

6-21-2010

Beus v. Beus Clerk's Record v. 4 Dckt. 37384

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4 5
LAW CLERK

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

DALLAS BEUS, Individually;

DOUG BEUS, Individually;

vs. Plaintiffs-Respondents

John C. Souza, Trustee of the Lynn G. Beus
Trust; Jerry Beus, Individually,

Defendants,

Jerry Beus

vs. Cross-Claimant/Appellant,

John C. Souza, Trustee of the Lynn G. Beus
Trust Cross-Defendant/Respondent

Hon. David C. Nye District Judge

Appealed from the District Court of the Sixth
Judicial District of the State of Idaho, in and for

Bannock County.

Stephen C. Smith

Hawley Troxell Enlis & Hawley LLP

Attorney X For Appellant X

Randall C. Budge

Racine, Olson, Nye, Budge & Bailey, Chartered

Attorney X For Respondent X

FILED - COPY	
Filed this	day of
2008	
JUN 21 2008	
Supreme Court	Court of Appeals
Entered on file by	
Clerk	Deputy

37384

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs-Respondents,

Vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually,

Defendants,

Supreme Court No. 37384

Volume IV

JERRY BEUS,

Cross-Claimant/Appellant,

Vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust,

Cross-Defendant
Respondent

CLERK'S RECORD

Appeal from the District Court of the Sixth Judicial District of the State of
Idaho, in and for the County of Bannock.

Before **HONORABLE David C. Nye**, District Judge.

For Appellant:

**Stephen C. Smith
Hawley Troxell Ennis & Hawley LLP
P.O. Box 1617
Boise, Idaho 83701-1617**

For Respondent:

**Randall C. Budge
Racine, Olson, Nye
Budge & Bailey, Chartered
P.O. Box 1391
Pocatello, Idaho 83204-1391**

**Thomas J. Holmes
Jones, Chartered
P.O. Box 967
Pocatello, Idaho 83204**

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VOLUME IV

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
5/6/2009	NCOC	DCANO	Court records
	COMP	DCANO	Verified Complaint for Relief and Declaratory Judgment Filed
	SMIS	DCANO	Summons Issued
		DCANO	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Racine, Olson Receipt number: 0017405 Dated: 5/6/2009 Amount: \$88.00 (Check) For:
	ATTR	JANA	Plaintiff: Beus, Dallas Attorney Retained Randall C Budge
	ATTR	JANA	Plaintiff: Beus, Doug Attorney Retained Randall C Budge
5/26/2009		MARLEA	Filing: 17 - All Other Cases Paid by: hawley troxell ennis and hawley Receipt number: 0019758 Dated: 5/26/2009 Amount: \$58.00 (Check) For: Beus, Jerry (defendant)
	ATTR	BRANDY	Defendant: Beus, Jerry Attorney Retained Stephen C Smith
	NOAP	BRANDY	Notice Of Appearance; Stephen Smith aty for dfdt Jerry Beus
5/27/2009		CAMILLE	Acceptance of Service of Process; aty John Souza for plntf
6/3/2009		CAMILLE	Amended notice of taking Depo upon oral Examination; set for 6-25-09 @ 1pm: aty Stephen Smith for def Jerry Beus
		CAMILLE	Amended notice of taking Depo upon oral examination; on 6-30-09 @ 9am: aty Stephen Smith for def Jerry Beus
		CAMILLE	Notice of taking Depo upon Oral Examination; set for 6-26-09 @ 9am: aty Stephen Smith for Jerry Beus
		CAMILLE	Notice of taking Deposition upon oral examination; set for 6-25-09 @ 9am: aty Stephen Smith for Jerry Beus
6/4/2009		CAMILLE	Affidavit of Service - srvd on John Souza on 5-21-09
6/11/2009		CAMILLE	Amended Notice of taking Depo upon Oral Examination; 7-1-09 @ 9am aty Stephen Smith for Def Jerry Beus
		CAMILLE	Second Amended Notice of taking Depo upon Oral Examination set for 7-1-09 @ 1pm: aty Stephen Smith
		CAMILLE	Amended Notice of Taking Depo upon Oral Examination; set for 7-2-09 @ 9am: aty Stephen Smith
6/12/2009		CAMILLE	Notice of taking Depo ; set for 6-30-09 @ 9am: aty Randy Budge for plntf

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
6/12/2009		CAMILLE	Notice of taking Depo on Max Hemmert on 6-2-09 @ 1:30 pm : aty Randy Budge for plntf David C Nye
		CAMILLE	Notice of taking Depo on John Souza on 7-3-09 @ 9 am: aty Rany Budge David C Nye
6/25/2009		CAMILLE	Amended Notice of Taking Deposition ; of John Souza for 7-3-09: aty Randall Budge for plntf David C Nye
7/2/2009		CAMILLE	Amended Notice of taking Depo of Max Hemmert on 7-7-09 @ 9am: aty Randall Budge for plntfs David C Nye
		CAMILLE	Amended Notice of Taking Depo of John Souza on 7-8-09 @ 8am: aty Randall Budge for plntf David C Nye
7/6/2009		CAMILLE	Amended Notice of Taking Depo of M&M Court Reporting Service on 7-7-09 @ 10:30 am: aty Randall Budge David C Nye
7/9/2009		CAMILLE	Notice of intent to take default; aty Randall Budge for plntf David C Nye
8/5/2009		CAMILLE	Second Amended Notice of Taking Depo; John souza @ 10am: aty Randall Budge for plntfs David C Nye
		CAMILLE	Second Notice of Intent to take Default; aty Randall Budge David C Nye
8/10/2009		CAMILLE	Defendant Jerry Beus Answer to Verified Complaint for Relief and Declaratory Judgment; aty Stephen Smith for Def Jerry Beus David C Nye
8/14/2009		MARLEA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: jones chartered Receipt number: 0030901 Dated: 8/18/2009 Amount: \$58.00 (Check) For: Souza, John C. (defendant) David C Nye
	NOTC	AMYW	Notice of Appearance; Thomas Holmes, for def John Souza David C Nye
	ATTR	AMYW	Defendant: Souza, John C. Attorney Retained Thomas J Holmes David C Nye
8/26/2009	ORDR	AMYW	Order for Submission of Information for Scheduling Order; /s/ J Nye David C Nye
9/3/2009		CAMILLE	Motion for partial summary Judgment; aty Randy Budge for plntf David C Nye
		CAMILLE	Memorandum in support of Motion for Partial Summary Judgment ; aty Randall Budge for plntf David C Nye
		CAMILLE	Notice of hearing; set for 10-19-09 @ 9am: aty Randall Budge for plntf David C Nye
		CAMILLE	Supporting Affidavit of Randall Budge; aty Randall Budge for plntf David C Nye
		CAMILLE	Certificate of service - srvd Motion for partial summary judgment, Memorandum in Suport of Motion , Supporting Affidavit , Notice of hearing; aty Randall Budge David C Nye
9/4/2009	HRSC	CAMILLE	Hearing Scheduled (Motion 10/19/2009 09:00 AM) David C Nye

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
9/8/2009		DCANO	Joint Statement of Information for Scheduling Order; Randall C. Budge, Attorney for Plaintiffs.
10/5/2009		CAMILLE	Affidavit of Stephen Smith in Support of Def Jerry Beus Memorandum in Opposition to plntfs Motion for partial summary judgment; aty Stephen Smith
		CAMILLE	Defendants Jerry Beus Memorandum in Opposition to Plaintiffs Motion for Partial Summary Judgment; aty Stephen Smith for def Jerry Beus
10/13/2009		CAMILLE	Plntfs Reply Memorandum in support of Motion for Partial Summary Judgment; aty Randy Budge for plntf
		CAMILLE	Certificate of Service - Plntfs Reply Memorandum in support of Motion for Partial Summary Judgment; aty Randall Budge for plntf
		DCANO	Notice of Lease Termination: Affidavit of Service, served Jerry Beus on 10-8-09 at 3121 Wood Canyon Road, Soda Springs, Idaho.
		DCANO	Notice of Lease Termination; Served Jerry Beus on 10-8-09, Thomas J. Holmes Attorney for Lessor.
		DCANO	Notice to Quit or To Pay Rent; Served Jerry Beus on 10-8-09, Thomas J. Holmes Attorney for Lessor.
		DCANO	Affidavit of Thomas J. Holmes; filed/dated 10-12-09; Thomas J. Holmes, Atty.
10/19/2009	DCHH	AMYW	Hearing result for Motion held on 10/19/2009 09:00 AM: District Court Hearing Held Court Reporter: Stephanie Morse Number of Transcript Pages for this hearing estimated: Less than 100 pages.
11/23/2009	DPWO	CAMILLE	Decision on Motion for Partial Summary Judgment; Court GRANTS Motion for Partial Summary Judgment: J Nye 11-23-09
12/8/2009		CAMILLE	Motion for Judgment and Rule 54b certificate; aty Randy Budge for plntf
		CAMILLE	Motion for Order awarding attorneys fees and costs; aty Randy Budge for plntf
		CAMILLE	Affidavit of Randall Budge in support of fees and costs; aty Randy Budge for plntf
		CAMILLE	Memorandum of Fees and Costs; aty Randy Budge for plntf
12/28/2009		CAMILLE	Memorandum in support of Defs Motion to Disallow fees and Costs; aty Stephen Smith for def Jerry Beus
12/29/2009		CAMILLE	Defs Motion to Disallow Fees and Costs; aty Stephen Smith

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
2/1/2010		DCANO	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Hawley Troxell Ennis Receipt number: 0004027 Dated: 2/3/2010 Amount: \$101.00 (Check) For: Beus, Jerry (defendant)
	APSC	DCANO	Appealed To The Supreme Court David C Nye
	NOTC	DCANO	NOTICE OF APPEAL BY JERRY BEUS; Stephen C. Smith, Atty for Jerry Beus. David C Nye
	MISC	DCANO	Received \$15.00 check # 119747, \$86.00 check # 119722 and \$100.00 check 119748 for Filing Fees and Clerk's Record on 2-2-10. David C Nye
2/3/2010	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL; Signed and Mailed to Supreme Court and Counsel on 2-3-10. David C Nye
2/4/2010		CAMILLE	Decision on Motin for Attorney Fees; (court took the remaining matter concerning atty fees under Advisement . Court now issues its decision Denying atty fees, Plntfs Request for atty fees is Denied) J Nye 2-4-2010 David C Nye
	DPWO	CAMILLE	Disposition Without Trial Or Hearing David C Nye
2/11/2010	MISC	DCANO	IDAHO SUPREME COURT; Clerk's Record and Reporter's Transcript Suspend. Reason for Suspension: Suspended for Dist. Court Entry of Final Judgment. David C Nye
	MISC	DCANO	IDAHO SUPREME COURT; Order Suspending Appeal; Remanded to District Court and proceedings in this appeal shall be suspended to allow for the entry of a judgment. David C Nye
2/22/2010		CAMILLE	Motion for Leave to Amend Complaint; aty Randy Budge for plntf David C Nye
		CAMILLE	Plaintiffs Brief in Support of Motion for Leave to Amend Complaint; aty Randy Budge for plntfs David C Nye
	HRSC	DCANO	Hearing Scheduled (Motion 03/08/2010 10:00 AM) Motion for Leave to Amend Complaint. David C Nye
3/3/2010	STIP	AMYW	Stipulation - parties are agreeable to Plaintiff's Motion for Leave to Amend Complaint David C Nye
3/4/2010	ORDR	AMYW	Order Granting Leave of Court to Amend Plaintiff's Complaint; Plaintiff's Motion for Leave to Amend Complaint and add DBL Company, Inc. as an additional party for the purpose of determining the validity of the DBL Mortgage lien against the trust property is GRANTED, plaintiff may file and serve its amended complaint; /s/ J Nye, 3-4-10 David C Nye
3/8/2010	MISC	DCANO	IDAHO SUPREME COURT; Notice of Appeal received in SC on 2-2-10. Docket # 37384-2010. Clerk's Record and Reporter's Transcript to be filed in SC by 5-7-10. (4-2-10 5 weeks prior). David C Nye
	MISC	DCANO	IDAHO SUPREME COURT; Document filed in Sc Judgment and Rule 54(b)Cert. David C Nye

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
3/8/2010	HRVC	AMYW	Hearing result for Motion held on 03/08/2010 10:00 AM: Hearing Vacated Motion for Leave to Amend Complaint.
3/9/2010	AMCO	CAMILLE	Amended Complaint Filed; aty Randall Budge or plntfs
	SMIS	CAMILLE	Summons Issued
3/17/2010		CAMILLE	Affidavit of Return; srvd on DBL Company Inc. on 3-12-2010
3/23/2010		CAMILLE	Motion to Approve or disapprove farm lease with option to purchase; aty Tom Holmes
		CAMILLE	Motion for Expedited Hearing; aty Tom Holmes
		CAMILLE	Third Affidavit of Thomas Holmes; aty Tom Holmes
		CAMILLE	Fourth Affidavit of Thomas Holmes; aty Tom Holmes
		CAMILLE	Second Affidavit of Thomas Holmes; aty Tom Holmes
		CAMILLE	Notice of Hearing; set for 3-30-2010 @ 1:30 pm: aty Tom Holmes for def John Souza
	HRSC	CAMILLE	Hearing Scheduled (Motion 03/30/2010 01:30 PM)
	ORDR	AMYW	Order for Expedited Hearing; /s/ Thomas Holmes, atty for Defendant Souza
	MISC	DCANO	REPORTER'S TRANSCRIPT received from Stephanie Morse in Court Records on 3-23-10 for Motion for Partial Summary Judgment held 10-19-09.
	MISC	DCANO	Notice of Lodging; Stephanie Morse on 3-23-10.
3/29/2010		MEGAN	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Moffatt Thomas Barrett Receipt number: 0011634 Dated: 3/29/2010 Amount: \$58.00 (Check) For: DBL Company, Inc., an Idaho corporation (defendant)
	ATTR	DCANO	Defendant: DBL Company, Inc., an Idaho corporation Attorney Retained Julian E Gabiola
	NOAP	DCANO	Notice Of Appearance; Julian E. Gabiola, Atty for DBL Company, Inc.
	MOTN	DCANO	Defendant DBL Company, Inc.'s Motion to Vacate Hearing on Motion to Approve or Disapprove Farm Lease with Option to Purchase; Julian E. Gabiola, Atty for DBL Company, Inc.
	AFFD	DCANO	Affidavit of Julian E. Gabiola In Support of Motion to Vacate Hearing on Motion to Approve or Disapprove Farm Lease with Option to Purchase; Julian E. Gabiola, Atty for DBL Company, Inc.
3/30/2010	CONT	AMYW	Continued (Motion 04/05/2010 09:00 AM)

Dallas Beus, Doug Beus vs. John C. Souza, Jerry Beus, DBL Company, Inc., an Idaho corporation

Date	Code	User	Judge
4/2/2010	MISC	DCANO	IDAHO SUPREME COURT; Documents Filed in District Court and Supreme court received a copy of: Motion to Approve or Disapprove Farm Lease with Option to Purchase. Second Affidavit of Thomas Holmes, Third Affidavit of Thomas Holmes, Fourth Affidavit of thomas Holmes, Notice of Hearing, Motion for Expedited Hearing and Affidavit of Return.
		DCANO	Defendant DBL Company, Inc.'s Motin for Temporary Restraining Order; Julian E. Gabiola, Atty for Dfdts. DBL Company, INC.
4/13/2010		CAMILLE	Motion for Partial Summary Judgment; aty Randall Budge for plaintiffs
		CAMILLE	Memorandum in support of Motin for Partial Summary Judgment; aty Randall Budge for plaintiffs
		CAMILLE	Affidavit of Counsel; aty Randall Budge for plaintiffs
		CAMILLE	Notice of Hearing; set for (motion at 6-1-2010 @ 9am) aty Randall Budge for Plaintiffs
4/14/2010	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 06/01/2010 09:00 AM)
4/15/2010	MISC	DCANO	IDAHO SUPREME COURT; Documents Filed. Notice of Appearance; Defendant DBL Company, Inc.'s Motion to Vacate Hearing on Motion to Approve or Disapprove Farm Lease with Option to Purchase; Affidavit in Support.
		CAMILLE	Defendants DBL company , Inc. Motion to Dismiss Amended Complaint; aty Julian Gabiola for def DBL
		CAMILLE	Defendant DBL Company m Inc's Memorandum in support of motion to dismiss amended Complaint; aty Julian Gabiola for Def DBL
		CAMILLE	Defendant DBL company Inc's Objectijon to Lakey Lease and Motion for Declaratory Relief;
4/20/2010	NOTC	DCANO	Notice of Hearing: Motion for Temporary Restraining Order for April 5th, 2010. at 9:00am.
	MEOR	DCANO	Minute Entry and Order; Regaing Motion for Temporary Restraining Order. The Court Denied DBL Copany, Inc's Motion for Temporary Restraining Order. DBL Company, Inc. can file an objection to the lease once they have reviewed it. It is further order that the money in the trust can pay the taxes on the property. The est of the rental income will need to stay in trust until the remaining issues are resolved. s/Judge David C. Nye on 4-20-10.
4/23/2010	MISC	DCANO	CLERK'S RECORD RECEIVED IN COURT RECORDS ON 4-23-10.

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2010 JAN 15 PM 4:46

BY 
DEPUTY CLERK

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Attorneys for Defendant/Cross-Claimant Jerry Beus

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually,

Defendants.

Case No. CV-2009-1822-OC

RESPONSE TO MOTION TO APPROVE
OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY
BEUS' RIGHT OF FIRST REFUSAL TO
HAVE LAPSED

JERRY BEUS,

Cross-Claimant,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust,

Cross-Defendant.

COMES NOW Defendant Jerry Beus ("Defendant"), by and through his counsel of
record, Hawley Troxell Ennis & Hawley LLP, and submits this Response to Defendant's Motion

RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY BEUS' RIGHT OF FIRST REFUSAL TO
HAVE LAPSED - 1

to Approve or Disapprove Sale, and, If Approved, To Declare Jerry Beus' Right of First Refusal to have Lapsed. This Response is supported by the Affidavit of Stephen S. Smith.

I. INTRODUCTION

The Court is familiar with the proceedings leading up to this motion. At issue presently is the approval or disapproval of the sale of the Beus Ranch to William C. Rieck in the amount of \$1.3 million dollars. As the foregoing discussion will demonstrate, the sales price is unreasonably low, and would leave Plaintiffs with significantly less than that reasonably available through prudent efforts, and would leave Jerry Beus insolvent. Accordingly, approval of the sale at this price is not in the best interest of any of the beneficiaries, in dereliction of the Trustee's fiduciary duties. Plaintiffs have failed to produce sufficient cause to force the sale at bar. As we will discuss further below, the listing agreement and efforts made to sell the property up to this point have been grossly inadequate, and militate against the consummation of an appropriate sale. Since adequate effort has not been made to properly market the property at a higher value, and there is adequate time to pursue a more favorable price, the Court should disapprove the sale in order to allow the parties to seek a better price for the sale of the subject property. Accordingly, the Court should not find that Defendant's Right of First Refusal has lapsed. Alternatively, Defendant requests the Court to stay the sale at this time, and give Jerry Beus until a further date certain to procure additional offers.

II. DISCUSSION

Defendant Sousa, as trustee of the Lynn G. Beus Trust, has a fiduciary duty to act in the best interest of all the beneficiaries in every respect – including in the sale of the trust property.

See DBSI/TRI V v. Bender, 130 Idaho 796 (1997); *Taylor v. Maile*, 142 Idaho 253, 259 (2005)

RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY BEUS' RIGHT OF FIRST REFUSAL TO
HAVE LAPSED - 2

(trustee of trust had a fiduciary duty to the beneficiaries to observe the same standards in dealing with the trust property as would be observed by a prudent man dealing with the property of another; agreement to transfer property for substantially less than its fair market value would be a violation of that duty). A sale of the property at \$1.3 million dollars is not in the best interest of any of the beneficiaries, especially Jerry Beus, and is therefore in dereliction of trustee's fiduciary duty to the beneficiaries. The efforts taken thus far have been insufficient to sell the property at a reasonable price. In fact, two appraisals have been conducted which evaluate the subject property. *See* Affidavit of Nicole C. Trammel, Exs. A, B. The most recent appraisal, conducted on June 9, 2009 estimated the value of the property to be \$1,982,000.00, which amount is \$682,000 below the offer at issue here. *See id.* at Ex. B. The first appraisal estimated the property to be at \$2,900,000. *See id.*, at Ex. A. Although all parties agree there are errors in the report, the errors certainly do not make up the \$1.6 million dollar deficiency in the present offer. Accordingly, the proposed offer is below the value of the property, and the parties should not be forced to accept the offer at this time.

The Trustee's efforts to market the property to date have been grossly insufficient. First, the Trustee has only considered two offers, both of which were far below the two appraisals, and both of which were within the past twelve months. In addition, the Listing Agreement with Gate City Real Estate is not an ideal method for marketing this type of property. First, upon Defendant's information and belief, Gate City Real Estate specializes in residential property, and does not commonly deal with specialized recreational property like the one at issue here. The property at issue here is known to be prime acreage for hunting and recreational activities. Specifically, the appraisal performed on June 9, 2009 states "subject property is located in one of the pristine hunting areas of Southeast Idaho with an abundance of wild game in the area with

access to public lands on the East and South.” Trammel Aff., Ex. B at p.2. It may be more appropriate to engage an agency that specializes in similar type of property to achieve better results. In addition, upon information and belief, the agency has not been cooperative with interested buyers. Upon information and belief, there have been one or two interest buyers in the two million dollar range, who walked away from the property due to the uncooperative attitude of Gate City Real Estate. This goes to show that, if given more time, and a better marketing arrangement, the parties could find a better offer. Finally, the Listing Agreement signed by Defendant Trustee as currently written provides no incentive for buyers. As written, the agreement required a 5% commission to Gate City with 0% to be shared with a buyer’s broker – this potentially precludes some broker’s from investigating the property and seeking out buyers. The Court should instruct the parties to terminate the Listing Agreement, and proceed with a more appropriate agency.

Finally, if the Court were to approve the sale at a mere \$1.3 million, the parties would be left with significantly less than that reasonable available through prudent efforts. Jerry Beus would almost certainly be forced to file for bankruptcy, which could result in a stay of the sale, and further delays in costs in consummating the sale. Once the adjustments are made for the DBL Mortgage, settlement charges, and taxes due the County, *see* Holmes Aff, Ex. E, and further considering that Jerry will be unable to satisfy the court directive to pay the DBL Mortgage, the amount flowing down to Dallas Doug will be relatively low, and Jerry Beus will receive nothing. In addition, preliminary due diligence shows that there are various outstanding liens on the property, totally approximately \$80,000. Further, the sale will require inspection of the property, and Defendant believes there may be capital improvements required, which may cost approximately \$100,000. This will leave beneficiaries with very little as a result of the sale.

RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY BEUS’ RIGHT OF FIRST REFUSAL TO
HAVE LAPSED - 4

Finally, since the Court appointed the entire mortgage in the amount of \$444,937.35 to Jerry Beus, who is otherwise insolvent, Dallas and Doug will have to share the cost of the mortgage, which must be paid at closing, in order to effectuate the sale. Based on the foregoing, the sale is not in the best interest of any of the beneficiaries, especially Jerry Beus, and would be in dereliction of the trustee's fiduciary duties. The parties should be given more time to seek a better deal, at a better price. Based on these considerations, the Court should disapprove the sale, or stay the sale to a further date certain. If the parties could proceed with a new, improved marketing agreement more consistent with common practices, Defendant believes a better price could easily be attained for the property, which would leave all parties in a better position.

III. CONCLUSION

Based on the foregoing, Defendant Jerry Beus respectfully requests the Court disapprove the sale of the property, and instruct the parties to terminate the existing agreement with Gate City Realty, and enter into a new, improved agreement to seek a better offer on the property. In the alternative, Defendant request the Court stay the sale to a further date certain to give the parties time to produce superior offerors.

DATED THIS 15th day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Stephen C. Smith
for Stephen C. Smith, ISB No. 7336
Attorneys for Defendant/Cross-Claimant Jerry
Beus

RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY BEUS' RIGHT OF FIRST REFUSAL TO
HAVE LAPSED - 5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of January, 2010, I caused to be served a true copy of the foregoing RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF APPROVED, TO DECLARE JERRY BEUS' RIGHT OF FIRST REFUSAL TO HAVE LAPSED by the method indicated below, and addressed to each of the following:

Randall C. Budge
Mark S. Shaffer
RACINE, OLSON, NYE, BUDGE & BAILEY,
CHARTERED
P.O. Box 1391
Pocatello, ID 83204-1391
[Attorneys for Plaintiffs]

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.232.6109

Thomas J. Holmes
JONES, CHARTERED
203 South Garfield
P.O. Box 967
Pocatello, ID 83204
[Attorneys for Defendant John C. Souza]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☐ Telecopy: 208.232.5962

Stephen C. Smith
for Stephen C. Smith

RESPONSE TO MOTION TO APPROVE OR DISAPPROVE SALE AND, IF
APPROVED, TO DECLARE JERRY BEUS' RIGHT OF FIRST REFUSAL TO
HAVE LAPSED - 6

January 6, 2010, and Supporting Affidavit of Thomas Holmes.

3. Clarifying and confirming that the sale of the Beus Ranch to William C. Reick for \$1,300,000 includes "all irrigation equipment" as identified in the October 2, 2009 Counteroffer, Exhibit A-2 to the Affidavit of Thomas Holmes.

4. Authorizing and directing Trustee John Souza to execute any and all documents necessary to close the transaction on or before February 15, 2010, so as to fully perform all terms and conditions of the William C. Reick Counteroffer dated December 30, 2009, Exhibit A-1 to the Thomas Holmes Affidavit.

5. Approving the Settlement Statement prepared by Caribou Land Title, Inc., pertaining to the Sale, Exhibit E to Thomas Holmes Affidavit.

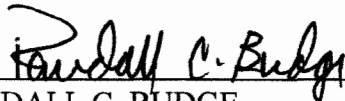
6. Confirming and establishing Plaintiffs' reimbursement claim against Jerry Beus to the extent that Jerry Beus's share of the net proceeds is insufficient to fully satisfy his obligation to pay off the DBL Mortgage and delinquent real property taxes and in such amount paid by Plaintiffs from their share of the net proceeds in order to clear title so the sale can be closed. (See Closing Statement, lines 504, 506, Ex. E to T. Holmes Affidavit.)

7. That the amounts owed by Jerry Beus to Plaintiffs for real property taxes and to pay off the DBL Mortgage be included in the Final Judgment to be entered by the Court.

8. That Defendant Jerry Beus be compelled to pay the Trustee his unpaid obligations under the Farm Lease to the date of its termination, December 31, 2009, which include but are not limited to the unpaid real property taxes for 2008 and 2009, being \$8341.20 plus accruing interest and late penalties, and the unpaid 2009 rent in the amount of \$12,000.

DATED this 19th day of January, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

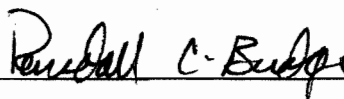
By: 
RANDALL C. BUDGE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of January, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

Stephen C. Smith (Email and U.S. Mail)
Hawley Troxell
P.O. Box 1617
Boise, Idaho 83701-1617

Thomas J. Holmes (Email and U.S. Mail)
Jones Chartered
P.O. Box 967
Pocatello, Idaho 83204-0967



2010 JUL 27 PM 3:48

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,	)	Case No. CV-2009-1822 OC
)	
Plaintiffs,	)	ORDER APPROVING SALE
)	
vs.)	
)	
JOHN C. SOUZA, Trustee of the Lynn G.)	
Beus Trust; JERRY BEUS, individually,)	
)	
Defendants.)	
)	

This matter came on for hearing before the Court on January 25, 2010 on the Defendant Trustee's Motion to Approve or Disapprove Sale and, If Approved, to Declare Jerry Beus' Right of First Refusal to Have Lapsed and on Plaintiffs' Motion to Approve Sale, Confirm Disposition of Proceeds, and Obligations of Jerry Beus. The Trustee appeared through his attorney, Thomas Holmes, the Plaintiffs through their attorney, Randall C. Budge, and the Defendant, Jerry Beus, through his attorney, Stephen Smith, who appeared by phone. All parties waived the transcription by Court Reporter, the hearing being recorded electronically.

The Defendant Trustee filed the Affidavit of Thomas Holmes and the Plaintiffs and Defendant Jerry Beus each filed Affidavits and Briefs, which have been considered by the Court.

Based upon the Court's review of the Motions, Affidavits and Briefs and after hearing argument, the Court finds:

- a. The second half of the 2008 taxes and the 2009 taxes, which are the responsibility of Jerry Beus remain unpaid.
- b. The 2009 rent, which is the responsibility of Jerry Beus remains unpaid.
- c. The January payment owing on the DBL Promissory Note and Real Estate Mortgage against the real estate owned by the Trust remains unpaid.
- d. Jerry Beus, in his Response to this Motion, indicates he is insolvent and may file bankruptcy.
- e. None of the parties have the financial ability to pay the DBL Note and Mortgage payments in order to avoid foreclosure or allow additional time to seek other purchasers of the real estate on more favorable terms.
- f. Since the property was listed for sale in May, 2009, only two offers have been received, one for One Million dollars from the sublessee Lakey and the current offer from William C. Rieck which was reduced by him from 1.8 million to 1.3 million dollars due to concerns about the crop yield and the ability to service debt on the property.
- g. Plaintiffs Dallas Beus and Doug Beus, who are beneficiaries of two-thirds of the interest in the Trust and therefore in the proceeds of the proposed sale approve the sale to William C. Rieck. Their equity is at risk if the sale is lost or the DBL mortgage is foreclosed. The Defendant Jerry Beus who is a one-third beneficiary of the Trust does not approve the sale.
- h. The proposed sale to William C. Rieck includes the opportunity for Jerry Beus to lease the residence on the property with no rent payment for twenty (20) years.
- i. Any further delays in selling the property will not benefit any of the parties and places the remaining equity in jeopardy given the foregoing.

BASED UPON THE FOREGOING, the Court enters the following Order:

1. The sale of the Beus Ranch to William C. Rieck based on the Amended Offer received December 30, 2009, attached to the Affidavit of Thomas Holmes is approved. All irrigation equipment, including the wheel lines and hand lines belonging to Jerry Beus, as well as the irrigation equipment affixed to the real estate owned by the Trust, shall be included in the sale in accordance with the offer.

2. The Trustee is authorized and directed to execute all such documents and to take such action as may be required to complete the sale on or before the expiration of the Amended Offers's closing date of February 15, 2010, or any extension of said closing date if William C. Rieck should agree to an extension of the closing date.

3. The right of first refusal granted to Jerry Beus in the Last Will of Lynn G. Beus has lapsed due to non-exercise of the right and is of no further force or effect. The property shall be conveyed free and clear of any cloud created by said right of first refusal.

4. Plaintiffs Dallas Beus and Doug Beus shall have a claim against Jerry Beus to the extent their share of the sale proceeds must be utilized to pay the real property taxes, the DBL Note and Mortgage owed by Jerry Beus , or any other obligations of Jerry Beus in order to clear title and complete the sale.

5. Trustee shall, within six months of the date of this Order, obtain an independent valuation of the wheel lines and hand lines and, upon approval by the Court, Defendant Jerry Beus shall be given credit for the value of said wheel lines and hand lines.

DATED this 27th day of January, 2010.


David C. Nye, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2010, a true and correct copy of this ORDER APPROVING SALE was served by the method indicated below upon each of the following.

Randall C. Budge
Racine Olson Nye Budge & Bailey
P O Box 1391
Pocatello, ID 83204

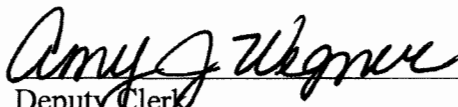
 X U.S. Mail, Postage Prepaid
 Hand-Delivered
 Facsimile

Stephen C. Smith
Hawley Troxell Ennis & Hawley
P O Box 1617
Boise, ID 83701

 X U.S. Mail, Postage Prepaid
 Hand-Delivered
 Facsimile

Thomas J. Holmes, Esq.
PO Box 967
Pocatello, ID 83204

 X U.S. Mail, Postage Prepaid
 Hand-Delivered
 Facsimile


Deputy Clerk

Randall C. Budge (ISB#: 1949)
Mark S. Shaffer (ISB#: 7559)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109

2010 JUN 27 11:10:05

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)
)
Plaintiffs,)

Case No. CV-09-1822-OC

vs.)

**JUDGMENT AND RULE 54(b)
CERTIFICATE**

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,)
)
Defendants.)

_____)
This matter having come on regularly for hearing before the Court, the Honorable David C. Nye presiding, upon the Motion for Partial Summary Judgment filed by Plaintiffs against Defendant Jerry Beus and Defendant John C. Souza ("Defendants"). The Court having considered the arguments of counsel, the affidavits and other pleadings of record, and having entered its Decision on Motion for Partial Summary Judgment dated November 23, 2009 granting Plaintiffs' Motion for Partial Summary Judgment and the Court finding the Plaintiffs are entitled to judgment against Defendants as a matter of law, and good cause appearing therefore,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs have and recover judgment against Defendants as follows:

1. Plaintiffs shall have judgment against Defendants, and the Court shall issue the following Rule 54(b) Certificate, with respect to all issues and claims addressed and adjudicated by this Court's Decision on Motion for Partial Summary Judgment dated November 23, 2009.

2. The Last Will and Testament and the Testamentary Trust ("Trust") of Lynn G. Beus and the Trust Agreement created on or about May 14, 1987 are clear and unambiguous.

3. The Trust of Lynn G. Beus terminated at the death of Beth Beus on June 10, 2008.

4. The Farm Lease entered into between the Trustee John C. Souza and Defendant Jerry Beus dated January 1, 2007 is terminated on December 31, 2009.

5. All Trust real property and appurtenant water rights and improvements, consisting of approximately 2,521 acres of farming and ranching land located in Caribou County, Idaho, shall be sold by the Trustee who shall also liquidate all other Trust assets in accordance with the terms and conditions of the Trust.

6. The Trustee shall provide a final accounting to the Court and beneficiaries. In accordance with the terms of the Trust, the Trustee shall divide and distribute all net proceeds equally among Defendant Jerry Beus, Plaintiff Dallas Beus, and Plaintiff Douglas Beus, after first debiting to Defendant Jerry Beus's share the amounts set forth below.

7. Defendant Jerry Beus shall pay all unpaid rent and other obligations due under the Farm Lease entered into between the Trustee John C. Souza and Defendant Jerry Beus on January 1, 2007. If all unpaid rent and any other obligations are not paid by Defendant Jerry Beus prior to the termination of said lease on December 31, 2009, said amounts shall be debited and withheld from

Defendant Jerry Beus's share of the distributable Trust proceeds and paid to the Trustee for distribution purposes.

8. Defendant Jerry Beus is not entitled to any reimbursement from the Trust for any improvements or any other expenses.

9. The DBL Company Inc. promissory note dated May 2, 2007 is the sole obligation and responsibility of Defendant Jerry Beus, who shall remain obligated to make all payments thereon until the Trust property is sold, at which time the remaining balance shall be paid off from Jerry Beus's share of the distributed Trust proceeds.

10. Plaintiffs shall be entitled to their reasonable attorneys' fees incurred in this matter through November 30, 2009 in the amount of \$ _____ and reasonable costs incurred in this matter through November 30, 2009 in the amount of \$ _____, for a total amount of \$ _____, which amount shall be paid by Defendant Jerry Beus, withheld from his share of the net Trust distributable proceeds, and paid to Plaintiffs Dallas Beus and Douglas Beus.


To be
Determined
later
DEN

11. Interest on all amounts due under this Judgment from and after the due date shall accrue at the statutory rate.

12. Plaintiffs may hereafter seek amendment of this Judgment to request additional attorneys' fees and costs incurred ~~after November 30, 2009~~ ^{DEN} relating to the enforcement of this judgment and the collecting of any and all amounts due.

13. Plaintiffs may immediately have execution hereon.

DATED this th 25 day of ~~December~~, 2009. ^{January, 2010.}

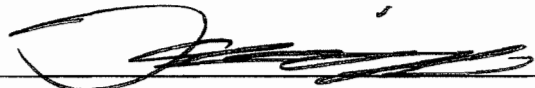


DAVID C. NYE
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 25th day of ~~December~~, 2009. ^{January, 2010.}



DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of December, 2009, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

Stephen C. Smith
Hawley Troxell
P.O. Box 1617
Boise, Idaho 83701-1617

[] U. S. Mail
Postage Prepaid
[] Hand Delivery
[] Overnight Mail
[] Facsimile (208) 954-5268

Thomas J. Holmes
Jones Chartered
P.O. Box 967
203 S. Garfield
Pocatello, Idaho 83204

[] U. S. Mail
Postage Prepaid
[] Hand Delivery
[] Overnight Mail
[] Facsimile (208) 232-5962

Randall C. Budge
Racine Olson Nye Budge & Bailey, Chtd.
P.O. Box 1391
Pocatello, Idaho 83204-1391

[] U. S. Mail
Postage Prepaid
[] Hand Delivery
[] Overnight Mail
[] Facsimile (208) 232-6109

Deputy Clerk

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2010 FEB -1 AM 11:08

BY 
DEPUTY CLERK

Stephen C. Smith, ISB No. 7336
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5268
Email: ssmith@hawleytroxell.com

Attorneys for Appellant Jerry Beus

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually,

Defendants.

JERRY BEUS,

Cross-Claimant/Appellant,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust,

Cross-Defendant.

Case No. CV-2009-1822-OC

NOTICE OF APPEAL BY JERRY BEUS

Filing Fee: \$86.00

TO: THE ABOVE-NAMED RESPONDENTS, DALLAS BEUS, DOUG BEUS AND JOHN SOUZA, AND HIS/HER/THEIR/ITS ATTORNEYS OF RECORD, RANDALL BUDGE, AND THE CLERK OF THE ABOVE ENTITLED COURT (ADMINISTRATIVE AGENCY)

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Jerry Beus, appeals against the above-named Respondents, to the Idaho Supreme Court from the judgment and Rule 54(b) certificate entered on January 25, 2010, and the memorandum and order granting partial summary judgment in favor of Doug and Dallas Beus, entered on the 25th day of November, 2009, the Honorable David C. Nye, District Court Judge, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(3). I.A.R.

3. A preliminary statement of the issues on appeal which the Appellant then intends to assert in the appeal is as follows, provided any such list shall not prevent the Appellant from asserting other issues on appeal:

- a. Whether the District Court committed an error of law in ruling that the Last Will and Testament and the Testamentary Trust ("Trust") of Lynn G. Beus and the Trust Agreement created on or about May 14, 1987 were clear and unambiguous.
- b. Whether the District Court committed an error of law in ruling that the Trust of Lynn G. Beus terminated at the death of Beth Beus on June 10, 2008.
- c. Whether the District Court committed an error of law in ruling that the Farm Lease entered into between the Trustee John C. Souza and Defendant Jerry Beus dated January 1, 2007 was terminated on December 31, 2009.

- d. Whether the District Court committed an error of law in ruling that all trust real property and appurtenant water rights and improvements, consisting of approximately 2,521 acres of farming and ranching land located in Caribou County, Idaho, should be sold by the Trustee who should also liquidate all other Trust assets in accordance with the terms and conditions of the Trust.
- e. Whether the District Court committed an error of law in ruling that the Trustee should provide a final accounting to the Court and beneficiaries.
- f. Whether the District Court committed an error of law in ruling that the Trustee should divide and distribute all net proceeds equally among Defendant Jerry Beus, Plaintiff Dallas Beus, and Plaintiff Douglas Beus, after first debiting to Defendant Jerry Beus certain amounts contained in the order and final judgment.
- g. Whether the District Court committed an error of law in ruling that Defendant Jerry Beus should pay all unpaid rent and other obligations due under the Farm Lease entered into between the Trustee John C. Souza and Defendant Jerry Beus on January 1, 2007.
- h. Whether the District Court committed an error of law in ruling that any amounts of unpaid rent and any other obligations of Defendant Jerry Beus should debited and withheld from Jerry Beus's share of the distributable Trust proceeds and paid to the Trustee for distribution purposes.
- i. Whether the District Court committed an error of law in ruling that Defendant Jerry Beus is not entitled to any reimbursement from the Trust for any improvements upon the ranch, sweat equity or any other expenses.

- j. Whether the District Court committed an error of law in ruling that the DBL Company Inc. promissory note dated May 2, 2007 is the sole obligation and responsibility of Defendant Jerry Beus.
- k. Whether the District Court committed an error of law in ruling that Jerry Beus should remain obligated to make all payments on the DBL mortgage until the Trust property is sold.
- l. Whether the District Court committed an error of law in ruling that at the time of sale of the property, the remaining balance of the DBL mortgage shall be paid off only from Jerry Beus's share of the distributed Trust proceeds.
- 4. No order has been entered sealing all or any portion of the record.
- 5. The appellant requests the preparation of the following portions of the reporter's transcript: that hearing held on October 19, 2009.
- 6. The Appellant requests those portions of the clerk's record automatically included under Rule 28, I.A.R. in electronic format, as well as the following:

- a) Motion for Partial Summary Judgment;
- b) Memorandum in Support of Motion for Partial Summary Judgment;
- c) Supporting Affidavit of Randall Budge with Exhibits;
- d) Defendant Jerry Beus' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- e) Affidavit of Stephen C. Smith in Support of Defendant Jerry Beus' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- f) Affidavit of Thomas Holmes;
- g) Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment;
- h) Memorandum and Order granting partial summary judgment in favor of Doug and Dallas Beus, entered on the 25th day of November, 2009
- i) Judgment and Rule 54(b) certificate entered on January 25, 2010;

7. I certify:

a) That a copy of this Notice of Appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: Stephanie

Morse, **PUT IN ADDRESS OF COURT REPORTER**

b) That the clerk of the district court will be paid the estimated fee for preparation of the reporter's transcript.

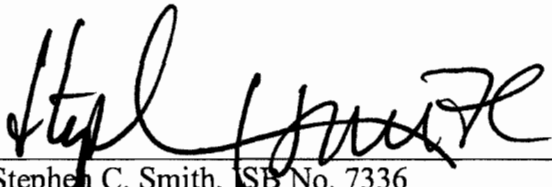
c) That the appellate filing fee has been paid.

d) That service has been made upon all parties required to be served pursuant to Rule 20.

e) That the court reporter has been served pursuant to Rule 17(k)(1), I.A.R.

DATED THIS 29th day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Stephen C. Smith, SB No. 7336
Attorneys for Appellant Jerry Beus

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2010, I caused to be served a true copy of the foregoing NOTICE OF APPEAL BY JERRY BEUS by the method indicated below, and addressed to each of the following:

Randall C. Budge
Mark S. Shaffer
RACINE, OLSON, NYE, BUDGE & BAILEY,
CHARTERED
P.O. Box 1391
Pocatello, ID 83204-1391
[Attorneys for Plaintiffs]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
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☐ E-mail
☐ Telecopy: 208.232.6109

Thomas J. Holmes
JONES, CHARTERED
203 South Garfield
P.O. Box 967
Pocatello, ID 83204
[Attorneys for Defendant John C. Souza]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.232.5962

M&M Court Reporting
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Stephen C. Smith

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn
G. Beus Trust; JERRY BEUS,
individually

Defendants.

Case No. CV-2009-0001822-OC

**DECISION ON MOTION FOR
ATTORNEY FEES**

This matter came before this Court for hearing on Plaintiff's Motion for costs and attorney fees. The Plaintiffs, Dallas and Doug Beus were represented by Randy Budge. The Defendant Jerry Beus was represented by Stephen Smith. The Defendant John Souza was represented by Thomas Holmes. The Court reviewed the documents submitted by the parties and heard oral argument from counsel. During the arguments, the Court awarded the costs as a matter of right in the amount of \$2,131.15. The Court took the remaining matter concerning attorney fees under I.C. §12-120(3) and 12-121 under advisement. The Court now issues its decision **denying** attorney fees.

BACKGROUND AND PROCEDURAL HISTORY

This is a dispute between three brothers concerning the interpretation of their father's trust agreement. In 1987, Lynn Beus created a testamentary trust and signed a will. The assets held in the trust consist primarily of approximately 2,521 acres of farming land along with appurtenant water rights, all of which is located in Caribou County. Lynn's three sons, Jerry, Dallas, and Doug, were the remaindermen beneficiaries. Lynn passed away on January 5, 1986.

Doug and Dallas brought this action against Jerry due to a dispute concerning the interpretation of the trust agreement, and the interpretation of a 2007 Farm Lease that Jerry entered into with the trustee, and a DBL Loan.

Due to the disagreements and failures of mediation of the parties, Plaintiffs, Doug and Dallas Beus, filed a Complaint on May 6, 2009. Defendant Jerry Beus filed an Answer but Defendant John Souza failed to file an Answer to the Complaint, which seeks to remove him as the Trustee of the trust. The Plaintiff filed a Motion for Partial Summary Judgment on September 3, 2009. The Court granted the Plaintiff's motion holding that the will trust was clear and unambiguous,¹ the 2007 Farm Lease was to terminate at the end of 2009 and Jerry Beus was not entitled to reimbursement, and finally that the DBL Loan was the sole responsibility of Jerry Beus. As a result, the Plaintiff requests costs and attorneys fees pursuant to Rule 54, Rule 68, and I.C. § 12-120(3). Specifically, Plaintiff is asking for the following: the costs as a matter of right

¹ The Court held that the clear and unambiguous reading of the will and trust agreement stated that the trust property was to be sold by the Trustee and divided equally among the brothers due to the disagreement of the operation and management of the property.

pursuant to Rule 54(d)(1)(C) in the amount of \$2,141.15 and discretionary costs pursuant to Rule 54(d)(1)(D), Rule 68, and I.C. § 12-120(3), in the amount of \$69,430.84. Both parties came before the Court for a hearing on January 4, 2010. The Court heard oral argument from both parties and then took the matter of attorney fees under advisement.

STANDARD OF REVIEW

IRCP 54(e)(1) states: “In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract.” The determination of who is the prevailing party is committed to the sound discretion of the trial court. *Rockefeller v. Grabow*, 139 Idaho 538, 82 P.3d 450 (2003). In making this determination courts look to Idaho Rule of Civil Procedure 54(d)(1)(B) which provides:

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 part 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.

Once the issue of the prevailing party is determined, it is also within the trial court’s discretion to determine whether the attorney fees requested by a party are reasonable and recoverable. *Kelly v. Hodges*, 119 Idaho 872, 811 P.2d 48 (Ct. App. 1983). In exercising its discretion, the trial court must consider the twelve factors outlined in I.R.C.P. 54(e)(3). *Boel v. Stewart Title Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002); *Brinkman*

v. Aids Insurance Co., 115 Idaho 346, 351, 766 P.2d 1227, 1232 (1988). The district court must, at a minimum, provide a record which establishes that the court considered these factors. *Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 645, 759 P.2d 931, 936 (Ct. App. 1988). A trial court need not specifically address all of the factors contained in I.R.C.P. 54(e)(3) in writing, so long as the record clearly indicates that the court considered them all. *Brinkman*, 115 Idaho at 351, 766 P.2d at 1232. In addition, a court need not blindly accept those attorney fees requested by a party, and may disallow those fees that were incurred unnecessarily or unreasonably. *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985).

DISCUSSION

In order to award costs or attorney fees under the Idaho Rules of Civil Procedure (“IRCP”), the Court must determine who, if anyone is the prevailing party, if attorney fees have been provided for, and the amount of the attorney fees.

I. Prevailing Party.

Under IRCP 54(d)(1)(B), the Court in its discretion can determine the prevailing party. The Court issued a decision on November 23, 2009, in which it granted the Plaintiffs’ Motion for Partial Summary Judgment. Therefore, the Court finds the Plaintiffs to be the prevailing party as against Jerry Beus.

II. Attorney Fees Provided by Statute and/or Contract.

IRCP 54(e)(1) allows the Court in its discretion to award attorney fees when provided by a statute or contract. The Plaintiffs requests attorney fees pursuant to Rule

68², I.C. § 12-120(3) and § 12-121.

The Court will first address the attorney fees requested under I.C. § 12-120(3).

A. Attorney Fees Under I.C. § 12-120(3)

Idaho Code § 12-120(3) provides:

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 fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

The critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover. *Bingham*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999). The award of attorney fees is warranted when the commercial transaction comprises the crux of the lawsuit. *Broods v. Gigray Ranches, Inc.*, 910 P.2d 744, 750 (Idaho 1996). The Idaho Supreme Court has held that there is a two-part test in determining whether attorney fees are appropriate in a commercial transaction. "First, the commercial transaction must be integral to the claim, and second, the commercial transaction must provide the actual basis for recovery." *Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 65 P.3d 509, 515 (Idaho 2003). The term "commercial

² Rule 68 will not be discussed because it does not allow plaintiffs to file an Offer of Judgment. It is only for a party "defending" against a claim. Additionally, Rule 68 does not authorize attorney fees but only addresses the issue of prevailing party. Since the Court has determined that plaintiffs prevailed, there is no need for analysis under Rule 68, even if it were available to plaintiffs.

transaction” is defined by statute to mean “all transactions” except those for “personal or household purposes.” I.C. § 12-120(3).

This lawsuit against Defendant Jerry Beus concerns several different aspects: the interpretation of the trust agreement, a 2007 Lease Agreement, a DBL loan promissory note, and the division of the trust property. The complaint must allege a commercial transaction between the parties before I.C. § 12-120(3) applies. *Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526, 537 (2004).

In *Lexington*, two parties, the Mayes and Crandlemires, sought attorney fees from Lexington LLC. The Idaho Supreme Court explained that the Mayes were not able to recover attorney fees because the complaint did not allege a commercial transaction between Mayes and Lexington. *Id.* The complaint only alleged a commercial transaction existed between the Crandlemires and Lexington, and therefore, the Crandlemires were entitled to an award of attorney fees under the statute. *Id.*

The *Lexington* Court further explained that when a “party alleges the existence of a contract ***that would be*** a commercial transaction...that claim triggers the application of the statute and the prevailing party may recover attorney fees even if no liability under the contract is established.” *Id.* (emphasis added). Therefore, the Court must determine what ***would be*** a commercial transaction. It does not become a commercial transaction simply because one of the parties raises the existence of a commercial transaction either as an assertion or a defense.

Here, this lawsuit involves the interpretation of a trust agreement. It also involved the issue of whether a loan agreement with DBL Company was a personal debt or a trust debt. This Court held that the will and trust agreement were clear and unambiguous and required the brothers to sell the trust property and divide the proceeds because they could not agree on how to operate the property. This Court then held that the 2007 Farm Lease was interpreted to terminate at the end of 2009 and that Jerry Beus is not entitled to any reimbursement. Lastly, this Court held that the DBL promissory note was the personal responsibility of Jerry Beus.

There was an argument that this DBL loan is a commercial transaction, however, the commercial transaction exists between Jerry Beus and DBL, not between Jerry and his brothers. Therefore, just as Mayes was not awarded attorney fees for the commercial transaction that existed between Crandlemires and Lexington, the Plaintiffs cannot be awarded attorney fees on a commercial transaction that exists between Jerry and DBL.

The gravaman of this lawsuit is the interpretation of estate and trust documents and the division of trust property. The gravaman is not a commercial transaction. This case is more akin to a probate dispute than a commercial transaction dispute. After reviewing the documents and hearing oral argument, the Court does not find that a commercial transaction has been integral to the claim nor does it provide actual basis for the recovery. As a result, Plaintiffs are denied attorney fees based on I.C. §12-120(3).

B. Attorney Fees Allowed Under I.C. § 12-121

I.C. § 12-121 allows the Court to award attorney fees whenever the judge believes the matter was brought, defended, or pursued frivolously. The decision of what constitutes frivolous conduct is committed to the discretion of the trial court. *Drew v. Sorensen*, 133 Idaho 534, 543, 989 P.2d 276, 285 (1999). The Defendant argues that Plaintiffs did not argue attorney fees under I.C. § 12-121 in their brief. However, the Defendant overlooked that the Plaintiffs did ask for fees under this statute in their original Complaint. Regardless of whether Plaintiffs asked for the fees in the Complaint or brief the Court finds that the Defendant did not defend this case frivolously, unreasonable or without foundation. Therefore, the Plaintiffs' claim for attorney fees under I.C. § 12-121 is denied.

CONCLUSION

Plaintiffs are the prevailing parties. Plaintiffs are awarded costs as a matter of right in the amount of \$2,131.15. Plaintiffs request for attorney fees is denied under both I.C. § 12-120(3) and I. C. § 12-121.

IT IS SO ORDERED.

DATED: February 4, 2010.



DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of February, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Stephen C. Smith
Hawley Troxell Ennis & Hawley, LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

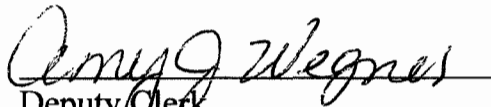
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☐ Fax: 232-6109

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey
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Deputy Clerk

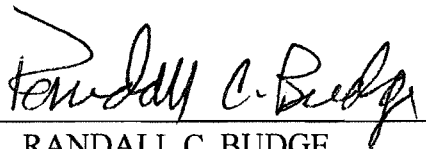
BY [Signature]
DEPUTY CLERK

Trust property in accordance with the Judgment entered on January 25, 2010, and Order Approving Sale entered on January 27, 2010, and therefore is of substantial interest to all parties.

Plaintiffs assert that the DBL Mortgage is invalid and does not constitute a lien against the mortgage property because at the time it was executed and recorded Defendant Souza had no authority to act as Trustee and encumber Trust property for the reason that he was never nominated in the Trust Agreement as a successor trustee, was never nominated as a successor trustee by any of the beneficiaries after the original trustee Max Whittier died, never accepted any appointment as trustee and was never appointed trustee by any Court Order. *See*, I.C. §§ 45-901, 902; I.C. § 55-601. Plaintiffs' proposed Amended Complaint is attached hereto. This Motion is made based upon the record established herein together with Plaintiffs' Supporting Brief.

DATED this ~~22nd~~ day of February, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

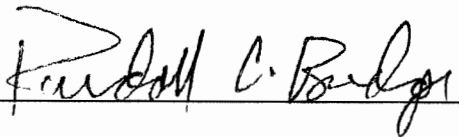
By: 
RANDALL C. BUDGE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,	)	Case No. CV-09-1822-OC
)	
Plaintiffs,	)	AMENDED COMPLAINT
)	
vs.)	
)	
JOHN C. SOUZA, Trustee of the Lynn G.))	
Beus Trust; JERRY BEUS, individually,)	
DBL Company, Inc., an Idaho corporation,)	
)	
Defendants.)	
)	
)	
)	

COME NOW PLAINTIFFS, Dallas Beus and Doug Beus ("Plaintiffs"), through counsel, and hereby amend their Verified Complaint for Relief and Declaratory Judgment filed herein on May 6, 2009, by interlineation, adding DBL Mortgage Company, Inc., an Idaho corporation, as an additional party Defendant and asserting the additional Sixth Cause of Action and Prayer for Relief as follows:

SIXTH CAUSE OF ACTION

Declaratory Judgment Against DBL Company, Inc.
(That the DBL Company, Inc., Mortgage is invalid.)

81. The allegations contained in paragraphs 1 through 80 are incorporated by reference

and made a part hereof.

82. At all times material herein, Defendant DBL Company, Inc. (hereinafter "DBL") was an Idaho corporation.

83. DBL is the "lender" under the terms of a Promissory Note dated May 2, 2007 in the face amount of \$427,500 (hereinafter "DBL Note") secured by a Mortgage dated May 2, 2007 and recorded on May 4, 2007 as Caribou County Recorder's Instrument No. 178119, each executed by John C. Souza as Trustee of the Lynn G. Beus Trust (hereinafter "DBL Mortgage"). True and correct copies of the DBL Note and DBL Mortgage are attached to the Complaint as Exhibits "K" and "M" respectively.

84. That Defendant John C. Souza was not nominated as trustee or successor trustee in the Lynn G. Beus Testamentary Trust nor in the Trust Agreement, Exhibits "A" and "B" to the Complaint.

85. That Defendant John C. Souza was never nominated as successor trustee by any of the Trust beneficiaries.

86. That Defendant John C. Souza was never appointed as trustee pursuant to any Court Order prior to the execution of the DBL Mortgage.

87. That Defendant John C. Souza never executed any Acceptance of any nomination or appointment as trustee of the Trust.

88. That Defendant John C. Souza was without any legal authority to act as trustee of the Trust and lacked any authority to pledge the Trust's real property as security.

89. That by reason of the foregoing the DBL Mortgage is invalid and of no force or effect.

90. That the Court should declare the DBL Mortgage invalid and remove it as a lien

against the Trust property.

PRAYER FOR RELIEF ON PLAINTIFFS' SIXTH CAUSE OF ACTION

WHEREFORE, Plaintiffs pray for relief and judgment from the Court as follows:

A. For a declaratory judgment that Defendant John C. Souza lacked authority to act as Trustee of the Trust and pledge Trust property as security at the time the DBL Mortgage was executed and recorded.

B. For a declaratory judgment that the DBL Mortgage is invalid and does not constitute a lawful lien or encumbrance against the Trust property.

C. For an Order granting Plaintiffs their reasonable attorney fees and costs incurred herein as provided by I.C. §12-120 and/or §12-121.

D. For such other and further relief as the Court deems just and proper under the circumstances.

DATED this ____ day of _____, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: _____
RANDALL C. BUDGE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

Stephen C. Smith
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Boise, Idaho 83701-1617

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,	)	Case No. CV-09-1822-OC
)	
Plaintiffs,	)	PLAINTIFFS' BRIEF IN
	)	SUPPORT OF MOTION
vs.	)	FOR LEAVE TO AMEND
	)	COMPLAINT
JOHN C. SOUZA, Trustee of the Lynn G.))	
Beus Trust; JERRY BEUS, individually,)	
)	
Defendants.)	
)	
)	
)	

COME NOW PLAINTIFFS, Dallas Beus and Douglas Beus ("Plaintiffs"), by and through their attorney of record and hereby submit this Brief in Support of their Motion for Leave to Amend Complaint.

CASE HISTORY

Plaintiffs commenced this action by Verified Complaint filed May 6, 2009 against John C. Souza, acting trustee of the Lynn G. Beus Trust ("Trust") and Jerry Beus, lessee in possession of the Trust property and residual beneficiary along with Plaintiffs. The Complaint presented five causes

of action, seeking removal of the Trustee and damages for breach of fiduciary duty, specific performance and dissolution of the Trust, declaratory judgment that the 2007 Farm Lease is terminated, declaratory judgment that Jerry Beus is not entitled to reimbursement for improvements, and declaratory judgment that the DBL Company loan is the sole obligation of Defendant Jerry Beus. All of these claims were presented to the Court on Plaintiffs' Motion for Partial Summary Judgment except for Plaintiffs' First Cause of Action seeking damages against John C. Souza as trustee, which remains pending. All other issues presented in this case were determined in the Court's *Decision on Motion for Partial Summary Judgment* entered November 23, 2009 ("Summary Judgment Decision"). In accordance with the Summary Judgment Decision the Court entered a *Judgment and Rule 54(b) Certificate* on January 25, 2010 ("Judgment"). The Judgment determined that the testamentary trust contained in the Will of Lynn G. Beus and the Trust Agreement thereafter created are clear and unambiguous; that the Trust terminated upon the June 10, 2008 death of Beth Beus; that the Farm Lease entered into between the Trustee and Jerry Beus was terminated on December 31, 2009; that the Trust real property should be sold by the Trustee in accordance with the terms of the Trust; that the Trustee provide a final accounting to the Court and beneficiaries and divide the net proceeds between Dallas Beus, Douglas Beus and Jerry Beus after debiting Jerry Beus's share with unpaid rent and obligations under the Farm Lease; that Jerry Beus is not entitled to any reimbursement from the Trust for improvements; and that the DBL Note was the sole obligation of Defendant Jerry Beus and to be paid from his share of the net proceeds.

Upon motion of the Plaintiffs and the Trustee, the Court entered an *Order Approving Sale* on January 27, 2010, authorizing and directing the sale of the Trust property based upon the offer from William C. Rieck for \$1,300,000. This sale of the Trust property commonly known as the

“Beus Ranch” remains pending, with the buyer Rieck having secured financing and ready to close once the lender has secured an appraisal which is due this week. However, because Defendant Jerry Beus has filed Notice of Appeal and because he has been unwilling to stipulate that the appeal only pertains to the disposition of the proceeds, not the sale of the property as proposed by the Trustee, the closing is in jeopardy. This is because the Title Company will not issue the requisite Mortgagee’s Policy to the Buyer’s lender with the appeal pending absent a stipulation that the sale will not affect the property sale, notwithstanding the fact that Plaintiffs have agreed that the sale proceeds may be held in trust pending disposition of the appeal.

During the course of discovery it was learned that the acting trustee Souza was not nominated in the Trust as the successor trustee, has never been nominated as successor trustee by any or all of the beneficiaries, has never registered the Trust and has never been appointed by the Court as trustee until recently in order to facilitate the pending sale to Rieck. By reason thereof, it appears clear that the trustee lacked authority to execute the DBL Mortgage and pledge the Trust property as security. In order to have the DBL Mortgage lien determined invalid, Plaintiffs have filed their Motion for Leave to Amend the Complaint by adding DBL Company, Inc., as a necessary and indispensable party Defendant, together with an additional Sixth Cause of Action seeking to determine that the DBL Mortgage lien against the Trust property is invalid.

**AMENDED PLEADINGS ARE FREELY ALLOWED PURSUANT
TO RULE 15, I.R.C.P.**

Leave of Court or written consent of the adverse party is required to amend the Complaint and “leave shall be freely given when justice so requires.” Rule 15(a), I.R.C.P. While amendment is vested in the discretion of the trial court, great liberality should be shown in allowing amendments

to pleadings in furtherance of justice between the parties. *Markstaller v. Markstaller*, 80 Idaho 129, 326 P.2d 994 (1958); *Smith v. Shinn*, 82 Idaho 141, 350 P.2d 348 (1960); *State v. Palmlund*, 95 Idaho 150, 504 P.2d 1199 (1972).

The issues presented concerning the authority of John C. Souza to act as trustee and the validity of the DBL Mortgage lien arose after the original Complaint was filed and during the course of subsequent discovery. The Trust property which is the subject matter of this action is the same property encumbered by the DBL Mortgage lien. Since the validity of the Mortgage lien will substantially affect the pending sale of the Trust property and the ultimate disposition of all sale proceeds between Plaintiffs and Defendant Jerry Beus, and since the remaining damage cause of action against Defendant Souza will be dependent upon sale proceeds and their disposition, determining the validity of the DBL Mortgage lien substantially affects the rights and interests of all parties presently before the Court in this action.

JOINDER OF ADDITIONAL CLAIMS AND PARTIES IS PROPER
UNDER RULES 18, 19 AND 20, I.R.C.P.

Plaintiffs have a right to assert multiple claims to relief against multiple opposing parties. Rule 18(a), I.R.C.P. It is proper to join DBL as a party Defendant so that complete relief can be afforded and so that the validity of the DBL Mortgage can be disposed of to protect the interests of all parties. Rule 19(a)(1), I.R.C.P. Joinder is feasible because DBL is an Idaho corporation and the holder of the mortgage against the Trust property.

The permissive joinder of DBL and assertion of the proposed cause of action against DBL to determine the validity of the Mortgage is lien is specifically provided for in Rule 20 (a), I.R.C.P., which provides in pertinent part:

Rule 20(a). Permissive Joinder of Parties - Permissive Joinder. . . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more of the defendants according to their respective liabilities. (Emphasis Added)

**A VALID CAUSE OF ACTION EXISTS TO DETERMINE
THE VALIDITY OF THE DBL MORTGAGE**

The DBL Mortgage (Exhibit “M” to the Complaint) was executed on May 2, 2007 by John C. Souza purportedly acting as trustee of the Lynn G. Beus Trust. The recording of the Mortgage on May 5, 2007 as Caribou County Instrument No. 178119 establishes an encumbrance of record against the Trust property which impairs the ordered sale of the same and has a direct and substantial effect on the disposition of the proceeds. Simply, if the Mortgage is valid, it will need to first be paid off from the sale proceeds, thus diminishing the net proceeds to be divided between the residual beneficiaries, Plaintiffs Dallas and Doug Beus and Defendant Jerry Beus. It also will determine the urgency and significance of proceeding with the pending sale to Rieck at a price which is arguably less than appraised value.

If the Mortgage lien is invalid, Plaintiffs’ damage claim against Defendant Souza will be substantially reduced and perhaps eliminated, rendering it unnecessary for Plaintiffs to pursue their First Cause of Action. Furthermore, the urgency and critical necessity of completing the sale to Rieck would be eliminated as the Trust property could then be leased out and operated while sale efforts continue. On the other hand if the Mortgage lien is valid, then foreclosure is imminent and the need to timely complete the Rieck sale critical. An invalid DBL Mortgage would in all

likelihood mean that DBL will need to seek recourse based upon the Mortgagee's Title Insurance Policy secured at the time the loan was made and the Mortgage taken.

There exists a substantial legal basis for challenging the validity of the DBL Mortgage lien on the basis that the acting trustee Souza had no legal authority to sign the Mortgage and pledge the Trust real property as security. The reason he had no authority to act on behalf of the Trust was that he was never nominated in the Will or Trust Agreement as a successor trustee, was never nominated as a trustee by any of the beneficiaries after the original Trustee Max Whittier died, never accepted any appointment, and was never appointed trustee by any Court Order. Instead, Mr. Souza simply chose to "step in and continue what Monte and Max had done." J. Souza Deposition, p. 41, l.5-12 Mr. Souza was reflected as trustee on only two tax returns for the years 1997 and 2000 and thereafter did not receive or expend any funds, maintain any accounts or provide any accountings. Instead he simply chose to turn over operation of the trust property and payment of trust expenses over to the lessee Jerry Beus leaving the matters of trust income and expenses to be worked out with him and his mother Beth Beus. (See J. Souza Deposition, pp. 46 - 47 l.5, p. 99 l.14 - p. 100, l.10)

A mortgage is a contract. I.C. §45-901. A mortgage can only be created by writing, executed with the formalities required. I.C. §45-901. I.C. §55-601 provides: "A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." The unauthorized signature of John Souza is ineffective to bind the Trust and it only may be effective to bind Souza as the unauthorized signer in favor of DBL, assuming that DBL took the mortgage for value acting in good faith. I.C. §28-3-403. DBL is nothing more than an unsecured creditor of Souza and/or Jerry Beus. The Idaho Supreme Court has described the rule pertaining to an unauthorized signature made without actual

authority as follows:

“The rule would seem to be that a person dealing with an agent should ascertain the extent of his authority, or upon the mere proposition of authority. (Citation omitted)

If such person makes no inquiry but chooses to rely upon the agent’s statement, he is chargeable with knowledge of the statement’s authority and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the principal who never authorized the act or contract.” (*Carpenter v. Payette Valley Cooperative, Inc.*, 99 Idaho 143, citing *Chamberlain v. Amalgamated Sugar Co.*, 42 Idaho 604, 612, 247 P.2d 12, 14 (1946).

It is astonishing the Title Company would ever issue a Mortgagee Policy to DBL without first making the normal and routine inquiry and requiring proof that Souza was in fact the lawfully-appointed trustee and had authority to act. Had they done so, they would have found he had none. Fortunately, DBL secured a Mortgagee's Policy and may have a claim against them to recover any loss.

That John Souza recently petitioned the Magistrate Court and secured an Order formally appointing him as Trustee on January 12, 2010, in Bannock County Case No. CV-2009-4852-TR in and of itself constitutes an admission that he did not previously have the proper authority. This appointment was secured in order to facilitate the pending sale to Rieck. It is noteworthy that I.C. §15-7-101 provides that a trustee "shall register the Trust in the Courts of this state at the principal place of administration", yet this never occurred. Under I.C. §15-7-303, the Trustee also has a duty to inform an account to the beneficiaries, and within thirty days of his acceptance to inform all beneficiaries, yet this never occurred. Even though pursuant to I.C. §68-101, the District Court has power to appoint a trustee, no appointment was secured here until recently. This statute also provides that when a Trust exists without any appointed trustee or where a trustee dies, the Court of the County where the Trust property is situated 'must appoint another trustee' to direct the execution of the Trust." No such appointment was ever secured prior to the execution of the DBL Mortgage. Furthermore, pursuant to I.C. §68-107 the Trust office once held by Max Whittier is not transferable, meaning that there is no authority for a trustee to act unless the statutory requirements are met.

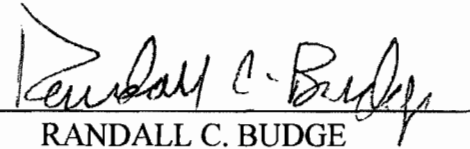
CONCLUSION

Based on the foregoing, it is submitted that Plaintiff's should be granted leave of court to file their proposed Amended Complaint to add DBL as a party defendant and add an additional Sixth Cause of Action to determine the validity of the DBL Mortgage lien against the Trust property.

Respectively submitted,

DATED this 22nd day of February, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: 
RANDALL C. BUDGE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

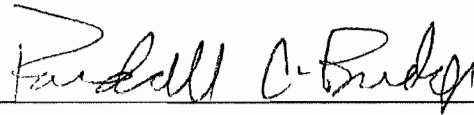
I HEREBY CERTIFY that on this 22nd day of February, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,	)	Case No. CV-09-1822-OC
)	
Plaintiffs,	)	AMENDED COMPLAINT
)	
vs.)	
)	
JOHN C. SOUZA, Trustee of the Lynn G.))	
Beus Trust; JERRY BEUS, individually,)	
DBL Company, Inc., an Idaho corporation,)	
)	
Defendants.)	
)	
)	

COME NOW PLAINTIFFS, Dallas Beus and Doug Beus ("Plaintiffs"), through counsel, and hereby amend their Verified Complaint for Relief and Declaratory Judgment filed herein on May 6, 2009, by interlineation, adding DBL Mortgage Company, Inc., an Idaho corporation, as an additional party Defendant and asserting the additional Sixth Cause of Action and Prayer for Relief as follows:

SIXTH CAUSE OF ACTION

Declaratory Judgment Against DBL Company, Inc.
(That the DBL Company, Inc., Mortgage is invalid.)

81. The allegations contained in paragraphs 1 through 80 are incorporated by reference

and made a part hereof.

82. At all times material herein, Defendant DBL Company, Inc. (hereinafter "DBL") was an Idaho corporation.

83. DBL is the "lender" under the terms of a Promissory Note dated May 2, 2007 in the face amount of \$427,500 (hereinafter "DBL Note") secured by a Mortgage dated May 2, 2007 and recorded on May 4, 2007 as Caribou County Recorder's Instrument No. 178119, each executed by John C. Souza as Trustee of the Lynn G. Beus Trust (hereinafter "DBL Mortgage"). True and correct copies of the DBL Note and DBL Mortgage are attached to the Complaint as Exhibits "K" and "M" respectively.

84. That Defendant John C. Souza was not nominated as trustee or successor trustee in the Lynn G. Beus Testamentary Trust nor in the Trust Agreement, Exhibits "A" and "B" to the Complaint.

85. That Defendant John C. Souza was never nominated as successor trustee by any of the Trust beneficiaries.

86. That Defendant John C. Souza was never appointed as trustee pursuant to any Court Order prior to the execution of the DBL Mortgage.

87. That Defendant John C. Souza never executed any Acceptance of any nomination or appointment as trustee of the Trust.

88. That Defendant John C. Souza was without any legal authority to act as trustee of the Trust and lacked any authority to pledge the Trust's real property as security.

89. That by reason of the foregoing the DBL Mortgage is invalid and of no force or effect.

90. That the Court should declare the DBL Mortgage invalid and remove it as a lien

against the Trust property.

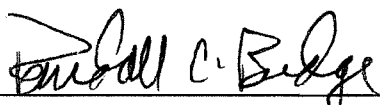
PRAYER FOR RELIEF ON PLAINTIFFS' SIXTH CAUSE OF ACTION

WHEREFORE, Plaintiffs pray for relief and judgment from the Court as follows:

- A. For a declaratory judgment that Defendant John C. Souza lacked authority to act as Trustee of the Trust and pledge Trust property as security at the time the DBL Mortgage was executed and recorded.
- B. For a declaratory judgment that the DBL Mortgage is invalid and does not constitute a lawful lien or encumbrance against the Trust property.
- C. For an Order granting Plaintiffs their reasonable attorney fees and costs incurred herein as provided by I.C. §12-120 and/or §12-121.
- D. For such other and further relief as the Court deems just and proper under the circumstances.

DATED this 9th day of March, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: 
RANDALL C. BUDGE
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of March, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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Frederick L. Ramey, PA
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Boise, Idaho 83702

Frederick L. Ramey

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COUNTY OF COLO.
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DEPUTY CLERK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually,

Defendants.

STIPULATION

DATED this 14 day of March, 2010.

JONES CHARTERED

By THOMAS J. HOLMES, Attorney for
Defendant John C. Souza

BANNOCK COUNTY
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)
)
Plaintiffs,)

Case No. CV-09-1822-OC

STIPULATION

vs.)

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,)
)
Defendants.)

COME NOW Defendants John C. Souza and Jerry Beus, by and through their respective attorneys of record, and do hereby stipulate and agree that Plaintiffs' Motion for Leave to Amend Complaint be granted and that the attached Order Granting Leave of Court to Amend Plaintiffs' Complaint be entered without further notice or hearing.

DATED this 2 day of March, 2010.

HAWLEY TROXELL ENNIS & HAWLEY

JONES CHARTERED

By _____
STEPHEN C. SMITH, Attorney for
Defendant Jerry Beus

By _____
THOMAS J. HOLMES, Attorney for
Defendant John C. Souza

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)

Plaintiffs,)

vs.)

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,)

Defendants.)

Case No. CV-09-1822-OC

**ORDER GRANTING LEAVE
OF COURT TO AMEND
PLAINTIFFS' COMPLAINT**

^{DEN}
This matter came on regularly before the Court ~~for hearing~~ on Plaintiffs' Motion for Leave to Amend Complaint, the Honorable David C. Nye, District Judge, presiding. The Court having read Plaintiffs' Motion for Leave to Amend Complaint, proposed Amended Complaint, Plaintiffs' Brief in Support in Motion for Leave to Amend Complaint, together with Defendants' Stipulation approving the same and this Order, and good cause appearing therefor, Plaintiffs' Motion is granted.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Leave to Amend Plaintiffs' Complaint and add DBL Company, Inc., as an additional party Defendant and an additional Sixth Cause of Action against DBL for the purpose of determining the validity of the DBL Mortgage lien against the Trust property be and the same is hereby granted.

IT IS FURTHER ORDERED that Plaintiff is granted leave of Court and may file and serve its Amended Complaint.

DATED this 4th day of March, 2010.



DAVID C. NYE, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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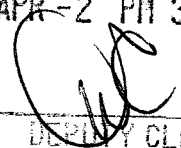
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Attorneys for Defendant DBL Company, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

COMES NOW defendant DBL Company, Inc., ("DBL") by and through
undersigned counsel, pursuant to Rule 65 of the Idaho Rules of Civil Procedure, and hereby
moves the Court to enjoin and restrain the execution, by the Trustee of the Lynn G. Beus Trust,

**DEFENDANT DBL COMPANY, INC.'S MOTION
FOR TEMPORARY RESTRAINING ORDER- 1**

Client:1581461.1

or its successor, or by any other person, of that certain purported Farm Lease with Option to Purchase ("Lease"), and to set a hearing convenient to the Court and counsel after such time as counsel for DBL has been granted access to the terms of said Lease for review and further objection to the Lease.

DBL has standing to object to the execution of the Lease based upon the Court's Order that prior to the execution of the Lease, DBL shall be provided with a copy of the Lease and be provided an opportunity to review the Lease and object to its terms as necessary.

Based on information and belief, the parties, other than DBL, have agreed to the terms of the Lease, have canceled the upcoming hearing regarding the Lease and intend on executing the Lease without providing the Lease to DBL for review and objection, if necessary.

DBL has further standing to restrain the execution of the Lease because DBL is the Mortgagee of the property at issue in this case, and as the secured party, DBL is entitled to "all rents, issues, profits, royalties, income and other benefits derived from the property." See Verified Complaint for Relief and Declaratory Judgment, Exhibit H (Mortgage), p. 1.

Pursuant to Rule 65 of the Idaho Rules of Civil Procedure, good cause exists for the Court to enjoin and restrain the execution of the Lease.

DATED this 2nd day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola – Of the Firm
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S MOTION FOR TEMPORARY RESTRAINING ORDER** to be served by the method indicated below, and addressed to the following:

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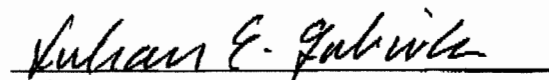
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Julian E. Gabiola

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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

DALLAS BEUS, individually; DOUG
BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually,
DBL COMPANY, INC., an Idaho
corporation,

Defendants.

Case No:CV-2009-0001822-OC

MINUTE ENTRY & ORDER

THE PARTIES came before the Court on the 5th day of April, 2010 for Defendant DBL Company, Inc.'s Motion for Temporary Restraining Order. Randall Budge appeared in person on behalf of the Plaintiff. Thomas Holmes appeared in person on behalf of the Defendant, John Souza. Stephen Smith appeared telephonically on behalf of the Defendant, Jerry Beus. Julian Gabiola appeared in person on behalf of the Defendant, DBL Company, Inc. The parties waived the presence of a Court Reporter.

At the outset, the Court heard oral argument on Defendant DBL Company, Inc.'s Motion for Temporary Restraining Order.

Thereafter, the Court **DENIED** Defendant DBL Company, Inc.'s Motion for Temporary Restraining Order. DBL Company, Inc. can file an objection to the lease once they have reviewed it.

IT IS FURTHER ORDERED that the money in the trust can pay the taxes on the property. The rest of the rental income will need to stay in trust until the remaining issues are resolved.

DATED this 20th day of April, 2010.



DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Randall C. Budge
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Chartered
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Attorneys for Defendant DBL
Company, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
MOTION TO DISMISS AMENDED
COMPLAINT**

COMES NOW defendant DBL Company, Inc. ("DBL"), by and through its
attorneys Moffatt, Thomas, Barrett, Rock & Fields, Chartered, in response to Plaintiffs'

Amended Complaint, and pursuant to Idaho Rule of Civil Procedure 12(b)(6), hereby submits its Motion to Dismiss Amended Complaint.

DBL supports its Motion with its *Memorandum in Support of Motion to Dismiss Amended Complaint* filed herewith and the Court's record on file.

DATED this 15th day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola – Of the Firm
Attorneys for Defendant DBL Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S MOTION TO DISMISS AMENDED COMPLAINT** to be served by the method indicated below, and addressed to the following:

Randall C. Budge
Mark S. Shaffer
RACINE, OLSON, NYE, BUDGE & BAILEY,
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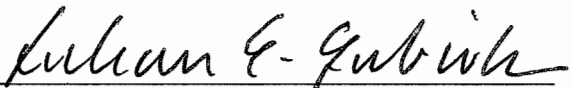
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Attorneys for Defendant Jerry Beus .

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Julian E. Gabiola

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Attorneys for Defendant DBL Company, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

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I. INTRODUCTION

For many years, the Plaintiffs, Dallas Beus and Doug Beus, and the Defendants, Jerry Beus and John C. Souza, believed that John C. Souza (“Souza”) was the successor Trustee to a trust set up by Dallas, Doug, and Jerry’s father, Lynn Beus, which is known as the Lynn G. Beus Trust (“Trust”). It was only after this litigation began and discovery ensued that Dallas Beus and Doug Beus discovered a technicality in the Trust Agreement that showed that Souza had never been formerly appointed. There is no evidence that any of the parties to this lawsuit had *actual knowledge* of this technicality before the litigation began. Dallas Beus and Doug Beus, formerly believing for decades that Souza was the Trustee, now desire to use this technicality to avoid the Trust’s mortgage of the Trust property entered into by Souza as Trustee.

Dallas Beus and Doug Beus have filed an amended complaint against DBL Company, Inc. (“DBL”), requesting the Court to invalidate a promissory note to DBL and set aside its corresponding mortgage on Trust property based upon this technicality. Plaintiffs request that the Court declare DBL’s mortgage void on the grounds that John C. Souza did not have authority under the specific procedures of the Trust to act as the Trustee. However, Idaho law protects DBL from Plaintiffs’ claims pursuant to Idaho Code Section 68-110. Under that statute, third persons, such as DBL, are protected from such claims when dealing with a purported trustee and have no duty to investigate whether a trustee has been properly appointed or has sufficient authority to conduct a certain transaction. Only with *actual knowledge* of the technicality could the Court declare the note and mortgage void. Plaintiffs’ complaint fails to assert any claim that DBL had any knowledge of the technicality. Without an allegation of actual knowledge of the technicality, the Court must dismiss Plaintiffs’ complaint against DBL as a matter of law.

II. BACKGROUND

A. The Relevant Individuals.

Lynn G. Beus (“Lynn Beus”) is an individual whose Last Will and Testament and Beneficiary Trust are at issue in this matter. Lynn Beus passed away on January 5, 1986. *Verified Complaint for Relief and Declaratory Judgment* (“Cplt.”) ¶ 6. Beth Beus (“Beth Beus”) was Lynn’s wife and lifetime beneficiary of the Lynn G. Beus Trust (“Trust”). She passed away on June 10, 2008. Cplt. ¶ 6. Defendant Jerry Beus is Lynn Beus’s son and is one of three brothers, each a designated remainderman beneficiary of the Trust. Cplt. ¶¶ 6, 7. Plaintiffs Doug Beus and Dallas Beus are the other brothers and remainderman beneficiary of the Trust.

R.M. Whittier, Esq., was Lynn Beus’s attorney who drafted his Last Will and Testament (“Will”) and was also appointed as the personal representative of Lynn Beus’s estate. R.M. Whittier also drafted the Trust and was the named Trustee in the Trust. He served as Trustee of the Trust until his death in 1986. Cplt. ¶¶ 8, 10, 14. Monte R. Whittier, Esq., R.M. Whittier’s son and law partner, acted as the successor Trustee of the Trust for some time. Cplt. ¶ 11. Defendant John C. Souza, Esq., was Monte Whittier’s law partner. Once Monte Whittier left the partnership, Souza acted as the successor Trustee of the Trust. Cplt. ¶ 3. Defendant DBL is a mortgagee that holds a mortgage on the Trust real property.

B. The Will and Trust.

Lynn Beus’s Will provides that all probate property be “poured over” into the Trust upon his death. The assets of Lynn Beus’s estate consisted primarily of real property, appurtenant water rights, and improvements of approximately 2,500 acres of farming and ranching land located in Caribou County. Cplt. ¶ 9. Following Lynn Beus’s death, pursuant to his Will, a Trust Agreement was created on or about May 14, 1987, executed by R.M. Whittier,

acting as personal representative of Lynn's estate; R.M. Whittier, as Trustee of the Trust; and Beth Beus, as the lifetime beneficiary under the Trust. Cplt. ¶ 14.

The Trust Agreement vests the trustee with certain powers, "in addition to those now or hereinafter conferred by statute or case law, all of which shall be exercised in a fiduciary capacity subject to any limitations stated elsewhere" in the Trust Agreement. Cplt. ¶ 16. The assets of Lynn Beus's estate were to be held in trust for Beth Beus during her lifetime. Cplt. ¶ 17. Pursuant to language contained in Lynn Beus's Will, the Trust was to close and terminate upon the death of Beth Beus. Cplt. ¶ 18. The Will also states that if Dallas, Doug, and Jerry Beus cannot "agree upon the operation, management or division of the real property, following the death of [Beth], my Trustee is instructed to sell the same, and to divide the proceeds equally between Dallas, Jerry and Doug after all expenses, taxes, and liens of any kind and nature against the Trust property is paid." Apparently, since Beth's death, Dallas, Doug, and Jerry have been unable to agree upon the continued operation or division of the real property. Cplt. ¶ 20.

With respect to designating a successor trustee, the Trust Agreement states the following:

The Trustee shall have the power at any time to designate successor Trustee, and the successor Trustee shall have the same duties and powers as are assumed and conferred in this Agreement upon the Trustee, including the power in any successor to himself appoint a successor. Any appointment of a successor Trustee shall be made in writing, shall be acknowledged, and shall state the time or the event when such appointment shall take effect. A copy of the appointment shall be delivered to the Beneficiary and remainderman beneficiaries upon the failure of any Trustee to designate a successor Trustee and the failure of the successor to assume the duties of Trustee, the Beneficiary and Remaindermen beneficiaries may petition the Courts for appointment of a successor Trustee.

Am. Cplt. ¶ 14, Ex. B.

After R.M. Whittier's death, Monte R. Whittier acted as the successor Trustee for a period of time. Cplt. ¶ 11. Thereafter, Souza acted as the successor trustee to date. Cplt. ¶ 12. From the time that Souza took over responsibilities as successor Trustee until this litigation, it does not appear that Beth, Jerry, Dallas, or Doug Beus ever questioned whether Souza was the successor Trustee. Indeed, in Plaintiffs' Amended Complaint, Plaintiffs repeatedly refer to Souza as the "successor trustee." Cplt. ¶¶ 3, 5, 12, 24, 29, 30, 31, 44-55, 62, 64-68, 71. In fact, the first claim in the complaint is a breach of fiduciary duty against Souza as Trustee. From the allegations contained in the complaint, it is obvious that Beth, Jerry, Dallas, and Doug Beus never disputed that Souza was the successor Trustee of the Trust. It was only after this case started that Doug and Dallas discovered that Souza had not been technically appointed under the Trust Agreement:

During the course of discovery it was learned that the acting trustee Souza was not nominated in the Trust as the successor trustee, has never been nominated as successor trustee by any or all of the beneficiaries, has never registered the Trust and has never been appointed by the Court as trustee until recently in order to facilitate the pending sale to Rieck.

Plaintiffs' Brief in Support of Motion for Leave to Amend Complaint at 3 (emphasis added). The Amended Complaint is the first time the failure of procedure is claimed. The Amended Complaint alleges that Souza was never formally nominated as a trustee or successor trustee by the Trust, Trust Agreement, any of the Trust beneficiaries, or by any court as required by the Trust. Amended Complaint ("Am. Cplt.") ¶¶ 84-86. It also alleges that Souza never executed an acceptance of any nomination or appointment as Trustee of the Trust and is alleged to have no authority to act as the Trustee of the Trust. Am. Cplt. ¶¶ 88-89. These technical deficiencies in

Souza's assumption of the office of Trustee form the sole basis of Plaintiffs' claims to invalidate DBL's Note and Mortgage.

C. The Leases.

Since the death of Lynn Beus, the Trust property has been leased to Jerry Beus pursuant to various farm leases. Cplt. ¶ 21. R.M. Whittier, as personal representative of Lynn Beus's estate, entered into the first farm lease with Jerry in 1986. The lease was amended and ran until 1993. The annual rent was for \$23,900.00. In 1994, Month R. Whittier, acting as successor Trustee, entered into an Addendum Farm Lease with Jerry Beus. The Addendum Farm Lease extended the lease to March 1, 2001, and raised the annual rent to \$25,000. Cplt. ¶¶ 22-23. On January 1, 2007, Souza, acting in his capacity as successor Trustee, entered into a new farm lease for the Trust property for a term of 1/1/2007 – 12/31/2013, with the annual rent reduced to \$12,000.00. Cplt. ¶ 24.

The 1986 farm lease and the 2007 farm lease obligated Jerry Beus to maintain the Trust property at his own expense. Both leases also stated that the Trust had no obligation to reimburse Jerry Beus for his operating expenses or personal operating loans. Cplt. ¶¶ 25-26. The 1986 farm lease did not obligate the Trust to reimburse Jerry Beus for any improvements to the Trust property. The 2007 lease, however, obligates the Trust to reimburse Jerry Beus for improvements made to the Trust property. Cplt. ¶ 27.

D. The Notes and Mortgages.

On June 7, 2002, Jerry Beus signed a promissory note, secured by a mortgage on the Trust property executed by the Trustee, Souza, in the amount of \$372,740, with Ireland Bank. The purpose of the loan was to pay off past operating lines of credit. Jerry Beus signed a second promissory note on June 7, 2002, with Ireland Bank to obtain a personal loan in the amount of

\$235,000.00. This note was likewise secured by a mortgage on the Trust property signed by Souza, Trustee. Cplt. ¶¶ 29-30.

On May 2, 2007, Souza, acting as Trustee of the Trust, executed a promissory note in the amount of \$427,500.00, in favor of DBL. The Note was secured by a mortgage on the Trust property, also executed by Souza, Trustee. The Note refinanced the unpaid balance owed to Ireland Bank with the balance being used as an operating line of credit for Jerry Beus. There was likewise a cash amount of \$18,153.84 paid directly to Jerry Beus. Cplt. ¶ 31. Apparently, Jerry Beus maintains that the proceeds he received from the Note were used to enhance the value of the Trust property. Cplt. ¶ 34.

E. Procedural Background.

On May 6, 2009, Dallas and Doug Beus filed suit against Souza and Jerry Beus. The original Complaint contains five causes of action: 1) Breach of Fiduciary Duty against Souza as the Trustee and a request for Souza's removal as trustee; 2) Specific Performance, requesting Souza to sell the Trust property and dissolve the Trust; 3) Declaratory Judgment against Souza as the Trustee and Jerry that the 2007 farm lease is terminated; 4) Declaratory Judgment against Souza as the Trustee and Jerry Beus that Jerry Beus is not entitled to reimbursement for improvements made to the Trust property; and 5) Declaratory Judgment that the mortgage is the sole obligation of Jerry Beus, and not the Trust.

Dallas and Doug Beus later learned that Souza's appointment as Trustee did not follow the technical requirements of the Trust and moved to amend their Complaint to add DBL as a party. Plaintiffs' Motion to Amend was granted, and Plaintiffs incorporated the 81 allegations of the Complaint into the Amended Complaint and added a sixth cause of action based upon Souza's failed appointment as Trustee. The Amended Complaint seeks an additional

remedy—declaratory relief that the DBL mortgage is invalid due to Souza’s failure to follow the procedures required in the Trust. Dallas and Doug allege:

84. That Defendant John C. Souza was not nominated as trustee or successor trustee in the Lynn G. Beus Testamentary Trust nor in the Trust Agreement, Exhibits “A” and “B” to the Complaint.

85. That Defendant John C. Souza was never nominated as successor trustee by any of the Trust beneficiaries.

86. That Defendant John C. Souza was never appointed as trustee pursuant to any Court Order prior to the execution of the DBL Mortgage.

87. That Defendant John C. Souza never executed any Acceptance of any nomination or appointment as trustee of the Trust.

88. That Defendant John C. Souza was without any legal authority to act as trustee of the Trust and lacked any authority to pledge the Trust’s real property as security.

89. That by reason of the foregoing the DBL Mortgage is invalid and of no force or effect.

Am. Cplt. ¶¶ 84-89.

III. LEGAL STANDARD

In considering a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6), the court must consider whether “the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 161 (2005) (quoting *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). The legal standard for determination of a motion to dismiss under Rule 12(b) is the same as the standard for a motion for summary judgment, except that the Court need only look to the pleadings in ruling on a motion to dismiss. Under either motion, the court must draw all reasonable inferences in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho

102, 104, 44 P.3d 1157, 1159 (2002); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993); *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. If the plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. *Johnson v. Boundary Sch. Dist. #101*, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003).

IV. ARGUMENT

Dallas and Doug Beus seek an order from the Court declaring the DBL Note and Mortgage invalid because Souza was not properly nominated, appointed, or accepted as the Trustee under the Will, Trust, or Trust Agreement. As noted above, the beneficiaries and their attorneys treated Souza as the Trustee until this technicality was discovered after this litigation commenced. Apparently, when the Trust property was mortgaged to DBL, neither Dallas, Doug, nor Jerry Beus had actual knowledge of the technicality that Souza had not been properly nominated or otherwise appointed as Trustee. As such, it seems impossible that DBL had actual knowledge of the technical deficiencies in the appointment.

Contrary to Plaintiffs' claims, DBL's Note and Mortgage are valid because Idaho law grants broad protections to third persons who deal with trusts and trustees. Lenders, like DBL, are not required to investigate the terms of trust agreements when dealing with trusts. As discussed below, any other finding would restrain commerce and eliminate many of the purposes of Idaho trusts. Idaho Code Section 68-110 grants this near absolute protection as follows:

Third persons protected in dealing with trustee. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the *existence* of trust powers and their proper exercise by the trustee *may be assumed without inquiry*. The third person is not bound to inquire whether the trustee has

power to act or is properly exercising the power; and *a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise*. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

(2009) (emphasis added).

Pursuant to this statute, DBL's Note and Mortgage are fully protected "as if the trustee possessed and properly exercised the powers he purports to exercise." The Court should dismiss Dallas and Doug Beus's cause of action in the Amended Complaint against DBL.

A. Idaho Code Section 68-110 Requires that the Court Rule that the Note and Mortgage Are Valid.

Idaho Code Section 68-110 protects DBL in its dealings with Souza under the plain language of the statute. First, DBL is a third person, as it was not a party to the Trust. Second, DBL was permitted to assume, without inquiry, that Souza had the authority to exercise the trust powers he purported to have. Third, DBL was not bound to inquire whether Souza had fulfilled the technical requirements establishing his authority to execute the Note and Mortgage and bind the Trust. Fourth, DBL is fully protected in dealing with Souza as the purported Trustee of the Trust, as if he did have the powers he purported to exercise, because there is no allegation that DBL had actual knowledge that Souza was not an authorized Trustee or improperly exercising trust power. Fifth, DBL was not required to assure that the funds obtained from the Note and Mortgage were properly applied. Thus, DBL is protected from Plaintiffs' allegations under this statute and must be dismissed from this action.

Importantly, Plaintiffs fail to allege in their Complaint that DBL had "actual knowledge" that Souza either had no trust powers or that he was improperly using trust powers.

The legislature clearly intended to use the term “actual knowledge” as opposed to some other type of knowledge. “Actual knowledge” has been defined as “[d]irect and clear knowledge, as distinguished from constructive knowledge.” BLACK’S LAW DICTIONARY 876 (7th ed. 1999). DBL was under no duty to investigate whether Souza had Trust powers or if he was properly exercising trust powers. Without an allegation or evidence of actual knowledge, Plaintiffs’ cause of action in the Amended Complaint against DBL must fail. As mentioned above, Plaintiffs will be unable to assert any kind of actual knowledge of the technicality that Souza was never properly nominated or otherwise appointed in light of their own failure to discover the technicality until after discovery began.

The protections provided by Idaho Code Section 68-110 are an integral part of the Uniform Trustees’ Powers Act adopted by the Idaho legislature. Several other states have adopted this statute and have similarly dismissed comparable lawsuits against third persons who had no actual knowledge of the trustee’s deficiency of authority. These cases demonstrate that actual knowledge is required when alleging lack of authority based on the requirements of a trust. The following two cases, although unreported, involve similar circumstances to the case at hand. First, *Elliott v. J.C. Bradford & Co., LLC*, No. 2006-CA-00546-MR (Ky. Ct. App. September 14, 2007) (available at 2007 WL 2687413), involved a trustee that had not been properly appointed under the trust documents, but nevertheless exercised control over trust assets. In that case, the settlor, William E. Elliott, Sr., created two irrevocable trusts for his two great-grandchildren. The initial trustee was First National Bank, but the settlor gave his son, William E. Elliott, Jr., certain powers, including the power to remove the trustee and appoint a new one. First National Bank later resigned, but allegedly failed to give notice as required by the trust documents to the beneficiaries’ parents. William, Jr. then unilaterally appointed himself

trustee and moved the trust assets to a brokerage firm, J.C. Bradford, and then later to another firm, Morgan Keegan. Separately, the beneficiaries' guardians appointed Sandra Elliott, one of the beneficiaries' mothers, to be the trustee. When William Jr. removed Sandra as the trustee, the beneficiaries' guardians filed suit, seeking a declaratory judgment that William Jr. had improperly appointed himself as trustee and had improperly exercised control over the assets. The complaint also sought an accounting of the trust assets and claimed damages against the brokerage firms. The brokerage firms moved for summary judgment, which the lower court granted on the grounds that they were third parties who had no actual knowledge that William Jr. lacked authority when appointing himself trustee and exercising control over the trust assets. The Kentucky Court of Appeals affirmed and held:

The trial court concluded that the statute insulated the brokerage firms from liability absent a showing that they had actual knowledge that William Jr. was exceeding the powers given him under the trust document...

...

A reading of the statute makes clear that as far as the brokerage firms are concerned, "the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry." Absent actual knowledge that the trustee is exceeding his authority, the brokerage firms are insulated from liability for the trustee's actions. As stated in the opinion of the trial court, it was conceded that a simple reading of the trust documents would not have provided the firms with actual knowledge concerning any defect in William Jr.'s authority as trustee. In fact, the trust documents plainly give William Jr. specific authority to remove trustees and appoint a successor trustee. ***More importantly, however, until actual knowledge is established, no duty to make any inquiry into the trustee's authority arises.***

Elliott, Slip op. p. 3 (emphasis added).

The case of *Oliver v. The CIT Group*, No. A117400 (Cal. Ct. App. 2008

January 15, 2008) (available at 2008 WL 133078), involved a trustee that mortgaged the trust real property to obtain funds for his own benefit. In that case, the settlor had created a trust for her son with the only asset being a residence. She named her husband as the trustee and instructed him to turn the residence over to her son upon reaching the age of 21. The settlor died, and the trustee, after using up his own inheritance from a \$600,000 investment account, mortgaged the residence to pay off his credit cards and other debts. The trustee eventually refinanced the loan for over \$400,000, also secured by a mortgage on the residence. Once the beneficiary turned 21, the trustee turned the residence over to him, but still encumbered with the mortgage. Soon thereafter, the beneficiary brought suit against the trustee and the mortgage company, seeking to have the note and mortgage set aside. The lower court granted summary judgment to the lender, and the beneficiary appealed. On appeal, the California Court of Appeals affirmed, finding no actual knowledge, stating:

Thus, as the trial court found, Probate Code section 18100 negates any obligation by a lender in CIT's position to review, analyze, or inquire about trust powers merely because it becomes aware of facts that would cause a reasonable person to suspect that a potential borrower may not be authorized to use trust property to secure the type of personal loan requested. ***That section eliminates any duty by a lender to investigate or police the powers of the trustee absent actual knowledge of a breach of trust.***

In our view, Justin's evidence fails to create a triable issue of fact as to whether CIT had actual knowledge that Hirsch was breaching the Trust by using Trust property to obtain a loan to be used for personal purposes.

Oliver, Slip op. pp. 4-5 (emphasis added).

Courts recognize that this statute can often result in harsh results for beneficiaries.

The two following cases also demonstrate that the Uniform Trust Act protects third parties, even

in egregious circumstances. In *Collier v. Trustmark*, 678 So. 2d 693 (Miss. 1996), Hendrick established four irrevocable trusts for her daughter and grandsons and named her accountant as the trustee. The trustee had broad powers under the terms of the instruments. In 1984, a checking account was opened for each trust at the offices of Trustmark Bank. Between 1983 and 1985, Hendrick made deposits of significant funds into the checking accounts. In 1984, the trustee began withdrawing funds from the accounts and depositing them into his personal checking account. In 1989, the trustee admitted to Hendrick that he had depleted all of the assets of the trust checking accounts. He was later removed as trustee and the successor trustee brought suit against the bank for allowing the trustee to transfer the funds. The bank, utilizing this statute, moved for summary judgment, arguing that it had no actual knowledge that the trustee was acting wrongfully. The lower court granted the motion and the trustee appealed. On appeal, the court first noted that the trust clearly had a cause of action against the former trustee. With respect to the bank, it looked to its version of Section 68-110 and applied the following definition of actual knowledge:

[A]wareness at the moment of the transaction that the fiduciary is defrauding the principal. It means express factual information that funds are being used for private purposes in violation of the fiduciary relationship.

Collier, 678 So. 2d at 697, (quoting *Master Chem. Corp. v. Inkrott*, 563 N.E.2d 26, 30-31 (Ohio 1990)). The court noted that constructive knowledge was insufficient, and affirmed the summary judgment ruling:

In the instant case, the Hendricks could pierce the statutory protection afforded Trustmark only if they could show Trustmark had actual knowledge that Moss exceeded or improperly exercised his fiduciary powers when he deposited trust funds into his personal checking account. The mere fact that Moss executed checks on the trust accounts and deposited them into his personal

account was insufficient by itself to require Trustmark to inquire into Moss' authority to perform the transaction. ***At the close of all discovery, the Hendricks simply could not put forth any evidence which would allow a jury to determine that Trustmark had actual knowledge "at the moment of the transaction[s] that the fiduciary [was] defrauding the principal."***

Collier, 678 So. 2d at 697-698 (citations omitted) (emphasis added).

Similarly, in *Wetherill v. Bank IV Kansas*, 145 F.3d 1187 (10th Cir. 1998), a trustee converted funds for his personal use from bank accounts that were part of the corpus of several trusts. Over time, the trustee converted over \$250,000 from the trusts. Upon discovery, the trustee resigned, and the beneficiaries brought suit against the trustee and the bank where the accounts were located. Once again, the lower court granted summary judgment to the bank on the grounds that it had no actual knowledge of the trustee's breach of his duties. On appeal, the beneficiaries attempted to argue that actual knowledge should also include constructive knowledge. The court rejected the argument and held:

The trial court instead applied a literal definition to the term "actual knowledge," recognizing the higher evidentiary standard which was intended to be applied to such transactions. This Court concurs. ***The clear terms of § 58-1207 confer on Bank IV the right to presume that Leitner had both the power to perform the transactions in controversy, and that he was acting within the scope of such authority. Bank IV had no duty to inquire into Leitner's authority to conduct the transactions. Unless there was "actual knowledge" of a fiduciary breach, Bank IV enjoyed complete protection in its dealings with Leitner*** and had no obligation to ensure that Leitner had properly applied the trust fund monies, even where the misapplications of funds benefited the bank in having its loans to Leitner paid. While this result may at first appear harsh, to hold otherwise where the bank was unaware it was benefiting from Leitner's wrongdoing, would necessarily chill commerce.

Wetherill, 145 F.3d at 1192 (emphasis added).

In order to set aside a purported trustee's transactions, courts consistently require plaintiffs to show actual knowledge on the part of third persons dealing with the trustees who either have no authority, are exceeding their authority, or are wrongfully using trust assets. *See Bayview Bank, N.A. v. The Highland Golf Mortgagees Realty Trust*, 814 A.2d 449 (Me. 2002) (Successor in interest was entitled to rely on trustee's purported authority to enter into subordination agreement without actual knowledge of lack of authority); *Vournas v. Fidelity Nat'l Title Ins. Co.*, 73 Cal. App. 4th 668 (Cal. Ct. App. 1999) (Complaint failed to allege, and record failed to show, any evidence of actual knowledge that trustee had failed to gain permission of beneficiaries to sale trust real property); *Adler v. Manor Healthcare Corp.*, 7 Cal. App. 4th 1110 (Cal. Ct. App. 1992) (Plain meaning of statute requires actual knowledge, and without it, third person is entitled to enforce grant of easement from trustee); *Gleason v. Elbthal Realty Trust*, 445 A.2d 1104 (N.H. 1982) (Third person was entitled to rely upon trustee's purported authority to sell trust land without actual knowledge that trustee did not have sufficient authority to sell trust land without permission of two trustees).

In this case, Plaintiffs have failed to allege that DBL had actual knowledge that Souza had never been properly appointed Trustee. Without actual knowledge, DBL was entitled to rely upon Souza's purported authority. DBL obviously could have relied on public instruments that the prior Ireland Bank mortgages were signed by Souza as Trustee. DBL also had knowledge of the 2007 lease that Souza signed on behalf of the Trust. Beneficiaries and family members Beth Beus and Jerry Beus treated Souza as the Trustee and Souza signed two tax returns for the Trust. The Verified Complaint and Amended Complaint allege that Souza acted as successor Trustee and claim that Souza executed documents and otherwise held himself out in public as successor Trustee, but that the procedural requirements of his appointment were

not followed. All indications pointed to Souza as the acting successor Trustee, and there is no allegation or evidence that DBL possessed actual knowledge of the technicality that Souza was not formally nominated or elected under the Trust. Plaintiffs' Complaint fails because Idaho Law protects third parties when dealing with Trusts and because there is no allegation that DBL had actual knowledge of the Trustee's lack of proper nomination and election.

B. Public Policy Supports a Dismissal of Plaintiffs' Complaint.

Public policy explains why Idaho Code Section 68-110 shifts the burden of responsibility from third persons dealing with trustees to the beneficiaries of a trust. As one court noted in enforcing a land sales agreement that a trustee had entered into without proper authority:

“The actual standard of liability allocate[d] virtually all of the risk of harm associated with a breach of trust to the settlor and trust beneficiaries, thereby creating an incentive for them to take precautions to minimize the risk of a breach.”

Smith v. Lillian V. Donahue Trust, 953 A.2d 753, 756 (N.H. 2008). The Act's shift of risk to those who are most capable of policing the trust is proper, especially in this case. Dallas Beus and Doug Beus were in the best position to watch over the trust property. The Ireland Bank mortgages are public record and Dallas and Doug Beus are imputed with knowledge of Souza's execution of the Ireland Bank and DBL mortgages of the Trust property. *See Quinlan v. Pearson*, 71 Idaho 26, 225 P.2d 455 (1950) (Individuals are charged with constructive knowledge of public records relating to conveyances and title to real property). These beneficiaries could have easily kept apprised of the title of both the Trust property and also the actions of the Trustee, especially in light of R.M. Whittier's death and after Monte Whittier

moved out of the area. They were in a position to monitor the Trustee and enforce the provisions of the Trust, while DBL is relieved of such duties by statute.

Another policy consideration cited by the courts is the chilling effect Plaintiffs' arguments for invalidating the mortgage would have on commerce and trade. If third parties were burdened with the duty to ensure that every trustee was properly appointed under the trust documents, no one would risk transacting business with them. As the 10th Circuit Court of Appeals noted, "[w]hile this result may at first appear harsh, to hold otherwise . . . would necessarily chill commerce." *Wetherill*, 145 F.3d at 1192 (emphasis added). One commentator noted:

Without this section, third persons might never safely deal with a trustee for fear that he was exceeding his trust powers under the prudent man rule. Accordingly, third persons are protected and are not charged with knowledge of limitations on trustees' powers.

Charles Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 28 (1966). *See also*

William F. Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. Rev. 627, 663 (1962)

(Requiring a third person to inquire about trust powers would impede "the effective administration of every trust by delaying necessary transactions and discouraging dealings with and assistance to trustees.") A third person, such as DBL, does not have the duty to inquire into a trustee's proper appointment and power. The cost of litigation in defending its review of the technicalities of trust documents, and the risk of getting it wrong, would prevent banks from doing business with trusts altogether. The very existence of trusts would be threatened if trustees could not enter into commerce using trust assets. Public policy supports shifting the burden to the beneficiaries and protecting third parties, such as DBL, from Plaintiffs' claims.

V. CONCLUSION

Based upon the foregoing, DBL respectfully requests that the Court grants its Motion to Dismiss and dismiss Plaintiffs' Amended Complaint with prejudice.

DATED this 15th day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola— Of the Firm
Attorneys for Defendant DBL Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S MOTION TO DISMISS AMENDED COMPLAINT** to be served by the method indicated below, and addressed to the following:

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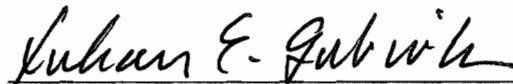
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2010 APR 13

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)
)
Plaintiffs,)

Case No. CV-2009-0001822-OC

vs.)

**MOTION FOR PARTIAL
SUMMARY JUDGMENT**

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,))
DBL Company, Inc., an Idaho corporation,))
)
Defendants.)

COMES NOW Plaintiffs Dallas Beus and Doug Beus, individually (hereinafter "Plaintiffs"), by and through counsel, and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, hereby move the Court for entry of summary judgment in favor of Plaintiffs and against Defendant DBL Company, Inc., an Idaho corporation ("DBL"). This Motion is made upon the grounds and for the reasons that there are no material issues of fact and the moving parties are entitled to judgment as a matter of law that:

1. Defendant Souza did not have the legal authority to act as a trustee of the Trust and

pledge Trust property as security at the time the DBL Mortgage was executed and recorded.

2. The DBL Mortgage is invalid, constitutes an unlawful lien or encumbrance against the Trust property, and should be removed as a lien or encumbrance against the Trust property.

DATED this 13th day of April, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By Randall C. Budge
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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FILED

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)
)
Plaintiffs,)

Case No. CV-2009-0001822-OC

vs.)

**MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,))
DBL Company, Inc., an Idaho corporation,))
)
Defendants.)

COMES NOW Plaintiffs Dallas Beus and Doug Beus, individually (hereinafter "Plaintiffs"),
by and through counsel, and submit this Memorandum in Support of Motion for Partial Summary
Judgment ("Memorandum") filed by Plaintiffs against Defendant DBL Company, Inc. ("DBL").
Plaintiffs' partial summary judgment motion is based upon Plaintiffs' Verified Complaint; Plaintiffs'
Amended Complaint; the Supporting Affidavit of Randall C. Budge filed September 3, 2009, to
which is attached the depositions of Plaintiffs, Defendant John C. Souza and Defendant Jerry Beus,
along with the deposition exhibits referred to in this Memorandum; the Court's Decision on Motion

for Partial Summary Judgment entered November 23, 2009; the Court's Judgment and Rule 54(b) Certificate on January 25, 2010; the Affidavit of Counsel ("Counsel Aff.") filed herewith; and the record herein. Exhibits A-P attached to Plaintiffs' Verified Complaint are the same as deposition exhibits 1-16. For convenience, all exhibits referred to will be deposition exhibits unless otherwise indicated.

I. INTRODUCTION

Plaintiffs commenced this action by Verified Complaint filed May 6, 2009 ("Complaint") against John C. Souza ("Souza" or "Trustee"), acting trustee of the Lynn G. Beus Trust ("Trust") and Jerry Beus, lessee in possession of the Trust property and residual beneficiary along with Plaintiffs. The Complaint presented five causes of action, seeking: (1) removal of the Trustee and damages for breach of fiduciary duty, (2) specific performance and dissolution of the Trust, (3) declaratory judgment that the 2007 Farm Lease is terminated, (4) declaratory judgment that Jerry Beus is not entitled to reimbursement for improvements, and (5) declaratory judgment that the DBL loan is the sole obligation of Defendant Jerry Beus.

All of these claims were presented to the Court on Plaintiffs' Motion for Partial Summary Judgment filed September 3, 2009, except for Plaintiffs' First Cause of Action seeking damages against John C. Souza as acting trustee, which remains pending. All other issues presented in this case were determined in the Court's Decision on Motion for Partial Summary Judgment entered November 23, 2009 ("Summary Judgment Decision"). In accordance with the Summary Judgment Decision the Court entered a Judgment and Rule 54(b) Certificate on January 25, 2010 ("Judgment"). The Judgment determined that: (1) the testamentary trust contained in the Will of Lynn G. Beus and the Trust Agreement thereafter created are clear and unambiguous; (2) the Trust terminated upon the June 10, 2008 death of Beth Beus; (3) the Farm Lease entered into

between the Trustee and Defendant Jerry Beus was terminated on December 31, 2009; (4) the Trust real property should be sold by the Trustee in accordance with the terms of the Trust; (5) the Trustee provide a final accounting to the Court and beneficiaries and divide the net proceeds between Plaintiff Dallas Beus, Plaintiff Douglas Beus and Defendant Jerry Beus after debiting Defendant Jerry Beus's share with unpaid rent and obligations under the Farm Lease; (6) Defendant Jerry Beus is not entitled to any reimbursement from the Trust for improvements; and (7) the DBL Note was the sole obligation of Defendant Jerry Beus and to be paid from his share of the net proceeds.

Upon motion of the Plaintiffs and the Trustee, the Court entered an Order Approving Sale on January 27, 2010, authorizing and directing the sale of the Trust property (commonly known as the "Beus Ranch") based upon an offer from William C. Rieck to purchase the Trust property for \$1,300,000.00. This sale of the Trust property was not closed because Defendant Jerry Beus filed a Notice of Appeal on February 1, 2010 and has been unwilling to stipulate that the appeal pertain only to the disposition of the proceeds, not the sale of the property as proposed by the Trustee. Accordingly, it became impossible to close the transaction because the Title Company would not issue the requisite Owner's Title policy to Rieck and Rieck could not obtain the required Mortgagee's Policy necessary to secure his loan from his lender with the appeal pending. As a result, the Court has recently approved the lease of the Trust property to Dwight Lakey, who will farm the property this year and pay rent to the Trustee held in Trust pending determination of the validity of the DBL Mortgage and the Beus residual beneficiaries to the Trust proceeds.

During the course of discovery¹ it was learned that the acting trustee Souza was not nominated in the Trust as the successor trustee, was never nominated as successor trustee by any or all of the beneficiaries, had never registered the Trust, and had never been appointed by the Court as trustee until recently in order to facilitate the pending sale to Rieck. By reason thereof, it appears clear that Souza lacked authority to execute the DBL Mortgage and pledge the Trust property as security.

The DBL Mortgage was executed on May 2, 2007 by John C. Souza purportedly acting as trustee of the Lynn G. Beus Trust. *See* Exhibit “13”. The recording of the DBL Mortgage on May 4, 2007 as Caribou County Instrument No. 178119 establishes an encumbrance of record against the Trust property which impairs any sale of the Trust property and has a direct and substantial effect on the disposition of the Trust property proceeds. This Court has already determined that the DBL Mortgage is the sole obligation of Defendant Jerry Beus and is to be paid from his share of the net proceeds. *See* Summary Judgment Decision, pages 10-13; Judgment. However, the amount due on the DBL Mortgage is well above the face amount of \$427,500.00 due to Defendant Jerry Beus’s non-payments and late fees, with interest accruing. *See* Exhibit “15”; Souza Dep. 83:18–84:13. Accordingly, unless a purchaser is secured at a price considerably higher than the prior offer of \$1,300,000.00 from Rieck, Defendant Jerry Beus’s proceeds from the sale would not cover the entire current balance of the DBL Mortgage. *See id.* In that case, if the DBL Mortgage is valid Plaintiffs Dallas and Doug Beus could be required to contribute a portion of their sale proceeds to clear the DBL Mortgage lien, diminishing their entitled shares.

If the DBL Mortgage is invalid, the ability to sell the property will be substantially

¹ The depositions of Trustee John Souza, Plaintiffs Dallas and Doug Beus, and Defendant Jerry Beus are attached to the Supporting Affidavit of Randall C. Budge filed September 3, 2009 and establish without dispute that John C. Souza never received a Court order appointing him as Trustee, and was never nominated by any beneficiary.

improved, Plaintiffs and Defendant Jerry Beus will receive their respective shares of the proceeds, and Plaintiffs' damage claim against Defendant Souza will be substantially reduced if not eliminated, rendering it unnecessary for Plaintiffs to pursue their First Cause of Action.

While it is unclear at this point, since DBL has not answered the Complaint, in all likelihood the title insurance company that issued the mortgagee's policy to DBL will pay off DBL and be in a position to seek recovery against Jerry Beus's share of the proceeds.

II. LEGAL STANDARD

Summary judgment is proper when "the pleadings, depositions, 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 a judgment as a matter of law." Idaho R. Civ. P. 56(c). "All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the records are to be drawn in favor of the non-moving party." *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 130 P.3d 1106 (2006). Yet, to withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853 (Ct. App. 1986).

III. COURSE OF PROCEEDINGS AGAINST DBL

Plaintiffs commenced this action against DBL by adding DBL as a necessary and indispensable party via Amended Complaint filed March 9, 2010, seeking a declaratory judgment that the DBL Mortgage lien against the Trust property is invalid. DBL was given an extension of time to file an Answer to the Amended Complaint, which should be forthcoming. Plaintiffs' Amended Complaint seeks an Order declaring that Defendant Souza lacked authority to act as trustee of the Trust and pledge Trust property as security at the time the DBL Mortgage was

executed and recorded, and that the DBL Mortgage is invalid and does not constitute a lawful lien or encumbrance against the Trust property.

IV. STATEMENT OF UNDISPUTED FACTS

Plaintiffs submit that the following material facts are undisputed based upon the pleadings, depositions and exhibits in the record, and entitle Plaintiffs to summary judgment as a matter of law:

1. Defendant Jerry Beus asked Plaintiffs, as remaindermen beneficiaries of the Trust, to sign off on a loan from Federal Land Bank because Federal Land Bank wanted the permission of all beneficiaries. *See* Summary Judgment Decision, page 10; Jerry Beus Dep. 127:14-24; Souza Dep. 79:13–80:10. Plaintiffs, however, did not want to put the farm as collateral on any loan and refused to sign any documentation. *See* Summary Judgment Decision, page 10; Jerry Beus Dep. 141:23–142-12; Souza Dep. 79:13–80:10.

2. Defendant Jerry Beus then contacted Defendant Souza and asked if Defendant Souza, as the acting trustee, would put up the farm as collateral in order to get money to pay Defendant Jerry Beus's loans at Ireland Bank. *See* Summary Judgment Decision, page 10; Jerry Beus Dep. 143:4-21; Souza Dep. 79:13–80:25.

3. Defendant Souza agreed and signed a Promissory Note dated May 2, 2007, in the face amount of \$427,500.00, in favor of DBL (hereinafter "DBL Note"). *See* Summary Judgment Decision, page 10; Exhibit "11".

4. The DBL Note was secured by a mortgage (also executed by Defendant Souza) against the Trust property dated May 2, 2007 and recorded on May 4, 2007 as Caribou County Recorder's Instrument No. 178119 (hereinafter "DBL Mortgage"). *See* Exhibit "13".

5. Defendant Souza was not nominated as trustee or successor trustee of the Trust either by the Last Will and Testament of Lynn G. Beus (hereinafter the "Will") or the Trust Agreement

created on or about May 14, 1987 (hereinafter the “Trust Agreement”). *See* Exhibits “1” and “2”.

6. Defendant Souza was never nominated as successor trustee by any trustee or successor trustee of the Trust. (Jerry Beus Dep. 35:16-19, 39:18–40:25; Souza Dep. 21:24–22:4, 41:5-12.)

7. Defendant Souza was never nominated as successor trustee of the Trust by any of the Trust beneficiaries. *See id.*

8. Defendant Souza was never appointed as trustee of the Trust pursuant to any Court Order prior to the execution of the DBL Mortgage. *See id.*

9. Defendant Souza never executed any Acceptance of any nomination or appointment as trustee of the Trust. *See id.*

10. Defendant Souza recently petitioned the Magistrate Court and secured an Order for the first time appointing him as Trustee on January 12, 2010, in Bannock County Case No. CV-2009-4852-TR. *See* Counsel Aff. at ¶¶ 2, 3; Exhibits “1” and “2” to Counsel Aff.

11. Defendant Souza’s recent appointment as Trustee was secured in order to facilitate the pending sale of the Trust property to William C. Rieck.

V. ISSUES PRESENTED

Plaintiffs submit that pursuant to their Motion for Partial Summary Judgment, the following issues should be determined as a matter of law based upon undisputed facts, to-wit:

1. Whether Defendant Souza had the legal authority to act as a trustee of the Trust and pledge Trust property as security at the time the DBL Mortgage was executed and recorded?
2. Whether the DBL Mortgage is valid and/or constitutes a lawful lien or encumbrance against the Trust property?

VI. ARGUMENT

A. DEFENDANT SOUZA LACKED AUTHORITY TO ACT AS TRUSTEE OF THE TRUST AND TO PLEDGE THE TRUST'S REAL PROPERTY AS SECURITY.

Defendant Souza was never nominated in the Will or Trust Agreement as a successor trustee, was never designated as a successor trustee by any previous trustee or successor trustee, was never nominated as a trustee by any of the beneficiaries after the original trustee R. M. Whittier died, never accepted any appointment, and was never appointed trustee by any Court Order. As a matter of law, Defendant Souza had no legal authority to sign the DBL Note or the DBL Mortgage and pledge the Trust real property as security.

Section 34 of the Restatement (Third) of Trusts states that: “[e]xcept as required by statute, a trustee designated by or selected in accordance with the terms of a trust may act without being appointed or confirmed by an order of court.” However, “[i]f the appointment of a trustee is not provided for or made pursuant to the terms of the trust, the trustee will be appointed by a proper court.” *Id.* Section 68-101 of the Idaho Code states that “[w]hen a trust exists without any appointed trustees or where any or all of the trustees renounce, die, or are discharged, the district court of the county where the trust property or some portion thereof is situated, must appoint another trustee to direct the execution of the trust.” Idaho Code § 68-101; *see also* *Sherman v. Citizens' Right of Way Co.*, 37 Idaho 528, 533, 217 P. 985, 986 (1923) (“The deed . . . made no provision for the appointment of successors to the original trustees. We know of no authority empowering the trustees to fill a vacancy or to incorporate and transfer their trust to the corporation, and none has been called to our attention.”). The process for the appointment of a trustee by a court includes “application to the court”, “notice to all interested parties”, the “filing of an acceptance of the duties”, and the issuance of “letters of trusteeship”. Idaho Code § 15-7-

Once a trustee has been appointed, whether pursuant to the terms of a trust or by a court, a trustee “shall not transfer his office to another or delegate the entire administration of the trust to a co-trustee or another.” Idaho Code § 68-107. A trustee’s duties include a requirement to “register the trust in the court of this state at the principal place of administration”. Idaho Code § 15-7-101. A trustee also has a duty to “keep the beneficiaries of the trust reasonably informed of the trust and its administration”, and “within thirty (30) days after his acceptance of the trust . . . inform in writing the current beneficiaries . . . of the court in which the trust is registered and of his name and address”. Idaho Code § 15-7-303.

The Will in this case merely appoints “R. M. Whittier to be Trustee of all Trusts herein created.” *See* the third section of Exhibit “1”. The Will does not formalize a process for the appointment of a successor trustee. *See id.* The Trust Agreement, however, states that:

The Trustee shall have the power at any time to designate successor Trustee, and the successor Trustee shall have the same duties and powers as are assumed and conferred in this Agreement upon the Trustee, including the power in any successor to himself appoint a successor. Any appointment of a successor Trustee shall be made in writing, shall be acknowledged, and shall state the time or the event when such appointment shall take effect. A copy of the appointment shall be delivered to the Beneficiary and remainderman beneficiaries. . . . [U]pon the failure of any Trustee to designate a successor Trustee and the failure of the successor to assume the duties of Trustee, the Beneficiary and Remaindermen beneficiaries may petition the Courts for appointment of a successor Trustee.

See section 23 of Exhibit “2”. Thus, the trustee R. M. Whittier could have appointed a successor trustee without appointment by the court pursuant to the terms of Trust Agreement. *See id.*

However, any such appointment by R. M. Whittier must have (1) been made in writing, (2) been acknowledged, and (3) stated when the appointment would take effect. *See id.* A copy of the appointment would then need to have been delivered to the remainderman beneficiaries. *See id.*

Alternatively, the court could have been petitioned to appoint a successor if a successor trustee was not designated by R. M. Whittier or any successor trustee. *See id.* In this case the facts are undisputed that none of these authorized procedures were followed.

R. M. Whittier acted as the trustee of the Trust from the execution of the Will until his retirement. (Souza Dep. 18:25–19:3; 38:25–39:12.) Thereafter, R.M. Whittier’s son and law partner, Monte R. Whittier, supposedly acted as a successor trustee of the Trust for a period of time, although no evidence has been produced showing the nomination or appointment of Monte R. Whittier as a trustee of the Trust. (Jerry Beus Dep. 33:19–35:2, 39:18–40:25; Dallas Beus Dep. 65:3-18; Souza Dep. 19:17-25, 39:13–40:5, 40:10–41:4.)

On his own accord and without nomination, appointment, or other authority, Defendant Souza simply began acting as successor trustee of the Trust after Monte R. Whittier left the law firm at which Defendant Souza was practicing. (Jerry Beus Dep. 35:16-19, 39:18–40:25; Souza Dep. 21:24–22:4.) Defendant Souza readily admits he was never nominated or appointed as a successor trustee. (Souza Dep. 41:5-12.) Instead, Defendant Souza simply chose to “step in and continue what Monte and Max had done.” *Id.* As an acting successor trustee of the Trust, Defendant Souza was reflected as trustee on only two tax returns (for the years 1997 and 2000) and failed to file any tax returns for the Trust since 2001. (Souza Dep. 40:6-9, 45:25–46:12, 100:1-6.) Defendant Souza did not handle any Trust money after 2000, maintain any accounts, provide any accountings, or keep Plaintiffs reasonably informed of the Trust and its administration. (Jerry Beus Dep. 162:7-17; Dallas Beus Dep. 65:3-18; Douglas Beus Dep. 31:7–32:13; Souza Dep. 46:13-25, 47:1-12.) Instead, Defendant Souza simply chose to turn over operation of the Trust property and payment of Trust expenses to the lessee Defendant Jerry Beus, leaving the matters of Trust income and expenses to be worked out with Defendant Jerry

Beus and his mother Beth Beus. (Souza Dep. 45:25–46:25; 99:14–100:10.) Defendant Souza was not formally appointed as Trustee of the Trust until January 12, 2010, in Bannock County Case No. CV-2009-4852-TR. *See* Counsel Aff. at ¶¶ 2, 3; Exhibits “1” and “2” to Counsel Aff.

Because the Trust office once held by R. M. Whittier is not transferable, meaning that there is no authority for a trustee to act unless the statutory requirements are met, Defendant Souza could not merely step in and begin acting as successor trustee of the Trust. *See* Idaho Code § 68-107. Defendant Souza would instead need to be appointed as trustee, either pursuant to the terms of the Trust or by a court, in order to act as trustee. *See* Restatement (Third) of Trusts § 34; Idaho Code § 68-101; Idaho Code § 15-7-403.

As discussed, no acknowledged writing exists whereby R. M. Whittier or any other prior trustee appointed Defendant Souza as a successor trustee, and no copy of any appointment of Defendant Souza as successor trustee was delivered to the remaindermen beneficiaries. (Jerry Beus Dep. 35:16-19, 39:18–40:25; Dallas Beus Dep. 65:3-18; Douglas Beus Dep. 31:7–32:13; Souza Dep. 21:24–22:4, 40:6-9, 41:5-12, 45:25–46:25, 46:13-25, 47:1-12, 99:14–100:10.) There was also no petition to the courts for Defendant Souza’s appointment as trustee of the Trust prior to January 12, 2010. *See id.* Defendant Souza was never designated or appointed as a successor trustee in accordance with the terms of the Trust Agreement. *See* section 23 of Exhibit “2”.

Further, no letters of trusteeship existed prior to Defendant Souza’s formal appointment as Trustee of the Trust on January 12, 2010. *See* Idaho Code § 15-7-403. That Defendant Souza only recently petitioned the Magistrate Court and secured an Order formally appointing him as Trustee on January 12, 2010 in and of itself constitutes an admission that he did not previously have the proper authority to act for the Trust. *See* Idaho Code §68-101; Counsel Aff. at ¶¶ 2, 3; Exhibits “1” and “2” to Counsel Aff. No evidence exists that Defendant Souza was ever

nominated or appointed as a successor trustee of the Trust, or that Defendant Souza executed any acceptance of any nomination or appointment as trustee of the Trust, prior to Defendant Souza's execution of the DBL Note and DBL Mortgage.

It is also noteworthy that Souza has not acted in accordance with the duties required of a trustee. Particularly, Souza failed to register the Trust, failed to inform Plaintiffs and Defendant Jerry Beus in writing of any registration of the Trust, and/or failed to keep Plaintiffs and Defendant Jerry Beus reasonably informed of the trust and its administration. *See* Idaho Code §§ 15-7-101, 15-7-303; Jerry Beus Dep. 162:7-17; Dallas Beus Dep. 65:3-18; Douglas Beus Dep. 31:7-32:13; Souza Dep. 46:13-25, 47:1-12.

As stated, the Will merely appoints "R. M. Whittier to be Trustee of all Trusts herein created" and does not provide for the appointment of a successor trustee. *See* the third section of Exhibit "1". In addition, Defendant Souza was never designated or appointed as a successor trustee according to the terms of the Trust Agreement. The Trust therefore existed without any appointed trustee after R. M. Whittier ceased to be trustee, and it was necessary for the Court to appoint another trustee to direct the execution of the Trust. *See* Idaho Code § 68-101. Defendant Souza was not appointed by the Court as a Trustee of the Trust until January 12, 2010. Defendant Souza was therefore not the trustee of the Trust and had no authority from the Trust to pledge the Trust's real property as security when he executed the DBL Note and the DBL Mortgage.

B. THE DBL MORTGAGE IS INVALID AND DOES NOT CONSTITUTE A LAWFUL LIEN OR ENCUMBRANCE AGAINST THE TRUST PROPERTY.

The DBL Mortgage is invalid and should be removed as a lien against the Trust property. Defendant Souza had no authority as either a trustee or an agent to execute the DBL Note and

DBL Mortgage.

A mortgage is a contract. *See* Idaho Code § 45-901. As a contract, a mortgage can only be created by writing, executed with the required formalities of a conveyance of real property. *See* Idaho Code § 45-902. The conveyance of real property “may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.” Idaho Code § 55-601 (emphasis added). Concerning the DBL Note, “[a] person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person.” Idaho Code § 28-3-401 (emphasis added). Such a signature is only binding “to the same extent the represented person would be bound if the signature were on a simple contract.” Idaho Code § 28-3-402. An “unauthorized signature,” however, “is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value.” Idaho Code § 28-3-403. The term “unauthorized signature” is defined as “a signature made without actual, implied, or apparent authority.” Idaho Code § 28-1-201(b)(41).

The Supreme Court of Idaho described the law of principal and agency, and the rule pertaining to an unauthorized signature made without actual authority, as follows:

The rule would seem to be that a person dealing with an agent should ascertain the extent of his authority from the principal [citations omitted]; . . . and he cannot rely upon the agent’s statement or assumption of authority, or upon the mere presumption of authority. [Citation omitted.] If such person makes no inquiry but chooses to rely upon the agent’s statement he is chargeable with knowledge of the agent’s authority, and his ignorance of its extent will be no excuse to him, and the fault cannot be thrown upon the principal who never authorized the act or contract. *Chamberlin v. Amalgamated Sugar Co.*, 42 Idaho 604, 612, 247 P. 12, 14 (1926).

Carpenter v. Payette Valley Cooperative, Inc., 99 Idaho 143, 146, 578 P.2d 1074, 1077 (1978).

As discussed, Defendant Souza was not designated or appointed as a trustee of the Trust prior to his execution of the DBL Note and DBL Mortgage. Nor was Defendant Souza ever authorized in writing to act as an agent of the Trust or to sign the DBL Note and/or the DBL Mortgage on behalf of the Trust. *See* Idaho Code §§ 55-601, 28-3-401. The unauthorized signature of Defendant Souza is therefore ineffective to bind the Trust. *See* Idaho Code § 28-3-403. Defendant Souza's signature would instead only be effective to bind Defendant Souza as the unauthorized signer in favor of DBL if DBL took the mortgage for value acting in good faith. *See id.* Thus, DBL is nothing more than an unsecured creditor of Defendant Souza and/or Defendant Jerry Beus.

Even if Defendant Souza was deemed to have been an agent of the Trust, at no time did Defendant Souza have the authority to execute the DBL Note or the DBL Mortgage. In addition, DBL never inquired as to the authority of Defendant Souza to execute the DBL Note or the DBL Mortgage. (Souza Dep. 104:12–105:1.) DBL cannot rely upon Defendant Souza's "statement or assumption of authority, or upon the mere presumption of authority." *Carpenter*, 99 Idaho at 146, 578 P.2d at 1077. Because DBL did not inquire as to Defendant Souza's authority, DBL is chargeable with knowing Defendant Souza's lack of authority and its fault cannot be put upon the Trust, who never authorized Defendant Souza to contract for the Trust. *See id.* It is astonishing that neither the Title Company nor DBL made the normal and routine inquiry requiring proof that Defendant Souza was in fact the lawfully-appointed trustee and had authority to act. Had they done so, they would have found he had none.

In addition, even if Defendant Souza was an agent of the Trust, his unauthorized signature was not ratified by the Trust. "A principal may ratify the unauthorized act of its agent, with the effect being essentially the same as if the act had been authorized when it occurred."

Manning v. Twin Falls Clinic & Hospital, Inc., 122 Idaho 47, 54, 830 P.2d 1185, 1192 (1992).

Absent authority, a principal may therefore be bound where it ratifies its agent's transaction. *See Twin Falls Livestock Commission co. v. Mid-Century Ins. Co.*, 117 Idaho 176, 786 P.2d 567 (Ct. App. 1989). A principal ratifies the transaction only when it adopts the benefits of the unauthorized transaction with knowledge of all material facts. *See Carpenter*, 99 Idaho at 149, 578 P.2d at 1080.

In this case, the Trust was without a trustee at the time the DBL Note and DBL Mortgage were signed. The Court has already found that Plaintiffs refused to sign any loan that would use the Trust property as collateral. *See Summary Judgment Decision*, page 10. Defendant Jerry Beus instead went to Defendant Souza and asked that Defendant Souza put the Trust property up for collateral on a loan, which Defendant Souza agreed to do. *See id.* Plaintiffs, as remaindermen beneficiaries of the Trust, were unaware of the transaction when it took place and petitioned this Court to hold that the DBL Note and DBL Mortgage are the sole obligation of Defendant Jerry Beus, which the Court did. *See id.*, page 11. In doing so, this Court found that “[a]ll payments of the [DBL] loan have been made by [Defendant Jerry Beus]. The trust has made no payments to the DBL Company and received no benefits of the DBL Company loan.” *Id.* This Court further stated that “[a]fter reviewing the uses of the DBL loan, the Court finds the purpose of the loan to be for the sole benefit of [Defendant Jerry Beus]. As such . . . the DBL loan must be debited to [Defendant Jerry Beus's] share in order to remove the encumbrance from the property.” *Id.* Therefore, because Defendant Jerry Beus received the sole benefit of the DBL Note and DBL Mortgage, the Trust did not adopt any benefits of the unauthorized transaction and did not ratify the transaction. *See Carpenter*, 99 Idaho at 149, 578 P.2d at 1080.

Defendant Souza was not designated or appointed as a trustee of the Trust prior to his

execution of the DBL Note and DBL Mortgage, and he was not authorized in writing to act as an agent of the Trust. Defendant Souza's signatures on the DBL Note and the DBL Mortgage were unauthorized and ineffective to bind the Trust. The DBL Note and DBL Mortgage are therefore invalid and should be removed as a lien against the Trust property.

C. ATTORNEY FEES

Plaintiffs' Amended Complaint requested an award of attorney's fees and costs against Defendant DBL pursuant to Sections 12-120 and 12-121, Idaho Code. Plaintiff's claim for attorney fees and costs is reserved and will be separately pursued once the issues in dispute have been finally determined by the Court.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enter summary judgment in their favor as a matter of law declaring that (1) Defendant Souza lacked authority to act as trustee of the Trust and pledge Trust property as security at the time the DBL Mortgage was executed and recorded, (2) Defendant Souza was not an agent of the Trust authorized to sign the DBL Note and/or the DBL Mortgage on behalf of the Trust, and (3) the DBL Mortgage is invalid, does not constitute a lawful lien or encumbrance against the Trust property, and should be removed as a lien or encumbrance against the Trust property.

Respectfully submitted.

DATED this 13th day of April, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By 
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

Stephen C. Smith
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FILED
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Clerk
DISTRICT COURT

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)
DOUG BEUS, individually,)

Case No. CV-09-1822-OC

Plaintiffs,)

AFFIDAVIT OF COUNSEL

vs.)

JOHN C. SOUZA, Trustee of the Lynn G.)
Beus Trust; JERRY BEUS, individually,)
DBL Company, Inc., an Idaho corporation,)

Defendants.)

STATE OF IDAHO)
: SS
COUNTY OF BANNOCK)

Randall C. Budge, being first duly sworn under oath deposes and states as follows:

1. I am a licensed and practicing lawyer in good standing under the laws of the State of Idaho, hold Idaho State Bar License No. 1949, and am a partner in the firm Racine, Olson, Nye, Budge & Bailey, Chartered, attorneys of record for Plaintiffs.

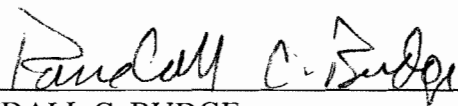
2. Attached hereto as Exhibit "1" is a true and correct copy of the Order Upon Motion

for Confirmation of Trusteeship dated January 12, 2010, Bannock County Case No. CV-2009-4852-TR, confirming John Souza as Trustee.

3. Attached hereto as Exhibit "2" is a true and correct copy of the Letters of Trusteeship dated January 12, 2010, Bannock County Case No. CV-2009-4852-TR, evidencing the authority of John Souza to act as Trustee.

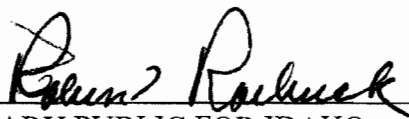
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 13th day of April, 2010.

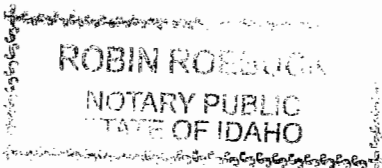


RANDALL C. BUDGE

SUBSCRIBED AND SWORN TO before me this 13th day of April, 2010.



NOTARY PUBLIC FOR IDAHO,
Residing at Pocatello.
My Commission Expires 8/18/2012.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2010, I served a true and complete copy of the foregoing document on the following persons in the manner indicated:

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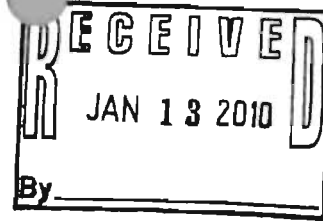
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Donald C. Brady

EXHIBIT 1

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
P. O. Box 967
203 South Garfield
Pocatello, Idaho 83204
(208) 232-5911



IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

In the Matter of the	)	Case No. CV-2009-4852-TR
)	
LYNN G. BUES TRUST,	)	ORDER UPON MOTION FOR
	)	CONFIRMATION
	)	OF TRUSTEESHIP
)	

This Matter comes on for hearing on the motion by John Souza is acting as trustee of the Lynn G. Bues Trust, both the testamentary trust created under the last will of Lynn G. Bues dated June 2, 1983 and probated in Caribou County Case No. 3848 N and the inter vivos trust created by R. M. Whittier, personal representative of Lynn G. Bues estate.

The Court finds:

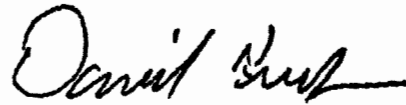
- a. John Souza has acted as successor trustee of said trust, has entered into a lease and various documents introduced into evidence in Bannock County Case No. CV-2009-1822-OC, Dallas Bues and Doug Bues, Plaintiffs, vs. John C. Souza, Trustee of the Lynn G. Bues Trust; Jerry Bues, Individually, Defendants.
- B. John Souza, as Trustee has entered into a Purchase and Sale Agreement for sale of the principal asset of the trust, the Bues Ranch in Caribou County, Idaho

No objection is made to this Motion and the Court finds:

a. John Souza should be and is hereby confirmed as Trustee of the Lynn G. Bues Trust, both the testamentary trust created under the last will of Lynn G. Bues dated June 2, 1983 and probated in Caribou County Case No. 3848 N and the inter vivos trust created by R. M. Whittier, personal representative of Lynn G. Bues estate.

b. Letters of Trusteeship should be issued evidencing his authority to act as trustee.

DATED this 12 day of January, 2010.



David Kress, Magistrate Judge

CERTIFICATE OF SERVICE

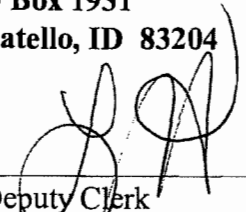
I HEREBY CERTIFY that a true and correct copy of the foregoing **Order Upon Motion for Confirmation of Trusteeship** was mailed this 12 day of January, 2010, in an envelope with sufficient first-class postage prepaid thereon to the following:

Randall C. Budge
Racine Olson Nye Budge & Bailey
P O Box 1391
Pocatello, ID 83204

Jerry Bues
3121 Wood Canyon Road
Soda Springs, ID 83276

Stephen C. Smith
Hawley Troxell Ennis & Hawley
P O Box 1617
Boise, ID 83701

Dallas Bues and Douglas Bues
c/o Randy C. Budge
Racine Olson Nye Budge and Bailey
P O Box 1931
Pocatello, ID 83204



Deputy Clerk

EXHIBIT 2

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
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203 South Garfield
Pocatello, Idaho 83204
(208) 232-5911

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

In the Matter of the	)	Case No. CV-2009-4852-TR
)	
LYNN G. BUES TRUST,	)	LETTERS OF TRUSTEESHIP
)	
_____)	

John Souza is duly appointed and acting as trustee of the Lynn G. Bues Trust, both the testamentary trust created under the last will of Lynn G. Bues dated June 2, 1983 and probated in Caribou County Case No. 3848 N and the inter vivos trust created by R. M. Whittier, personal representative of Lynn G. Bues estate.

These Letters of Trusteeship are issued to evidence his appointment, qualification and authority to act as said Trustee.

DATED this 12 day of January, 2010.



David Kress, Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Letters of Trusteeship** was mailed this 12 day of January, 2010, in an envelope with sufficient first-class postage prepaid thereon to the following:

Jerry Bues
3121 Wood Canyon Road
Soda Springs, ID 83276

Stephen C. Smith
Hawley Troxell Ennis & Hawley
P O Box 1617
Boise, ID 83701

Dallas Bues, Douglas Bues
and Randy C. Budge, their attorney
Racine Olson Nye Budge and Bailey
P O Box 1931
Pocatello, ID 83204



Deputy Clerk

Julian E. Gabiola, ISB No. 5455
Jon A. Stenquist, ISB No. 6724
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Attorneys for Defendant DBL Company, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
OBJECTION TO LAKEY LEASE AND
MOTION FOR DECLARATORY
RELIEF**

COMES NOW defendant DBL Company, Inc., ("DBL") by and through undersigned counsel and hereby objects to portions of that certain purported Farm Lease with Option to Purchase dated April 7, 2010 ("Lease") and moves the Court for the Declaratory Relief outlined herein. Capitalized terms have the same meanings as those terms in the Lease.

**DEFENDANT DBL COMPANY, INC.'S
OBJECTION TO LAKEY LEASE AND
MOTION FOR DECLARATORY RELIEF - 1**

DBL has standing to bring this motion and lodge these objections based upon the Court's instruction, and because DBL is a party in this case, and because DBL is the secured Mortgagee entitled to "all rents, issues, profits, royalties, income and other benefits derived from the property," and is entitled to possession of the property in the event of Landlord's default on its note and mortgage.

OBJECTIONS

1. DBL objects to the Lease because the Lease does not require the Tenant to comply with Landlord's obligations outlined in the Mortgage.

2. DBL objects to the Lease to the extent the Facts Section A implies that DBL is in agreement with terms of the Lease.

3. DBL objects to Section 1 of the Lease to the extent Landlord's option to terminate the lease is ambiguous since the cancellation period is limited "prior to planting or preparation of the ground for the following year," which may be coterminous with the "end of the crop year." This ambiguity may preclude Landlord from timely terminating the Lease.

4. DBL objects to the Lease to the extent the Rent is not tendered to DBL as required by the Mortgage. The Landlord is in default of the Note and Mortgage and DBL is entitled to the proceeds thereof.

5. DBL objects to the Lease to the extent Tenant, as a limited liability company, may be an entity without assets or the ability to perform all of the other obligations of the Lease. This objection is material because 43% of the Rent will not be paid until November, 2010 and may be at risk.

6. DBL objects to the Lease to the extent the Lease is not guaranteed by a proven guarantor. This objection is material because 43% of the Rent will not be paid until

November, 2010 and may be at risk, and because there is no indication that the limited liability company has the ability to perform all of the other obligations of the Lease.

7. DBL objects to the Lease to the extent the Lease is not secured by crops and proceeds. This objection is material because 43% of the Rent will not be paid until November, 2010 and may be at risk, and because there is no indication that the limited liability company has the ability to perform all of the other obligations of the Lease.

8. DBL objects to the Lease because Section 12 of the Lease purports to grant the Tenant a right to purchase the property simply upon Landlord's receipt of an offer to purchase. This option is ambiguous as to whether such right arises regardless of Landlord's acceptance of the offer and without regard to a minimum purchase price or other terms of sale.

9. DBL further objects to Section 12 of the Lease to the extent this Section is silent as to the payment of the Note in satisfaction of the Mortgage as a condition of sale.

10. DBL objects to Section 4(A) of the Lease to the extent the Lease does not allow Landlord to immediately protect the leased premises and because it does not recognize Mortgagee's right to do so under the Mortgage.

11. DBL objects to Section 4(J) of the Lease because Mortgagee is not named as an additional insured on Tenant's required insurance policies.

12. DBL objects to Section 4(K) of the Lease because the first sentence is ambiguous, missing the word "not" between the words "may make" in the first sentence.

13. DBL objects to Section 5(C) of the Lease to the extent Landlord warrants to Tenant that Landlord "holds good and marketable fee simple title to the Leased Premises and there are no encroachments on the premises and Landlord is in full and complete possession thereof," when in fact, DBL holds a first position Mortgage on the property. Landlord is in

default of its Note and Mortgage, and DBL is entitled to remedies (including possession) as provided in the Mortgage contrary to Landlord's warranty.

14. DBL objects to Section 7 of the Lease to the extent the Lease allows the Tenant to cure a default at its option within 30 days without Landlord's prior consent and without penalty. The Lease essentially grants Tenant an unnecessary 30-day payment extension, which injures the Mortgagee.

15. DBL objects to the Lease if, and to the extent, the Rent does not reflect fair market value.

16. DBL hereby reserves any and all rights which it may have against any and all parties in this matter including against Tenant.

RELIEF REQUESTED

Based upon the Objections outlined above, DBL moves this Court for the following relief:

1. For a Court Order requiring the Landlord to provide information establishing the fair market rental value of the Leased Premises;
2. For a Court Order requiring the Rent be tendered to DBL;
3. For a Court Order requiring Landlord to enter into an unambiguous Lease with Tenant;
4. For a Court Order requiring Landlord to consult with Mortgagee prior to any further agreements or modifications of the Lease;
5. For a Court Order reserving any and all of DBL's rights and remedies against the parties and Tenant;

6. Unless and until the ambiguities in the Lease are resolved to the Court's satisfaction, for a Court Order requiring the Trustee to exercise its option to cancel the Lease after the first year of the Lease; and

7. For any other relief the Court deems just and proper.

DATED this 15th day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola – Of the Firm
Attorney for Defendant DBL Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S OBJECTION TO LAKEY LEASE AND MOTION FOR DECLARATORY RELIEF** to be served by the method indicated below, and addressed to the following:

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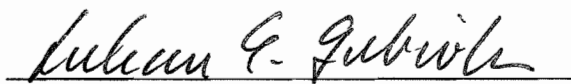
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Julian E. Gabiola

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Attorneys for Defendant DBL
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
MOTION TO DISMISS AMENDED
COMPLAINT**

COMES NOW defendant DBL Company, Inc. ("DBL"), by and through its
attorneys Moffatt, Thomas, Barrett, Rock & Fields, Chartered, in response to Plaintiffs'

**DEFENDANT DBL COMPANY, INC.'S MOTION
TO DISMISS AMENDED COMPLAINT - 1**

Client:1598518.1

Amended Complaint, and pursuant to Idaho Rule of Civil Procedure 12(b)(6), hereby submits its Motion to Dismiss Amended Complaint.

DBL supports its Motion with its *Memorandum in Support of Motion to Dismiss Amended Complaint* filed herewith and the Court's record on file.

DATED this 15th day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola – Of the Firm
Attorneys for Defendant DBL Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S MOTION TO DISMISS AMENDED COMPLAINT** to be served by the method indicated below, and addressed to the following:

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Attorneys for Defendant John Souza, Esq.

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Thomas J. Holmes
Jones Chartered
P.O. Box 967
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Attorneys for Defendant Jerry Beus .

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Julian E. Gabiola

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Attorneys for Defendant DBL Company, Inc.

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs,

vs.

JOHN C. SOUZA, Trustee of the Lynn G.
Beus Trust; JERRY BEUS, individually, DBL
COMPANY, INC., an Idaho corporation,

Defendants.

Case No. CV-09-1822-OC

**DEFENDANT DBL COMPANY, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

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I. INTRODUCTION

For many years, the Plaintiffs, Dallas Beus and Doug Beus, and the Defendants, Jerry Beus and John C. Souza, believed that John C. Souza (“Souza”) was the successor Trustee to a trust set up by Dallas, Doug, and Jerry’s father, Lynn Beus, which is known as the Lynn G. Beus Trust (“Trust”). It was only after this litigation began and discovery ensued that Dallas Beus and Doug Beus discovered a technicality in the Trust Agreement that showed that Souza had never been formerly appointed. There is no evidence that any of the parties to this lawsuit had *actual knowledge* of this technicality before the litigation began. Dallas Beus and Doug Beus, formerly believing for decades that Souza was the Trustee, now desire to use this technicality to avoid the Trust’s mortgage of the Trust property entered into by Souza as Trustee.

Dallas Beus and Doug Beus have filed an amended complaint against DBL Company, Inc. (“DBL”), requesting the Court to invalidate a promissory note to DBL and set aside its corresponding mortgage on Trust property based upon this technicality. Plaintiffs request that the Court declare DBL’s mortgage void on the grounds that John C. Souza did not have authority under the specific procedures of the Trust to act as the Trustee. However, Idaho law protects DBL from Plaintiffs’ claims pursuant to Idaho Code Section 68-110. Under that statute, third persons, such as DBL, are protected from such claims when dealing with a purported trustee and have no duty to investigate whether a trustee has been properly appointed or has sufficient authority to conduct a certain transaction. Only with *actual knowledge* of the technicality could the Court declare the note and mortgage void. Plaintiffs’ complaint fails to assert any claim that DBL had any knowledge of the technicality. Without an allegation of actual knowledge of the technicality, the Court must dismiss Plaintiffs’ complaint against DBL as a matter of law.

II. BACKGROUND

A. The Relevant Individuals.

Lynn G. Beus (“Lynn Beus”) is an individual whose Last Will and Testament and Beneficiary Trust are at issue in this matter. Lynn Beus passed away on January 5, 1986.

Verified Complaint for Relief and Declaratory Judgment (“Cplt.”) ¶ 6. Beth Beus (“Beth Beus”) was Lynn’s wife and lifetime beneficiary of the Lynn G. Beus Trust (“Trust”). She passed away on June 10, 2008. Cplt. ¶ 6. Defendant Jerry Beus is Lynn Beus’s son and is one of three brothers, each a designated remainderman beneficiary of the Trust. Cplt. ¶¶ 6, 7. Plaintiffs Doug Beus and Dallas Beus are the other brothers and remainderman beneficiary of the Trust.

R.M. Whittier, Esq., was Lynn Beus’s attorney who drafted his Last Will and Testament (“Will”) and was also appointed as the personal representative of Lynn Beus’s estate. R.M. Whittier also drafted the Trust and was the named Trustee in the Trust. He served as Trustee of the Trust until his death in 1986. Cplt. ¶¶ 8, 10, 14. Monte R. Whittier, Esq., R.M. Whittier’s son and law partner, acted as the successor Trustee of the Trust for some time. Cplt. ¶ 11. Defendant John C. Souza, Esq., was Monte Whittier’s law partner. Once Monte Whittier left the partnership, Souza acted as the successor Trustee of the Trust. Cplt. ¶ 3. Defendant DBL is a mortgagee that holds a mortgage on the Trust real property.

B. The Will and Trust.

Lynn Beus’s Will provides that all probate property be “poured over” into the Trust upon his death. The assets of Lynn Beus’s estate consisted primarily of real property, appurtenant water rights, and improvements of approximately 2,500 acres of farming and ranching land located in Caribou County. Cplt. ¶ 9. Following Lynn Beus’s death, pursuant to his Will, a Trust Agreement was created on or about May 14, 1987, executed by R.M. Whittier,

acting as personal representative of Lynn's estate; R.M. Whittier, as Trustee of the Trust; and Beth Beus, as the lifetime beneficiary under the Trust. Cplt. ¶ 14.

The Trust Agreement vests the trustee with certain powers, "in addition to those now or hereinafter conferred by statute or case law, all of which shall be exercised in a fiduciary capacity subject to any limitations stated elsewhere" in the Trust Agreement. Cplt. ¶ 16. The assets of Lynn Beus's estate were to be held in trust for Beth Beus during her lifetime. Cplt. ¶ 17. Pursuant to language contained in Lynn Beus's Will, the Trust was to close and terminate upon the death of Beth Beus. Cplt. ¶ 18. The Will also states that if Dallas, Doug, and Jerry Beus cannot "agree upon the operation, management or division of the real property, following the death of [Beth], my Trustee is instructed to sell the same, and to divide the proceeds equally between Dallas, Jerry and Doug after all expenses, taxes, and liens of any kind and nature against the Trust property is paid." Apparently, since Beth's death, Dallas, Doug, and Jerry have been unable to agree upon the continued operation or division of the real property. Cplt. ¶ 20.

With respect to designating a successor trustee, the Trust Agreement states the following:

The Trustee shall have the power at any time to designate successor Trustee, and the successor Trustee shall have the same duties and powers as are assumed and conferred in this Agreement upon the Trustee, including the power in any successor to himself appoint a successor. Any appointment of a successor Trustee shall be made in writing, shall be acknowledged, and shall state the time or the event when such appointment shall take effect. A copy of the appointment shall be delivered to the Beneficiary and remainderman beneficiaries upon the failure of any Trustee to designate a successor Trustee and the failure of the successor to assume the duties of Trustee, the Beneficiary and Remaindermen beneficiaries may petition the Courts for appointment of a successor Trustee.

Am. Cplt. ¶ 14, Ex. B.

After R.M. Whittier's death, Monte R. Whittier acted as the successor Trustee for a period of time. Cplt. ¶ 11. Thereafter, Souza acted as the successor trustee to date. Cplt. ¶ 12. From the time that Souza took over responsibilities as successor Trustee until this litigation, it does not appear that Beth, Jerry, Dallas, or Doug Beus ever questioned whether Souza was the successor Trustee. Indeed, in Plaintiffs' Amended Complaint, Plaintiffs repeatedly refer to Souza as the "successor trustee." Cplt. ¶¶ 3, 5, 12, 24, 29, 30, 31, 44-55, 62, 64-68, 71. In fact, the first claim in the complaint is a breach of fiduciary duty against Souza as Trustee. From the allegations contained in the complaint, it is obvious that Beth, Jerry, Dallas, and Doug Beus never disputed that Souza was the successor Trustee of the Trust. It was only after this case started that Doug and Dallas discovered that Souza had not been technically appointed under the Trust Agreement:

During the course of discovery it was learned that the acting trustee Souza was not nominated in the Trust as the successor trustee, has never been nominated as successor trustee by any or all of the beneficiaries, has never registered the Trust and has never been appointed by the Court as trustee until recently in order to facilitate the pending sale to Rieck.

Plaintiffs' Brief in Support of Motion for Leave to Amend Complaint at 3 (emphasis added). The Amended Complaint is the first time the failure of procedure is claimed. The Amended Complaint alleges that Souza was never formally nominated as a trustee or successor trustee by the Trust, Trust Agreement, any of the Trust beneficiaries, or by any court as required by the Trust. Amended Complaint ("Am. Cplt.") ¶¶ 84-86. It also alleges that Souza never executed an acceptance of any nomination or appointment as Trustee of the Trust and is alleged to have no authority to act as the Trustee of the Trust. Am. Cplt. ¶¶ 88-89. These technical deficiencies in

Souza's assumption of the office of Trustee form the sole basis of Plaintiffs' claims to invalidate DBL's Note and Mortgage.

C. The Leases.

Since the death of Lynn Beus, the Trust property has been leased to Jerry Beus pursuant to various farm leases. Cplt. ¶ 21. R.M. Whittier, as personal representative of Lynn Beus's estate, entered into the first farm lease with Jerry in 1986. The lease was amended and ran until 1993. The annual rent was for \$23,900.00. In 1994, Month R. Whittier, acting as successor Trustee, entered into an Addendum Farm Lease with Jerry Beus. The Addendum Farm Lease extended the lease to March 1, 2001, and raised the annual rent to \$25,000. Cplt. ¶¶ 22-23. On January 1, 2007, Souza, acting in his capacity as successor Trustee, entered into a new farm lease for the Trust property for a term of 1/1/2007 – 12/31/2013, with the annual rent reduced to \$12,000.00. Cplt. ¶ 24.

The 1986 farm lease and the 2007 farm lease obligated Jerry Beus to maintain the Trust property at his own expense. Both leases also stated that the Trust had no obligation to reimburse Jerry Beus for his operating expenses or personal operating loans. Cplt. ¶¶ 25-26. The 1986 farm lease did not obligate the Trust to reimburse Jerry Beus for any improvements to the Trust property. The 2007 lease, however, obligates the Trust to reimburse Jerry Beus for improvements made to the Trust property. Cplt. ¶ 27.

D. The Notes and Mortgages.

On June 7, 2002, Jerry Beus signed a promissory note, secured by a mortgage on the Trust property executed by the Trustee, Souza, in the amount of \$372,740, with Ireland Bank. The purpose of the loan was to pay off past operating lines of credit. Jerry Beus signed a second promissory note on June 7, 2002, with Ireland Bank to obtain a personal loan in the amount of

\$235,000.00. This note was likewise secured by a mortgage on the Trust property signed by Souza, Trustee. Cplt. ¶¶ 29-30.

On May 2, 2007, Souza, acting as Trustee of the Trust, executed a promissory note in the amount of \$427,500.00, in favor of DBL. The Note was secured by a mortgage on the Trust property, also executed by Souza, Trustee. The Note refinanced the unpaid balance owed to Ireland Bank with the balance being used as an operating line of credit for Jerry Beus. There was likewise a cash amount of \$18,153.84 paid directly to Jerry Beus. Cplt. ¶ 31. Apparently, Jerry Beus maintains that the proceeds he received from the Note were used to enhance the value of the Trust property. Cplt. ¶ 34.

E. Procedural Background.

On May 6, 2009, Dallas and Doug Beus filed suit against Souza and Jerry Beus. The original Complaint contains five causes of action: 1) Breach of Fiduciary Duty against Souza as the Trustee and a request for Souza's removal as trustee; 2) Specific Performance, requesting Souza to sell the Trust property and dissolve the Trust; 3) Declaratory Judgment against Souza as the Trustee and Jerry that the 2007 farm lease is terminated; 4) Declaratory Judgment against Souza as the Trustee and Jerry Beus that Jerry Beus is not entitled to reimbursement for improvements made to the Trust property; and 5) Declaratory Judgment that the mortgage is the sole obligation of Jerry Beus, and not the Trust.

Dallas and Doug Beus later learned that Souza's appointment as Trustee did not follow the technical requirements of the Trust and moved to amend their Complaint to add DBL as a party. Plaintiffs' Motion to Amend was granted, and Plaintiffs incorporated the 81 allegations of the Complaint into the Amended Complaint and added a sixth cause of action based upon Souza's failed appointment as Trustee. The Amended Complaint seeks an additional

remedy—declaratory relief that the DBL mortgage is invalid due to Souza’s failure to follow the procedures required in the Trust. Dallas and Doug allege:

84. That Defendant John C. Souza was not nominated as trustee or successor trustee in the Lynn G. Beus Testamentary Trust nor in the Trust Agreement, Exhibits “A” and “B” to the Complaint.

85. That Defendant John C. Souza was never nominated as successor trustee by any of the Trust beneficiaries.

86. That Defendant John C. Souza was never appointed as trustee pursuant to any Court Order prior to the execution of the DBL Mortgage.

87. That Defendant John C. Souza never executed any Acceptance of any nomination or appointment as trustee of the Trust.

88. That Defendant John C. Souza was without any legal authority to act as trustee of the Trust and lacked any authority to pledge the Trust’s real property as security.

89. That by reason of the foregoing the DBL Mortgage is invalid and of no force or effect.

Am. Cplt. ¶¶ 84-89.

III. LEGAL STANDARD

In considering a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6), the court must consider whether “the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 161 (2005) (quoting *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975)). The legal standard for determination of a motion to dismiss under Rule 12(b) is the same as the standard for a motion for summary judgment, except that the Court need only look to the pleadings in ruling on a motion to dismiss. Under either motion, the court must draw all reasonable inferences in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho

102, 104, 44 P.3d 1157, 1159 (2002); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993); *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

In order to withstand a motion to dismiss, the nonmoving party must allege all essential elements of the claims presented. If the plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. *Johnson v. Boundary Sch. Dist. #101*, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003).

IV. ARGUMENT

Dallas and Doug Beus seek an order from the Court declaring the DBL Note and Mortgage invalid because Souza was not properly nominated, appointed, or accepted as the Trustee under the Will, Trust, or Trust Agreement. As noted above, the beneficiaries and their attorneys treated Souza as the Trustee until this technicality was discovered after this litigation commenced. Apparently, when the Trust property was mortgaged to DBL, neither Dallas, Doug, nor Jerry Beus had actual knowledge of the technicality that Souza had not been properly nominated or otherwise appointed as Trustee. As such, it seems impossible that DBL had actual knowledge of the technical deficiencies in the appointment.

Contrary to Plaintiffs' claims, DBL's Note and Mortgage are valid because Idaho law grants broad protections to third persons who deal with trusts and trustees. Lenders, like DBL, are not required to investigate the terms of trust agreements when dealing with trusts. As discussed below, any other finding would restrain commerce and eliminate many of the purposes of Idaho trusts. Idaho Code Section 68-110 grants this near absolute protection as follows:

Third persons protected in dealing with trustee. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the *existence* of trust powers and their proper exercise by the trustee *may be assumed without inquiry*. The third person is not bound to inquire whether the trustee has

power to act or is properly exercising the power; and *a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.* A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

(2009) (emphasis added).

Pursuant to this statute, DBL's Note and Mortgage are fully protected "as if the trustee possessed and properly exercised the powers he purports to exercise." The Court should dismiss Dallas and Doug Beus's cause of action in the Amended Complaint against DBL.

A. Idaho Code Section 68-110 Requires that the Court Rule that the Note and Mortgage Are Valid.

Idaho Code Section 68-110 protects DBL in its dealings with Souza under the plain language of the statute. First, DBL is a third person, as it was not a party to the Trust. Second, DBL was permitted to assume, without inquiry, that Souza had the authority to exercise the trust powers he purported to have. Third, DBL was not bound to inquire whether Souza had fulfilled the technical requirements establishing his authority to execute the Note and Mortgage and bind the Trust. Fourth, DBL is fully protected in dealing with Souza as the purported Trustee of the Trust, as if he did have the powers he purported to exercise, because there is no allegation that DBL had actual knowledge that Souza was not an authorized Trustee or improperly exercising trust power. Fifth, DBL was not required to assure that the funds obtained from the Note and Mortgage were properly applied. Thus, DBL is protected from Plaintiffs' allegations under this statute and must be dismissed from this action.

Importantly, Plaintiffs fail to allege in their Complaint that DBL had "actual knowledge" that Souza either had no trust powers or that he was improperly using trust powers.

The legislature clearly intended to use the term “actual knowledge” as opposed to some other type of knowledge. “Actual knowledge” has been defined as “[d]irect and clear knowledge, as distinguished from constructive knowledge.” BLACK’S LAW DICTIONARY 876 (7th ed. 1999). DBL was under no duty to investigate whether Souza had Trust powers or if he was properly exercising trust powers. Without an allegation or evidence of actual knowledge, Plaintiffs’ cause of action in the Amended Complaint against DBL must fail. As mentioned above, Plaintiffs will be unable to assert any kind of actual knowledge of the technicality that Souza was never properly nominated or otherwise appointed in light of their own failure to discover the technicality until after discovery began.

The protections provided by Idaho Code Section 68-110 are an integral part of the Uniform Trustees’ Powers Act adopted by the Idaho legislature. Several other states have adopted this statute and have similarly dismissed comparable lawsuits against third persons who had no actual knowledge of the trustee’s deficiency of authority. These cases demonstrate that actual knowledge is required when alleging lack of authority based on the requirements of a trust. The following two cases, although unreported, involve similar circumstances to the case at hand. First, *Elliott v. J.C. Bradford & Co., LLC*, No. 2006-CA-00546-MR (Ky. Ct. App. September 14, 2007) (available at 2007 WL 2687413), involved a trustee that had not been properly appointed under the trust documents, but nevertheless exercised control over trust assets. In that case, the settlor, William E. Elliott, Sr., created two irrevocable trusts for his two great-grandchildren. The initial trustee was First National Bank, but the settlor gave his son, William E. Elliott, Jr., certain powers, including the power to remove the trustee and appoint a new one. First National Bank later resigned, but allegedly failed to give notice as required by the trust documents to the beneficiaries’ parents. William, Jr. then unilaterally appointed himself

trustee and moved the trust assets to a brokerage firm, J.C. Bradford, and then later to another firm, Morgan Keegan. Separately, the beneficiaries' guardians appointed Sandra Elliott, one of the beneficiaries' mothers, to be the trustee. When William Jr. removed Sandra as the trustee, the beneficiaries' guardians filed suit, seeking a declaratory judgment that William Jr. had improperly appointed himself as trustee and had improperly exercised control over the assets. The complaint also sought an accounting of the trust assets and claimed damages against the brokerage firms. The brokerage firms moved for summary judgment, which the lower court granted on the grounds that they were third parties who had no actual knowledge that William Jr. lacked authority when appointing himself trustee and exercising control over the trust assets. The Kentucky Court of Appeals affirmed and held:

The trial court concluded that the statute insulated the brokerage firms from liability absent a showing that they had actual knowledge that William Jr. was exceeding the powers given him under the trust document...

...

A reading of the statute makes clear that as far as the brokerage firms are concerned, "the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry." Absent actual knowledge that the trustee is exceeding his authority, the brokerage firms are insulated from liability for the trustee's actions. As stated in the opinion of the trial court, it was conceded that a simple reading of the trust documents would not have provided the firms with actual knowledge concerning any defect in William Jr.'s authority as trustee. In fact, the trust documents plainly give William Jr. specific authority to remove trustees and appoint a successor trustee. ***More importantly, however, until actual knowledge is established, no duty to make any inquiry into the trustee's authority arises.***

Elliott, Slip op. p. 3 (emphasis added).

The case of *Oliver v. The CIT Group*, No. A117400 (Cal. Ct. App. 2008

January 15, 2008) (available at 2008 WL 133078), involved a trustee that mortgaged the trust real property to obtain funds for his own benefit. In that case, the settlor had created a trust for her son with the only asset being a residence. She named her husband as the trustee and instructed him to turn the residence over to her son upon reaching the age of 21. The settlor died, and the trustee, after using up his own inheritance from a \$600,000 investment account, mortgaged the residence to pay off his credit cards and other debts. The trustee eventually refinanced the loan for over \$400,000, also secured by a mortgage on the residence. Once the beneficiary turned 21, the trustee turned the residence over to him, but still encumbered with the mortgage. Soon thereafter, the beneficiary brought suit against the trustee and the mortgage company, seeking to have the note and mortgage set aside. The lower court granted summary judgment to the lender, and the beneficiary appealed. On appeal, the California Court of Appeals affirmed, finding no actual knowledge, stating:

Thus, as the trial court found, Probate Code section 18100 negates any obligation by a lender in CIT's position to review, analyze, or inquire about trust powers merely because it becomes aware of facts that would cause a reasonable person to suspect that a potential borrower may not be authorized to use trust property to secure the type of personal loan requested. ***That section eliminates any duty by a lender to investigate or police the powers of the trustee absent actual knowledge of a breach of trust.***

In our view, Justin's evidence fails to create a triable issue of fact as to whether CIT had actual knowledge that Hirsch was breaching the Trust by using Trust property to obtain a loan to be used for personal purposes.

Oliver, Slip op. pp. 4-5 (emphasis added).

Courts recognize that this statute can often result in harsh results for beneficiaries.

The two following cases also demonstrate that the Uniform Trust Act protects third parties, even

in egregious circumstances. In *Collier v. Trustmark*, 678 So. 2d 693 (Miss. 1996), Hendrick established four irrevocable trusts for her daughter and grandsons and named her accountant as the trustee. The trustee had broad powers under the terms of the instruments. In 1984, a checking account was opened for each trust at the offices of Trustmark Bank. Between 1983 and 1985, Hendrick made deposits of significant funds into the checking accounts. In 1984, the trustee began withdrawing funds from the accounts and depositing them into his personal checking account. In 1989, the trustee admitted to Hendrick that he had depleted all of the assets of the trust checking accounts. He was later removed as trustee and the successor trustee brought suit against the bank for allowing the trustee to transfer the funds. The bank, utilizing this statute, moved for summary judgment, arguing that it had no actual knowledge that the trustee was acting wrongfully. The lower court granted the motion and the trustee appealed. On appeal, the court first noted that the trust clearly had a cause of action against the former trustee. With respect to the bank, it looked to its version of Section 68-110 and applied the following definition of actual knowledge:

[A]wareness at the moment of the transaction that the fiduciary is defrauding the principal. It means express factual information that funds are being used for private purposes in violation of the fiduciary relationship.

Collier, 678 So. 2d at 697, (quoting *Master Chem. Corp. v. Inkrott*, 563 N.E.2d 26, 30-31 (Ohio 1990)). The court noted that constructive knowledge was insufficient, and affirmed the summary judgment ruling:

In the instant case, the Hendricks could pierce the statutory protection afforded Trustmark only if they could show Trustmark had actual knowledge that Moss exceeded or improperly exercised his fiduciary powers when he deposited trust funds into his personal checking account. The mere fact that Moss executed checks on the trust accounts and deposited them into his personal

account was insufficient by itself to require Trustmark to inquire into Moss' authority to perform the transaction. ***At the close of all discovery, the Hendricks simply could not put forth any evidence which would allow a jury to determine that Trustmark had actual knowledge "at the moment of the transaction[s] that the fiduciary [was] defrauding the principal."***

Collier, 678 So. 2d at 697-698 (citations omitted) (emphasis added).

Similarly, in *Wetherill v. Bank IV Kansas*, 145 F.3d 1187 (10th Cir. 1998), a trustee converted funds for his personal use from bank accounts that were part of the corpus of several trusts. Over time, the trustee converted over \$250,000 from the trusts. Upon discovery, the trustee resigned, and the beneficiaries brought suit against the trustee and the bank where the accounts were located. Once again, the lower court granted summary judgment to the bank on the grounds that it had no actual knowledge of the trustee's breach of his duties. On appeal, the beneficiaries attempted to argue that actual knowledge should also include constructive knowledge. The court rejected the argument and held:

The trial court instead applied a literal definition to the term "actual knowledge," recognizing the higher evidentiary standard which was intended to be applied to such transactions. This Court concurs. ***The clear terms of § 58-1207 confer on Bank IV the right to presume that Leitner had both the power to perform the transactions in controversy, and that he was acting within the scope of such authority. Bank IV had no duty to inquire into Leitner's authority to conduct the transactions. Unless there was "actual knowledge" of a fiduciary breach, Bank IV enjoyed complete protection in its dealings with Leitner*** and had no obligation to ensure that Leitner had properly applied the trust fund monies, even where the misapplications of funds benefited the bank in having its loans to Leitner paid. While this result may at first appear harsh, to hold otherwise where the bank was unaware it was benefiting from Leitner's wrongdoing, would necessarily chill commerce.

Wetherill, 145 F.3d at 1192 (emphasis added).

In order to set aside a purported trustee's transactions, courts consistently require plaintiffs to show actual knowledge on the part of third persons dealing with the trustees who either have no authority, are exceeding their authority, or are wrongfully using trust assets. *See Bayview Bank, N.A. v. The Highland Golf Mortgagees Realty Trust*, 814 A.2d 449 (Me. 2002) (Successor in interest was entitled to rely on trustee's purported authority to enter into subordination agreement without actual knowledge of lack of authority); *Vournas v. Fidelity Nat'l Title Ins. Co.*, 73 Cal. App. 4th 668 (Cal. Ct. App. 1999) (Complaint failed to allege, and record failed to show, any evidence of actual knowledge that trustee had failed to gain permission of beneficiaries to sale trust real property); *Adler v. Manor Healthcare Corp.*, 7 Cal. App. 4th 1110 (Cal. Ct. App. 1992) (Plain meaning of statute requires actual knowledge, and without it, third person is entitled to enforce grant of easement from trustee); *Gleason v. Elbthal Realty Trust*, 445 A.2d 1104 (N.H. 1982) (Third person was entitled to rely upon trustee's purported authority to sell trust land without actual knowledge that trustee did not have sufficient authority to sell trust land without permission of two trustees).

In this case, Plaintiffs have failed to allege that DBL had actual knowledge that Souza had never been properly appointed Trustee. Without actual knowledge, DBL was entitled to rely upon Souza's purported authority. DBL obviously could have relied on public instruments that the prior Ireland Bank mortgages were signed by Souza as Trustee. DBL also had knowledge of the 2007 lease that Souza signed on behalf of the Trust. Beneficiaries and family members Beth Beus and Jerry Beus treated Souza as the Trustee and Souza signed two tax returns for the Trust. The Verified Complaint and Amended Complaint allege that Souza acted as successor Trustee and claim that Souza executed documents and otherwise held himself out in public as successor Trustee, but that the procedural requirements of his appointment were

not followed. All indications pointed to Souza as the acting successor Trustee, and there is no allegation or evidence that DBL possessed actual knowledge of the technicality that Souza was not formally nominated or elected under the Trust. Plaintiffs' Complaint fails because Idaho Law protects third parties when dealing with Trusts and because there is no allegation that DBL had actual knowledge of the Trustee's lack of proper nomination and election.

B. Public Policy Supports a Dismissal of Plaintiffs' Complaint.

Public policy explains why Idaho Code Section 68-110 shifts the burden of responsibility from third persons dealing with trustees to the beneficiaries of a trust. As one court noted in enforcing a land sales agreement that a trustee had entered into without proper authority:

“The actual standard of liability allocate[d] virtually all of the risk of harm associated with a breach of trust to the settlor and trust beneficiaries, thereby creating an incentive for them to take precautions to minimize the risk of a breach.”

Smith v. Lillian V. Donahue Trust, 953 A.2d 753, 756 (N.H. 2008). The Act's shift of risk to those who are most capable of policing the trust is proper, especially in this case. Dallas Beus and Doug Beus were in the best position to watch over the trust property. The Ireland Bank mortgages are public record and Dallas and Doug Beus are imputed with knowledge of Souza's execution of the Ireland Bank and DBL mortgages of the Trust property. *See Quinlan v. Pearson*, 71 Idaho 26, 225 P.2d 455 (1950) (Individuals are charged with constructive knowledge of public records relating to conveyances and title to real property). These beneficiaries could have easily kept apprised of the title of both the Trust property and also the actions of the Trustee, especially in light of R.M. Whittier's death and after Monte Whittier

moved out of the area. They were in a position to monitor the Trustee and enforce the provisions of the Trust, while DBL is relieved of such duties by statute.

Another policy consideration cited by the courts is the chilling effect Plaintiffs' arguments for invalidating the mortgage would have on commerce and trade. If third parties were burdened with the duty to ensure that every trustee was properly appointed under the trust documents, no one would risk transacting business with them. As the 10th Circuit Court of Appeals noted, "[w]hile *this result may at first appear harsh, to hold otherwise . . . would necessarily chill commerce.*" *Wetherill*, 145 F.3d at 1192 (emphasis added). One commentator noted:

Without this section, third persons might never safely deal with a trustee for fear that he was exceeding his trust powers under the prudent man rule. Accordingly, third persons are protected and are not charged with knowledge of limitations on trustees' powers.

Charles Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 28 (1966). *See also*

William F. Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. Rev. 627, 663 (1962)

(Requiring a third person to inquire about trust powers would impede "the effective administration of every trust by delaying necessary transactions and discouraging dealings with and assistance to trustees.") A third person, such as DBL, does not have the duty to inquire into a trustee's proper appointment and power. The cost of litigation in defending its review of the technicalities of trust documents, and the risk of getting it wrong, would prevent banks from doing business with trusts altogether. The very existence of trusts would be threatened if trustees could not enter into commerce using trust assets. Public policy supports shifting the burden to the beneficiaries and protecting third parties, such as DBL, from Plaintiffs' claims.

V. CONCLUSION

Based upon the foregoing, DBL respectfully requests that the Court grants its Motion to Dismiss and dismiss Plaintiffs' Amended Complaint with prejudice.

DATED this 15th day of April, 2010.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Julian E. Gabiola
Julian E. Gabiola- Of the Firm
Attorneys for Defendant DBL Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 2010, I caused a true and correct copy of the foregoing **DEFENDANT DBL COMPANY, INC.'S MOTION TO DISMISS AMENDED COMPLAINT** to be served by the method indicated below, and addressed to the following:

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Julian E. Gabiola

IN THE DISTRICT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;
DOUG BEUS, individually,

Plaintiffs/
Respondents,

vs.

JOHN C. SOUZA, Trustee of the
LYNN G. BEUS TRUST,

Defendant/
Cross-Defendant/
Respondent,

and

JERRY BEUS, individually,

Defendant/
Cross-Claimant/
Appellant

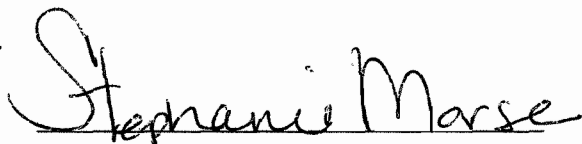
NOTICE OF LODGING

SUPREME COURT CASE NO. 37384-2010

The following transcript(s) in the above-entitled matter consisting of 67 pages was lodged with the District Court Clerk at the Bannock County Courthouse in Pocatello, Idaho, on the 23rd day of March, 2010.

1. Hearing held October 19, 2009

DATED this 23rd Day of March, 2010.



STEPHANIE MORSE, RPR, CSR

**Electronic copy of transcript sent to: Diane Cano at dianec@bannockcounty.us*

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,)	
)	
Plaintiffs-Respondents,	)	Supreme Court No. 37384
)	
Vs.)	
	)	CLERKS CERTIFICATE
JOHN C. SOUZA, Trustee of the Lynn G.)	
Beus Trust; JERRY BEUS, individually,)	
)	
Defendants,)	
)	
<hr/>)	
JERRY BEUS,)	
)	
Cross-Claimant/Appellant,)	
Vs.)	
)	
JOHN C. SOUZA, Trustee of the Lynn G.)	
Beus Trust,)	
)	
Cross-Defendant)	
Respondent)	
<hr/>)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, 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 as are automatically required under Rule 28 of the Idaho appellate Rules.

CLERK'S CERTIFICATE

I do further certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this _____ day of _____, 2010.

(Seal)

DALE HATCH,
Clerk of the District Court
Bannock County, Idaho Supreme Court

By 
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

DALLAS BEUS, individually;)	
DOUG BEUS, individually,)	
)	
Plaintiffs-Respondents,	)	Supreme Court No. 37384
)	
Vs.)	
	)	CERTIFICATE OF SERVICE
JOHN C. SOUZA, Trustee of the Lynn G.)	
Beus Trust; JERRY BEUS, individually,)	
)	
Defendants,)	
)	
)	
<hr/>		
JERRY BEUS,)	
)	
Cross-Claimant/Appellant,)	
)	
Vs.)	
)	
JOHN C. SOUZA, Trustee of the Lynn G.)	
Beus Trust,)	
)	
Cross-Defendant)	
Respondent)	
)	
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I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the REPORTER'S TRANSCRIPT and CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

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CERTIFICATE OF SERVICE

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal
of said Court at Pocatello, Idaho, this 21 day of May, 2010.

(Seal)

DALE HATCH,
Clerk of the District Court
Bannock County, Idaho Supreme Court

By 

Deputy Clerk