr. Comstock (2.4 hours). It is not reasonable that the opposing party should have to pay for the luxury of having more than one attorney consider the same subject matter in any case. The Court should disallow Mr. Comstock’s time at 2.4 hours. $456.00.

6) 1/25/11 Telephone conference with Lee and Krystal Chaklos regarding all e-mails... There is a five (5) hour charge for this telephone call. Given the status of the case – that numerous motions have been filed containing factual allegations – this conversation had to have already occurred on one prior occasion in this case and five hours is excessive to develop the facts of this case at that stage in the litigation. $950.00.

7) 1/26/11 Travel to Coeur d’Alene for depositions. See objection contained in item 2 above. $627.00.

8) 1/28/11 Return Travel from Coeur d’Alene. See objection contained in item 2 above. $627.00.

The total of the challenged attorney’s fee is $4,484.00.

DATED this 8th day of March, 2011.

ARTHUR M. BISTLINE
Attorney for Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2011, I caused to be served a true and correct copy of the foregoing PLAINTIFF’S OBJECTION TO DEFENDANTS’ COSTS AND FEES by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
702 W. Idaho St. Suite 700
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Honorable John T. Mitchell
Kootenai County Courthouse
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[x] Facsimile to (208)446-1132
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BY: ______________
LEANNE M. VILLA
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS
AL CHAKLOS, individually,

Case No. CV-10-7217

Appellant/Plaintiff,

AMENDED NOTICE OF APPEAL

Respondent/Defendants.

TO: The above named Respondent/Defendants, KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYS
AL CHAKLOS, and the parties’ attorney, Randy L. Schmitz of Hall, Farley, Oberrecht & Blanton, P.A., 702 W. Idaho St., Suite 700, P.O. Box 1271, Boise, ID 83701; phone: (208) 395-8500; email: rls@hallfarley.com, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

Appellant/Plaintiff, AED, Inc., appeals from the First Judicial District, the Honorable John T. Mitchell, presiding:

I. Judgments and Orders Appealed

A. Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary

Injunction entered December 15, 2010, by the Honorable John T. Mitchell;

AMENDED NOTICE OF APPEAL -1-

A. Motion for Preliminary Injunction filed November 17, 2010,
B. Memorandum In Support of Motion for Mandatory Injunction filed November 17, 2010;

C. Affidavit of Mikela A. French in Support of Motion for Preliminary Injunction filed November 17, 2010;

D. Plaintiff’s Objection to Defendant’s Motion for Preliminary Injunction filed November 18, 2010;

E. Affidavit of Krystal Chaklos in Support of Motion for Preliminary Injunction filed November 18, 2010;

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J. Plaintiff’s Response to Issuance of Preliminary Injunction filed November 29, 2010;

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L. Memorandum Decision and Order on Defendant KDC’s Motion for Preliminary Injunction filed December 15, 2010;

M. Motion for Summary Judgment filed December 15, 2010;
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O. Affidavit of Randall L. Schmitz in Support of Motion for Summary Judgment filed December 15, 2010;

P. Affidavit of Lee Chaklos in Support of Motion for Summary Judgment filed December 15, 2010;

Q. Affidavit of Krystal Chaklos in Support of Motion for Summary Judgment filed December 15, 2010;

R. Motion to Reconsider Memorandum Decision Holding that Plaintiff is Not Entitled to Rescission filed December 30, 2010;

S. Affidavit of Eric J. Kelly in Opposition to Summary Judgment filed December 30, 2010;

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BB. Plaintiff’s Reply to Defendants Response to Motion to Reconsider filed January 7, 2011;

CC. Plaintiff’s Response to Defendants Motion to Strike Plaintiff’s Affidavits Filed in Support of Plaintiff’s Opposition to Motion for Summary Judgment filed January 7, 2011;

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II. Plaintiff's Response to Defendant's Reply Regarding Supplemental Affidavit of Lee Chaklos filed January 24, 2011;

JJ. Memorandum Decision and Order Granting Defendant KDC’s Motion for Summary Judgment and Denying Plaintiff AED’s Motion for Reconsideration filed January 31, 2011;

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RR. Plaintiff’s Reply to Defendant’s Response on Motion to Reconsider filed February 11, 2011;

SS. Memorandum Decision and Order Denying Plaintiff AED’s Second Motion for Reconsideration filed February 14, 2011;

TT. Memorandum in Support of Motion to Alter or Amend Judgment filed March 1, 2011;

UU. Motion to Amend or Alter Judgment filed March 1, 2011.

VI. Certification of Attorney

A. Service of the Notice of Appeal has been served on the Court Reporter.

B. The estimated fees for the reporter’s transcript have been paid.

C. All appellate filing fees have been paid.

D. Service of this Notice of Appeal has been filed on all parties.

DATED this 14th day of March, 2011.

ARTHUR M. BISTLINE
Attorney for Appellant/Plaintiff
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of March, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Randy L Schmitz
John Burke
Hall, Farley, Oberrecht & Blanton, P.A.
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BY: LEANNE VILLA
Attorneys for Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC,
and LEE CHAKLOS and KRISTAL
CHAKLOS, individually,

Defendants.

COME NOW Defendants KDC Investments, LLC ("KDC"), Lee Chaklos and Krystal Chaklos (collectively "Defendants"), by and through their undersigned counsel of record, and submit this Memorandum in Opposition to Plaintiff's Motion to Alter or Amend Judgment.

Defendants assert that AED, Inc. ("AED") claims in their entirety and quieting title to the Bellaire Bridge in the name of KDC.

DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT - 1
On February 28, 2011, AED filed its Motion to Alter or Amend Judgment pursuant to Idaho Rule of Civil Procedure 59(e). However, AED’s motion is untimely under Rule 59(e). Furthermore, AED’s motion is nothing more than a third attempt at reconsideration of this Court’s previous decisions. Yet, AED fails to cite to any evidence before the Court which would justify altering its decisions and, in fact, AED’s arguments are directly contrary to the submitted evidence and controlling case law.

ARGUMENT

A. AED’s Motion is Untimely

AED’s current motion to amend the judgment is brought pursuant to Rule 59(e), Idaho Rules of Civil Procedure. Rule 59(e) requires a motion to amend the judgment be served no later than fourteen (14) days after entry of judgment. In this case, the Judgment was entered on February 8, 2011, but AED’s motion to amend the Judgment was not filed and served until February 28, 2011: twenty (20) days after the Judgment was entered. As such, AED’s motion is untimely and barred.

B. There is no Evidence Before the Court Supporting AED’s Argument That the “Demolition Agreement” was Consideration for the Purchase Agreement, and in Fact, the Evidence is to the Contrary.

In the event this Court decides to entertain AED’s untimely motion, AED is still not entitled to the relief it seeks. Motions brought pursuant to Rule 59(e) give the trial court an opportunity to correct errors of fact or law that had occurred in its proceedings short of an appeal. Lowe v. Lym, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App. 1982). “Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.” Id; See also Barmore v.
Perrone, 145 Idaho 340, 344, 179 P.3d 303, 307 (2008). In other words, since a Rule 59(e) motion is brought after judgment, new evidence may not be presented by the moving party.

Johnson v. Lambros, 143 Idaho 468, 472, n.3, 147 P.3d 100, 104 (Ct.App. 2006). A trial court's decision to grant or deny a Rule 59(e) motion is reviewed only for abuse of discretion. "So long on the trial court recognized the matter as discretionary, acted within the outer boundaries of the court's discretion, and reached its conclusion through an exercise of reason, this Court will not...

AED criticizes this Court because it incorrectly believes the Court's entire Memorandum Decision and Order Denying Plaintiff's (Second) Motion for Reconsideration ("Order") was based on the Asset Purchase and Liability Assumption Agreement ("Purchase Agreement") and the "demolition agreement" being executed at different times. AED argues this "factual finding" is incorrect. Actually, while the Court's opinion was based in part upon the timing of the agreements, it was also based upon AED's failure to submit any evidence supporting its claim that the demolition agreement was consideration for the Purchase Agreement. After reciting AED's claim that the agreement to sell the bridge was contingent upon execution and performance of the demolition agreement, the Court stated: "It is important to note that there is no citation given to the record for these three sentences written by counsel for AED. Perhaps the reason for a lack of citation is the fact that there is nothing in the record which supports any of these three sentences." Order, p. 7 (italics in original).

In response, AED now argues that the Purchase Agreement was terminated on May 27, 2010, and somehow reinstated on June 1, 2010, with the demolition agreement as part of its

DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT - 3
consideration. Memorandum in Support of Motion to Alter or Amend Judgment ("AED's Memo"), p.3. However, once again, AED does not cite any evidence which supports this allegation.

In support of its contention that the Purchase Agreement was terminated on May 27, 2010, AED cites paragraph 16 of the Affidavit of Eric Kelly in Opposition to Summary Judgment ("Kelly Aff."). AED's Memo, p. 3, n. 2. Paragraph 16 of Mr. Kelly's affidavit states that on May 27, 2010, he "informed KDC that the contract was terminated because it had not paid the purchase money for the bridge" and attached Exhibit "D" as evidence of this termination. Kelly Aff., ¶ 16. However, Exhibit "D" does not indicate the Purchase Agreement was ever terminated. Exhibit "D" consists of a couple email transmissions between AED and KDC. The first email from Mr. Kelly states "AED is weighing the opinion to decline to enter into any agreement with KDC Investments." Kelly Aff., Ex. D. This does not state AED actually terminated the Purchase Agreement. The second email in Exhibit "D" sent by Mr. Kelly states, "I did not terminate the agreement as I should have..." Id., (emphasis added). The evidence submitted by AED directly contradicts Mr. Kelly's own self-serving affidavit. Neither email contained in Exhibit "D" which AED cites in support of its argument, even remotely supports its contention.

Furthermore, Mr. Kelly's and Mrs. Kelly's deposition testimony conclusively establish that the Purchase Agreement was not terminated on May 27, 2010. In Mr. Kelly's deposition he

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1 At page 3 of the AED Memo, AED cites to paragraphs 13, 16, 18, and 19 of the Affidavit of Eric Kelly in Opposition to Summary Judgment. However, paragraphs 13 and 19 were stricken by the Court upon objection by KDC. See Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment and Denying Plaintiff AED's Motion for Reconsideration, p.10.

DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT - 4
was questioned about the email in Exhibit “D” in which he said he was weighing the opinion not to enter any agreement with KDC. He testified that the email was written in response to KDC failing to pay the $75,000 by May 25th, pursuant to the Letter of Contingency. See Affidavit of Randall L. Schmitz in Opposition to Plaintiff’s Motion to Reconsider Court’s Memorandum decision and Order Granting Defendant KDC’s Motion for Summary Judgment (“Schmitz Aff.”), Exhibit A (“Kelly depo trans.”), P. 98, L. 17 – P. 100, L. 9. He also testified that he spoke with KDC about an extension to the May 25 payment deadline. During this conversation he handed the phone to his wife, Lisa Kelly, because she is the president of AED and he wanted her to take care of it. Kelly depo trans., P. 101, L. 7 – P. 102, L. 23. Lisa Kelly said to “give them a chance,” meaning give AED an extension. Id., at P. 102, LL 9 – 23. Lisa Kelly confirmed in her deposition that she granted AED an extension to pay the purchase money. Schmitz Aff., Exhibit C (“Lisa depo trans.”) P. 14, L. 13 – P. 17, L. 12. Accordingly, contrary to AED’s contention, the evidence before the Court only supports the conclusion that the Purchase Agreement was not terminated on May 25, 2010, because an extension was granted. Since the Purchase Agreement was not terminated, we are again left with the uncontroverted fact that the Purchase Agreement was entered before the demolition agreement. The Purchase Agreement unambiguously specifies the consideration upon which it was entered, and that consideration does not include the demolition agreement.

AED argues:

**These are the facts on summary judgment.** On June 1, 2010, no agreement was in place to sell the bridge. That agreement had been terminated. A second agreement to sell the bridge was reached which was that the terms of the old agreement would apply as soon as, and only when, KDC executed the blasting contract, which it did. Therefore, the purchase contract came into existence at the
exact same time as the blasting agreement. This Court is not free to find any other facts on summary judgment.

If this Court is going to rely so heavily upon the finding of fact that the purchase contract came into existence well before the blast contract, then the Court needs to explain how it can take that determination from the jury in light of the evidence before this Court.

AED Memo, p. 4. (Emphasis in original).

AED is incorrect as to the facts and the law. The Court is free to find facts on summary judgment as long as they are undisputed. Specifically, Rule 56(e) of the Idaho Rules of Civil Procedure states in pertinent part:

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law

I.R.C.P. 56(c).

It was AED's duty to submit evidence to establish a genuine issue of material fact. It failed to do so. Rule 56(e) of the Idaho Rules of Civil Procedure states in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavit or otherwise provided in this rule, must set forth facts showing there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be rendered against the party.

I.R.C.P. 56(e).

Where a motion for summary judgment is made against a party who will have the burden of persuasion at trial, the non-moving party must show sufficient evidence of a genuine issue of material fact to support the essential elements of the case. See generally Celotex Corp. v. Catrett, 477 U.S. 317, (1986); Badell v. Beeks, 115 Idaho 101, 765 P.2d 126, 127 (1988) (the moving party is entitled to judgment when the non-moving party fails to make a showing sufficient to
establish the existence of an element essential to the party's case on which that party will bear the burden of proof at trial).

To establish a genuine issue of material fact, then, the non-moving party must do more than recite general or conclusory allegations and must produce more than a "mere scintilla" of evidence. *Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 618, 717 P.2d 1033, 1036 (1986) (unsupported general or conclusory allegations are not sufficient in the face of a motion for summary judgment); *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 549, 691 P.2d 787, 795 (Ct. App. 1984) (the creation of "only a slight doubt as to the facts will not defeat a summary judgment motion"); *Tri-State Nat'l. Bank v. Western Gateway Storage Co.*, 92 Idaho 543, 547, 447 P.2d 409 (1968) (to forestall summary judgment, more is required than raising "slightest doubt as to the facts").

As discussed above, AED failed to present any evidence to support its allegation that the demolition agreement was consideration for the Purchase Agreement. It failed to present any evidence that the Purchase Agreement was terminated. In fact, the evidence submitted establishes just the opposite. Mr. and Mrs. Kelly both testified that the Purchase Agreement was not terminated. The evidence establishes that the Purchase Agreement was executed well before the demolition agreement and because that evidence is undisputed, the Court is free to establish that as a fact without submitting the issue to the jury.

**DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT - 7**
C. The Court Correctly Applied the Law and Correctly Interpreted the Quiring Case.

1. The Court correctly determined that to be successful, AED needed to show that the demolition agreement was not merely part of the consideration for the Purchase Agreement, but was the only consideration.

AED next criticizes the Court's application of the law regarding illegal contracts. AED takes exception to the Court's statement that in order to buy into AED's argument, it would have to infer that the demolition agreement formed "the" consideration for the Purchase Agreement. AED also disagrees with the Court's conclusion that separate and distinct illegal consideration does not turn legal consideration into illegal consideration. Without any citation to authority, AED baldly asserts that "[t]he emphasized language is directly contrary to all law on this subject, and wholly unsupported by any authority in the United States and the Court has provided no citing any authority. AED itself failed to offer any authority to support such strong language in opposition to the Court's analysis. As it is, AED's criticism is completely unfounded. There exists Idaho precedent which supports the Court's analysis.

AED argues that the Purchase Agreement and demolition agreement were entered into at the same time, with the demolition agreement constituting consideration for the Purchase Agreement. In essence, AED claims the two agreements make up one contract and cannot be separated from each other. See Memorandum in Support of Plaintiff's Motion to Reconsider Court's Memorandum Decision and Order Granting Defendant KDC's Motion for Summary Judgment, p. 4. There is no evidence before the Court to support this allegation. However, even if AED could somehow show that the agreements were entered simultaneously and the agreement formed "the" consideration for the Purchase Agreement, but was the only consideration.

DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT, p. 8
demolition agreement formed part of the consideration for the Purchase Agreement, the Court would still be correct in its legal analysis.

It should be noted that AED only raises this argument in response to the Court’s grant of summary judgment to KDC on its quiet title claim. AED seeks to overturn that ruling by having the Purchase Agreement declared illegal. However, “a contract will be enforced even if it is incidentally or indirectly connected with an illegal transaction provided it is supported by an independent consideration so that the plaintiff will not require the aid of the illegal transaction to make out his case.” *Vancil v. Anderson*, 71 Idaho 95, 102, 227 P.2d 74, 77 (1951); See also *Ingle v. Perkins*, 95 Idaho 416, 417, 510 P.2d 480, 481 (1973) (The general rule is that no relief will be granted to either party to an unlawful contract, however, when the two agreements are severable and supported by distinct consideration, the legal agreement is enforceable even though the other agreement is illegal); *Hill v. Schulte*, 71 Idaho 145, 149, 227 P.2d 586, 589 (1951) (“Where some of the provisions of an agreement are lawful and some are illegal and the same are severable and supported by distinct or apportionable considerations, and the plaintiff does not have to rely upon the illegal provisions to make his cause of action, the illegal provisions in the contract are no bar to such action.”). This rule of law was discussed by the Idaho Supreme Court in *Durant v. Snyder*, wherein the Court explained that “where a contract contains illegal provisions, also a separate legal agreement, the latter will be enforced if no necessity exists for reliance by the party seeking to enforce it upon any of the illegal provisions thereof.” 65 Idaho 678, 151 P.2d 776, 778 (1944). The Court also explained that “whether a contract is severable or indivisible must be determined from the subject matter of the agreement and the language used therein controls.” *Id.* The Court also cited the “settled rule of law that
where several things are to be done under a contract, if the money consideration to be paid is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent.” Id at 779. Contrary to AED’s assertion, there is also authority outside of Idaho to support the Court’s analysis. In Blockum v. Fieldale Farms Corp., the Georgia Supreme Court upheld a written contract even though a related oral contract was illegal.

573 S.E.2d 36, 38-39 (2002). The Georgia Court explained:

“Where the terms of a written contract are clear and unambiguous the court will look to the contract alone to find the intention of the parties.” Health Svc. Center v. Boddy, 257 Ga. 378, 380(2), 359 S.E.2d 659 (1987). Within the four corners of the written contract, there is no mention that its execution is the result of illegal consideration. Accordingly, the trial court erred when it granted summary judgment to Fieldale on the ground that the contract could not be enforced due to illegal consideration, and the Court of Appeals erred in affirming this portion of the trial court’s decision.

Id., at 39.

In the case at bar, the Purchase Agreement and demolition agreement are separate and divisible with each pertaining to separate subject matters and each being supported by distinct consideration. The Purchase Agreement specifies that the sale of the bridge is supported by payment of $25,000 and assumption of all liabilities and obligations for demolishing the bridge. Amended Complaint, Ex. A. The demolition agreement indicates that in exchange for AED performing the “blasting” of the bridge it would be paid $275,000. Amended Complaint, Ex. B. Each agreement is separate and supported by distinct consideration. Moreover, the Purchase Agreement contains the following provision:

If any provision of this Agreement is determined to be illegal or unenforceable, such provision will be deemed amended to the extent necessary to conform to applicable law or, if it cannot be so amended without materially altering the intention of the parties, it will be deemed stricken and the remainder of the Agreement will remain in full force and effect.

DEFENDANTS’ RESPONSE TO AED, INC.’S MOTION TO ALTER OR AMEND JUDGMENT - 10
Amended Complaint, Ex. A, ¶ 31, p. 11.

According to this provision, if any part of the Purchase Agreement is deemed illegal, it is to be stricken so that the remainder of the Purchase Agreement will remain in full force and effect. This demonstrates that Purchase Agreement, even if the demolition agreement is construed as part of it, is divisible. Moreover, there is no mention within the four corners of the Purchase Agreement that it is the result of illegal consideration. The Purchase Agreement makes no reference to the demolition agreement or any oral agreement to have AED blast the bridge.

Lastly, KDC did not rely upon any portion of the demolition agreement to make its claim for title to the bridge. KDC relied solely upon the terms of the Purchase Agreement and accompanying Bill of Sale to prove its entitlement to the bridge. As such, and for the reasons stated above, the demolition agreement is divisible from the Purchase Agreement. Therefore, even if AED could show that the demolition agreement was part of the consideration for the Purchase Agreement, it still would not render the Purchase Agreement illegal. AED's argument is an exercise in futility. As the Court stated: "To buy into AED's argument, the Court would have to infer the demolition agreement formed the consideration of the purchase agreement." Order, p. 10. The Court is unable to make such an inference since there are absolutely no facts before the Court to support it. The only evidence before the Court is that the Purchase Agreement was entered before the demolition agreement, was never terminated, and was always to be separate from the demolition agreement. The Court's analysis was correct and AED's motion should be denied.
2. **AED misconstrues the facts and holding of *Quiring v. Quiring***

AED relentlessly relies upon *Quiring v. Quiring*, 130 Idaho 560, 944 P.2d 695 (1997) as support for its contention that if any part of an agreement is illegal, it renders the entire agreement illegal. That is not the holding of *Quiring*.

The Court set forth a good summary of the facts in *Quiring* in its Order, so KDC will not restate those facts here. AED argues that consideration for the quitclaim deed in *Quiring* consisted of $800 which was in addition to the separate illegal written agreement. As such, AED claims the *Quiring* Court determined that even though the quitclaim deed was a separate agreement supported by separate, and legal, consideration, it was unenforceable because it was also part of the consideration for the illegal written agreement. However, the only mention of the $800 to which AED so desperately clings was in one sentence that reads: "The deed listed $800.00 as the value received by Ron." 130 Idaho at 562, 944 P.2d at 697. The $800 was not even a factor in the Court’s analysis.

Rather, the Court found that “Ron’s acquiescence in the quitclaim deed was supported by Lynn’s acquiescence in the Agreement.” *Id.*, at 567, 702. In other words, the quitclaim deed was not a separate agreement supported by separate consideration; it was the consideration. In exchange for signing the written agreement, Lynn acquired property via the quitclaim deed. The Court held that “[o]btaining the transfer of property by a threat of arrest or exposure to hatred, contempt or ridicule is theft by extortion and violates I.C. § 18-2403.” *Id.* A quitclaim deed transfers property ownership. The Court found that Lynn had illegally acquired the transfer of property, via the quitclaim deed, illegally by extortion. Therefore, the Court found the entire transaction illegal, and invalidated the quitclaim deed because it was acquired illegally. That is
not the situation before this Court and, accordingly, the Court correctly determined that *Quiring* is inapposite.

**CONCLUSION**

AED's motion is untimely under Rule 59(o) and, for that reason alone, should be denied. However, even if the Court entertains AED's motion, it is still not entitled to the relief it seeks because the Court's previous analysis and decision was correct. AED failed to produce even a scintilla of evidence to support its allegation that the demolition agreement was consideration for the Purchase Agreement. Yet, even if it could prove that allegation, it would not render the Purchase Agreement void or illegal because both agreements are divisible and supported by separate and distinct consideration. Therefore, the Court should still find the Purchase Agreement valid, KDC the owner of the Bridge, and deny AED's motion.

RESPECTFULLY SUBMITTED this 16th day of March, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By [Signature]

Randall L. Schmitz, Of the Firm
Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

DEFENDANTS' RESPONSE TO AED, INC.'S MOTION TO ALTER OR AMEND JUDGMENT - 13
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of March, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

Arthur Bistline
Bistline Law, PLLC
1423 N. Government Way
Coeur d'Alene, ID 83814
Facsimile: (208) 665-7290

U.S. Mail, Postage Prepaid
Hand Delivered
Overnight Mail
Telecopy 208/665-7290
Email william@bistline.com

Randall L. Schmitz
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AED, INC., an Idaho corporation,

Plaintiff,

vs.

KDC INVESTMENTS, LLC, a Virginia LLC, and LEE CHAKLOS and KRYSRAL CHAKLOS, individually,

Defendants.


DEFENDANTS' REPLY IN SUPPORT OF VERIFIED MEMORANDUM OF COSTS AND FEES - 1
COSTS AND FEES

A. Defendants are Entitled to Discretionary Costs as This Case was Exceptional.

It should be noted at the outset that Plaintiff does not dispute Defendants are the prevailing party in this matter. It only argues that there was nothing "exceptional" about this case other than it was going to be litigated in a very compressed time frame. There are other factors that make this case exceptional and justify an award of discretionary costs.

The award of discretionary costs is a matter left to the trial court's discretion. Roe v. Harris, 128 Idaho 569, 917 P.2d 403 (1996). "A trial court may, in its discretion, award a prevailing party certain costs where there has been 'a showing that the costs are necessary and exceptional, reasonably incurred, and should in the interests of justice be assessed against the adverse party.'" Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) quoting I.R.C.P. 54(d)(1)(D). An award of discretionary costs may include long distance phone calls, photocopying, faxes, and travel expenses. Id. The requirement that a cost be exceptional includes costs incurred because the nature of the case itself was exceptional. Id.; see also Great Plains Equip., Inc., v. Northwest Pipeline Corp., 136 Idaho 466, 475, 36 P.3d 218, 227 (2001)(discretionary costs were "exceptional given the magnitude and nature of the case.").

The magnitude and nature of this case make it exceptional. This case involved the ownership and right/obligation to demolish and remove a very large bridge that spans the Ohio River between Bellaire, Ohio, and Benwood, West Virginia. The bridge had been the subject of litigation in the Ohio federal court system for several years. The outcome of this case impacts more than just the parties involved; it impacts the City of Bellaire, the City of Benwood, the Ohio federal court proceedings, the U.S. Coast Guard, the companies (such as railroad
companies) which own land on the banks of the Ohio River, and the those companies and people who use the Ohio River for transportation. This also was not a simple breach of contract action. It involved a purchase and sale agreement, an alleged service agreement, allegations of fraudulent inducement, and the interrelatedness and enforceability of the two agreements. This case involved numerous legal issues including fraudulent inducement, breach of contract, illegality of contracts, application of the parol evidence rule, injunctions, effect of administrative dissolution upon a party to a contract, right to rescission when a party fails to make a proper tender, right to specific performance, effect of failing to obtain a West Virginia contractor's license, and title to the bridge. This case was not a usual case by any means. It was not discovery or fact intensive, but it involved numerous complex legal issues. The complexity of the legal issues combined with the aggressive trial schedule made this an exceptional case and justifies the award of discretionary costs to the defendants.

B. The Attorney Fees Incurred by the Defendants Were Reasonable and Necessary Given the Nature of the Case.

Plaintiff objects to the amount of fees incurred by the Defendants because it claims this was a simple breach of contract/fraud case. As explained above, this was not a simple case. It involved numerous, complex legal issues which needed to be researched and competently briefed. As the Defendants pointed out in their Verified Memorandum of Costs and Fees, between August 23, 2010, and the Court's summary judgment decision on January 31, 2011, there were fifteen (15) pleadings and motions filed. Since that time, Plaintiff has filed a motion to reconsider the Court's summary judgment decision, which the Court found was utterly baseless, and a motion to amend the judgment. These motions required Defendants to conduct additional research and file responsive briefing, including motions to strike objectionable
evidence Plaintiff attempted to introduce. Plaintiff complains that the Defendants' fees are excessive, but Plaintiff's motion practice directly impacted the amount of fees incurred. Considering the extent of the motion practice involved in this case and the complexity of the legal issues, the amount of fees incurred by the Defendants was reasonable and necessary.

C. Particular Attorney Fees Challenged.

Plaintiff challenges certain fees incurred in particular. It challenges all travel expenses incurred. As set forth above, this was an exceptional case and travel expenses are properly awarded in an exceptional case.

Plaintiff also challenges fees incurred by a second attorney, Mr. Comstock. Assistance of a second attorney was necessary to assist with trial preparation given the extremely aggressive schedule and the difficulties Defendants were having obtaining depositions and discovery from Plaintiff. Mr. Comstock was brought in to handle pretrial motions, briefing, exhibits, and jury instructions while Mr. Schmitz completed discovery which required travel away from the office. Given the aggressive schedule of this case, assistance with trial preparation was necessary and reasonable.

Lastly, Plaintiff challenges time spent on a telephone conference between defense counsel and Defendants on the grounds this conversation should have already occurred. What Plaintiff fails to understand is that this conversation could not have occurred until all documents had been produced in discovery. After all documents had been produced, a detailed timeline of events and email communications was prepared. The challenged conversation was about the documents produced, the timeline of events, and in preparation for trial which was less than a month away. This telephone conversation was necessary and reasonable.

DEFENDANTS' REPLY IN SUPPORT OF VERIFIED MEMORANDUM OF COSTS AND FEES - 4
CONCLUSION

Based upon the foregoing, Defendants respectfully request the Court award them costs and fees in this matter as outlined in their Verified Memorandum of Costs and Fees.

RESPECTFULLY SUBMITTED this 17th day of March, 2011.

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

By Randall L. Schmitz - Of the Firm
Defendants KDC Investments, LLC, Lee Chaklos and Krystal Chaklos

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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Email arthurmooneybistline@me.com

Randall L. Schmitz

DEFENDANTS’ REPLY IN SUPPORT OF VERIFIED MEMORANDUM OF COSTS AND FEES - 5

AED Inc. vs. KDC Investments, LLC, et al
Supreme Court Case No. 38603-2011
1043 of 1046
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<td>Motion to alter or amend. Issue if one contract has to do with another during Summary Judgment. Blast agreement and sales contract were done at same time. At issue one was material to another. Self serving affidavits. This is a jury case and jury decides whether or not AED would sell bridge if they weren't able to destroy it. These contracts were done on same day. Contract isn't subject to statute of frauds. They have a contractors license now. KDC is still under obligation to hire them. Agreements are related. They brought legality of blasting contract. I'm not trying to pull a fast. If illegal than jury has to decide. Court can say incorrect and reverse decision and set it for trial.</td>
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<td>Mr. Schmitz</td>
<td>This motion is untimely. 14 days within entry of judgment. 20 days after entry of judgment and barred. Demolition agreement is separate from purchase agreement. They are wrong factually and legally. Neither e-mail states purchase agreement was terminated. They granted extension. No genuine issue of material fact. Proevidence rule. 2 agreements can be separated as legal portion. Legal agreement is enforceable even though one is illegal. Hill vs. Shull. AED hasn't cited any case in support of their argument. Purchase agreement is separable from demolition agreement are separate and unrelated. Mr. Kelly testified in depo that purchase and demol agreement were to be always separate. Never alleged breach of contract for oral agreement in their complaint. They can only agree what they allege.</td>
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AED Inc. vs. KDC Investments, LLC, et al   Supreme Court Case No. 38603-2011 1044 of 1046

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IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC., an Idaho corporation  )  SUPREME COURT
Petitioner/Plaintiff, )  CASE NO. 38603-2011

VS. )  KOOTENAI COUNTY CASE NO.  
KDC INVESTMENTS, LLC a Virginia )  )  CV 2010-7217
LLC, and LEE CHAKLOS and )  )
KRystal CHAKLOS, individually )  )

Respondents/Defendants. )  )

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that no exhibits were offered in this case.

I certify that the Attorneys for the Petitioner and Respondents were notified that the Clerk’s Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the 8th day of September, 2011.

I do further certify that the Clerk’s Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 8th day of September, 2011.

CLIFFORD T. HAYES
Clerk of the District Court

Deputy Clerk
IN THE SUPREME COURT OF THE STATE OF IDAHO

AED, INC., an Idaho corporation )
Petitioner/Plaintiff, )

VS. )
KDC INVESTMENTS, LLC a Virginia )
LLC, and LEE CHAKLOS and )
KRISTAL CHAKLOS, individually )
Respondents/Defendants. )

SUPREME COURT CASE NO. 38603-2011
KOOTENAI COUNTY CASE NO. CV 2010-7217

CLERK’S CERTIFICATE OF SERVICE

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk’s Record to each of the Attorneys of record in this cause as follows:

ARTHUR M. BISTLINE
1423 N Government Way
Coeur D’Alene, ID 83814

JOHN J. BURKE and
RANDALL L. SCHMITZ
P.O. Box 1271
Boise, Idaho 83701

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 8th day of September, 2011.

Clifford T. Hayes
Clerk of District Court