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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLEARWATER REI, LLC, BARTON COLE COCHRAN, CHAD JAMES HANSEN, RONALD D. MEYER, CHRISTOPHER J. BENAK, AND ROB RUEBEL Plaintiffs – Counterdefendants - Respondents, vs. MARK BOLING, Defendant – Counter-Claimant – Appellant	Supreme Court Docket No. 40809-2013 (Ida County Case No. CV OC 1208669)

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of Idaho

In and For the County of Ida

HONORABLE DEBORAH BAIL, DISTRICT JUDGE, PRESIDING

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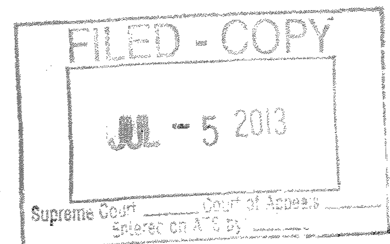

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STATEMENT OF THE CASE

This action arises out of conduct involving the purchase and performance of the 2008 Note Program "Note Program," with Defendant/Counter-Claimant/Appellant Mark Boling ("Boling") by individuals employees and affiliated business entities related to Clearwater Real Estate Investments aka Clearwater Real Estate Investments, LLC.

On February 15, 2012, out of abundance of caution, Boling filed a Demand for Commercial Arbitration with the American Arbitration Association ("AAA") against all named Counterdefendants and Clearwater 2008 Note Program, LLC ("Company") and served said parties therewith regarding the acts and omissions set forth herein under the arbitration clause in the Subscription Agreement. [Clerk's Record on Appeal ("R") 302, ¶ 33]

On March 8, 2012, Counterdefendants filed with the AAA and served their Answer Statement objecting to arbitrate the disputes set forth in Boling's counterclaim and third party complaint on behalf of all named Counterdefendants, but not the Company. [R 302, ¶ 34]

On May 14, 2011, Counterdefendants filed their initial complaint in this action. [R 005-020] All Counterdefendants/Respondents have challenged Boling's AAA demand to arbitrate his claims against all non-signatory Counterdefendants under the Subscription Agreement.

On June 28, 2012 Boling filed his Answer to Complaint and Counterclaim seeking monetary and/or equitable relief in his counterclaim alleging, inter alia, 1) violations of the Idaho Consumer Protection Act [*Idaho Code* ("I.C.") §§ 48-601 – 48-619 ("ICPA")] against all Counterdefendants, and each of them, and 3) Breach of Guaranty against the Counterdefendant Clearwater REI, LLC. [R 021-223]

On August 17, 2012, Counterdefendants filed a Motion to Stay Arbitration in this case and denied the existence of the agreement to arbitrate. [R 224-226]

On October 16, 2012, the district court rejected Boling's declaration and issued its Decision and Order Re: Motion to Stay Arbitration [R 278-279], stating, inter alia, "The Court notes that the relief sought by the plaintiffs is a determination that they are *not* subject to the requirement to arbitrate contained in the Subscription Agreement - if their position is correct, that hardly gives a basis for them to evade any direct liability they may have for consumer protection violations on the record as it currently exists, at a minimum, the Court could not address the merits of the claim on this record. * * * **Until or unless** additional evidence is presented to the Court as provided for by I.R.C.P. 43(e) that would warrant any other conclusion, the only parties which are required to arbitrate are Clearwater 2008 Note Program LLC and Mark Boling." (bold and underline added)

On December 10, 2012, Boling filed a new and separate Motion to Compel Arbitration. [R 507-538]

On February 7, 2013, the district court issued its Second Decision and Order Re:

Motion to Stay Arbitration and **54(b) Certificate**. [R 575-577]

On March 11, 2013, Boling filed this appeal to the district court's February 7, 2013 ruling as a matter of right under I.A.R. 11 (a) (3) ("Judgments made pursuant to a partial judgment certified by the trial court to be final as provided by Rule 54(b), I.R.C.P."). [R 578-581]

STATEMENT OF FACTS[1]

A. Private Placement Memorandum, Supplements One and Two Thereto and Guaranty

On or about February 4, 2010, Boling received an initial package from Rob Ruebel, Regional Vice-President of Sales of Clearwater Real Estate Investments ("Clearwater") [2] consisting of A) a bound Confidential Private Placement Memorandum Book # 08Note-A238 dated August 29, 2008 with the letterhead of Clearwater [R 296, ¶ 5 Exhs. 1-3, R 309-364], which included, inter alia, the Private Placement Memorandum ("PPM"), a Guaranty , and Supplements One and Two to the PPM, and B) a cover letter with the letterhead of Clearwater dated February 1, 2010 and miscellaneous sheets about Clearwater [R 365-372 collectively, Exh. 4]. Boling did <u>not</u>

---

1 The statement of facts and all exhibits identified or referenced in this document are taken from Boling's affidavit (R 295-506 "Boling Affdvt.").

2 The cover letter and business card of Mr. Ruebel [R 366] identifies Clearwater Real Estate Investments as the business entity <u>providing</u> the initial package. Consulting agreements for RE Capital Investments, LLC and others are made with Clearwater Real Estate Investments, but is executed by the business entity, Clearwater Real Estate Investments, LLC. [R 305-306, Boling Affdvt., ¶ 49 (c)] However, Clearwater Real Estate Investments, LLC **<u>didn't even exist</u>** as business entity in Idaho <u>until</u> 7/24/12. [R 302, 306, Boling Affdvt., ¶¶ 32, 50; R 471-472, R 505-506, Exhs 20 & 27]

receive a copy of the Note dated August 29, 2008, the Third Supplement to the PPM dated January 20, 2010, or the 2009 Year-End Update dated March 19, 2010 until <u>after</u> the submission and acceptance of his Subscription Agreement, *infra*.

The **<u>PPM</u>** sets forth the following:

> Clearwater 2008 Note Program, LLC, an Idaho limited liability company, was organized to offer up to $20,000,000 in aggregate principal amount of 9.0% Notes due December 31, 2015. The Company will use the proceeds from the offering of the Notes to provide secured financing for real estate acquisition and development projects undertaken by Clearwater REI, LLC, an Idaho limited liability company, its Affiliates and other borrowers who satisfy the lending criteria established by the Company. * * * All loans made by the Company will be collateralized by a first position mortgage or deed of trust, as the case may be. [R 310-311, PPM, Introduction.]
>
> Noteholders may elect, from time to time, to (a) receive monthly distributions of simple interest at the annual rate of 9.0%, or (b) re-invest accrued interest at a compounded annual interest rate of 9.0%. [R 310-311, PPM, Introduction.]
>
> The mailing address of the Company is c/o Clearwater REI, LLC, 1300 E. State Street, Suite 103, Eagle, Idaho 83616. [R 312, PPM, Introduction.]
>
> If, after carefully reading the entire Memorandum, obtaining any other information available and being fully satisfied with the results of pre-investment due diligence activities, a prospective Noteholder would like to purchase Notes, a prospective Noteholder should complete and sign the attached Subscription Agreement. The full purchase price for the Notes must be paid by check upon submission of the Subscription Agreement for the Notes. [R 316, PPM, p. 3.]
>
> <u>Interest</u>: Noteholders may elect to receive monthly interest payments in an amount equal to 9.0% simple interest on their principal investment. All distributions will paid in arrears on the fifteenth day of each month, beginning with the month following the month in which the Notes are issued. [C 332, PPM, p. 19.]
>
> Interest Reinvestment Program (IRP): By giving written notice to the Company of their desire to do so not later than November 30, Noteholders may elect to have their interest reinvested and compounded monthly beginning on the first day of the year immediately following the date on which such notice was received by the Company. Reinvested interest will be compounded at the annual rate of 9.0%. Interest that is reinvested will

be added to and considered part of the principal amount of the Note at the end of each calendar month. [R 332, PPM, p. 19.]

Liquidity; Callability: Beginning December 31, 2010 and once annually thereafter, Notes representing up to 10% of the original principal amount may be called by the Noteholders upon not less than 90 days written notice to the Company. [R 332-333, PPM, pp. 19-20.]

Guaranty: The Notes will be obligations of the Company the principal of which will be guaranteed by RE Capital Investments, LLC [R 333, PPM, p. 20.] The Guaranty is attached to the PPM as Exhibit D [R 354].

Annual Report: Within 120 days after the end of each calendar year, the Company will send to each Noteholder of record during the previous year: (a) an audited balance sheet for the Company as of the end of such fiscal year and (b) an audited statement of the Company's earnings for such fiscal year, along with a year-end status report. [R 337, PPM, p. 24.]

Definitions:
"Company" means Clearwater 2008 Note Program, LLC, an Idaho limited liability company. [R 338, PPM, p. 25.]
"Manager" refers to Clearwater REI, LLC. The Manager is sole owner and the initial manager of the Company. [R 339, PPM, p. 26.]
"Noteholders" means purchasers of Notes. [R 339, PPM, p. 26.]
"Notes" means the $20,000,000 aggregate principal amount of 9.0% notes due December 31, 2015, subject to increase to $40,000,000 at the sole discretion of the Company, which will be obligations of the Company the principal of which will be guaranteed by RE Capital Investments, LLC; however, the Notes will not be secured by collateral. [R 339, PPM, p. 26.]

"**Event of Default**" refers to the occurrence of any of the following: (a) failure to pay the principal on the Notes when due at maturity, or upon any earlier due date, or upon mandatory redemption at the option of Noteholder, (b) failure to pay any interest on the Notes for ten days after notice of such default to the Company; (c) failure to perform any other covenant for ten days after receipt of written notice specifying the default and requiring the Company to remedy such default; **or** (c) events of insolvency, receivership, conservatorship or reorganization of the Company. [R 339, PPM, p. 26.] (Emphasis added.)
Guarantor's Balance Sheet dated July 31, 2008 [R 351-353] – attached Exhibit C to the PPM.

Guaranty dated July 31, 2008 [R 354] – attached Exhibit D to the PPM, which was signed on behalf of the Guarantor, RE Capital Investments, LLC, by its managing member, Diamond B Asset Management.

The Guaranty states, inter alia:

> "In order to induce each prospective purchaser (each a "Noteholder" and collectively the "Noteholders") of 9% Notes due on December 31, 2015 (each a "Note" and collectively the "Notes) issued by Clearwater 2008 Note Program, LLC (the "Company") to purchase the Notes, the Guarantor hereby unconditionally guarantees the payment of the original principal amount of the Notes as provided therein. This Guaranty shall remain in full force throughout the terms of the Notes."
>
> "Guarantor hereby waives notice of acceptance of this Guaranty and all other notices in connection herewith or in connection with the liabilities, obligations and duties guaranteed hereby, including notices to them of default by the Company under the Notes."
>
> "The Guarantor's net worth will at all times during the term of the Guaranty be maintained at $54, 000.000 subject to increase in pro rata up to $78,000,000 if the Company increases the offering of the Notes."
>
> "Guarantor further agrees, to the extent permitted by law, to pay any costs or expenses, including the reasonable fees of an attorney, incurred by the Noteholders in enforcing this Guaranty."

First Supplement to PPM dated October 3, 2008 [R 360-364]:

Peter Cooper, Senior Vice-President of Sales will assume the role of Director of Sales and Broker Dealer Relations for Clearwater REI, LLC. Don Steeves, former National Sales Director and Director of Broker Relations, concluded his employment with Clearwater REI, LLC. [R 361, 1st Suppl., p. 2.]

The four member Investment Committee now consists of current principal members of Clearwater REI, LLC, namely: Ron Meyer, Chris Benak, Bart Cochran and Chad Hansen. No loan will be made by the Company without the prior approval of the Investment Committee. [R 362, 1st Suppl., p. 3.]

Second Supplement to PPM dated June 30, 2009 [R 356-359]:

The **RELATIONSHIP** of the **Company** (Clearwater 2008 Note Program,

LLC), the **Manager** (Clearwater REI, LLC) and the **Guarantor** (RE Capital Investments, LLC) to each other, and their respective owners, is as follows [R 357, 2nd Suppl., p.2]:

- RE Capital Investments, LLC owns 55.84% of Clearwater (Real Estate Investments).
  - Ronald D. Meyer owns 100% of Terron Investments, Inc., which owns 50 % of RE Capital Investments, LLC.
    - Christopher J. Benak owns 100% of Diamond B Asset Management, Inc., which owns the other 50% of RE Capital Investments, LLC.
- Barton Cole Cochran 100% of Leap, Inc. which owns 19.58% of Clearwater.
- Chad James Hansen owns 100% of Green Jackets Investments, Inc., which owns 19.58% of Clearwater.

Bart Cochran, who was formerly the Company's Vice-President of Acquisitions & Operations, is now the Company's President. Chad Hansen, who was formerly the Company's Vice-President of Finance, is now the Company's Chief Financial Officer. [R 357, 2nd Suppl., p.2]

Guarantor's Balance Sheet dated December 31, 2008 [R 358-359] – attached as Exhibit A to the 2nd Suppl.

After receiving the initial package from Clearwater, Boling viewed and relied upon Clearwater's website at www.clearwaterrei.com that was disclosed on the

letterhead from the initial package. The website disclosed that the business entity known as Clearwater Real Estate Investments, LLC owned or operated the website and implied by its content of ownership that Clearwater Real Estate Investments, LLC was a viable business entity authorized to do business in the state of Idaho.[3] Boling was unable to access the web pages on Clearwater's website for investors because he was not as yet an investor. [R 296, ¶ 6]

B. Subscription Agreement

On February 12, 2010, Boling executed and submitted a Subscription Agreement ("**SA**") [R 373-379, Exh. 5], and Boling paid the sum of $50,000 pursuant thereto as his personal investment in the Company's Note Program without having previously received a copy of the Note. [R 296, ¶ 7]

At the time of submitting Boling's executed SA and $50,000 payment, Counterdefendants or their agents or principals had not disclose to Boling that a) Clearwater and Clearwater Real Estate Investments, LLC did not exist as business entities authorized to do business in the state of Idaho, b) RE Capital Investments, LLC ("Guarantor") had a 55.84% membership interest and 50% voting interest in Clearwater REI, LLC ("Manager"), and c) the Guarantor had a consulting agreement with Clearwater aka Clearwater Real Estate Investments, LLC for $8,500.00 per month. [R 297, ¶ 9]

[3] Clearwater Real Estate Investments, LLC didn't exist as business entity in Idaho until 7/24/12. [R 302, 306, Boling Affdvt., ¶¶ 32, 50; R 471-472, R 505-506, Exhs 20 & 27]

<u>Subscription Agreement</u>:

The SA is <u>the offer and agreement</u> of Boling to purchase $50,000 in principal of 9% Notes to be issued by the Company subject to the terms, conditions, acknowledgments, representations and warranties stated herein and in the PPM, as supplemented from time to time. [R 375, SA, p.2.]

RE Capital, LLC agreed to guarantee the repayment of principal under the Notes. [R 376, SA, p.3., ¶1]

Pertinent portions of the SA are as follows:

> "I acknowledge that I have received, read and fully understand the Memorandum. I acknowledge that I am basing my decision to invest in Notes <u>on the Memorandum</u> and I have relied only on the information contained in said materials and have not relied upon any representations made by any other person." [R 376, SA, p.3., ¶2] (underline added)
>
> "I am purchasing Notes for my own account and for investment purposes only." [R 377, SA, p.4, ¶7.]
>
> "This Subscription Agreement shall be construed in accordance with and governed by the laws of the State of Idaho without regard to its choice of law provisions." [R 377, SA, p.4, ¶10.]
>
> [**<u>ARBITRATION CLAUSE</u>**]
>
> "[A]ny dispute, controversy or other claim arising under, out of or relating to this Agreement or any of the transactions contemplated hereby, or any amendment thereof, or the breach or interpretation hereof or thereof, shall be determined and settled in binding arbitration in Boise, Idaho, in accordance with applicable Idaho law, and with the rules and procedures of The American Arbitration Association. The prevailing party shall be entitled to an award of its reasonable costs and expenses, including, but not limited to, attorneys' fees, in addition to any other available remedies. Any award rendered therein shall be final and binding on each and all of the parties thereto and their personal representatives, and judgment may be entered thereon in any court of competent jurisdiction. BY EXECUTING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ALL DISPUTES DECIDED BY NEUTRAL ARBITRATION, YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE SUCH

DISPUTES LITIGATED IN A COURT OR JURY TRIAL, AND YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE. BY EXECUTING THIS AGREEMENT, YOU HEREBY CONFIRM THAT YOUR AGREEMENTS TO THIS ARBITRATION PROVISION IS VOLUNTARY." [R 377, SA, p.4, ¶11.]

> "[T]his Subscription Agreement and the Memorandum, together with all attachments and exhibits thereto, constitute the entire agreement among the parties hereto with respect to the sale of Notes and may be amended, modified or terminated only by a writing executed by all parties." [R 377, SA, p.4, ¶13.]

C. Acceptance of Subscription Agreement, Certificate and Note

On or about March 6, 2010, Boling received a cover letter with the letterhead of Clearwater dated March 1, 2010 [R 381], an Acceptance of the Subscription Agreement [R 379], a Certificate with an effective date of February 27, 2010 [R 383], and a Note dated August 29, 2008 [R 385-389] from Clearwater. [R 297, ¶10]

<u>Acceptance of Subscription Agreement</u>:

On February 26, 2010, Bart Cochran signed the acceptance of the SA, as the Manager for the Company.

<u>Certificate</u>:

Effective February 27, 2010, Certificate No 08-470 with Clearwater Real Estate Investments letterhead was signed by Bart Cochran as the Manager for the Company and issued to Boling.

<u>Note</u>:

A Note dated August 29, 2008 with the Company (Clearwater 2008 Note Program, LLC) as the maker, and which contained new interest accrual terms <u>not</u> set

forth in the PPM, was signed by Bart Cochran as the sole member for the Manager. No Exhibit A, listing the names of the Noteholders, including Boling, was attached or included with the Note that was delivered to Boling.

Pertinent portions of the Note are as follows:

> FOR VALUABLE CONSIDERATION, the receipt, adequacy and sufficiency of which are hereby acknowledged, Clearwater 2008 Note Program, LLC, an Idaho limited liability company ("Maker"), promises to pay to the parties listed on Exhibit A attached hereto (the "Noteholders"), the aggregate principal amount of Twenty Million and 00/100 Dollars ($20,000,000) with the option to increase to Forty Million and 00/100 Dollars ($40,000,000), together with interest, late charges, costs and expenses, and all other amounts described below in accordance with the following terms and provisions:
>
> Section 1 Definitions.
> "Memorandum" shall mean Maker's Confidential Private Placement Memorandum dated August 18, 2008, as amended or supplemented from time to time, relating to the offer and sale by the Maker of up to $20,000,000 of Notes (subject to increase to $40,000,000).
>
> "Noteholder" shall mean any person or entity hereafter purchasing a Note in accordance with the Memorandum, subject to the provisions of the Transaction Documents applicable thereto, and any successor or assign thereof or entity acquiring an interest herein at any time.
>
> "Transaction Documents" shall mean this Note, the Subscription Agreement and the Memorandum.
>
> Section 2.1 Fixed Interest.
> "Commencing on the date hereof and continuing until December 31, 2015, the outstanding principal hereunder shall bear interest at a fixed annual rate of 9%."
>
> **Section 3 Payments; Accrual**.
> "Commencing on the fifteenth day of the month next following the Funding Date and continuing on the fifteenth day of the month thereafter until the outstanding principal hereof is paid in full, Maker shall pay to, or accrue and compound for the benefit of, the Noteholders all unpaid Interest in an amount equal to the product of the principal amount hereunder and that fraction the numerator of which is the Noteholder's principal investment and the denominator of which is the principal amount hereunder. If not sooner paid, Maker shall pay the principal balance

hereof in full on the Maturity Date, together with all unpaid accrued interest. Maker shall make all payments of Interest, late charges, and principal to the Noteholders at their respective addresses on file with the Maker as of the day which is ten days prior to the due date of such payment, on or before the date when due, without notice, deduction or offset. All payments shall be made in lawful money of the United States of America." (bold added)

Section 5 Put Rights.
"Beginning December 31, 2010 and once annually thereafter, up to 10% of the original principal amount may be called by the Noteholders upon not less than 30 days written notice to the Maker."

Section 6 Late Charges.
" * * * Maker therefore agrees that a late charge equal to 5% of each payment of Interest or principal that is not paid within 10 days after its due date is a reasonable estimate of fair compensation for the loss or damages to the Noteholders will suffer. Further, Maker agrees that such amount shall be presumed to be the amount of damages sustained by Noteholders in such case, and such sum shall be added to amount then due and payable."

Section 8.1 Events of Default:
"Any of the following occurrences shall constitute an "Event of Default" under this Note: (a) failure by Maker to make any payment of Interest on or principal of this Note on or before the twenty-fifth (25th) day of the month first becoming due in accordance with the terms of this Note, without any notice or demand for payment (a "Payment Default"); * * *."

Section 8.2 Remedies.
"Upon any Event of Default under this Note and the expiration of any applicable notice or cure periods: (a) the entire unpaid principal balance hereof , any accrued but unpaid Interest, late charges, and all other amounts owing under this Note, shall, at the option of the Noteholders, without further notice or demand of any kind to Maker or any other person, become immediately due and payable; and (b) Noteholders shall have and may exercise any and all rights and remedies available at law, by statute, or in equity.

The remedies of the Noteholders, as provided in this Note, shall be cumulative and concurrent and may be exercised singularly, successively, or together, at the sole discretion of the Noteholders, as often as occasion therefor shall arise. No act of omission or commission by the Noteholders, including specifically any failure to exercise any right, remedy or recourse, shall be deemed a waiver or release to be effected only through a written documents executed by the Noteholders. A waiver or release with reference to any one event shall not be construed as

> continuing, as a bar to, or as a waiver or release of, any subsequent right, remedy, or recourse to collateral as to any subsequent event."

D. Subsequent Communications to Boling

On or about March 19, 2010, Clearwater sent to the Boling by mail a 2009 Year-End Update [R 297, ¶ 12; R 390-392, Exh. 9] to keep the investors informed of the status of the Note Program. The 2009 Year-End Update letter states, "the assets of RE Capital, the guarantor, are being maintained at sufficient levels to allow us to meet our obligations." This 2009 Year-End Update revealed information regarding the update and current strategy of the various loans made by Counterdefendants prior to Boling's investment. Two of the four loan projects were in default and/or in bankruptcy. The other two loan projects were having delays in the entitlement process.

On or about June 17, 2010, the Company disclosed its Independent Auditor's Report and Financial Statements for the calendar years 2008 and 2009 [R 298, ¶ 13; R 393-408, Exh. 10].

On or about March 24, 2011, Clearwater sent to Boling by mail a 2010 Year-End Update [R 298, ¶ 14; R 409-411, Exh. 11] to keep the investors informed of the status of the Note Program. Now, all five (5) outstanding loans were in default.

On or about August 19, 2011, the Company disclosed its Independent Auditor's Report and Financial Statements for the calendar years 2009 and 2010 [R 298, ¶ 15; R 412-430, Exh. 12]. The Company is solely owned by the Manager. The Company maintained a separate allowance for each loan receivable. At December 31, 2010, the

Company had an allowance for losses of $2,311,584. In 2010, the Company suspended early redemption requests.

On or about October 26, 2011, the Clearwater sent by mail on behalf of the Company a Notice to Note Holders [R 298, ¶ 16, R 431-434, Exh. 13], which was received by Boling on November 4, 2011. The Notice states, "Note Holders can be optimistic of the collateral position of the Note Program today." The Notice further states that the amount of the interest payment distribution would be reduced for the months of November 2011, December 2011 and January 2012 and reassessed for February 2012. Boling never agreed to any accrual of interest.

On November 6, 2011, Boling sent to Farris, as Director of Marketing and Investor Relations for Clearwater and acting on behalf of the Company, written notice to redeem 10% of his principal amount under the Transaction Documents and requested a current Balance Sheet of the Guarantor [R 298, ¶ 17; R 446-447, Exh. 14 – Email String/Letters]. The last Balance Sheet of the Guarantor disclosed to the Boling was dated December 31, 2008.

On November 10, 2011, Clearwater acknowledged receipt of Boling's liquidation request, placed Boling's request on a *priority list* with an acceptance date of November 7, 2011 and informed Boling that all liquidation requests have been suspended [R 298, ¶ 18; R 444-446, Exh. 14 – Email String/Letters]. Clearwater stated that it "has made multiple attempts to get updated financials from RE Capital

(Guarantor) and we have received word that we should have updated financials no later than year end 2011."

On December 1, 2011, Boling *first* obtained by email and reviewed a copy of the Third Supplement to the PPM dated January 20, 2010 from Ross Farris, Director Marketing and Investor Relations for Clearwater. [R 298-299, ¶ 19; R 452-457, Exh. 15]

The **Third Supplement to the PPM** states, inter alia, "[a]lthough the Guarantor's net worth of approximately, $53.4 million is lower than the net worth of $54 million it has covenanted to maintain under the Guaranty based on a Maximum Offering Amount of $20,000,000, in the event that the increased Maximum Amount of $21,900,000 is attained, the Guarantor's net worth does provide a principal coverage ratio of: (a) 1.2x, if a portion of the Guarantor's net worth is reserved to provide 1.5x coverage over principal amounts outstanding under the notes issued by Clearwater 2007 Notes Program, LLC (the "2007 Notes Program") (accounting for liquidation of $2,000,000 in principal amounts of the notes issued by the 2007 Notes Program as of December 31, 2009, with $18,000,000 remaining outstanding), and (b) 2.44x, if this reserve is not made (the Guarantor is not required to make this reserve). Attached as Exhibit A to the Third Supplement to the PPM was the RE Capital Balance Sheet dated December 31, 2009.

Counterdefendants did not complete the 2010 Balance Sheet for RE Capital (Guarantor) and no efforts were made to create a balance sheet for RE Capital for the 2011 calendar year. [R 305, ¶¶ 46-47]

On December 14, 2011, Boling received a letter from the Company with Clearwater letterhead stating that 1) the security for the loans were not cross-collateralized, 2) the Manager decides exclusively when to get appraisals for the Projects, 3) the 2010 Audited Report and financials of the Company were purportedly first available on May 1, 2011, 4) the initial PPM packet included the Third Supplement to the PPM (which is not true), 5) the Company has requested a final 2010 Balance Sheet from the Guarantor, and 6) the Company "cannot honor the liquidation requests of a few Note Holders at the expense of the other Note Holders." [R 299, ¶ 21; R 448-449, Exh. 14 – Email String/Letters]

On December 20, 2011, Boling spoke by telephone with Lori Fischer, Controller of Clearwater, who informed Boling that the 2010 Audited Report and financials of the Company were first available on or after August 29, 2011. [R 299-300, ¶ 22]

On December 20, 2011, Boling stated in an email to Clearwater: "If the Company maintains now and at the time of the initial PPM that it can alter or over-ride this expressed term regarding Callability on the basis that it has an obligation to ALL Note holders allowing the Company not to abide by this expressed term, then I would request that my subscription be immediately rescinded and the total principal amount of my note be restored." [R 300, ¶ 23; R 438-439, Exh. 14 – Email String/Letters]

On or about January 12, 2012, Clearwater sent a letter to Note Holders, including Boling, postponing all 2011 liquidation requests until further notice. [R 300, ¶ 24; R 458-459, Exh. 16]

On or about January 25, 2012, the Company sent a letter to Boling stating that it has "been in contact with RE Capital and are hopeful of receiving correspondence from them in the next 30 days. [R 300, ¶ 25; R 451, Exh. 14 – Email String/Letters][4]

On February 2, 2012, Ross Farris, Director of Marketing and Investor Relations for Clearwater informed Boling by telephone that the reduction of interest payment was made pursuant to Section 3 of the Note and the suspension of liquidation rights was to protect all Noteholders. Boling informed Mr. Farris that he never received a copy of the Note until after submitting his Subscription Agreement and $50,000 payment to the Company. Boling requested a copy of Exhibit A to the Note. Mr. Farris responded that he would obtain a copy of Exhibit A to the Note, but only with Boling's name on it and not the identity of all Noteholders. No Exhibit A to the Note was ever received by Boling.[5] [R 300, ¶ 26]

On February 2, 2012, Boling sent to Clearwater by email a written Notice of Default on Interest payments for November 2011, December 2011, and January 2011, and a written Notice of Default on his liquidation rights and demanding that payment be made immediately or after a cure period, if necessary. [R 301, ¶ 27; R 436-437, Exh.

4 Mssrs. Meyer and Benak effectively own RE Capital and are also Chief Development Officers for the Company. [R 357, 2nd Suppl., p.2; R 330, PPM, p. 17.]

5 Exhibit A to the Note never existed. [R 305, ¶ 48]

14 – Email String/Letters]

On February 6, 2012, Boling received from Clearwater a cover letter and January Update dated January 31, 2012. [R 301, ¶ 28; R 460-463, Exh. 17] The cover letter states: "the February payment will be 25% of the monthly interest distributed." The Update acknowledges: "Real Estate values have fallen dramatically nationwide."

On February 9, 2012, Boling received from Clearwater a Quarterly Statement ending December 31, 2011 [R 301, ¶ 29; R 464-465, Exh 18] that sets forth the "Total Outstanding Principal of Master Promissory Note to Investors" as $21,810,000 and "Total Appraised Value of Collateral" as $25,100,000 and "Collateral valuations dated September 15, 2010, January 19, 2011 and September 21, 2011."

If Boling was timely made aware of the aforementioned facts, Boling would not have made his $50,000 investment in the Note Program. [R 301-302, ¶ 30]

ISSUES PRESENTED ON APPEAL

ISSUE NO. 1: Whether Boling's statutory tort claims fall within the scope of the arbitration clause of the subscription agreement?

ISSUE NO. 2: Whether the non-signatory Counterdefendants, and each of them, are bound by the arbitration clause of the subscription agreement?

ISSUE NO. 3: Whether Boling is entitled to compel arbitration against the non-signatory Counterdefendants, and each of them, under the arbitration clause of the subscription agreement?

ARGUMENT

A *Standard of Review*

""Arbitrability is a question of law to be decided by the court." Accordingly, we exercise free review over questions of arbitrability and may draw our own conclusions from the evidence presented. "A court reviewing an arbitration clause will order arbitration unless 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' Doubts are to be 'resolved in favor of coverage.' Determining the scope of an arbitration clause is a question of contractual interpretation. In determining the meaning of a contract, "[w]hen the language of a contract is clear and unambiguous," its meaning and legal effect are questions of law over which we exercise free review." (Citations omitted.) *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315, 246 P.3d 961, 968 (Dec. 2010). "A district court decides a motion to compel arbitration under the same standard it applies to a motion for summary judgment.... On appeal, a 'question concerning the applicability and scope of an arbitration agreement' is subject to de novo review." *Id.* at p. 317.

A strong public policy favors arbitration. See, e.g., *Bingham County Comm'n v. Interstate Elec. Co.*, 105 Idaho 36, 40 (1983). Agreements to arbitrate are encouraged and given explicit recognition as effective means to resolve disputed issues. *Loomis, Inc. v. Cudahy,* 104 Idaho 106, 108 (1983).

B. *Right to Compel Arbitration*

On application of a party showing an agreement described in section 7-901,

Idaho Code, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied. *I.C.* § 7-902 (a).

If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made therein. Otherwise and subject to section 7-918, Idaho Code, the application may be made in any court of competent jurisdiction. *I.C.* § 7-902 (c).

Once the Counterdefendants objected to the arbitration demand with the AAA on the basis of not being signatories to the agreement containing an arbitration clause, the American Arbitration Association did not have jurisdiction to arbitrate the matter as to the objecting Counterdefendants because the issue is for the courts, and not the arbitrator, to decide whether Boling can compel arbitration.

In the instant case, Counterdefendants filed this action denying the existence of the agreement to arbitrate against them. However, there is nothing in the entire subscription agreement that expressly limits the arbitration clause to the parties or excludes non-signatory parties from arbitration.

B. The Scope of the Arbitration Clause includes the Counterdefendants

Whether an arbitration clause in a contract requires arbitration of a particular

dispute or claim depends upon its terms. *Lovey v. Gregence BlueShield of Idaho,* 139 Idaho 37, 46 (2003). In the instant case, the arbitration clause in the SA [SA, p.4, ¶11] covers "any dispute, controversy or other claim arising under, out of or relating to this Agreement or any of the transactions contemplated hereby, or any amendment thereof, or the breach or interpretation hereof or thereof. . . ."

The broad language of the arbitration clause would encompass Boling's statutory tort claims against the non-signatory Counterdefendants because these claims and non-signatory parties relate to the formation and performance of the entire agreement that is in dispute. See, *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.,* 142 Idaho 235, 240 (2005) – "language is broad enough to include claims under the ICPA." (underline added)

Counterdefendants concede that an agreement exists and that Boling's statutory tort claims are subject to the arbitration clause in that agreement. [R 544, Opposition, p. 4] Counterdefendants only contest that they are not subject to arbitration because they are non-signatories to the agreement in which the arbitration clause exists. Counterdefendants' argument goes to the scope of the arbitration clause and not to the validity of the existing agreement. Once the existence of a contract is established, doubts about its scope "are to be 'resolved in favor of coverage.' *Bauscher v. Brookstone Securities, Inc.*, 2012 WL 3100383 at *2 (D. Idaho, 2012) (third party beneficiary seeking to compel arbitration as a non-signatory).

While Counterdefendants argued that no presumption in favor of arbitration

exists, Counterdefendants did not present any legal support to refute that a strong public policy favors arbitration and doubts are to be resolved in favor of coverage. [R 530-531, MP, pp. 19-20] The agreement is established; and as discussed *infra*, the scope of the arbitration clause includes the Counterdefendants as non-signatories. [R 531-537 MP, pp. 20-26] [6]

Any reliance on *Lewis v. CEDU Educational Servs., Inc.*, 135 Idaho 139 (2000) and *Rath v. Managed Health Network, Inc.*, 123 Idaho 30 (1992) is without merit because the language of the arbitration clauses therein was limited to the parties.

In *Lewis*, the court held that the arbitration provision only applied to the contracting parties, not the third party beneficiaries, because the *narrow* language of the arbitration provision limited arbitration to "any controversy between the parties" and "of the parties hereto." *Lewis*, 135 Idaho at 143.

In *Rath*, the court held that although the Raths were third party beneficiaries to the contract, the express language of the arbitration clause of the contract was *limited* to "parties" to the agreement. *Rath*, 123 Idaho at 31. The court reasoned that to hold otherwise would be "inapposite in the face of the language in the Agreement expressly limiting the arbitration clause to the 'parties' to the Agreement." *Ibid.*

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[6] Counterdefendants have represented in this action that the Guarantor, RE Capital, LLC has filed bankruptcy on July 7, 2012. Therefore, the Breach of Guaranty claim for relief is stayed during the pendency of said purported bankruptcy action and no action is requested against RE Capital Investments, LLC.

1. **Idaho continues to acknowledge no distinction between state and federal principals of arbitration law**.

This Court has noted that the distinction between state and federal substantive arbitration law is largely a distinction without a difference because the applicable legal principles are one and the same. *Mason v. State Farm Mut. Auto Ins. Co.,* 145 Idaho 197, at 200 n.1 (2007).

The federal courts have identified five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory: "1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Boucher v. Alliance Title Co., Inc.,* 127 Cal.App.4th 262, 268 (2005), quoting *Thomson-CSF, S.A. v. American Arbitration Ass'n.,* 64 F.3d 773, 776 (2nd Cir. 1995).

Counterdefendants anticipated reliance on *Arthur Anderson v. Carlisle,* 556 U.S. 624, 631-32 (2009) that there is no federal substantive law of arbitration and that state contract law governs whether non-signatories can be compelled to arbitration does not deter the application of five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory. Subsequent to the *Carlisle* case, this Court in *Wattenbarger v. A.G. Edwards & Sons, Inc.,* 150 Idaho 308, 316, 246 P.3d 961, 969 n. 1 (Dec. 2010), reiterated that the applicable state and federal legal principles of arbitration law are one and the same. Thus, this Court recognizes that the five theories pursuant to which an arbitration clause can be enforced by or against a non-signatory is applicable for the state of Idaho as federal legal principles that are indistinguishable

from Idaho's own arbitration principles.

This Court in *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.,* 142 Idaho 235 (2005) decided the issue "Does the Arbitration Clause Apply to the Defendants Who Did Not Sign the Agreement" under Michigan law. However, this Court prefaced its analysis of deciding the issue under Michigan law by stating that "a nonsignatory can be bound to an arbitration agreement under ordinary principles of contract and agency," citing the *Thomson-CSF* case. This citation to the *Thomson-CSF* case was not Michigan law because the territory for the second circuit court of appeals, in which *Thomson-CSF* case was decided, comprises the states of Connecticut, New York and Vermont, not Michigan. Additionally, this Court cited the California case of *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. Inc.,* 129 Cal.App.4th 759, 28 Cal.Rptr. 3d 752 (2005), and not a Michigan case, as an example of the arbitration principles under the *Thomson-CSF* case. Thus, it is reasonable to conclude that this Court was recognizing the applicable Idaho arbitration law on this issue under the *Thomson-CSF* case and California case law before resolving the issue under Michigan law.

The right to arbitrate Boling's statutory tort claims against the non-signatory Counterdefendants exists under the entire agreement, which includes the broad arbitration clause, because:

1) A preexisting agency relationship existed between the non-signatory

Counterdefendants and the Company. [7]

2) A benefit was conferred on the non-signatory Counterdefendants as a result of the agreement, making the non-signatory Counterdefendants a third party beneficiary of the arbitration agreement.[8] And/or

3) Counterdefendants' actionable conduct is inextricably interwoven with the formation and performance of the entire agreement,, making it equitable to compel the non-signatory Counterdefendants to also be bound by the arbitration clause in the entire agreement. [9]

2. Counterdefendants are bound by the arbitration clause based on their agency relationship with the Company.

Contrary to the district court's ruling, the non-signatory parties are bound by the

[7] When contracting parties agree to arbitrate all disputes "under or with respect to" a contract (as they did here), they generally intend to include disputes about their agents' actions because "[a]s a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." If arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or be listed as a third-party beneficiary. *In re Merrill Lynch Trust Co. FSB,* 235 S.W.3d 185, 189 (Tex., 2007).

[8] "In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made. (Citation omitted). *Just's v. Arrington Constr. Co.,* 99 Idaho 462, 464 (1978) (finding intent to benefit third party class of merchant's within a local improvement district was evident on the face of the contract)

[9] Under the **doctrine of equitable estoppel**, claims against the non-signatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause. *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.,* 186 Cal.App.4th 696, 715 (2010) – citing *Goldman v. KPMG, LLP,* 173 Cal.App.4th 209 (2009).

broad arbitration clause in the entire agreement while acting within the course and scope of their agency relationship with the Company. See e.g., *Dan Wiebold Ford, Inc. v. Universal Computer Consulting Holding, Inc.,* 142 Idaho 235, 241 (2005) – a signatory's agent was entitled to enforce an arbitration clause for alleged violations of the ICPA, citing *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.,* 129 Cal.App.4th 759 (2005).[10]

Mutuality of remedy under the arbitration clause makes it equitable to compel the non-signatory Counterdefendants as agents for the Company to also be bound by the arbitration clause in the entire agreement. [11]

A preexisting agency relationship existed between each Counterdefendant and the Company based on the Counterdefendants acting in the capacity of agents, officers or employees of and on behalf of the Company and Clearwater REI, LLC acting as the Manager of the Company regarding the Note Program.

It is undisputed that Boling, signed a Subscription Agreement for the Clearwater 2008 Note Program LLC with Clearwater REI, LLC (Manager) acting as agent for the

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[10] See also, *Rowe v. Exline* , 153 Cal.App.4th 1276, 1285 (2007) - A non-signatory who is the agent of a signatory can even be *compelled* to arbitrate claims against his will. Citing *Harris v. Superior Court*, 188 Cal.App.3d 475, 477-479 (1986) – (the physician's relationship as an employee of the corporation was "sufficient to bind [him] to the arbitration agreement which named [the corporation].").

[11] "[I]f there were no mutuality of remedy requirement, the seller--which is usually the offeree in the real estate sales context--would have absolutely no incentive to initial the arbitration provision and thereby bind itself to arbitrate disputes." *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.,* 68 Cal.App.4th 83, 91, fn. 6 (1998).

Note Program LLC. [R 575-577, 2/7/13 Order] Each individual Counterdefendant was an agent of the Company and Manager with various conflicts of interest existing among the Company, the Manager and their Affiliates. [R 323, PPM, p. 10.]

COMPANY'S PRINCIPAL OFFICERS [R 330, PPM, p. 17.]:
The Investment Committee will include, but not be limited to the following principals:

- Ron Meyer, Chief Development Officer
- Chris Benak, Chief Development Officer
- Don Steeves, National Sales Director & Broker-Dealer Relations
- Bart Cochran, Vice President of Acquisitions & Operations
- Chad Hansen, Vice President of Finance.

MANAGER'S KEY MANAGEMENT [R 331, PPM, p. 18.]:

- Ron Meyer, Chief Development Officer
- Chris Benak, Chief Development Officer
- Don Steeves, National Sales Director & Broker-Dealer Relations
- Bart Cochran, Vice President Of Acquisitions & Operations
- Chad Hansen, Vice President of Finance

Bart Cochran, who was formerly the Company's Vice-President of Acquisitions & Operations, is now the Company's President. Chad Hansen, who was formerly the Company's Vice-President of Finance, is now the Company's Chief Financial Officer. [R 357, 2nd Suppl., p.2]

Thus, Counterdefendants Meyer, Benak, Cochran and Hansen acted as managing agents for both the Company and the Manager.

At the time of Boling's receiving the initial package, the cover letter and business card of Mr. Ruebel (R 336), Mr. Ruebel identifies himself as the Regional Vice-President of Sales of Clearwater Real Estate Investments aka Clearwater Real Estate Investments, LLC. In providing the initial package to Boling, Mr. Ruebel acts as

the agent for the Company and/or the Manager.

On February 2, 2012, Ross Farris, Director of Marketing and Investor Relations for Clearwater informed Boling by telephone that all the business decisions for the Note Program are made by the management team of Clearwater REI, LLC. [12]

Thus, each significant business act or decision in the formation, offer and operation of the Note Program were made by the named Counterdefendants as agents for the Company under the entire agreement and to the detriment of the Boling.

Counterdefendants' reliance on *Triad Leasing & Fin., Inc. v. Rocky Mt. Rogues, Inc.,* 148 Idaho 503, 507-508 (2009) that "agents of a disclosed principal cannot be held to contracts made for a disclosed principal" is misplaced because Boling is seeking relief against Counterdefendants under his statutory tort claims and not a breach of contract claim against Counterdefendants. Thus, the "disclosed" nature of their involvement is therefore irrelevant. As previously mentioned, Counterdefendants concede that Boling's statutory tort claims are subject to the arbitration clause in that agreement. Because the claims are cast in tort rather than contract does not avoid the arbitration clause. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 758 (11th Cir. 1993). The individual Counterdefendants were the officers or employees for the related Clearwater business entities that formed, managed or operated the Note Program for the Company. As agents for the Company, Counterdefendants' active

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[12] Farris would seek approval from the Company officers before disseminating correspondences about the Note Program. [R 305-306, ¶49 (e); R 499-504, Exh 26]

participation in the Note Program subjects them to the alleged statutory tort violations, as set forth *infra*, which are covered by the broad language of the arbitration clause.

3. Counterdefendants are bound by the arbitration clause based on a third-party beneficiary relationship with the Company.

Application of the arbitration clause also exists under a third-party beneficiary theory because a benefit was conferred on the non-signatory Counterdefendants as a result of the agreement based on the broad language of the arbitration clause to include all claims "arising under, out of or relating to this Agreement or any of the transactions contemplated hereby." The PPM expressed that the Counterdefendants were to acquire benefits as the direct fruits of the agreement, which are the loan proceeds used in part to operate Counterdefendants' related businesses and pay compensation to the individual Counterdefendants.[13] Thus, the agreement intended to provide a direct benefit to Counterdefendants, making the non-signatory Counterdefendants a third party beneficiary of the agreement.

Additionally, the Guarantor also owns 50% of the Manager entity. [R 305-306, ¶49 (d); R 495-498, Exh 25] The Guarantor is *wholly-owned* by businesses whose sole ownership is Counterdefendants Ron Meyer and Chris Benak, who are also officers of

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[13] "Most, if not all, of the loans to be made by the Company with the proceeds of this Offering will be made to Affiliates of the Company and the Manager." [R 325, PPM, p.12.]

"The Company, the Manager and their Affiliates are entitled to receive certain significant fees and other significant compensation, payments and reimbursements from the sale of the Notes." [R 326, PPM, p.13.] See also, [R 305-306, ¶ 49 (a-d).]

the Company. As officers of the Company and the sole principals of the Guarantor, Mssrs. Meyer and Benak derived a third-party benefit from the sale of the Notes.

4. **Counterdefendants are bound by the arbitration clause based on the doctrine of equitable estoppel.**

The incestuous operation of the individual corporate officers and their web of interlocking business entities under the umbrella of the "Clearwater" name creates an oneness of activity to invoke the doctrine of equitable estoppel. The estoppel theory to which an arbitration clause can be enforced by or against a non-signatory is based on the circumstances and nature of Boling's statutory tort claims that are interwoven with the Note Program under the entire agreement. See alleged ICPA violations, *infra.*

The ICPA is a remedial statute, and is to be construed liberally in order to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices. I.C. § 48-601[14]; *In re Wiggins*, 273 B.R. 839, 855 (2001); *In re Edwards*, 233 B.R. 461, 470 (1999); *Fenn v. Noah,* 142 Idaho 775, 780 (2006). [15] The

[14] The purpose of these Idaho consumer protection statutes are strikingly similar in Legislative content with the California Consumer Legal Remedies Act [*Cal. Civil Code* §1760].

[15] It is the intent of the legislature that in construing this act due consideration and great weight shall be given to the interpretation of the federal trade commission and the federal courts relating to section 5(a)(1) of the federal trade commission act (15 U.S.C. 45(a)(1)), as from time to time amended. I.C. § 48-604 (1). Federal case law as it has developed under Federal Trade Commission Act, although not binding, is **persuasive** in application of Idaho Consumer Protection Act. Federal Trade Commission Act, §§ 1 et seq., 5(a)(1), 15 U.S.C.A. §§ 41 et seq.,45(a)(1); *I.C.* §§ 48-601 to 48-619. *State ex rel. Kidwell v. Master Distributors, Inc.,* 101 Idaho 447, 453 (1980).

ICPA is applicable to commercial transactions. *Myers v. A.O. Smith Harvestore Products, Inc.*, 114 Idaho 432, 441 (1988).

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful, where a PERSON knows, or in the exercise of due care should know, that he has in the past, or is: Obtaining the signature of the buyer to a contract when it contains blank spaces to be filled in after it has been signed (*I.C.* § 48-603 (12)); Failing to deliver to the consumer at the time of the consumer's signature a legible copy of the contract or of any other document which the seller or lender has required or requested the buyer to sign, and which he has signed, during or after the contract negotiation (I.C. § 48-603 (13)); Engaging in any act or practice which is otherwise misleading, false, or deceptive to the consumer. *I.C.* § 48-603 (17). The Counterdefendants are allegedly such persons who have violated these specific provisions of the ICPA.

Boling contends, *inter alia*, that:

1) Counterdefendants violated *I.C.* § 48-603 (17) based on their initial failure to timely provide Boling with the Note, the Third Supplement to the PPM, and the 2009 Year-End Update, and Counterdefendants' failure to conspicuously disclose in a timely manner the material facts that a) Clearwater and Clearwater Real Estate Investments, LLC did not exist as a business entities authorized to do business in the state of Idaho, b) RE Capital Investments, LLC (Guarantor) had a 55.84% membership interest and 50% voting interest in Clearwater REI, LLC (Manager), and c) Benak,

Meyer and RE Capital Investments, LLC (Guarantor) had consulting agreements with Clearwater aka Clearwater Real Estate Investments, LLC for $8,500.00 per month.

If before investing, Boling had been made aware of, inter alia, 1) the Note's contents that the purported accrual of interest payments, as compared with the actual payment of interest as expressed in the PPM, was to apply to his transaction with the Company, 2) the contents of the Third Supplement to the PPM that a) further restrictions were place on the Noteholder's right to redeem principal, and b) the Guarantor's net worth on December 31, 2009 was less than the covenanted amount set forth in the Guaranty, 3) the Guarantor's cash reserves was depleted before Boling received the PPM, 4) the Program's unstable loan portfolio as described in the 2009 Year-End Update, 5) the non-existence of the business entities, and/or 6) the full incestuous nature of the Counterdefendants and the Company Boling would <u>not</u> have entered into the Subscription Agreement and purchased of the Note.

2) Counterdefendants violated *I. C.* § 48-603 (17) during the course of the Note Program because the Counterdefendants failed to timely and conspicuously disclose material facts as to the deteriorating financial condition of the Note Program's loan portfolio, the inability or refusal of the Company to pay interest or redeemable principal, and the Guarantor's unsatisfactory net worth and cash position. Each of these facts, if timely disclosed to Boling, would have allowed Boling to exercise his right to the 10% principal redemption substantially earlier in the note period.

3) Counterdefendants violated *I.C.* §48-603 (17) based on their failure to

timely provide the 2010 audited reports and financials for the Company and Guarantor's Balance Sheet for 2010 and 2011. The 2010 audited reports and financials for the Company were due to be given to the Noteholders by May 1, 2011, but were not disclosed on Clearwater's website until on or after August 19, 2011. This audited report first disclosed the suspension of principal redemption rights that occurred in 2010, the default or foreclosure status of all 5 existing projects, and the significant Net Loss of the Company.

4) Counterdefendants violated *I.C.* § 48-603 (17) because the 10/26/11 Notice to Note Holders [R 431-434, Exh. 13] had a tendency to mislead the Noteholders, including Boling. The 10/26/11 Notice to Note Holders sent by Clearwater Real Estate Investment and signed by the Company attempted to conceal their financial subterfuge by misleading the Noteholders as to the relative value of the collateralization in comparison to the Company's outstanding loans.

5) Counterdefendants violated I. C. § 48-603 (12) and/or (13) based on their failure to provide Boling with a copy of the Note at the time of providing the PPM and/or Boling submitting the executed Subscription Agreement because the Note, which was the subject matter of the entire agreement, contained different terms regarding the payment or accrual of interest than stated in the PPM.

6) Counterdefendants violated *I. C.* § 48-603 (13) based on their failure to provide Boling with Exhibit A to the Note, which was to list of all existing Noteholders, including Boling, at the time of providing the Note.

Further evidence/argument will be presented at time of arbitration on the merits.

The nature of these claims against the non-signatory Counterdefendants is interwoven with the formation, performance, breach and obligations under the entire agreement, which includes the arbitration clause. See *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 757-758 (11th Cir. 1993) – re equitable estoppel and claims intertwined with contractual obligations. Because the claims are cast in tort rather than contract does not avoid the arbitration clause. (*Sunkist, supra,* 10 F.3d at p. 758.)

Counterdefendants' reliance on the elements of equitable estoppel in the case of *Idaho Title Co. v. American States Ins. Co.,* 96 Idaho 465, 468, 531 P.2d 227, 230 (1975) is a misplaced class of estoppel not applied to enforce an arbitration clause, but rather an attempt to bar a contractual cause of action or defense.

In the context of Idaho arbitration law, equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." (citations omitted) *General Conference of the Evangelical Methodist Church v. New Heart Community Fellowship, Inc.,* 2012 WL 2916013 at *5 (D. Idaho 2012); See also *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753, 757-758 (11th Cir. 1993) – re equitable estoppel and claims intertwined with contractual obligations; See also *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.,* 186 Cal.App.4th 696, 715 (2010) – citing *Goldman v. KPMG, LLP,* 173 Cal.App.4th 209, 217-218 (2009).

Counterdefendants' alleged misrepresentations or concealment of known facts regarding the nature and financial status of the Note Program to support Boling's statutory tort claims also serve to establish Counterdefendants' seeking the aforementioned benefits of the agreement, plus their ability to use the arbitration clause in asserting any claims against Boling, while simultaneously attempting to avoid the burdens that the agreement imposes.

Counterdefendants argue that Boling was not prejudiced during the outset of the agreement because he had the opportunity to ask questions.[16] However, Counterdefendants' failure to disclose material financial facts regarding the nature and status of the Note Program and its Guarantor precluded Boling from initialing asking questions on topics that he did not know facts were being concealed.[17]

C. Boling has Not Waived his Right to Compel Arbitration

The party seeking the "heavy burden" to prove a waiver of the right to arbitration must show: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; <u>and</u> (3) prejudice to the party opposing

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[16] The mere existence of an opportunity to investigate, or of sources of information, will not preclude the plaintiff from relying upon the misrepresentation. (*Teague v. Hall,* 171 Cal. 668, 670 (1916); *McMahon v. Grimes,* 206 Cal. 526, 536 (1929); *Blackman v. Howes,* 82 Cal.App.2d 275, 280 (1947) ; *Perkins, v. Ketchum,* 322 Cal.App.2d 245, 251 (1962)) For example, no obligation rests on a purchaser of stock to investigate books of a corporation to determine the truth of representations that cash payment had been made to corporation. See, *Pollak v. Staunton,* 210 Cal. 656 (1930).

[17] "A party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract." (Citations Omitted.) *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th 979, 993 (2004).

arbitration resulting from such inconsistent acts." (underline added) *Bauscher v. Brookstone Securities, Inc.*, 2012 WL 3100383 at *5 (D. Idaho, 2012) (citing *Fisher v. A.G. Becker Paribas Inc.,* 791 F.2d 691, 694 (9th Cir.1986).)

Boling has acted consistently with his right to arbitrate under the entire agreement. On February 15, 2012 Boling filed his AAA Demand for Commercial Arbitration against all named Counterdefendants and the Company and served said parties therewith regarding the acts and omissions set forth herein under the arbitration clause in the SA. [R 302, ¶ 33] In response, Counterdefendants objected to arbitration and filed this lawsuit.

In ¶ 3 of his Answer to the Complaint, Boling consistently admits "Demand has been made upon the above named Plaintiffs for arbitration." [R 022] Boling's assertion of counterclaims in the instant case are not inconsistent with his right to arbitrate because such mandatory counterclaims were required to be pled in this action under *I.R.C.P.,* Rule 13 (a),[18]

In substance, the foundational *factual allegations of Boling's counterclaim* are substantially the <u>same</u> facts that form the transaction or occurrence, which is the subject matter of Complaint in this action, i.e. the SA. Boling's counterclaim alleges additional facts arising out of the *same* transaction or occurrence, which Boling attempted to

[18] In pertinent part *I.R.C.P.,* Rule 13 (a) provides: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ."

arbitrate. These operative facts are inextricably interwoven with the formation and performance of the SA, which written instrument is the causal connection between the parties and the foundation of Plaintiffs' claim for relief.

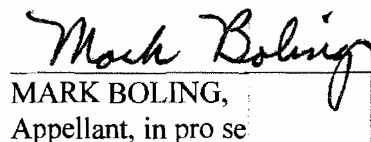
Counterdefendants did not set forth in their opposition to Boling's Motion to Compel Arbitration any prejudice that existed. Counterdefendants do not establish that volumes of discovery were produced in this case. Moreover, the burden of participating in discovery is *inadequate* to show prejudice. *See*, *Bauscher* at *6.

No trial date has been set in this case.

CONCLUSION

Boling seeks to conserve judicial resources by compelling arbitration. Boling submitted in support of his motion to compel arbitration admissible evidence, including newly discovered evidence in discovery on a new and different motion that warrants a different conclusion to the district court's 10/16/12 ruling [R 278-279] and 2/7/13 ruling [R 575-577]. Based on the foregoing, Boling respectfully requests that this Court reverse the district court's 2/7/13 ruling [R 575-577] with direction to compel arbitration against Counterdefendants, and each of them, based on Boling's initial demand for arbitration filed with the AAA on February 15, 2012.

Dated: June 28, 2013



MARK BOLING,
Appellant, in pro se

CERTIFICATE OF SERVICE

I hereby certify on June 28, 2013, I served the following document(s) in this action:

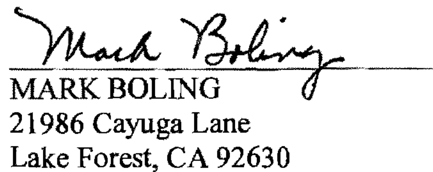
APPELLANT'S BRIEF

by sending two true copies thereof by ELECTRONIC SERVICE pursuant to *I.R.C.P*, Rule 5 (b) (E), *I.A.R*, Rule 20 and agreement between the parties addressed to the party(s) served as follows:

Rebecca A. Rainey – rar@raineylawoffice.com
Attorney for Plaintiffs – Counterdefendants – Respondents Clearwater REI, LLC, Barton Cole Cochran, Chad James Hansen, Ronald D. Meyer, Christopher J. Benak and Rob Ruebel.

The transmission of said document(s) to each party served was reported as complete and without error within a reasonable time after said transmission.

Dated: June 28, 2013



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