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# Wakelam v. Hagood Clerk's Record v. 3 Dckt. 36940

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Vol 3 of 4

(VOLUME III)

IN THE

# SUPREME COURT

OF THE

STATE OF IDAHO

LAW CLERK

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as M&M RE Holdings,

Plaintiffs-Appellants,

vs. SEE AUGMENTATION RECORD

THOMAS A. HAGOOD, an unmarried man,

Defendant-Third Party Plaintiff-Respondent,

And

BULLOCK AND COMPANY REALTORS LLC., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and LARRY DOWNS, an individual,

> Defendants-Third Party Defendants-Respondents.

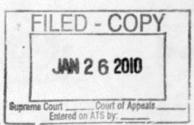
Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

Thomas E. Dvorak & Angela M. Reed GIVENS PURSLEY LLP P. O. Box 2720 Boise, Idaho 83701-2720

Attorneys for Appellants

Jay Gustavsen & Alex P. McLaughlin DAVISON COPPLE COPPLE & COPPLE P. O. Box 1583 Boise, Idaho 83701



Attorneys for Respondent (Hagood)

36940



STATE OF IDAHO

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as M&M RE Holdings,	) ) )
Plaintiffs-Appellants,	) ) Supreme Court No. 36940
-VS-	) Supreme Court No. 30940
THOMAS A. HAGOOD, an unmarried man,	)
Defendant-Third Party Plaintiff- Respondent, And	) ) )
BULLOCK AND COMPANY REALTORS LLC., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and LARRY DOWNS, an individual,	) ) ) ) )
Defendants-Third Party Defendants- Respondents	) )

 $\label{thm:continuity} \mbox{Appeal from the Third Judicial District, Canyon County, Idaho.}$ 

# $HONORABLE\ RENAE\ J.\ HOFF,\ Presiding$

Thomas E. Dvorak and Angela M. Reed, GIVENS PURSLEY LLP., P. O. Box 2720, Boise, Idaho 83701-2720

Attorneys for Appellants

Jay Gustavsen and Alex P. McLaughlin, DAVISON COPPLE & COPPLE, P. O. Box 1583, Boise, Idaho 83701

Attorneys for Respondent (Hagood)

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MAY 1 5 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

#### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

Plaintiffs

٧.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

٧.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO DEFENDANT HAGOOD'S SUPPLEMENTAL MEMORANDUM

#### I. INTRODUCTION

Plaintiffs Jon Wakelum ("Wakelum") and Mike Ressler ("Ressler"), by and through their attorneys of record, Givens Pursley LLP, submit this Supplemental Memorandum in Response to Defendant Thomas Hagood's ("Hagood") Supplemental Memorandum. In his Supplemental

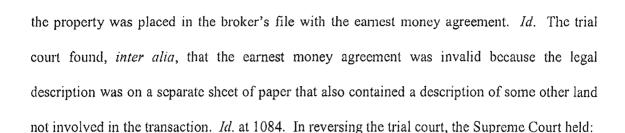
Memorandum, Hagood advances several purportedly clarifying arguments as to why the statute of frauds should apply in this case. For the reasons set forth herein and in Plaintiffs' prior summary judgment memoranda, Hagood's arguments lack factual and legal support and should, therefore, be rejected.

#### II. DISCUSSION

# A. The Statute of Frauds Does <u>Not Apply In This Case Because The Facts Do Not Align</u> With The Policies Underlying the Statute.

While his argument is rather difficult to track through, Hagood appears to contend that the policies underlying the statute of frauds are satisfied in this case, in part, because the zip code listed for the properties in the Representation Agreement is incomplete. Hagood, in essence, appears to be arguing that the incomplete zip code creates a risk that the contract will be attacked and this risk somehow aligns with the statute's purpose of preventing false or fraudulent contract claims. Notably, however, Hagood does not argue that the legal descriptions attached to the Representation Agreement are inaccurate. In other words, no one is this case is disputing the description of the properties or the accuracy of the legal descriptions. In fact, in his Answer, Hagood admitted that the legal descriptions for Parcel 1, Parcel 2, and Parcel 3 attached as Exhibit A to Plaintiffs' Complaint, which are the same legal descriptions attached to the Representation Agreement, described the three parcels of property that are the subject of this lawsuit. (See Complaint ¶¶ 5-6 and Answer ¶ 4).

Moreover, an argument similar to Hagood's property description vs. legal description argument was rejected by the Idaho Supreme Court in *Russell v. Russell*, 578 Idaho P.2d 1082 (Idaho 1978). In *Russell*, the plaintiff-seller brought an action against the defendant-purchaser to enforce an earnest money agreement that was executed between the parties. *Id.* at 1083. The earnest money described the property as "Full legal attached of Howard Russell Property located on Beacon Road, Emmett, Idaho, consisting of approx. 200 acres." A full legal description of



In Murphy v. Livesay, 34 Idaho 793, 796, 197 P. 536 (1921), this Court said: "(I)n order to comply with the requirements of the statute the contract must state the essential terms thereof, one of which is the description of the property involved ...."

However, this is not to say the statute of frauds invalidates all contracts with imperfect legal descriptions. "The statute is not pressed 'to the extreme of a literal and rigid logic."

The earnest money agreement referred to the property involved as: "Howard Russell property located on Beacon Road, Emmett, Idaho consisting of approx. 200 acres." Further, it provided a "Full legal" description was attached. An accurate legal description accompanied the earnest money agreement, albeit on a separate sheet of paper which was not stapled or otherwise physically attached.

It is not contended that buyer was in any way confused as to the boundaries or location of the farm. In fact buyer had been shown the farm several times. Buyer's only reason for raising a question about the legal description was an attempt to absolve himself of a contract he had signed.

"The statute of frauds is intended to protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or imposed upon them."

Id. at 1084-1085 (internal citations omitted) (emphasis added).

Hagood also contends the policies underlying the statute of frauds are at issue in this case because the facts surrounding Hagood's decision to put his property up for auction raise "suspicions" of fraud. This argument likewise lacks merit. As thoroughly addressed in Plaintiffs' Supplemental Memorandum, the purpose behind the statute of frauds is to prevent fraudulent contract claims caused by the capricious memories of interested witnesses regarding the terms of the contract. Apart from the purchase price, Hagood has not disputed the terms of the oral contracts. Moreover, Hagood indisputably admitted during his deposition that he understood, by selling his property via absolute auction, that the property would be sold to the

PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT MEMORANDUM-PAGE 3

highest bidder. Hagood's allegations that he was assured by his real estate agent and/or the auctioneer that that the sale of his property would garner \$2,000,000.00 at a minimum and that he was unaware that he allegedly possessed the ability to stop the auction at any time, may support recovery against the agent and/or auctioneer. Those allegations, however, as between Plaintiffs and Hagood, do not raise any issue of fraud in connection with the oral contracts formed between Plaintiffs and Hagood where Hagood merely disputes the purchase price and has admitted he understood the meaning of an absolute auction.

# B. The Statute of Frauds Is Satisfied Because The Writings, When Construed Together, Satisfy the Statute of Frauds

Hagood also asserts that the writings exchanged between the parties do not satisfy the statute of frauds because the writings do not satisfy the "express reference" rule announced in Hoffman v. S V Company, Inc., 628 P.2d 218, 221 (Idaho 1981). The Representation Agreement that Hagood signed contains legal descriptions for all of the parcels, identifies the purchase price for the parcels by stating that the parcels will be sold via absolute auction, and specifies the financing terms as being 20% down with the balance payable at 8% interest with interest only payments and the balance due in full two years from the sale. The only material term missing from the Representation Agreement is the identification of the buyers. Identification of the buyers in the Representation Agreement, of course, would have been impossible because the buyers' names were unknown at that time. Furthermore, while the Representation Agreement does not expressly reference a purchase and sale agreement, which identifies the buyers, it is implicit that a purchase and sale agreement would be executed to consummate an auction sale of real property. Moreover, the Purchase and Sale Agreements contain the same terms identified in the Representation Agreement. Lastly, there is no dispute that Plaintiffs were the highest bidders at the auction, and therefore, as the highest bidders, they were identified by reference in the

Representation Agreement, which states more than once that the property is to be sold via absolute auction, meaning to the highest bidder.

#### III. CONCLUSION

The most legally significant undisputed fact in this case is that Hagood understood, by putting his property up for sale via absolute auction, that the property would be sold to the highest bidder with no minimum price. The second undisputed controlling fact that is clear from Hagood's deposition testimony is that the only contract term Hagood is dissatisfied with is the purchase price. Hagood, having admitted that his property would be sold to the highest bidder regardless of the amount of the bid, should not be able to absolve himself from his obligation to convey the property to Plaintiffs. Each of the arguments Hagood has made in this case are attempts by Hagood to avoid his obligation to convey the property and escape what Hagood appears to consider an unfortunate contract. Such a result would be inconsistent with the numerous persuasive authorities from other jurisdictions and the policies underlying Idaho's statute of frauds. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment, deny Defendant Hagood's Motion for Summary Judgment, and order Hagood to convey the Parcels to the Plaintiffs, upon the terms identified in the purchase and sale agreements.

DATED this // day of May, 2009.

GIVENS PURSLEY LU

Thomas E. Dvorak Attorneys for Plaintiffs





	lay of May, 2009, I caused to be served a true and d indicated below, and addressed to the following:
Jay Gustavsen Davison, Copple, Copple & Cox Washington Mutual Capitol Plaza, Suite ( 199 North Capitol Blvd. P.O. Box 1583 Boise, Idaho 83701	U.S. Mail Overnight Mail Hand Delivery Fax
Phillip J. Collaer Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	U.S. Mail Overnight Mail Hand Delivery Fax
Terry Michaelson Hamilton Michaelson & Hilty, LLP 1303 12th Avenue Road P.O. Box 65 Nampa, ID 83653-0065	U.S. Mail Overnight Mail Hand Delivery Fax
	Thomas E. Dvorak

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PRESIDING: RENAE J. HOFF DATE: MAY 21, 2009

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

COURT MINUTE

Plaintiffs,

CASE NO: CV2008-8465\*C

Fiairitiii

REPORTED BY: Carole Bull

VS.

TIME: 1:30 P.M.

THOMAS A. HAGOOD, an unmarried man,

DCRT3 (138-229)

Defendants.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

VS.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

Third Party Defendants.

This having been the time heretofore set for motion for summary judgment and motion to amend complaint in the above entitled matter, the plaintiff was not present in court, but was represented by counsel, Ms. Angela Reed; and the defendant,

Mr. Thomas Hagood did not appear in Court, but was represented by counsel, Mr. Alex McLaughlin and Mr. Jay Gustavsen.

The Court called the case noted the parties present and reviewed prior proceedings. The Court further noted that there had been prior discussions with counsel regarding the cross motions for summary judgment and based on those, counsel had provided additional briefing to the Court including case law and argument. The Court advised that it had reviewed all filings and was ready to hear argument on the motions.

Ms. Reed presented argument to the Court in support of the plaintiff's motion for summary judgment.

Mr. McLaughlin presented rebuttal argument and argument in support of the defendant's motion for summary judgment.

Ms. Reed presented further argument to the Court.

The Court addressed counsel and noted that the facts in this case are compelling and further noted that it had previously discussed possible resolution of the matter through mediation. However, mediation turned out not to be an option. Therefore the Court was called upon this date to make a decision on these cross motions.

The Court indicated it would make a factual summary to begin with and indicated that the defendant owned three parcels in Canyon County and had retained Bullock and Company to hold an absolute land auction of the parcels. Mr. Hagood signed the exclusive seller agreement in June of 2008 providing that he would sell the property for **COURT MINUTES** Page 2

a total price at auction without reserve, in terms of sales to the highest bidder to reserve. At that point the advertisements were prepared by Downs Auction and have been discussed in the briefing and it was clearly contained that it was an "absolute auction, with sells to the highest bidder, no reserve". Mr. Hagood was present at the auction and never stopped the auction. The Court noted that the plaintiff, Wakelum was the highest bidder regarding Parcel 3 and the plaintiff, Ressler was the highest bidder on Parcels 1 and 2. Documentation was prepared, signed and tendered. Then however Mr. Hagood declined to sign any further documentation and has taken the position that there was no contract.

The Court advised counsel that this is a perfect scenario for a Rule 56 motion as to each side. The Court noted it would cite Rule 56 in support of the cross motions for summary judgment and particularly cited Gilmore v Bonner Co 132 Idaho 257 a 1999 case and reviewed the findings in that case regarding genuine issues of material fact. The Court advised that it was cautioned, based on that case, to examine the cross motions separately and resolve reasonable inferences. The Court addressed the parties regarding the involvement in real estate auctions and noted that Idaho did have the provision under Rule 28-2-32(a) of Commercial Code for Sale by Auction. This case is distinguishable in that it governs real estate, not goods. Further, the Court indicated it had been provided in prior briefings, cases from other jurisdictions that were persuasive authorities. Further, the Court had talked about a descent, quoted in the plaintiff's briefs in the Del Rio v Hammett case out of California. The Court referred to other persuasive authorities from other jurisdictions. However, the Court noted that those cases are not **COURT MINUTES** 

Idaho authorities and so it had looked additionally at briefings, reconsidered the matter and noted that the matter was really before the Court on the Statues of Frauds, Idaho Code 9-505. The Court noted that statue is a legislative directory and reviewed the same for the record citing McCune v. Hathaway. Further, the Court noted the purpose of the statute is to prevent false or fraudulent contract claims by forbidding disputed assertions of certain types of contracts without any written memorandum of the agreement. The Court further addressed and reviewed other cases as cited by counsel during argument. Specifically the Court noted the citing of Hemenway vs. Gruner, 186 Idaho 422 which was a 1984 Court of Appeals case discussing the three (3) doctrines concerning Idaho coming down as a strict constructionist. Idaho follows the doctrine that an unsigned writing may be considered part of the memo only where express referenced is made to it in a signed writing. The Court noted that it agreed with defense counsel that this matter is not a case of part performance as was the situation in the Roundy case, but the case does constitute specific sufficient performance that there must be actual possession which was permanent and valuable improvements or both combined. The Court indicated that was not the case here. The Court cited Kelly vs. Hodges, noting that case was instructional on the fraud issue and has been helpful in resolving the Court's questions on the fraud statute, and reviewed the same. The Court noted that this is not a mutual acknowledgment case as was the situation in the Kelly vs. Hodges case. The Court noted that the bottom line that the plaintiff has argued, that the written sale is enforceable even though the written contract to sell was not signed by Mr. Hagood; and further the other documents he did sign could be made up and Page 4

incorporated and that would provide for an exception. The plaintiff had also argued that the contract was mutually acknowledged or partly performed. This Court finds that was not the case here. Also both sides had made arguments on the purpose of the Statutes of Frauds and the most compelling one in Idaho is the Kelly vs. Hodges case on prevention of potential fraud. The Court noted that the defendant has argued that there are no exceptions to the statute of fraud in this case and that the cases cited from other jurisdictions are not persuasive here. Therefore this Court concludes that the plaintiffs have not demonstrated that an exception to the Statue of Frauds has been shown in this matter. The Court indicated that the statute was enacted to prevent potential fraud and the plaintiffs have not shown a signed writing as required under ICS 9-505.

The Court noted that being said, this is a frustrating case as previously indicated to counsel in chambers. The Court briefly reviewed the facts in that there were two (2) plaintiffs preparing to go to this auction, two (2) plaintiffs looking at property and two (2) plaintiffs setting up so that they could bid. Further, they had funds available and went to bid. Then Mr. Hagood indicated he was not going through with the process. The Court noted the facts are frustrating and it is unfortunate that the plaintiff's are not entitled to specific performance for land in which they bid and were the highest bidders. Therefore this Court concludes that the law in Idaho at the current time would prevent this Court from granting specific performance in their case. Idaho has strictly construed the statute of frauds to date and there is no genuine issue of material fact and accordingly summary judgment is granted in favor of the defendant.

The Court indicated the defendant will be required to prepare an Order. The Court advised counsel that the Court's comments, rulings and findings will stand on the record for appeal pursuant to transcript.

The Court noted that this ruling would not dispose of the law suit as there are other parties involved as well as the plaintiff's Motion to Amend Complaint, to which the defendant's have objected and have cited Haskin vs. Glass. The Court addressed counsel regarding its views on the Motion to Amend Complaint, noting that the plaintiff has argued that the complaint should be amended to add a claim under the Idaho Consumer Protection Act against all the defendants. The defendant's have argued that Haskins holds that if there is no contract there can be no claim under the Idaho Consumer Protection Act. Further, in the Haskins case there was no contract and it appears to this Court that if it allows the Complaint to be amended the issue of summary judgment may be re-visited. Therefore this Court is directed to freely grant the motion when justice requires. Therefore the Court will grant the motion and allow the Complaint to be amended. The Court noted that it assumed that eventually the matter will move to a higher court. The Court directed Mr. McLaughlin to add the ruling regarding the plaintiff's Motion to Amend Complaint, to the proposed Order. The Court reviewed for the record that the proposed Order should include the denial of the Plaintiff's Motion for Summary Judgment, the granting of Defendant's Motion for Summary Judgment and the granting of the Plaintiff's Motion to Amend Complaint.

In answer to the Court's inquiry, each of counsel indicated they understood and had nothing further to present to the Court at this time.

COURT MINUTES May 21, 2009 Page 6

The Court thanked counsel and court adjourned.

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Deputy Clerk

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F I L E D JUN 0 1 2009

CANYON COUNTY CLERK K CANNON, DEPUTY

Attorneys for Defendant Thomas A. Hagood

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	) ) )	Case No. CV 08-8465
Plaintiffs, vs.	)	PARTIAL SUMMARY JUDGMENT
THOMAS A. HAGOOD, an unmarried man,	)	JUDGMENT
Defendant.	) ) )	

PARTIAL SUMMARY JUDGMENT - 1

THIS MATTER having come regularly before the Court for hearing on Defendant's Motion For Partial Summary Judgment on Thursday, the 21<sup>st</sup> day of May, 2009, at 1:30 o'clock p.m., with the Plaintiffs appearing by and through their attorney of record, Angela M. Reed of the firm Givens Pursley, LLP, and the Defendant appearing by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin of the firm Davison, Copple, Copple & Copple, LLP, and the Court having considered the briefs, affidavits and oral argument of counsel and the Court having announced its decision in open court and entered its Order granting Summary Judgment and cause appearing therefor, and based upon there being no genuine issues as to any material facts, and Defendant being entitled to the entry of Summary Judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Partial Summary Judgment is hereby granted and that Plaintiffs' claims for Declaratory Judgment, Specific Performance, and Breach of Contract are barred by the Statute of Frauds, to wit, I.C. § 9-505, and are hereby dismissed with prejudice.

DATED this day of May, 2009.

MAY 2 9 2009

UDGERENAEJ. HOFF

# **CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the day of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack	X U.S. MAIL
Givens Pursley, LLP	Hand Delivery
601 W. Bannock St.	Facsimile Transmission
P.O. Box 2720	
Boise, Idaho 83701	
,	
Phillip J. Collaer	X U.S. MAIL
Anderson, Julian & Hull, LLP	Hand Delivery
PO Box 7426.	Facsimile Transmission
Boise, Idaho 83707	
,	
Terry Michaelson	X U.S. MAIL
Hamilton, Michaelson & Hilty, LLP	Hand Delivery
1303 12 <sup>th</sup> Avenue Road	Facsimile Transmission
PO Box 65	
Nampa, ID 83653-0065	
1 tampa, 12 05 055 0005	
Jay Gustavsen	X U.S. MAIL
Alex P. McLaughlin	Hand Delivery
Davison, Copple, Copple & Copple	Facsimile Transmission
P.O. Box 1583	
Boise, Idaho 83701	
20130, Idulio 03/01	WILLIAM H HURST
	UNITED SMINITED TO THE STATE OF

Clerk

JAY GUSTAVSEN (ISB No. 5293)
ALEX P. MCLAUGHLIN (ISB No. 7977)
DAVISON, COPPLE, COPPLE & COPPLE
Attorneys at Law
Washington Mutual Capitol Plaza
199 North Capitol Boulevard
Suite 600
Post Office Box 1583
Boise, Idaho 83701
Telephone: (208) 342-3658
Facsimile: (208) 386-9428

FILED

JUN 1 0 2009

CANYON COUNTY CLERK T. CRAWFORD, DEPUTY

Attorneys for Defendant Thomas A. Hagood

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	) Case No. CV 08-8465
Plaintiffs, vs.	ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING
THOMAS A. HAGOOD, an unmarried man,	) PLAINTIFFS' MOTION TO AMEND COMPLAINT
Defendant.	) ) _ )
	. And the

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT - 1

THIS MATTER having come regularly before the Court for hearing on Defendant's Motion For Partial Summary Judgment on Thursday, the 21<sup>st</sup> day of May, 2009, at 1:30 o'clock p.m., with the Plaintiffs appearing by and through their attorney of record, Angela M. Reed of the firm Givens Pursley, LLP, and the Defendant appearing by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin of the firm Davison, Copple, Copple & Copple, LLP, and the Court having considered the briefs, affidavits and oral argument of counsel and the Court having announced its decision in open court and good cause appearing therefore;

IT IS HEREBY ORDERED that based upon there being no genuine issues as to any material facts, Defendant Thomas A. Hagood's Motion for Partial Summary Judgment is granted and thus Plaintiffs' claims for Declaratory Judgment, Specific Performance, and Breach of Contract are barred by the Statute of Frauds, to wit, I.C. § 9-505, and are hereby dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that Plaintiffs' Motion To Amend Complaint is also granted. Plaintiffs' counsel is hereby ordered to file its Amended Complaint within ten (10) days of receipt of this Order.

JUN 1 0 2009

DATED this \_\_\_\_\_ day of \_\_\_\_\_\_\_, 2009.

HIDGE RENAT HOFE

## **CERTIFICATE OF MAILING**

 $w \to -\frac{\bullet}{1}$ 

Tom Dvorack Givens Pursley, 1 601 W. Bannock P.O. Box 2720 Boise, Idaho 83	St.	X_ U.S. MAIL Hand Delivery Facsimile Trans	mission
Phillip J. Collaer Anderson, Julian PO Box 7426. Boise, Idaho 837	& Hull, LLP	X_ U.S. MAIL Hand Delivery Facsimile Trans	mission
Terry Michaelson Hamilton, Micha 1303 12 <sup>th</sup> Avenu PO Box 65 Nampa, ID 8365	elson & Hilty, LLP e Road	X_ U.S. MAIL Hand Delivery Facsimile Trans	mission
Jay Gustavsen Alex P. McLaugh Davison, Copple, P.O. Box 1583 Boise, Idaho 837	, Copple & Copple	X_ U.S. MAIL Hand Delivery Facsimile Trans	mission

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT - 3



Thomas E. Dvorak (ID State Bar ID# 5043) GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720 Telephone: 208-388-1200

Facsimile: 208-388-1300

125421\_2

JUN 1 5 2009

CANYON COUNTY CLERK D. BUTLER, DEPUTY

Attorneys for John Wakelum and Mike Ressler

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

**Plaintiffs** 

v.

THOMAS A. HAGOOD, an unmarried man, BULLOCK AND COMPANY REALTORS, L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE, INC., an Idaho corporation, and LARRY DOWNS, an Individual.

Defendants.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual.

Third Party Defendants.

Case No. CV 08-8465

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION ACT COME NOW, Plaintiffs, Jon Wakelum ("Wakelum") and Mike Ressler ("Ressler"), by and through their attorneys of record, Givens Pursley LLP, who for causes of action against Defendant, allege and complain as follows:

## PARTIES, JURISDICTION AND VENUE

- 1. Plaintiff Ressler is an individual who resides in Canyon County, Idaho, who has done business as "M&M RE Holdings."
  - 2. Plaintiff Wakelum is an individual who resides in Canyon County, Idaho.
- 3. Defendant Thomas A. Hagood ("Hagood") is the owner of certain real property located within Canyon County, Idaho, which is the subject of this dispute, and it is believed that he resides at 3649 Oxbow, Nampa, Canyon County, Idaho, 83687.
- 4. Jurisdiction and venue are proper pursuant to Idaho Code Sections 5-401, 5-514, 1-701, 1-705 and other Idaho law.

#### **GENERAL ALLEGATIONS**

- 5. Defendant Hagood is the owner of record of three (3) parcels of real property located in Canyon County, Idaho. These are hereinafter referred to as "Parcel 1," "Parcel 2" and "Parcel 3."
- 6. A true and correct copy of the legal description for Parcel 1, Parcel 2 and Parcel 3 is attached hereto as Exhibit "A"; provided, however, any of the property rights included in the Judgment and Decree of Condemnation in favor of the City of Nampa entered on December 7, 2007, in the case of *City of Nampa v. Jeff Hagood, et. al.*, CV-05-4595, and recorded as Instrument No. 2007080423 in the real property records of the Canyon County Recorder on December 12, 2007, is encompassed within and, is hereby specifically excluded from, Parcel 1, Parcel 2 and Parcel 3.

- 7. Defendant Hagood did retain Bullock and Company Realtors, LLC, an Idaho limited liability company ("Bullock and Company"), to hold an "absolute land auction" of Parcels 1, 2 and 3 on August 6, 2008, at 1:00 p.m.
- 8. Bullock and Company did advertise said sale and make arrangements to conduct said sale.
- 9. A true and correct copy of one such advertisement is attached hereto as Exhibit "B."
- 10. Said advertisements of sale did include words to the effect "ABSOLUTE AUCTION (SELLS TO THE HIGHEST BIDDER NO RESERVE)."
  - 11. Plaintiffs did attend said auction sale.
- 12. Plaintiff Wakelum was the highest bidder at said sale on Parcel 3, his bid was accepted by Bullock and Company, and he was awarded said parcel by Bullock and Company, the auctioneer.
- 13. Plaintiff Ressler was the highest bidder on Parcels 1 and 2, his bid was accepted by Bullock and Company, and he was awarded said parcels by Bullock and Company, the auctioneer.
- 14. Defendant Hagood did attend said sale and did witness the bidding and the acceptance of the high bids by the auctioneer and the awards of the high bids by Bullock and Company, the auctioneer.
- 15. At the conclusion of the auction, Bullock and Company did take two standard RE23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE
  AGREEMENTS, and the Auctioneer did fill in the blanks on each form in a manner consistent
  with the advertised terms of the auction, and

- a. did present for signature to Ressler and did in fact secure Ressler's signature upon the RE-23 AGREEMENT with an ID# of LT100 for Parcel 1 and Parcel 2, a true and correct copy of which is attached as Exhibit "C."; and
- b. did present for signature to Wakelum and did in fact secure Wakelum's signature upon the RE-23 AGREEMENT with an ID# of LT 300 for Parcel 3, a true and correct copy of which is attached as Exhibit "D."
- 16. After the acceptance of the high bids and the preparation and completion of the RE-23 Purchase and Sale Agreements described above, Defendant Hagood did refuse, and continues to refuse, to go through with and enter the sale contracts contemplated and promised by the terms of the absolute auction and to sign the documents necessary to effectuate said sales on the advertised terms.
- 17. Plaintiffs have properly tendered the earnest money called for in the terms of sale and RE-23 Agreements.
- 18. Plaintiffs are ready, willing and able to effectuate the sales of the Parcels to them on the terms, have been willing to do so at all times relevant hereto, and remain willing to do so.
- 19. If the property in question is sold to another buyer or buyers, Plaintiffs will suffer irreparable harm because of the unique nature of the real property involved.
- 20. Plaintiffs are without an adequate remedy at law because of the unique nature of the real property involved.

#### COUNT 1

## **Declaratory Judgment**

- 21. Plaintiffs reallege and incorporate by reference all previous allegations.
- 22. Counts I through II are plead only against Defendant Thomas A. Hagood.
- 23. Plaintiffs are persons whose rights, status or other legal relations are affected by a contract for auction and are entitled to have a question of the construction or validity arising

under the contract and to obtain a declaration of rights, status or other legal relations thereunder by declaration of the Court.

- 24. As a result of Defendant's actions, Plaintiffs are entitled to declaratory judgment pursuant to Idaho Code Section 10-1201, et seq., against the Defendant, including findings that:
  - a. the auction in question was advertised and held without reserve and was absolute;
  - b. Defendant Hagood made an offer or offers to sell when the auction sale was advertised:
  - c. each plaintiff accepted the offer on their respective parcels described above by making the highest bid on each such parcel;
  - d. each such bid was a legitimately submitted bid;
  - e. that no later than upon the entry of each such bid with no other higher bids, and otherwise in accordance with the terms of the auction and the acceptance of said bids by the auctioneer, that defendant Hagood became absolutely committed to the sales to Plaintiffs;
  - f. Defendant Hagood was not entitled to withdraw the property from the sale simply because he was not pleased with the bids or otherwise;
  - g. Defendant Hagood's conduct amounts to a breach of his obligation pursuant to the auction contract or contracts for auction;
  - h. Defendant Hagood is obligated to enter into appropriate agreements in the form attached hereto to convey the parcels to each of the respective Plaintiffs and to convey the parcels at the time called for by said agreements;
  - i. the purchase price for each of the respective parcels be reduced and offset by any damages awarded by the Court in this action; and
  - j. the purchase price for each of the respective parcels be reduced and offset by any reasonable attorneys' fees and costs awarded by the Court to the Plaintiff's in this action;

#### COUNT 2

## **Specific Performance**

- 25. Plaintiffs reallege and incorporate by reference all previous allegations.
- 26. Plaintiffs are entitled to a judgment requiring, ordering and enjoining Defendant Hagood to specifically perform and enter into appropriate contracts to convey to each Plaintiff that property to which he is entitled under the auction contract or contracts.
  - 27. Plaintiffs are entitled to a judgment requiring, ordering and declaring that,
    - a. Defendant Hagood is bound as if he had entered into contracts in the form attached hereto to convey said parcels to the Plaintiffs in accordance with the terms of the advertised auction;
    - b. In accordance with I.R.C.P. 70, if the Defendant will not sign said instruments to convey the parcels at the appropriate time, the Clerk of the Court or the Court itself, at the expense of Defendant, will be empowered and authorized to sign the instruments of conveyance in place of Defendant or to enter a suitable judgment or order suitable for recording in the real property records decreeing the such conveyance has been made.

#### **COUNT 3**

## **Breach of Contract/Monetary Damages**

- 28. Plaintiffs reallege and incorporate by reference all previous allegations.
- 29. Plaintiffs are entitled to a judgment for monetary damages against the Defendant, in an amount to be proven at trial with respect to each Plaintiff, which said amount will exceed \$10,000.
  - 30. Said damages to include, without limitation, any and all reasonable foreseeable

damages flowing from and resulting from Defendant's breach of the auction contract or contracts.

#### **COUNT 4**

#### Violation of the Consumer Protection Act

- 31. Plaintiffs reallege and incorporate by reference all previous allegations.
- 32. Count 4 is plead in the alternative to Counts 1 through 3 and only in the event that the Court finds on the basis of the Statute of Frauds or similar basis that no enforceable contract for the sale of real property exists justifying specific performance or damages against Defendant Thomas A. Hagood under Counts 1 through 3.
  - 33. Count 4 is pled as against all Defendants.
- 34. The aforementioned auction sale constituted trade and commerce as defined under Idaho Code Section 48-602(2).
- 35. The sale of real property falls within the definition of "goods" under Idaho Code section 48-602(6) and/or "services" under Idaho Code Section 48-602.
- 36. To the extent the Statute of Frauds or similar law prohibits or renders void or voidable a sale of real property at "absolute auction", Defendants conduct in advertising, conducting and otherwise representing that an absolute auction of the real property at issue in this case without full disclosure of such prohibition or potential for a void result violated the Idaho Consumer Protection Act, Idaho Code Section 48-601, et. seq., and applicable rules promulgated by the Idaho Attorney General, I.D.A.P.A. Rule 04.02.01.01, et. seq., in that it:
  - a. Represented that goods or services had characteristics or qualities that they did not have;
  - b. Constituted an act or practice that is misleading, false or deceptive to the

consumer;

- c. Constituted an initial offer to sell goods or services with material contingencies, conditions, or qualifications attendant to the offer without clearly and conspicuously disclosing such contingencies, conditions or qualifications (I.D.A.P.A. Rule 40);
- d. Constituted a direct or implied representation that goods or services could be purchased for a specified price, when that was not the case (Rule 60)
- 37. Plaintiffs are entitled to recover their actual damages or \$1,000.00 per violation of the Consumer Protection Act in accordance with Idaho Code Section 48-608, whichever is greater, and a reasonable attorney fee pursuant to Idaho Code Section 48-608.

#### ATTORNEYS' FEES AND COSTS

Plaintiffs have been required to retain the services of Givens Pursley LLP to prosecute this matter. Plaintiffs have incurred and will continue to incur attorneys' fees and costs in connection with this lawsuit pursuant to contract, and Idaho Code Sections 12-120(3), and 12-121 and 48-608; and I.R.C.P. 54. Plaintiffs are entitled to their reasonable attorneys' fees and costs in the amount of \$3,000.00 in the event of a default judgment, or in such other and further amount as may be awarded by the Court at the appropriate time in the proceedings.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment in their favor and against the Defendant, both jointly and severally, for:

- 1. On Count 1,
- 2. On Count 2,
- 3. On Count 3, a monetary judgment in favor of Plaintiffs and against Defendant

Hagood in an amount to be proven at trial with damages with respect to each Plaintiff;

- 4. On Count 4, in the alternative to the relief sought in Counts 1 through 3, and only in the event the Court determines that no enforceable contract existed under the Statute of Frauds or similar law, then for an award of damages in an amount to be proven at trial against all Defendants, jointly and severally.
- 5. On all Counts, a judgment and order requiring Defendant to pay to Plaintiffs, pursuant to the Idaho Code sections cited herein, their reasonable attorneys' fees and costs incurred in connection with this lawsuit; and
- 6. For such other and further relief as this Court deems just and appropriate in the premises.

DATED this  $\frac{1277}{1200}$  day of June, 2009.

GIVENS PURSLEY LLP

Thomas E. Dvorak Attorneys for Plaintiffs

## **CERTIFICATE OF SERVICE**

I hereby certify that on this <u>127</u> day of June, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen	U.S. Mail
Davison, Copple, Copple & Cox	Overnight Mail
Washington Mutual Capitol Plaza, Suite 600	Hand Delivery
199 North Capitol Blvd.	Fax
P.O. Box 1583	
Boise, Idaho 83701	
	$\checkmark$
Phillip J. Collaer	
Anderson, Julian & Hull, LLP	Overnight Mail
P.O. Box 7426	Hand Delivery
Boise, ID 83707-7426	Fax
	\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\
Terry Michaelson	U.S. Mail
Hamilton Michaelson & Hilty, LLP	Overnight Mail
1303 12th Avenue Road	Hand Delivery
P.O. Box 65	Fax
Name ID 92652 0065	

Thomas E. Dvórak Attorneys for Plaintiffs

### **EXHIBIT "A"**

### Legal Descriptions Parcel 1

COMMENCING at the Northwest corner of the South Half of the Southeast Quarter of Section 13, Township 3 North, Range 2 West, Boise Meddian, Canyon County, Idaho, and running

East a distance of 278.1 feet along the North boundary line of the aforadescribed South Half of the Southeast Quarter of Section 13 to the POINT OF BEGINNING; thence South a distance of 322 feet, more or less, to the center of the Dewey Irrigation Lateral; thence South 75" 30' East a distance of 355.6 feet to the Intersection of the centerline of the State Highway; thence North 56° 6' East a distance of 74.3 feet along the centerline of the State Highway; thence North 44° 19' West a distance of 481.4 feet to the intersection of the North boundary line of the South Half of the Southeast Quarter of the aforedescribed Section 13; thence West a distance of 71.9 feet to the POINT OF BEGINNING.

### Legal Description for Parcel 2

A part of the South One-Half of the Southeast Quarter of Section 13, Township 3 North, Range 2 West of the Bolse Meridian, Canyon County, Idaho, more particularly described as follows:

BEGINNING at the Northwest corner of the South One-Half of the Southeast Quarter of Section 13, Township 3 North, Renge 2 West of the Boise Meridian, and running South 312.7 feet along the North and South center line of the aforesaid described Section 13; thence South 89°12' East 233.0 feet along the center of the Dewey Irrigation Leteral; thence South 76°30' East 44.4 feet; thence North 322.0 feet, more or less, to the Intersection of the North boundary line of the South One-Half of the Southeast Quarter of the above described Section 13; thence West 276.1 feet to the point of beginning.

# Legal Description for Parcel 3

The North 300 feet of the Southeast Quarter of the Southwest Quarter and a portion of the South One-Half of the Northeast Quarter of the Southwest Quarter, Section 13, Township 3 North, Range 2 West of the Boise Meridian, Canyon County, Idaho, all more particularly described as follows:

Commencing at the Southeast corner of the Northeast Quarter of the Southwest Quarter, Section 13, Township 3 North, Range 2 West of the Boise Meridian, Canyon County, Idaho and running

South 0° 33' 54" West 300.00 feet along the Easterly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 to a point

North 89° 21' 11" West 1,309.37 feet along a line parallel with and 300,00 feet Southerly from the Northerly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 to a point; thence

North 0° 18' 47" East 300.00 feet along the Westerly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 more or less to the Northwest corner thereof: thence continuing

North 0° 18' 47" East 221.27 feet along the Westerly boundary of the Northeast Quarter of the Southwest Quarter, Section 13; thence

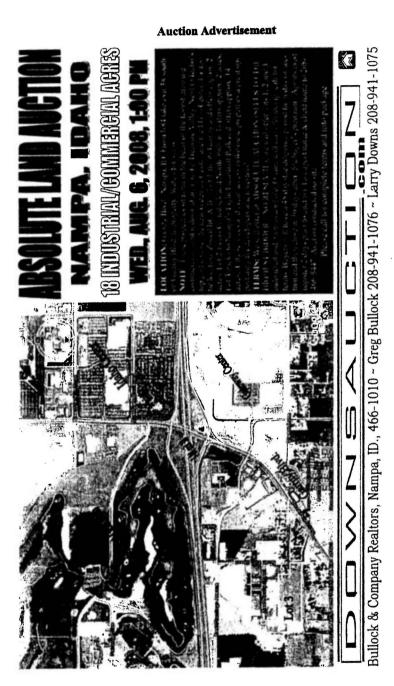
South 89° 41' 13" East 200,00 feet to a point; thence South 69° 38' 40" East 63.86 feet to a point; thence

South 89° 21' 36" East 801.58 feet along a line parallel with and 202.00 feet Southerly from the South boundary of East Newby Street as shown on the plat of Nampa Industrial Corporation Fifth Addition Phase No. 1, Nampa, Canyon County, Idaho, according to the plat filed in Book 27 of Plats at Page 47, records of said County, more or less to the Westerly boundary of Block 2 of said Plat; thence

South 0° 33' 54" West 200.99 feet along said Westerly boundary of said Block 2 and its Southerly extension, more or less to a point on the South boundary of the Northeast Quarter of the Southwest Quarter, Section 13; thence

South 89° 21' 11" East 250.00 feet along said Southerly boundary of the Northeast Quarter of the Southwest Quarter, Section 13 to the POINT OF BEGINNING.

# **EXHIBIT "B"**



### **EXHIBIT "C"**

RE-23 COMMERCIAL/INVESTMENT  REAL ESTATE PURCHASE AND SALE AGREEMENT  THUS IS A LEGALLY SINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS.  IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR AGCOUNTANT REFORE SIGNING.  DATE  DATE  DATE  Office Phone # 466-000 Fex # 466-100  Fix #	JULY 2008 EDI	ITECN:				
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Selling Agent						
1. BUYER: MSUVER' sprees to purchage, and the undersigned SELLER agrees to sell the following described real episte hereinance referred as "PROPERTY" COMMONIX" KNOWIN, AS	BELLING AG	ENGY Tre summer Valla		77107		<u>858-1444</u>
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AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION- 14

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8. TITLE INSURANCE: There may be types of this insurance coverages available other than those listed below and parties to this agreem are advised to talk to a title company about any other coverages available that will give the buyer additional deverage.							rabmo		
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172 170 174 175 176 177 170 181 182 183 184 183	PROPERTY ADDRESS: Les James Leau Leau Leau Leau Leau Leau Leau Leau
167 168 188 180 191	no event shall such time period exceed that time period sel forth for inspections in Section 9) to review and approve of any such CC4Rs that may effect the PROPERTY. Unless BUYER's will particular adjand objection to the total of any applicable CC4Rs with particularly describing BUYER's reasonable objections within such time period as sel forth above, BUYER shall be deemed to have conclusively waived any objection to the terms of any CC4Rs affecting the PROPERTY.
93	18. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voldable at the option of the BUYER.
194	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the inspection/Due Diligence period and thereafter, BUYER agrees to purchase the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing. BUYER will assume all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the draing in its present condition, ordinary weer and tear occepted.
160 160	20. CLOSING AGENOX: The Closing Agency for this transaction shall be
101 702	loomed M Mariph
107	21. CLOSING DATE: On or before the closing date, BUYER and SELLER shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than
107 10#	22. POSSESSION/PRORATION: SUYER shall be entitled to possession SUPON CLOSING or DATE TIME
100	and reserve on items, anoumbrances or obligations assumed and utilities shall be prorated as of the day of closing or  Any tenant deposits held by SELLER shall be credited to BUYER at closing.
12	23. "NOT APPLICABLE" DEFINED; The letters "n/s," "N/A," "n.s.," and "N.A." as used herein are abbreviations of the form "not applicable," Where this agreement uses the form "not applicable" or an abbreviation thereof, it shall be evidence that the period have contempisted certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.
16 17 18	24. FACSIMILE TRANSMISSION: Feesimile or electronic transmission of any signed original document, and refransmission of any signed facelmile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facelmile or electronic transmitted signatures by signing an original document.
20 27 28 23 24	25. BUSINESS DAYS & HOURS: A business day is herein defined as Monday through Friday, 8:00 A.M. to 6:00 P.M. in the local time zone where the subject reel property is physically located. A business day whall not include any Sakurday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as bound in Idaho Code \$73-108. The time in which any act required under this agreement is to be performed shall be computed by axcluding the data of execution and including the last day. The first day whell be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.
20 27 28 29 30 31 32 33 34 38 36 37	26. DEPAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as tiquidated damages or (2) pursuing any other fawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs theored by SELLERs shall make on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of fille insurance, accrow fees, credit report fees, inspection fees and attempt fees, and said holder shall pay any balance of the Earnest Money, one-half to SELLER and orne-half to SELLER's Broker, provided that the amount to be paid to SELLER's Broker shell not exceed the Broker's agreed to commission. SELLER and BUYER specificely acknowledge and agree that if SELLER elects to accept the Earnest Money as figuidated damages, such shall be SELLER's and and acclusive semely, and such shall not be considered a penalty or ioriblure, if SELLER elects to proceed under (2), the holder of the Rethest Money shall be antitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, illde insurance, accrow fees, credit report fees, and sell-ter, illde insurance, accrow fees, credit report fees, and approved said sale and falls to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/ther and SELLER shall pay for the costs of title insurance, accrow fees, inspection fees, Brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other tawful right or remedy to which BUYER may be entitled.
	BUYER'S Initials ( ) ) Date 9/4/08 SELLER'S Initials ( ) ) Date
	This form is priving and distributed by the Idaho Association of REALTORSO, Inc. This form has been designed and is provided for use by the rest schole professionals who are members of the National Association of REALTORSO, USB BY ANY OTHER PERSON IS PROVINCED, of Supplying Idaho Association of REALTORSO, USB BY ANY COLD TO THE PROVIDED AND SALE AGRICATION OF THE PROVIDED AGRICATION OF THE PROVIDED AND SALE AGRICATION OF THE PROVIDED AGRICATION OF T

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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL RETAYS PURCHASE AND SALE AGREEMENT Page 5 of 6
	PROPERTY ADDRESS: Agg. 2 Aug. 5 Company Blad 108: LT 100
238 246 241 242	27. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the prevailing party shall be chilled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and face on appeal.
243 244 245 245 247 248 248	28. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of this contract, SUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or all Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attornay's face.
250 251 252 253	29. THE RESPONSIBLE BROKER SHALL BE Tam's Cilly
254 255 256 256 257	30. SEVERABILITY: in the case that way one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
258 259 260 261	31. COUNTERPARTS: This Agreement may be executed in counterparts, executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall togather constitute one and the same instrument.
263 263 264	32. SALES PRICE INFORMATION: Pursuant to Idaho Code §64-2089(6)(g), a "sold" price of real property is not confidential client information.
260 250 257 265	33. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the SUYER(S) and SELLER(S).
269 270 271 272 273 274	Section 1;  A. The brokerage working with the BUYER(8) is acting as an AGENT for the BUYER(\$).  B. The brokerage working with the BUYER(8) is acting as a LIMITED DUAL AGENT for the BUYER(\$), without an ASSIGNED AGENT,  C. The brokerage working with the BUYER(\$) is acting as a LIMITED DUAL AGENT for the BUYER(\$) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(\$).  D. The brokerage working with the BUYER(\$) is acting as a NONAGENT for the BUYER(\$),
276 276	Social 5:
277 278 279 280	A. The brokerage working with the SELLER(S) is acting as an ADENT for the SELLER(S).  C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.  C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).
281 282	D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).
26) 284 286 286 287	Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above, in addition, each party confirms that the brokerage's agency office policy was made available for inspection and review, EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A BISNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.
286 286 290 201	34, AUTHORITY OF SIGNATORY; If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.
262 283 284 266	35. ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the perios and no warranties, including any warranty of habitability or representations have been made or shall be binding upon either party unless herein set forth.
285 297 298 298	36. Time is of the essence in this agreement.
300 301	37. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date)  ALC COME (Local Time in which PROPERTY is located)  5.000
	SUYER'S Initials ( YNL )( ) Date 8 LL 07 SELLER'S Initials ( )( ) Date
	This some is printed and distributed by the state Association of REALTORSE, (inc. This form has been designed and is provided for use by the real state prohistantable and are members of the National Association of REALTORSE. USE BY ANY OTHER PERSON IS PROMISED. OCcopyright listed Association of REALTORSE, line. At rights reserved.  JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 6 of 6

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PROPERTY ADDRESS: Afga inforces Come	ity BIND	ID#;	1000
36. BUYER'S SIGNATURES:			
SEE ATTACHED BUYER'S ADDENDUM(S):(Specify of	umber of SUYER addendum(s) alta	ched.)	
20.00.48.4.2	BUYER (Print Name)		
	Phone #		
Address	City		
E-Mail	Fax#		
7 MF (da bas mas was may bus may was man one one one of the MF may be bus we was one one of the MF			
BUYER Signature	BUYER (Print Name)		
DateTime [A.M. [] P.M.	Phone #		
Address	City		ZIP
	Pex#		
On this date, IAMe hereby approve and accept the transaction act forth i BELLER.  SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER  SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) #		o carry out all the term	s thereof on the part
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### STATE PURCHASE AND SALE AGREEMENT
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ELLING AGENCY    Trace   Valle   Property   Office Phone #	Z Fax	# 466	-1006
ELLING AGENCY    Trace   Color   Color	Phone	# 24/-	1075
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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 4 of 6 PROPERTY ADDRESS: Apr. 2 Area 9 1 34 1 108: 272 00
172 177 174 175 176 177 178 179	The subject property II is in it defined as "Target Housing" regarding lead-based paint or lead-based point hexards. If yes, BUYER hereby asknowledges the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pampilet, "Protect Your Pamily From Lead in Your Home," (b) receipt of the Soller's Disclosure of Information and Asknowledgment Form and have been provided with all records, resire property control in any, related to the presence of lead-based paint hazards on said property, (c) that this contract is contingent upon BUYER8 right to have the property tested for lead-based paint hazards to be completed no lefer than Africal or the contingency will terminate, (d) that BUYER has the right to cancel the contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint on the property. BUYER has the right to cancel the contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before dowing, (f) that if the contract is cancelled under this clause, BUYER's earnest money deposit will be returned to BUYER.
161 182 183	16. Square footage verification: Buyer is aware that any reference to the square footage of the real property or improvements is approximate if square footage is material to the buyer, it must be verified during the inspection period.
185 185 186 187 188 159 159	17. COVENANTS, CONDITIONS AND RESTRICTIONS (CCℜ); As part of the BUYER'S inspection of the PROPERTY as cell forth above in Section 9, BUYER is responsible for objetning and reviewing a copy of any CC&R's which may affect the PROPERTY. BUYER shall have
191 192 193 194	18. RISK OF LOSS: Prior to the closing of this sets, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voldable at the option of the BUYER.
198 198 197 198	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the Inspection/Due Diligence period and thereafter, BUYER agrees to purchase the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing. BUYER will assuring all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the closing in its present condition, ordinary wear and tear excepted.
201 201 201 202	20, CLOSING AGENCY: The Closing Agency for this transaction shall be
203 204 206	21. CLOSING DATE: On or before the closing date, SUYER and SELLER' shall deposit with the Closing Agency at funds and instruments necessary to complete the sale. The closing date shall be no later than
208 207 208 208 208 219	22. POSSESSION/PRORATION: BUYER shall be entitled to possession VIPON CLOSING or DATE  TIME AM DPM. Taxes and water assessments (using the last available assessment as a basis), ronts, insurance pramiums, interest and reserve on liene, anoumbrances or obligations assumed and utilities shall be prorated as of the day of closing or  Any tenant deposits hold by SELLER shall be credited to BUYER si closing.
211 212 213 214 214	23. "NOT APPLICABLE" DEFINED: The letters "n/a," "N/a," "n,a," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement used the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement of transaction herein.
219 210 217 218 218	24. FACSIMILE TRANSMISSION: Facaimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm faceimile or electronic transmitted signatures by signing an original document.
720 221 222 223 223	25. BUSINESS DAYS & HOURS: A business day is hareln defined as Monday through Friday, 5:00 A.M. to 0:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any local holiday recognized by the state of Idaho as found in Idaho Code §73-108. The lime in which any sot required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.
227 228 229 236 231 232 233 234 234 235 236	26. DEFAULT: If RUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Barnest Money as injudated damages or (2) putsuing any other tawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Bethest Money, upon which demand setd holder shall pay from the Earnest Money the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without similation, the costs of title incurrance, excrew fees, and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER's Groker, provided that the amount to be paid to SELLER's Broker shall not exceed the Broker's agreed to commission. SELLER and SUYER specifically extensived and agreed that If SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER's sole and exclusive remedy, and such shall not be considered a penalty or forbiture. If SELLER relate to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fees, alle insurance, sorow fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be half pending resolution of the matter, If SELLER shall pay for the costs of title insurance, accrow fees, credit report fees, Brokerage fees and attorney's fees, If any, This shall not be considered as a waiver by SUYER of any other lawful right or remedy to which BUYER may be antified.
	BUYER'S Initials (

	JULY 2008 EQITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND BALE AGREEMENT Page 6 of 8
	PROPERTY ADDRESS: Ago Z Acres A. 3972 IDS: 17200
231 240 241 241	27. ATTORNEY'S FRES: If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement, the provailing party shall be entitled to recover from the non-prevailing party reasonable does and attorney's fees, including such costs and feed on appeal.
244 246 246 247 247 248 248	28. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of this contract, BUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and bings of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interpleted all parties and deposit any moneys or things of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.
250 251 248	29. THE RESPONSIBLE BROKER SHALL BB . Jamie Silly
253 254 255 268 257	30. SEVERABILITY: In the case that any one or more of the provisions combined in this Agreement, or any application thereof, shall be invalid, kilagal or
250 250 250 260 261 282	
202 203 204 203	32. SALES PRICE INFORMATION: Pursuent to Idaho Code §54-2063(6)(d), a "sold" price of real property is not confidential client information.
264 267	33. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(s) and SELLER(s).
270 270 271 272 273 274	Segtion 1:    Color   The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).   Doctor   The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.   Color   The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S) is acting as a NONAGENT for the BUYER(S).   D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).
274 276 277 278 279 240 281	Section 2:  A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).  B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.  C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting soluty on behalf of the SELLER(S) is acting as a NOMAGENT for the SELLER(S).  D. The brokerage working with the SELLER(S) is acting as a NOMAGENT for the SELLER(S).
247 263 264 264 265 267	Each party signing like document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Ideho real estate commission and has consented to the relationship confirmed above, in addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.
200 200 200 201	34. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, extate, or other entity, the person executing this agreement on its behalf warrants his or her euthority to do so end to bind BUYER or SELLER.
202 203 204 205	36, ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the parties and no warrantes, including any warranty of habitability or representations have been made or shall be binding upon either party unless herein set forth.
296 297 298 299	36. Time is of the essence in this agreement.
300 301 302	37. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date)  ALCEPTANCE: This offer is made subject to the acceptance of this Agreement is not received within the time specified, the efforts withdrawn and the entire Barnest Money, if any, shall be refunded to BUYER on demand.
	BUYER'S Initials ( YTCL ) ( Data S C

PROPERTY AD	DRESSI A	2 Bus A	3975	10#:	200
36. BUYER'S S	• •	•	,		
SBE ATTAC	HED BUYER'S ADDEND	UM(S):(Specif)	number of BUYER addendum(	s) attached.)	
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Date 8 4 0	8 = 31)	TO DAM. DEP.M.		A-1-1	
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				Siate	
	·		BUYER (Print Name)		
	Time			Cell#	
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E.Mail					
37. 8ELLER'S	SIGNATURES:	rapi the iranascilon set for	h in the above Agraement and s	gree to carry out all the leans	Stereof on the part of
37. SELLER'S S On this date, I/We SELLER. SIGNATURE(	SIGNATURES: hereby approve and acc		h in the above Agreement and s	gree to carry out all the leams	thereof on the part of
37. SELLER'S S On this date, IWe BOLLER.	SIGNATURES: hereby approve and acc s) SUBJECT TO ATTAC n) SUBJECT TO ATTAC	repithe transaction set for HED COUNTER OFFER HED ADDENDUM(\$) #	h in the above Agreement and s	,	·
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37. SELLER'S I On this date, I/We SELLER SIGNATURE(S SELLER Signatur Calo E-Meil E-Meil SELLER Signatur Calo C-Meil	SIGNATURES: hereby approve and sec s) SUBJECT TO ATTAC s) SUBJECT TO ATTAC in Time	TERRITOR INTERPORT SET FOR THEO COUNTER OFFER HED ADDENDUM(S) #	SELLER (Print Name) From # City Fax # SELLER (Print Name) Phone #	Coll# State  Call# State	Tip.

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### **EXHIBIT "D"**

JULY 2008 EDITION Page 1 of 6 **RE-23 COMMERCIAL/INVESTMENT** REAL ESTATE PURCHASE AND SALE AGREEMENT THIS IS A LEGALLY BINDING CONTRACT, READ THE ENTIRE DOCUMENT, INCLUDING ANY ATTACHMENTS. IF YOU HAVE ANY QUESTIONS, CONSULT YOUR ATTORNEY AND/OR ACCOUNTANT BEFORE SIGNING. 17.300 DATE \_ LISTING AGENCY\_ E-Mail Office Phone # Phone # 94%-1076 \_ E-Mall OR Legal Description Attached as addendum # (Addendum must accompany original offer.) \$ 453,285,00 PURCHASE PRICE: Four Hundred Felts To the Tand 2910 100 Hardel Engly payable upon the following TERMS AND CONDITIONS (not including arosing costs): 3. FINANCIAL TERMS: Note: A+C+D must add up to total purchase price (A). \$.50. for the benefit of the parties hereto (B). ALL CASH OFFER: NO YES IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY. BUYER agrees to provide SELLER within \_\_\_\_\_\_\_ business days from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank or financial statement or contract(s) for the sale of BUYER'S current residence or other property to be sold. (C). \$ FINANCING:

Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 5 below).

Additional financial terms are contained in a financing addendum of same date, attached hereto, signed by both parties. (D). \$ 0.00 APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING: (Not including a by BUYER at dosing in GOOD FUNDS, includes: cash, electronic transfer funds, certified check or cashier's check APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING: (Not including closing costs) Cash at closing to be paid 4. SECTION 1031 TAX DEFERRED EXCHANGE: By checking either or both of the boxes that follow, it is hereby acknowledged by the parties that the Buyer, Seller intends to use the purchase and sale of the PROPERTY as an integral part of a tax deferred like-kind exchange as allowed under Section 1031 of the Internal Revenue Code (the "Exchange"). For purposes of this paragraph, the party participating in the Exchange shall be identified as the "Exchanger." If either box above is checked, then the parties recognize that a material part of the Exchanger's consideration for entering into the agreement for the purchase and sale of the PROPERTY is the successful completion of the exchange. The parties agree to assist each other in the completion of such exchange by cooperating with each other by signing any and all relevant documents provided that the party not doing the Exchange shall not incur any liabilities, costs, fees, or taxes in excess of those which that party would have incurred had this transaction not been an Exchange. 5. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations and/or contingencies which must be satisfied prior to closing . State The Control Rul y File . It is the Difference which Digence DAG SARNEST TRESELLER 6. ITEMS INCLUDED & EXCLUDED IN THIS SALE: All existing fixtures and fittings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of liens. These include, but are not limited to, all seller-owned attached floor coverings, attached television antennae, satellite dish, attached plumbing, bathroom and lighting fixtures, window screens, screen doors, storm doors, windows, window coverings, garage door opener(s) and transmitter(s), exterior trees, plants or shrubbery, water heating apparatus and fixtures, attached fireplace equipment, awnings, ventilating, cooling and heating systems, all ranges, ovens, built-in dishwashers, fuel tanks and Irrigation fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sale unless otherwise provided herein. BUYER should satisfy himself/herself that the condition of the included items is acceptable. (A). ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE:

National Association of REALTORS®, USE BY ANY OTHER PERSON IS PROHIBITED. ©Copy

BUYER'S Initials (

JULY 2008 EDITION

RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT

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Page 1 of 6

(B) ITEMS SPECIFICALLY				1.					
(5), (1), (1), (1), (1), (1), (1), (1), (1	EXCLUDED	IN THIS SA	ALE:	<u> </u>					
7. TITLE CONVEYANCE:	Title of SEL	LER is to b	e conveyed	by <b>⊠</b> _v	varranty deed Ospecial warranty deed	or 🗆		deed, ar	nd is
and ordinances of any gover	nmental unit,	and rights	of way and	easem	tate or rallroad deeds, building or use ents established or of record. Liens, e	ncumbrance	s or defect	s to be disch	narge
which title is taken subject to,					encumbrances or defects which are tement.	o de discha	rged or ass	umed by BU	YEK
					ages available other than those list ilable that will give the buyer addition			s to this ag	reer
(A). PRELIMINARY TITLE CO	MMITMENT	r: Prior to c	losing the tra	nsactio	SELLER or BUYER shall furn	ish to BUYE	R a prelimi	nary commit	meni
title insurance policy showing	the condition	of the title	to said PRC	PERTY	. BOYER shall haveb	usiness day	(s) from rec	elpt of the pr	elim
					n which to object in writing to the cond to have accepted the conditions of				
PROPERTY is not marketable	or cannot b	e made so	within	5,,,,,,	business day(s) after notice containing of the cost of	g a written :	statement of	f defect is de	ilven
SELLER, BUYER'S Earnest I	Money depos	sit will be n	elumed to B	UYER (	and SELLER shall pay for the cost of	litle insurar	rce cancell	ation fee, es	crow
legal fees, If any.		,	3						
(B). TITLE COMPANY: The pa	arties agree t	that	Mercer-	THE	shall provide the little			Title (	Com
located at					shall provide the little	policy and p	oreliminary i	report of com	miln
(C). STANDARD COVERAGI	OWNER'S	POLICY:	SELLER sh	ali withi	n a reasonable time after closing furn insurable title subject to the liens, end	ish to BUYI	ER a lille in	surance poli	cy ir
coverage policy is limited to request, can provide informati	matters of p	oublic reco	ord. BUYER y, desirabilit	shall re y, cove	ise provided herein. The risk assum- ceive a ILTA/ALTA Owner's Policy of age and cost of various title insurance	litle insurar ce cover <b>a</b> ge	ice. A title c	ompany, at E	BUYE
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D) FXTENDED COVERAGE	LENDER'S	POLICY (	Mortgagea	policy)	The lender may require that RUYER	(Borrower	l furnish an	Extended C	over
i (D), EXTENDED COVERAGE LENDER'S POLICY (Mortgages policy): The lender may require that BUYER (Borrower) furnish an Extended Coverage Lender's Policy. This extended coverage lender's policy considers matters of public record and additionally insures against certain matters not shown in the									
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124 125 126 127 128 129		pertinent section(s) of writter their option, may correct the it	inspecti ems as s er, then b	on reports	the BUYE	hall hav	LLER writlen notice of disapprove business day(s) in v neir letier or may elect not to do so ill continue with the transaction an	which to res	ipond In wi LLER agre	riting. The S es to correc	SELLER, at the items
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135 136 137 138 139		elected to proceed with the tra correct. SELLER shall make th hold SELLER harmless from al	nsaction e PROPE I liability,	without rep RTY avail claims, de	airs or corr able for all i mands, dan	ections inspecti rages a	the strict time periods specified, Bi other than for items with SELLER one. BUYER shall keep the PROP nd costs; and repair any damages overnment employee without the p	has other ERTY free arising fro	wise agreed and clear of mithe inspe	d in writing to of liens; Inde actions. No i	to repair or emnify and inspections
141			d all mine	ral rights a	ppurtenant	lo th <del>e</del> p	roperty are included in and are part	of the sale	of this pro	perty unless	otherwise
43 44 45	-	reed to by the parties in writing.  WATER RIGHTS: Any and a	il weler r	iahts includ	dina but not	llmited	to water systems, wells, springs,	iekes stre	ems ponds	rivers dite	ches ditch
46	rigi						re a part of the sale of this property				
48 49 50 51	by SE	law or required by lender, or othe LLER agrees to pay up to \$	rwise sla	ted herein.	The below	costs w	e incurred by BUYER and SELLER vill be paid as indicated. Some cost quired repair coats only. BUYER	s are subje	ct to loan p	program requ	uirements.
52	req	uired repair costs in excess of this	amount.	т	SHARED			<del></del>	·	SHARED	T1
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	PROPERTY ADDRESS: Agg. 14 Acces 1. 39th 10#: 27300
172 173 174 175 176 177 178 179	The subject property is is is in not defined as "Target Housing" regarding lead-based paint or lead-based paint hazards. If yes, BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family From Lead in Your Home," (b) receipt of the Seller's Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports of other information, if any, related to the presence of lead-based paint hazards on seld property, (c) that this contract is contingent upon BUYERS right to have the property tested for lead-based paint hazards to be completed no later than
181 182 183	16. SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY OR IMPROVEMENTS IS APPROXIMATE. IF SQUARE FOOTAGE IS MATERIAL TO THE BUYER, IT MUST BE VERIFIED DURING THE INSPECTION PERIOD.
184 185 186 187 188 189 190	17. COVENANTS, CONDITIONS AND RESTRICTIONS (CC&Rs); As part of the BUYER'S inspection of the PROPERTY as set forth above in Section 9, BUYER is responsible for obtaining and reviewing a copy of any CC&R's which may affect the PROPERTY. BUYER shall have
92 93	18. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.
96 96 97 98	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the Inspection/Due Diligence period and thereafter, BUYER agrees to purchase the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing. BUYER will assume all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the closing in its present condition, ordinary wear and lear excepted.
06 01	20. CLOSING AGENCY: The Closing Agency for this transaction shall be Prouter Title located at 16.7 Name grant Control of the C
02 03 04 05 06 07 08 09	21. CLOSING DATE: On or before the closing data, BUYER, and SELLER shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than
11 12 13 14	23. "NOT APPLICABLE" DEFINED: The letters "n/a," "n/a," "n.a.," and "n.a." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.
18	24. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.
20 21 22 23 24	25. BUSINESS DAYS & HOURS: A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday recognized by the state of idaho as found in Idaho Code §73-108. The Ilme in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal holiday, then the time for performance shall be the next subsequent business day.
3 4 5 6 7	26. DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, induding, without limitation, the costs of title insurance, escrow fees, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER's Broker, provided that the amount to be paid to SELLER's Broker shall not exceed the Broker's agreed to commission. SELLER and BUYER specifically such shall appear on the state of the Earnest Money as liquidated damages, such shall be SELLER's sole and exclusive remedy, and such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, title insurance, secrow fees, credit report fees, inspection fees and attorney's fees, with a plance of the Earnest Money to be held pending resolution of the matter. If SELLER defaults, having approved said sale and falls to consummate the same as herein agreed, BUYER'S Earnest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title insurance, escrow fees, inspection fees, Brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.
	BUYER'S Initials ( ) Date 5 /6 /DJ SELLER'S Initials ( ) Date
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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 4 of 6

	JULY 2008 EDITION			TMENT REAL ESTATE PURCH		Page 5 of
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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT RE			Page 6 of 6
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303 304	36. BUYER'S SIGNATURES:			
305 306	SEE ATTACHED BUYER'S ADDENDUM(8): (Specify I	number of BUYER addendum(s) attach	ed.)	
307 308	BUYER Signature	BUYER (Print Name)		
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317 318	BUYER Signature	BUYER (Print Name)		
319 320	Date Time	Phone #		
321 322	Address	City	State	Zip
323 324	E-Mail	Fax #		
325 326				
335	37. SELLER'S SIGNATURES:  On this date, I/We hereby approve and accept the transaction set forth i SELLER.  SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER		carry out all the terms	thereof on the part of the
337 338	SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) #			
	SELLER Signature	SELLER (Print Name)		
341	Date Time	Phone #	Cell #	
342 343 344	Address	City	State	Zip
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	Date	Phone #	Cell #	
	Address	City	Stale	Zip
355	E-Malf	Fax#		
356 357 358	CONTRACTOR REGISTRATION # (if applicable)			

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JUN 1 6 2009

CANYON COUNTY CLERK D. BUTLER, DEPUTY

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

) Case No. CV 08-8465
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
) ) )
) )

COMES NOW, Defendant Thomas A. Hagood, by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho, and hereby moves the Court pursuant to Rule 56 of the Idaho Rules of Civil Procedure for summary judgment on the grounds that that there are no disputed facts in this case and as a matter of law that Plaintiffs' claim against the Defendant Thomas A. Hagood for alleged violations of the Idaho Consumer Protection Act (hereinafter referred to as "ICPA) is barred as a

matter of law in light of the Court's prior ruling barring Plaintiffs' claims for Declaratory Judgment, Specific Performance, and Breach of Contract.

This Motion is made and based on the records and files herein. Oral argument is requested on this Motion.

DATED this Hof June, 2009

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:

Alex P. McLaughlin, of the firm Attorneys for Defendant

### **CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the day of June, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack	X_ U.S. MAIL
Givens Pursley, LLP	Hand Delivery
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Phillip J. Collaer	X_ U.S. MAIL
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Terry Michaelson	X_ U.S. MAIL
Hamilton, Michaelson & Hilty, LLP	Hand Delivery
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Nampa, ID 83653-0065	
_	
	Alex P. McLaughlin

JAY GUSTAVSEN (ISB No. 5293) ALEX P. MCLAUGHLIN (ISB No. 7977) DAVISON, COPPLE, COPPLE & COPPLE Washington Mutual Capitol Plaza 199 North Capitol Boulevard Suite 600 Post Office Box 1583 Boise, Idaho 83701 Telephone: (208) 342-3658

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Attorneys for Defendant Thomas A. Hagood

JUN 1 6 2009

CANYON COUNTY CLERK D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	) Case No. CV 08-8465
Plaintiffs, vs.	) ) DEFENDANT'S ) MEMORANDUM IN SUPPORT ) OF MOTION FOR SUMMARY ) JUDGMENT
THOMAS A. HAGOOD, an unmarried man,	)
Defendant.	) )

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits this Memorandum in Support of Defendant's Motion for Summary Judgment.

### I. INTRODUCTION

This memorandum addresses the sole question of whether Plaintiffs are barred from recovering damages against the Defendant Hagood under the Idaho Consumer Protection Act (hereinafter referred to as "ICPA") since the Court has already ruled that the alleged promise and/or contract on which Plaintiffs' entire suit was based is barred as a matter of law under the Statute of Frauds. In other words, this brief addresses the issue of whether the Plaintiffs may recover in tort for that which they cannot recover in contract.

### II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs' initial Complaint against the Defendant Hagood alleged claims for:

Declaratory Judgment, Specific Performance, and Breach of Contract. Plaintiffs and Defendant
then filed cross-motions with the latter moving the Court for Judgment that Plaintiffs' claims
were barred by the Statute of Frauds. Plaintiffs then moved the Court to Amend its Complaint so
as to add a claim against all of the Defendants under the ICPA for violations thereof.

Significantly, Plaintiffs' Motion to Amend was plead in the alternative and submitted only after Defendant's Motion for Summary Judgment was filed. Thus, the additional cause of action alleged therein was strictly contingent on whether the Court would find that Plaintiffs' prior claims against the Defendant were barred as a matter of law. Had the Court denied Defendant's Motion, Plaintiffs' Motion to Amend would have been moot. Were the Court to grant Defendant's Motion, Plaintiffs' Motion to Amend would have been averred.

In light of the foregoing, it was abundantly clear from the outset that Plaintiffs' Motion to Amend was an attempt to retain some medium by which to protect their recovery under Counts 1-3 should the Court apply and enforce the Statute of Frauds. See also Plaintiffs' Memorandum in Support of Motion to Amend, P.2 ("Purely out of an abundance of caution ... the Plaintiffs

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 2

desire to protect their right a [sic] recovery and therefore seek to amend their claim to add a claim under the Idaho Consumer Protection Act") (emphasis added); See also Plaintiffs' Amended Complaint ("Count 4 is plead in the alternative to Counts 1 through 3 and only in the event that the Court finds on the basis of the Statute of Frauds or similar basis that no enforceable contract for the sale of real property exists justifying specific performance or damages against Defendant Thomas A. Hagood under Counts 1 through 3") (emphasis added).

On May 21, 2009, this Court granted Defendant's Motion for Partial Summary Judgment, thus barring all of the Plaintiffs' prior claims. The Court did, however, grant Plaintiffs' Motion to Amend. Thereafter, Plaintiffs amended their Complaint and asserted a claim under the ICPA against all of the Defendants involved in the instant matter.

### III. ARGUMENT

Because the Court has already ruled that Plaintiffs' claims for Declaratory Judgment, Specific Performance, and Breach of Contract are barred under the Statute of Frauds, Plaintiffs' claim for violations of the ICPA <u>against the Defendant Hagood</u> is also barred as a matter of law as the latter claim is an indirect attempt to recover for breach of an alleged promise that this Court has already ruled is unenforceable.

### IV. ANALYSIS

The ICPA is codified under Title Forty-Eight (48), Chapter Six (6) of the Idaho Code. In essence, it forbids "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." See I.C. 48-603. Thus, if a person purchases goods or services and thereby suffers any ascertainable loss of money or property as a result of the use or employment of an unfair method of competition and unfair or deceptive acts or practices, that individual may bring an action to recover actual damages. See I.C. 48-608.

Notwithstanding the foregoing, under I.C. 9-505 an oral contract for the purchase and sale of real property is unenforceable unless that contract is evidenced by a signed memorandum. This provision is commonly known as the Statute of Frauds.

In the instant matter, the provisions referenced above have converged thereby creating an issue as to the appropriateness of recovery under the ICPA where the agreement that constitutes the crux of the claim is barred from enforcement under the Statute of Frauds.

While Idaho Courts have yet to broach the foregoing issue, authority from other jurisdictions have squarely addressed the matter and have ruled that where a claim under a State Consumer Protection Act is merely a guise in order to maneuver around an otherwise barred contract claim, the claim under the State Consumer Protection Act is likewise barred as a matter of law.

Keriotis v. Lombardo Rental Trust, 607S.W.2d 44 (Ct. Civ. App. Texas 1980), Canell v. Arcola Housing Corp. et al., 65 So.2d 849 (S.Ct. Florida 1953), and Zager v. Brown, 242 Ga.App. 427 (Ct. App. 2000) are directly on point.

In *Keriotis*, Plaintiff brought an action under the Deceptive Trade Practices-Consumer Protection Act (*hereinafter* referred to as "DTPA") for damages arising out of an alleged oral misrepresentation that the Defendant would sell a parcel of real estate to the Plaintiff for \$75,000.00. *Id.* at 45. Plaintiff had previously contacted the Defendant regarding the purchase of the building in which the Defendant was a tenant. *Id.* Defendant then wrote back to the Plaintiff and stated that the purchase price of \$75,000.00 would be acceptable. *Id.* Days later, Defendant sold the same piece of property to a third party for \$105,000.00. *Id.* 

Plaintiff brought suit against the Defendant under the DTPA. *Id.* The Defendant responded by stating that regardless of the terms in which Plaintiff's claim was couched (tort v.

contract), the action amounted to a suit for damages for failure to perform an oral contract for the sale of land and was thus unenforceable under the Statute of Frauds. The trial court sided with the Defendant's position and barred Plaintiff's claim under the contract and under the DTPA.

On appeal, the Court affirmed the decision of the trial court, offering the following rationale in support thereof:

"Even if it be conceded that an action in tort for (misrepresentation) is unaffected by the provisions of the statute of frauds, the judicial disregard of the statute should be limited to situations in which the essence of the action truly sounds in tort.... Since plaintiff is here seeking to recover what he would have gained had the promise been performed, it is apparent that his action, while cast in language sounding in tort is an <u>indirect attempt to recover for the breach of the unenforceable promise and is, therefore, barred by the statute of frauds."</u>

Id (emphasis added); See also Papanikolas v. Sampson, 73 Utah, 274 P. 856 (1929) (Refusal to perform an oral promise is not of itself a fraud for which an action will lie since in such a case the promisor has not in a legal sense, made a contract, and hence has the right, both in law and equity to refuse to perform).

The Court also quoted with approval the following excerpt from a related case:

"We fail to see how there could be any recovery for fraud involving the breach of an unenforceable contract. To hold otherwise would be to create an anomaly, and allow one to do indirectly what he could not by law do directly." *Keriotis*, *supra*, at 46 (citations omitted).

In Canell, supra, the Court reached the same conclusion as the Court in Keriotis. In Canell, Defendant sold to each Plaintiff a lot located in a subdivision in Dade County, Florida. Id. at 850. Before the purchase was made, Defendant represented that "there would be installed, provided, and constructed in the said subdivision, certain bathing beach facilities." Id. Plaintiffs claimed that the Defendant made these representations without any intent of performance and with the intent of fraudulently inducing the Plaintiffs to purchase the lots. Id.

The initial complaint in *Canell* did not contain any allegation of fraud and was thus premised solely on breach of contract. Plaintiffs then moved to amend their complaint to add a claim for fraud in the inducement with the factual basis thereof as delineated above. *Id.* The trial court denied Plaintiffs' motion.

On appeal, the Court affirmed the lower court's ruling on the basis that the complaint misjoined separate and independent causes of action. *Id.* The Court bolstered its decision to dismiss the claim for fraud by referencing the fact that the contract claim on which the alleged fraud was based was barred by the Statute of Frauds. *Id* ("Aside from this, the complaint contained a greater infirmity which required its dismissal. The complaint shows on its face that the plaintiffs' claims, whatever they may be, are predicated upon an alleged breach of an oral promise ...").

Thereafter, the Court elaborated on its reasoning, stating:

"While it is contended by plaintiffs that they are suing for damages for fraud and deceit, such an action under the circumstances of this case is simply an attempt in an indirect manner to obtain damages for breach of contract. Since the provision in the statute prohibiting any action to be brought on an oral contract within the statute includes actions based indirectly on the contract, an action for damages cannot be maintained on the ground of fraud in refusing to perform the contract, even though the defendant at the time of the making of the oral contract may have had no intention of performing it." *Id.* at 851 (citations omitted).

In support of it ruling, the Court also cited *Dung v. Parker*, 52 N.Y. 494, wherein the Court stated:

"A contract void by the statute of frauds is void for all purposes. It confers no right, and creates no obligation, as between the parties to it, and no claim can be founded upon it as against third persons. It cannot be enforced directly or indirectly ... He cannot say he was defrauded, and make that the substantive ground for his recovery, because he had no right to rely upon a contract, which when made, the law declared to be void. If he incurred expenses on the faith of the promise, or relying upon the express assurance of the defendant that the corporation would sanction the contract, it is his misfortune; but it furnishes no ground of action."

In Zager, supra, Plaintiff alleged that the Defendant breached a written employment contract. *Id.* at 427. Plaintiff also alleged fraud against the Defendant. The trial court dismissed the first count on the basis that the alleged employment contract did not satisfy the statute of frauds and that no exceptions thereto, to wit, part performance, applied. *Id.* at 430.

On appeal, the Court affirmed the decision of the lower court and thus dismissed the breach of contract claim; the Court thereafter also dismissed the claim for fraud. Particularly pertinent for present purposes was the Court's rationale for dismissal of the claim for fraud:

"Additionally, fraud cannot be predicated on a promise which is unenforceable at the time it is made. And this is controlling in the instant case because the promises upon which the plaintiff relies for establishing fraud are unenforceable even absent any fraud at the time of their utterance."

Id; See also Ikeyima v. Shibamoto America, 213 Ga.App. 271, 272 (1994).

In the present case, the Defendant's claim under the ICPA is barred against the Defendant Hagood because the Court has already ruled that the alleged oral contract between Plaintiffs and the Defendant Hagood is unenforceable under the Statute of Frauds. The following reasons substantiate this contention.

First, the claim by the Plaintiffs under the ICPA is a substitute cause of action - a guise to procure the contract damages to which Plaintiffs are not entitled since the Court ruled that the contract from which said damages arose is unenforceable under the Statute of Frauds. Plaintiffs themselves admit as much in their Memorandum in Support of their Motion to Amend Complaint and their Amended Complaint.

In Plaintiffs' Memorandum, they explicitly state: "Purely out of an abundance of caution ... the Plaintiffs desire to protect their right a [sic] recovery and therefore seek to amend their claim to add a claim under the Idaho Consumer Protection Act." By asserting that they are

merely protecting their right of recovery and not alleging a new cause of action to procure compensation for new and/or different damages, Plaintiffs admit that they are merely protecting their previous right to damages under Counts 1-3. As their Motion merely seeks to preserve their claim for the foregoing damages, Plaintiffs are thus not truly seeking damages different from or in addition to those previously alleged and for which the Court has effectively ruled they are precluded from recovering. Plaintiffs are simply attempting to circumvent the Statute of Frauds.

In their Amended Complaint, Plaintiffs do not simply add a cause of action under the ICPA; rather, Plaintiffs plead the additional cause of action "in the alternative." On page seven (7) of their Amended Complaint, it states: "Count 4 is plead in the alternative to Counts 1 through 3 and only in the event that the Court finds on the basis of the Statute of Frauds or similar basis that no enforceable contract for the sale of real property exists justifying specific performance or damages against Defendant Thomas A. Hagood under Counts 1 through 3."

In light of the law cited above, the issue at bar, and the form in which Plaintiffs' Amended Complaint is presented, it peaks one's interest as to why Plaintiffs would plead Count 4 only in the alternative and only after the Defendant submitted his Motion for Summary Judgment based on the Statute of Frauds. It certainly cannot be because Plaintiffs have sustained damages in addition to those suffered from the alleged breach of contract. Otherwise, Plaintiffs would be acting against their own interest, asserting damages for breach of contract under Counts 1-3 while failing to do so for violation of the ICPA. If there were different damages, i.e., contract damages vs. tort damages, pleading in the alternative would be irrational as Plaintiffs would not be pleading an amount of recovery in order to be made whole. Thus, the only true way that pleading in the alternative would make sense would be if the damages sought in Count 4 were actually the very same contract damages alleged in Count 3. In light of this fact and

because the Court <u>did</u> in fact bar Counts 1 through 3, Count 4 now stands alone as "an indirect attempt to recover for the breach of [an] unenforceable promise." *Keriotis*, *supra*, at 45. This is again an attempt to circumvent the Statute of Frauds and is the precise conduct that the Courts in the above-referenced cases unequivocally reject.

Second, if the Court were to allow Count 4 to stand, the Statute of Frauds would be rendered a dead letter. Where a contract falls under the Statute of Frauds and is thereby rendered unenforceable, damages stemming from the breached contract are not recoverable. The reasoning is clear - one cannot recover damages for the breach of an unenforceable contract. However, let us assume that in the same transaction there was a misrepresentation which rose to the level of constituting a violation of the ICPA. Now if there are damages stemming from the ICPA violation that are independent of the unenforceable contract, those damages would be recoverable because they are independent of the unenforceable agreement. However, to the extent that there really are no damages stemming from the misrepresentation, but just those stemming from the breach, the Court should bar not only the claim for breach of contract, but also the claim for violation of the ICPA. To rule otherwise would allow a litigant to recover damages under the ICPA which would be unrecoverable under the Statute of Frauds. In essence, it would provide a litigant a path to recover the exact damages for which the Statute of Frauds forbids recovery. Certainly, a litigant is entitled to tort damages if indeed their cause of action truly sounds in tort. However, where the tort is simply a way to recover contract damages on an unenforceable contract, it is subterfuge and should not receive sanction by the Court. In light of the contents of the Memorandum in Support of Plaintiffs' Motion to Amend their Complaint and Plaintiffs' Amended Complaint, Plaintiffs are engaging in the foregoing subterfuge and should be barred as a matter of law from doing so against the Defendant Hagood.

Third, the facts in Keriotis, Canell, and Zager are extraordinarily similar to those in the instant matter. In each case: 1.) There was an oral contract for the purchase of real property; 2.) There was also an allegation of some sort of fraud or deceit; 3.) The oral contract was rendered unenforceable under the Statute of Frauds; and 4.) The Courts barred actions for fraud (or refused to allow amendment of complaint therefor) on the basis that to rule otherwise would be to allow the litigant to do indirectly what he or she could not by law do directly. Although the authorities cited are not Idaho cases, their reasoning is sound and persuasive.

In light of the above, Plaintiffs' claim for violation of the ICPA against the Defendant Hagood is barred as a matter of law as it constitutes an indirect attempt to recover for the breach of an alleged promise that this Court has ruled is unenforceable.

### V. <u>CONCLUSION</u>

Defendant respectfully requests that this Court grant his Motion for Summary Judgment, filed concurrently herewith, and dismiss Plaintiffs' claim against the Defendant Hagood for violation of the Idaho Consumer Protection Act.

DATED this of June, 2009

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By:

Alex P. McLaughlin, of the firm

Attorneys for Defendant

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the day of June, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack Givens Pursley, LLP 601 W. Bannock St. P.O. Box 2720 Boise, Idaho 83701	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Phillip J. Collaer Anderson, Julian & Hull, LLP PO Box 7426. Boise, Idaho 83707	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Terry Michaelson Hamilton, Michaelson & Hilty, LLP 1303 12 <sup>th</sup> Avenue Road PO Box 65 Nampa, ID 83653-0065	X_ U.S. MAIL Hand Delivery Facsimile Transmission  Alex McLaughlin





Thomas E. Dvorak (ID State Bar ID# 5043) Angela M. Reed (ID State Bar ID# 7221) GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720

Telephone: 208-388-1200 Facsimile: 208-388-1300

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FILED AM 132PM

JUL 0 9 2009

CANYON COUNTY CLERK J DRAKE, DEPUTY

Attorneys for John Wakelum and Mike Ressler

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

**Plaintiffs** 

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

SECOND MOTION TO AMEND COMPLAINT

COMES NOW, Plaintiffs, Jon Wakelum and Mike Ressler, by and through their attorneys of record, Givens Pursley LLP, hereby moves this Court for an order allowing amendment of this complaint to the form attached hereto (changes from Previous Amended Complaint indicated by redlining). This Motion is made and based upon Rules 15(a) of the Idaho Rules of Civil Procedure and the interests of justice and the Memorandum in Support of the Second Motion to Amend, which is filed contemporaneously herewith.

DATED this 9 day of July, 2009.

GIVENS PURSLEY LLP

Thomas É. Dvorak Attorneys for Plaintiffs



## **CERTIFICATE OF SERVICE**

I hereby certify that on thisday of correct copy of the foregoing by the method indi-	July, 2009, I caused to be served a true and cated below, and addressed to the following:
Jay Gustavsen Davison, Copple, Copple & Cox Washington Mutual Capitol Plaza, Suite 600 199 North Capitol Blvd. P.O. Box 1583 Boise, Idaho 83701	U.S. Mail Overnight Mail Hand Delivery Fax
Phillip J. Collaer Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	U.S. Mail Overnight Mail Hand Delivery Fax
Terry Michaelson Hamilton Michaelson & Hilty, LLP 1303 12th Avenue Road P.O. Box 65 Nampa, ID 83653-0065	U.S. Mail Overnight Mail Hand Delivery Fax
	Mit. I





Thomas E. Dvorak (ID State Bar ID# 5043) GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720 Telephone: 208-388-1200

Facsimile: 208-388-1300

125421\_2

Attorneys for John Wakelum and Mike Ressler

# IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

**Plaintiffs** 

v.

THOMAS A. HAGOOD, an unmarried man, BULLOCK AND COMPANY REALTORS, L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE, INC., an Idaho corporation, and LARRY DOWNS, an Individual,

Defendants.

THOMAS A. HAGOOD, an unmarried man,
Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

Third Party Defendants.

Case No. CV 08-8465

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION ACT COME NOW, Plaintiffs, Jon Wakelum ("Wakelum") and Mike Ressler ("Ressler"), by and through their attorneys of record, Givens Pursley LLP, who for causes of action against Defendant, allege and complain as follows:

#### PARTIES, JURISDICTION AND VENUE

- 1. Plaintiff Ressler is an individual who resides in Canyon County, Idaho, who has done business as "M&M RE Holdings."
  - 2. Plaintiff Wakelum is an individual who resides in Canyon County, Idaho.
- 3. Defendant Thomas A. Hagood ("Hagood") is the owner of certain real property located within Canyon County, Idaho, which is the subject of this dispute, and it is believed that he resides at 3649 Oxbow, Nampa, Canyon County, Idaho, 83687.
- 4. Jurisdiction and venue are proper pursuant to Idaho Code Sections 5-401, 5-514, 1-701, 1-705 and other Idaho law.

#### **GENERAL ALLEGATIONS**

- 5. Defendant Hagood is the owner of record of three (3) parcels of real property located in Canyon County, Idaho. These are hereinafter referred to as "Parcel 1," "Parcel 2" and "Parcel 3."
- 6. A true and correct copy of the legal description for Parcel 1, Parcel 2 and Parcel 3 is attached hereto as Exhibit "A"; provided, however, any of the property rights included in the Judgment and Decree of Condemnation in favor of the City of Nampa entered on December 7, 2007, in the case of *City of Nampa v. Jeff Hagood, et. al.*, CV-05-4595, and recorded as Instrument No. 2007080423 in the real property records of the Canyon County Recorder on December 12, 2007, is encompassed within and, is hereby specifically excluded from, Parcel 1, Parcel 2 and Parcel 3.

- 7. Defendant Hagood did retain Bullock and Company Realtors, LLC, an Idaho limited liability company ("Bullock and Company"), to hold an "absolute land auction" of Parcels 1, 2 and 3 on August 6, 2008, at 1:00 p.m.
- 8. Bullock and Company did advertise said sale and make arrangements to conduct said sale.
- 9. A true and correct copy of one such advertisement is attached hereto as Exhibit "B."
- 10. Said advertisements of sale did include words to the effect "ABSOLUTE AUCTION (SELLS TO THE HIGHEST BIDDER NO RESERVE)."
  - 11. Plaintiffs did attend said auction sale.
- 12. Plaintiff Wakelum was the highest bidder at said sale on Parcel 3, his bid was accepted by Bullock and Company, and he was awarded said parcel by Bullock and Company, the auctioneer.
- 13. Plaintiff Ressler was the highest bidder on Parcels 1 and 2, his bid was accepted by Bullock and Company, and he was awarded said parcels by Bullock and Company, the auctioneer.
- 14. Defendant Hagood did attend said sale and did witness the bidding and the acceptance of the high bids by the auctioneer and the awards of the high bids by Bullock and Company, the auctioneer.
- 15. At the conclusion of the auction, Bullock and Company did take threewo standard RE-23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENTS, and the Auctioneer did fill in the blanks on each form in a manner consistent with the advertised terms of the auction, and

- a. did present for signature to Ressler and did in fact secure Ressler's signatures upon—the RE-23 AGREEMENTs with an ID# of LT100 for Parcel 1 and ID# LT200 for Parcel 2, a true and correct copiesy of which areis attached as Exhibit "C."; and
- b. did present for signature to Wakelum and did in fact secure Wakelum's signature upon the RE-23 AGREEMENT with an ID# of LT 300 for Parcel 3, a true and correct copy of which is attached as Exhibit "D."
- 16. After the acceptance of the high bids and the preparation and completion of the RE-23 Purchase and Sale Agreements described above, Defendant Hagood did refuse, and continues to refuse, to go through with and enter the sale contracts contemplated and promised by the terms of the absolute auction and to sign the documents necessary to effectuate said sales on the advertised terms.
- 17. Plaintiffs have properly tendered the earnest money called for in the terms of sale and RE-23 Agreements.
- 18. Plaintiffs are ready, willing and able to effectuate the sales of the Parcels to them on the terms, have been willing to do so at all times relevant hereto, and remain willing to do so.
- 19. If the property in question is sold to another buyer or buyers, Plaintiffs will suffer irreparable harm because of the unique nature of the real property involved.
- 20. Plaintiffs are without an adequate remedy at law because of the unique nature of the real property involved.

#### COUNT 1

#### **Declaratory Judgment**

- 21. Plaintiffs reallege and incorporate by reference all previous allegations.
- 22. Counts I through II are plead only against Defendant Thomas A. Hagood.
- 23. Plaintiffs are persons whose rights, status or other legal relations are affected by a contract for auction and are entitled to have a question of the construction or validity arising

under the contract and to obtain a declaration of rights, status or other legal relations thereunder by declaration of the Court.

- 24. As a result of Defendant's actions, Plaintiffs are entitled to declaratory judgment pursuant to Idaho Code Section 10-1201, et seq., against the Defendant, including findings that:
  - a. the auction in question was advertised and held without reserve and was absolute;
  - b. Defendant Hagood made an offer or offers to sell when the auction sale was advertised;
  - c. each plaintiff accepted the offer on their respective parcels described above by making the highest bid on each such parcel;
  - d. each such bid was a legitimately submitted bid;
  - e. that no later than upon the entry of each such bid with no other higher bids, and otherwise in accordance with the terms of the auction and the acceptance of said bids by the auctioneer, that defendant Hagood became absolutely committed to the sales to Plaintiffs;
  - f. Defendant Hagood was not entitled to withdraw the property from the sale simply because he was not pleased with the bids or otherwise;
  - g. Defendant Hagood's conduct amounts to a breach of his obligation pursuant to the auction contract or contracts for auction;
  - h. Defendant Hagood is obligated to enter into appropriate agreements in the form attached hereto to convey the parcels to each of the respective Plaintiffs and to convey the parcels at the time called for by said agreements;
  - i. the purchase price for each of the respective parcels be reduced and offset by any damages awarded by the Court in this action; and
  - j. the purchase price for each of the respective parcels be reduced and offset by any reasonable attorneys' fees and costs awarded by the Court to the Plaintiff's in this action;



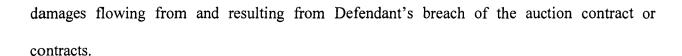
### **Specific Performance**

- 25. Plaintiffs reallege and incorporate by reference all previous allegations.
- 26. Plaintiffs are entitled to a judgment requiring, ordering and enjoining Defendant Hagood to specifically perform and enter into appropriate contracts to convey to each Plaintiff that property to which he is entitled under the auction contract or contracts.
  - 27. Plaintiffs are entitled to a judgment requiring, ordering and declaring that,
    - a. Defendant Hagood is bound as if he had entered into contracts in the form attached hereto to convey said parcels to the Plaintiffs in accordance with the terms of the advertised auction;
    - b. In accordance with I.R.C.P. 70, if the Defendant will not sign said instruments to convey the parcels at the appropriate time, the Clerk of the Court or the Court itself, at the expense of Defendant, will be empowered and authorized to sign the instruments of conveyance in place of Defendant or to enter a suitable judgment or order suitable for recording in the real property records decreeing the such conveyance has been made.

#### **COUNT 3**

#### Breach of Contract/Monetary Damages

- 28. Plaintiffs reallege and incorporate by reference all previous allegations.
- 29. Plaintiffs are entitled to a judgment for monetary damages against the Defendant, in an amount to be proven at trial with respect to each Plaintiff, which said amount will exceed \$10,000.
  - 30. Said damages to include, without limitation, any and all reasonable foreseeable



#### **COUNT 4**

#### Violation of the Consumer Protection Act

- 31. Plaintiffs reallege and incorporate by reference all previous allegations.
- 32. Count 4 is plead in the alternative to Counts 1 through 3 and only in the event that the Court finds on the basis of the Statute of Frauds or similar basis that no enforceable contract for the sale of real property exists justifying specific performance or damages against Defendant Thomas A. Hagood under Counts 1 through 3.
  - 33. Count 4 is pled as against all Defendants.
- 34. The aforementioned auction sale constituted trade and commerce as defined under Idaho Code Section 48-602(2).
- 35. The sale of real property falls within the definition of "goods" under Idaho Code section 48-602(6) and/or "services" under Idaho Code Section 48-602.
- 36. To the extent the Statute of Frauds or similar law prohibits or renders void or voidable a sale of real property at "absolute auction", Defendants conduct in advertising, conducting and otherwise representing that an absolute auction of the real property at issue in this case without full disclosure of such prohibition or potential for a void result violated the Idaho Consumer Protection Act, Idaho Code Section 48-601, et. seq., and applicable rules promulgated by the Idaho Attorney General, I.D.A.P.A. Rule 04.02.01.01, et. seq., in that it:
  - Represented that goods or services had characteristics or qualities that they did not have;
  - b. Constituted an act or practice that is misleading, false or deceptive to the

consumer;

- c. Constituted an initial offer to sell goods or services with material contingencies, conditions, or qualifications attendant to the offer without clearly and conspicuously disclosing such contingencies, conditions or qualifications (I.D.A.P.A. Rule 40);
- d. Constituted a direct or implied representation that goods or services could be purchased for a specified price, when that was not the case (Rule 60)
- <u>37.</u> Plaintiffs are entitled to recover their actual damages or \$1,000.00 per violation of the Consumer Protection Act in accordance with Idaho Code Section 48-608, whichever is greater, and a reasonable attorney fee pursuant to Idaho Code Section 48-608.

#### COUNT 5

#### **Declaratory Judgment: Duty of Auctioneers**

- 38. Plaintiffs reallege and incorporate by reference all previous allegations.
- 39. Count 5 is plead as against as against all Defendants.
- 40. That Bullock and Company Realtors, L.L.C., Scott Bullock, Bill Downs Auction Service, Inc, and Larry Downs (the "Auctioneer Defendants") worked together jointly to hold the absolute auction that is the subject of this lawsuit and were jointly and severally responsible as auctioneer for that auction.
- 41. Plaintiffs are entitled to an declaratory judgment and order of this Court in accordance with Idaho Code Section 10-1205, as said judgment and order would have the effect of terminating a controversy or removing an uncertainty.
- 42. Specifically, Plaintiffs are entitled to a declaratory judgment declaring and decreeing that:

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION-8

- a. Said Auctioneer Defendants were duly authorized and empowered to

  make and execute a duly sufficient memorandum of sale on behalf of

  Defendant Hagood for purposes of the statute of frauds;
- b. That the three standard RE-23 COMMERCIAL/INVESTMENT REAL

  ESTATE PURCHASE AND SALE AGREEMENTS prepared in this case

  would have been sufficient memorandums for purposes of the statute of

  frauds had the same been executed by any of the Auctioneer Defendants;

  and
- c. That the Auctioneer Defendants, as a matter of equity, still have the power and ability to execute said RE-23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENTS and that Defendant Hagood is estopped from denying said authority,
- 43. In accordance with Idaho Code Section 10-1208, Plaintiffs are entitled (a) to any reformation of said RE-23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENTS so as may be necessary to make them current, and (b) to an order and judgment compelling and requiring the Auctioneer Defendants to execute said reformed RE-23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENTS and authorizing the Clerk of the Court or the court itself to execute in the Auctioneer Defendants stead in accordance with I.R.C.P. 70.

#### COUNT 6

#### **Negligence**

- 44. Plaintiffs reallege and incorporate by reference all previous allegations.
- 45. Count 4 is plead in the event that the Court finds pursuant to Count 5 that the

Auctioneer Defendants no longer have authority to execute Purchase and Sale Agreements on behalf of Plaintiff Hagood.

- 46. Count 6 is pled as against Defendants Bullock and Company Realtors, L.L.C., Scott Bullock, Bill Downs Auction Service, Inc, and Larry Downs.
- 47. The Auctioneer Defendants owed a duty to the Plaintiffs timely execute a sufficient memorandum of sale for the absolute auction in order to satisfy the statute of frauds.
  - 48. The Auctioneer Defendants failed to perform this duty.
- 49. The failure to perform said duty amounted to negligence on the part of the Auctioneer Defendants
- 50. Plaintiffs have been damaged by the Auctioneer Defendants failure to perform said duties in an amount to be proven at trial.

37.

#### ATTORNEYS' FEES AND COSTS

Plaintiffs have been required to retain the services of Givens Pursley LLP to prosecute this matter. Plaintiffs have incurred and will continue to incur attorneys' fees and costs in connection with this lawsuit pursuant to contract, and Idaho Code Sections 12-120(3), and 12-121 and 48-608; and I.R.C.P. 54. Plaintiffs are entitled to their reasonable attorneys' fees and costs in the amount of \$3,000.00 in the event of a default judgment, or in such other and further amount as may be awarded by the Court at the appropriate time in the proceedings.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment in their favor and against the Defendant, both jointly and severally, for:

1. On Count 1,

2. On Count 2,

3. On Count 3, a monetary judgment in favor of Plaintiffs and against Defendant

Hagood in an amount to be proven at trial with damages with respect to each Plaintiff;

4. On Count 4, in the alternative to the relief sought in Counts 1 through 3, and only

in the event the Court determines that no enforceable contract existed under the Statute of Frauds

or similar law, then for an award of damages in an amount to be proven at trial against all

Defendants, jointly and severally.

5. On Counts 5 and 6, for the relief sought in each said count.

5.6. On all Counts, a judgment and order requiring Defendants to pay to Plaintiffs,

pursuant to the Idaho Code sections cited herein, their reasonable attorneys' fees and costs

incurred in connection with this lawsuit; and

6.7. For such other and further relief as this Court deems just and appropriate in the

premises.

DATED this \_\_\_\_\_ day of June, 2009.

GIVENS PURSLEY LLP

Thomas E. Dvorak

Attorneys for Plaintiffs

## **CERTIFICATE OF SERVICE**

· · · · · · · · · · · · · · · · · · ·	June, 2009, I caused to be served a true and
correct copy of the foregoing by the method indic	ated below, and addressed to the following:
Jay Gustavsen Davison, Copple, Copple & Cox Washington Mutual Capitol Plaza, Suite 600 199 North Capitol Blvd. P.O. Box 1583 Boise, Idaho 83701	U.S. Mail Overnight Mail Hand Delivery Fax
Phillip J. Collaer Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	U.S. MailOvernight MailHand DeliveryFax
Terry Michaelson Hamilton Michaelson & Hilty, LLP 1303 12th Avenue Road P.O. Box 65 Nampa, ID 83653-0065	U.S. Mail Overnight Mail Hand Delivery Fax
	Thomas E. Dvorak



#### Legal Descriptions Parcel 1

COMMENCING at the Northwest corner of the South Half of the Southeast Cuarter of Section 13, Township 3 North, Range 2 West, Boise Meridian, Canyon County, Idaho, and running

East a distance of 276.1 feet along the North boundary line of the aforedescribed South Helf of the Southeast Quarter of Section 13 to the POINT OF BEGINNING; thence South a distance of 322 feet, more or less, to the center of the Dewey Irrigation Lateral; thence South 75" 30' East a distance of 355.6 feet to the Intersection of the centerline of the State Highway; thence North 58° 6' East a distance of 74.3 feet along the centerline of the State Highway; thence North 44° 19' West a distance of 481.4 feet to the intersection of the North boundary line of the South Half of the Southeast Quarter of the aforedescribed Section 13; thence West a distance of 71.9 feet to the POINT OF BEGINNING.

#### Legal Description for Parcel 2

A part of the South One-Helf of the Southeast Quarter of Section 13, Township 3 North, Range 2 West of the Bolse Meridian, Canyon County, Idaho, more particularly described as follows:

BEGINNING at the Northweat comer of the South One-Half of the Southeast Quarter of Section 13, Township 3 North, Range 2 West of the Boise Meridian, and running South 312.7 feet along the North and South center line of the aforesaid described Section 13; thence South 86\*12' East 233.0 feet along the center of the Dewey Irrigation Leteral; thence South 76\*30' East 44.4 feet; thence North 322.0 feet, more or less, to the Intersection of the North boundary line of the South One-Half of the Southeast Quarter of the above described Section 13; thence West 276.1 feet to the point of beginning.

## Legal Description for Parcel 3

The North 300 feet of the Southeast Quarter of the Southwest Quarter and a portion of the South One-Half of the Northeast Quarter of the Southwest Quarter, Section 13, Township 3 North, Range 2 West of the Boise Meridian, Canyon County, Idaho, all more particularly described as follows:

Commencing at the Southeast corner of the Northeast Quarter of the Southwest Quarter, Section 13, Township 3 North, Range 2 West of the Boise Meridian, Canyon County, Idaho and running

South 0° 33′ 54" West 300.00 feet along the Easterly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 to a point

North 89° 21' 11" West 1,309.37 feet along a line parallel with and 300.00 feet Southerly from the Northerly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 to a point; thence

North 0° 18' 47" East 300.00 feet along the Westerly boundary of the said Southeast Quarter of the Southwest Quarter, Section 13 more or less to the Northwest corner thereof; thence continuing

North 0° 18' 47" East 221.27 feet along the Westerly boundary of the Northeast Quarter of the Southwest Quarter, Section 13; thence

South 89° 41' 13" East 200,00 feet to a point; thence South 69° 38' 40" East 63.86 feet to a point; thence

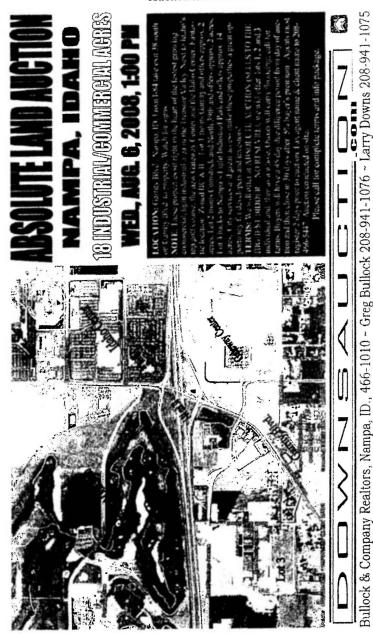
South 89° 21' 36" East 801.58 feet along a line parallel with and 202.00 feet Southerly from the South boundary of East Newby Street as shown on the plat of Nampa Industrial Corporation Fifth Addition Phase No. 1, Nampa, Canyon County, Idaho, according to the plat filed in Book 27 of Plats at Page 47, records of said County, more or less to the Westerly boundary of Block 2 of said Plat; thence

South 0° 33' 54" West 200.99 feet along said Westerly boundary of said Block 2 and its Southerly extension, more or less to a point on the South boundary of the Northeast Quarter of the Southwest Quarter, Section 13; thence

South 69° 21' 11" East 250.00 feet along said Southerly boundary of the Northeast Quarter of the Southwest Quarter, Section 13 to the POINT OF BEGINNING.

## EXHIBIT "B"

**Auction Advertisement** 



#### **EXHIBIT "C"**

JULY 2008 EDITION **RE-23 COMMERCIAL/INVESTMENT** REAL ESTATE PURCHASE AND SALE AGREEMENT This is a legally sinding contract, read the entire document, including any attachments. If you have any questions, consult your attorney animor accountant before signing. DATE 8-6-08 LISTING AGENCY BULLEK & Lo. Office Phone # 466-1017 Phone # 9-11 -E-Mall Listing Ageni Office Phone #898-1400 E-Mail John Por recrease was ment of home 63-841 . TASTONS RE- Italdings 240 Man 1. BUYER: T. SUTER: 17
(HereInater called "SUYER") agrees to purchase, and the undersigned SELLER agrees to sail the following described real estate hereinatter referred to as "PROPERTY" COMMONLY KNOWN AS FIG. 2 FREES BREETY BLUD

CIN JOHN ST. 2000 | Security Breeze | County Bree \_County, ID, Zip CITY A A A S OR Legal Description Attached as addendum # (Addendum must accompany original offer.) 2. \$ 257, 250.00 PURCHASE PRICE: The Hundred South for the payable upon the following TERMS AND CONDITIONS (not including challing offse): Frat and Zerol170 Wall Fil 3. FINANCIAL TERMS: Note: A+C+D must add up to total purchase price. 26 27 for the benefit of the parties hereto. (B), ALL CASH OFFER: DNO IN YES IF CASH OFFER, BUYER'S OBLIGATION TO CLOSE SHALL NOT BE SUBJECT TO ANY FINANCIAL CONTINGENCY, BUYER agridus to provide SELLER within \_\_\_\_\_\_\_ business days from the date of acceptance of this agreement by all parties, evidence of sufficient funds and/or proceeds necessary to close transaction. Acceptable documentation includes, but is not limited to, a copy of a recent bank of financial statement of contract(s) for the sale of BUYER'S current residence or other property to be sold. (C). S FINANCING:

Additional financial terms are specified under the heading "OTHER TERMS AND/OR CONDITIONS" (Section 5 below).

Additional financial terms are contained in a financing addendum of same date, alteched hereto, signed by both parties. (D). \$ 0.00 APPROXIMATE FUNDS DUE FROM BUYERS AT CLOSING: (Not including closing casts) Cash at closing to be paid by BUYER at closing in GOOD FUNDS, includes: cash, electronic transfer funds, certified check or ceshior's check. 4. SECTION 1631 TAX DEFERRED EXCHANGE: By checking either or both of the boxes that follow, it is hereby acknowledged by the parties that the Buyer, Beller intends to use the purchase and sale of the PROPERTY as an integral part of a tax deferred like-kind exchange as allowed under Section 1631 of the Internal Revenue Code (the "Exchange"). For purposes of this paragraph, the party participating in the Exchange shall be identified as the "Exchange"; I sither box above is obtooked, than the parties recognize that a material part of the Exchange's consideration for entering into the agreement for the purchase and sale of the PROPERTY is the successful completion of the exchange. The parties agree to assist each other by the number of the exchange by cooperating with each other by signing any and all relevant documents provided that the party not doing the Exchange shall not incur any flabilities, costs, fees, or taxes in excess of those which that party would have incurred had this transaction not been an Exchange. 5. OTHER TERMS AND/OR CONDITIONS: This Agreement is made subject to the following special terms, considerations end/or confingencies which must be satisfied prior to closing and the satisfied I.M Vortex muse And But sille Dings 6. ITEMS INCLUDED & EXCLUDED IN THIS SALE: All existing follures and fillings that are attached to the PROPERTY are INCLUDED IN THE PURCHASE PRICE (unless excluded below), and shall be transferred free of flens. These include, but are not limited to, all selen-owned attached floor coverings, ettached television enternase, satelike dish, stitsched plumbing, bathroom and lighting fintures, window screens, screen doors, storm doors, storm windows, whichew coverings, grange door open-rick) and transmitter(s), exterior trace, placing or structure, and transfer in the structure and futures and futures are futures, statched fireplace equipment, awrings, ventilating, cooling and healing systems, all ranges, overs, built-in dishwachers, fuel tenks and trigution fixtures and equipment, that are now on or used in connection with the PROPERTY and shall be included in the sele unless otherwise provided herein, BUYER should satisfy himselffreed that the condition of the included fitems is acceptable.

(A). ADDITIONAL ITEMS SPECIFICALLY INCLUDED IN THIS SALE: Date 8 6 - 07
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National Association of REALTOR: ) Daly

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION- 16

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JULY 2008 EDITION

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RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT

Page 1 of 6

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	_			_			STATE PURCHASE AND SALE A				Page 3 of 6
	P	ROPERTY ADDRESS	genter de	gree o	Cons	r tz	BLID	1D#:	471	<i>ee</i>	
110 120 121 127 127 123	(	deemed to have: (a) com- transaction and (c) assum- agreed in writing to repair of	ithin the stri placed all ins ad all liabilit corract	st time per peotlons, l y, respons	iod specified investigation libitity and a	d give i ns, revi expense	to SELLER written notice of disapets of applicable documents and a for repairs or corrections other ti	disclosures han for Ite	i; (b) elecie me which S	d to proces SELLER has	d with the seiwtertto
125 120 127 128 129 130		pertinent section(s) of wri their option, may correct th	iten inspect a liame as s auar, thon b	lan reports pecified by	. SELLER S	hali hav RS In th	LLER willen nolice of disapprove business day(s) in view of the large of the large per letter or may elect not to do a ill continue with the transaction an	which to res p. If the SE	spond in wi LLER agre	riting, The S as to correc	itho liems
131 132 133 134		have the option of either c	ontinuing the	transactio	on without th	no SELI	of respond in willing within the stri LER being responsible for correcti with the transaction and demand to	ing these d	eficiendes	or giving th	
125 136 137 138 138 140		elected to proteed with the correct, SELLER shall make hold SELLER harmless from	Iransection the PROPI n all liability,	without rep ERTY avail claims, do	pairs or com labie for all i mands, dan	ections inspecti nages s	the strict time periods specified, B other than for items with SELLER one. BUYER shall keep the SELLER one buyer and repair any demages overnment employee without the p	has other ERTY free arising fro	wise agreed and clear of the inspe	s in writing to of liens; Inde rations, No li	o repair or amnify and nepections
42		. MINERAL RIGHTS: Any rood to by the parties in writing		rel rights a	ppurenant:	to the p	roperty are included in and are par	t of the sale	of this pro	petty unless	otherwise
44 45 46 47	11 rigi	. WATER RIGHTS: Any ar	id all water r	ighis inclui property si	ding but not re included i	limited n and a	to Water systems, walls, springs, se a part of the sale of this property	lakes, sire runiass oth	ems, ponds Larwise agre	, rivers, dita red to by the	shes, ditch parties in
at.	by SE		otherwise sta	ted harein	. The below	COSIN W	e incurred by BUYER and SELLER dil be paid as indicated. Some cost quired repair costs only. BUYER	is are subje	of to foan p	regress sequ	uirements.
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		COSTS Appreisal fee	BUYER	SELLER	EQUALLY	N/A	COSTS Flood certification / tracking fee	BUYER	SELLER	EGUALLY	
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59	1			<b>!</b>		<b></b>	<u> </u>			<b></b>	
54 56 58	Eas	th party agrees to pay one-hal	of excrow/c	oliaction fe	es and east	urea w	d, then the escrow/collection halder o fees. Code § 55-2801 at sea, regulars that	_			
56 59 50 17	real DIS unit	i property" deliver to the trans CLOBLIRE FORM, "Resident	leree or his Al real prope III in e struc	agent, will iny" means lure of any	un ten (10) : real proper : size. This :	days of ty that i also ap	the screptance of an offer to pure s improved by a building or other a plies to real property which has a	iheso, a St Iructure the	CLLER PRO	PERTY CC 1) to four (4	) dwelling
34   35   36	haz Bou Den	ards. The term lead-based paires of the lead. Pursuant to some with disabilities (urises a	int hazard b 12 USCA § 4 ny child who	Intended 651 of soq is less than	to identify is ., "target ho: : six (6) year	ad-bas using" r s of age	teria of "largei housing" require ca: ed paint and all residential laad-co maans any housing constructed priv a resides or is expected to reside in	intelning du or io 1978, auch houel	Mis and so except how ng for the e	ils regardle: sing for the identy or pen	edelly or edelly or eons with
18 ( 18 (	or A osci	single-family dwalling unit in	a siructure or occupied, lated one (1)	that contai in whole o	ins more thi or in part, as	in one	ingle-family dwelling, including affac (1) separate residential dwelling u ne or residence of one (1) or more used or occupied, or intended to be	nit, and in	which each	such unit l	s used or
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	JULY 2008 POINTON RE-23 COMMERCIAL / INVESTMENT REAL ESTATS PURCHASE AND SALE AGREEMENT PAGE 4 of 6
	PROPERTY ADDRESS: Hop 2 Auce Censily Blad. 10#: LT 100
172 170 174 176 176 177 176 179	The subject property [1] is [1] is not defined as "Turgel Housing" regarding lead-based paint or lead-based paint hazards. If yes, BUYER haraby suknowledges the following: (s) BUYER has been provided an EPA approved lead-based paint hazard information pamphlet, "Protect Your Family Promited in Your Home," (b) receipt of the Seller's Disclosure of information and Acknowledgmant Form and have been provided with all records, test reports or other information, if any, related to the presence of lead-based paint hazards on said property (s) that this contract is contingent upon SUYERS right to have the property tested for lead-based paint hazards to be completed to later then forcely [2] waives [3] does not waive this right, (e) that if feet results show unacceptable smouris of lead-based paint on the property. BUYER has the right to cancel the contract subject to the option of the SELLER (to be given in writing) to elect to remove the lead-based paint and correct the problem which must be accomplished before doesing, (f) that if the contract is cancelled under this clause, SUYER's earnest maney deposit will be returned to SUYER.
181 102 183	16. Square footage verification: Buyer is aware that any reference to the square footage of the real property or improvements is approximate. If square footage is material to the buyer, it must be verified during the inspection period.
164 185 186 187 168 188 180	17. COVENANTS, CONDITIONS AND RESTRICTIONS (CCERs); As part of the BUYER'S inspection of the PROPERTY as set forth above in Section 8, BUYER is responsible for obtaining and reviewing a copy of eny CCER's which may affect the PROPERTY. BUYER shall have days (but in no event shall such time period exceed that time period set forth for inspections in Section 9) to review and approve of any such CCERs that may affect the PROPERTY. Unless BUYER definer to SELLER a written and signed objection to the terms of any applicable CCERs with particularity describing BUYER's reasonable objections within such time period as set forth above, BUYER shall be deemed to have conclusively waived any objection to the terms of any CCERs affecting the PROPERTY.
02 93	18. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In audition, should the PROPERTY be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voldable at the aprion of the BUYER.
95 95 97 98	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the inspection/Due Diligence period and thereafter, BUYER agrees to purchase the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless oftenwise agreed upon by the parties in writing. BUYER will assume all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the drowing in its present condition, ordinary weer and tear excepted.
88 00 01	20. CLOSING AGENCY: The Closing Agency for this transaction shall be
80	21. CLOSING DATE: On or before the closing date, BUYER and SELLER shell deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than "Closing Date" means the date on which all documents are either recorded or scoepted by an exprovioniseation agency and the sale proceeds are available to SELLER.
97 96 99 10	22. POSSESSION/PRORATION: BUYER shell be ankited to possession QUPON CLOSING or DATE.  TIME DAM DAM Takes and water assessments (using the lest available assessment as a basis), rents, insurence premiums, interest and reserve on items, encumbrances or obligations assumed and utilities shall be prorated as of the day of closing or Any tenant deposits held by SELLER shall be credited to BUYER at dosing.
11 12 13 14	23. "NOT APPLICABLE" DEFINED: The letters "n/s," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the perios have contempiated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.
7	24. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency, the BUYER and SELLER will confirm facsimite or electronic transmitted signatures by signing an original document.
10 11 13	25. BUSINESS DAYS & HOURS: A business day is herein defined as Monday through Friday, 8:00 A.M. to 8:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Sakurday or Sunday, nor shall a business day include any legal holiday recognized by the state of Idaho as found in Idaho Code \$73-108. The time in which any soll required under this agreement is to be performed shall be computed by excluding the date of execution. If the jast day is a legal holiday, then the time for performance shall be the next subsequent business day.
10 17 18 19 10 11 12 13 14 15 17	26. DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Barnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER's Broker on behalf of SELLER and BUYER selated to the transaction, inducing, without limitation, the costs of title insurance, excrow fees, credit report fees, inspection fees and stroney's test; and said holder shall pay any balance of the Earnest Money, one-helf to SELLER and one-helf to SELLER's Broker provided that the amount to be paid to SELLER's Broker shell not acceed the Broker's agreed to commission, SELLER and BUYER specifically acknowledge and agree that if SELLER's elect to accept the Earnest Money as liquidated damages, such shall be SELLER's sole and exclusive remedy, and such shall not be considered a penalty or forfeiture, if SELLER elects to proceed under (2), the holder of the Earnest Money shall be antitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, illied insurance, excrow fees, credit report fees, inspection of the matter (5 SELLER and Buyer and SELLER and Buyer and selection of the Earnest Money of SELLER's shall pay for the costs of title insurance, excrow fees, credit report fees, inspection fees and attoriety's fees, if any. This shall not be considered as a waiver by BUYER of any other tawful right or remedy to which BUYER may be entitled.
	BUYER'S Initials ( Y ( ) ) Date S ( ) Date S
	Trips form is private and distributed by the Idaho Association of REALTORSE, Inc. This form has been designed and is provided for two by the red cable professionals who are members of the National Association of REALTORSE, USE by Any OTHER PERSON IS FORMATICE, of Dopphich Idaho Aspociation of REALTORSE, Inc. All rights reserved.  118 V 2018 EPITTORS DR. 2 COMMARKECIAL INVESTMENT REAL ESTATE DISCOVER AND SALE AGREEMENT PROPERTY PROPERTY.

	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL RETATE FURCHASE AND SALE AGREEMENT Page 5 of 6										
	PROPERTY ADDRESS: Agp. 2 Adres & Company Bland 10x: LT 100										
238 240 241 242 243 244	27. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal sction or proceedings which are in any way connected with this										
245 248 247 248 249 250	of any controversy repording the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions ere received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to lake any action but may await any proceeding, or at Brokers or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or things of value into a court of competent jurisoidation and staff recover court costs and responsible attorney's fees.										
251 252	29. THE RESPONSIBLE BROKER SHALL BE										
253 254 255 264 247	30. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, she validity, tagainty or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.										
250 250 200 201	31. OCUNTERPARTS: This Agreement may be executed in counterparts, Executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall together contailute one and the same instrument.										
263 263 264	32. SALES PRICE INFORMATION: Pursuant to idaho Code §64-2088(8)(g), a "sold" price of real property is not confidential client information,										
268 269 267 266	33. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).										
269 270 271 272 273 274	Settion 1:  A. The brokerage working with the BUYER(8) is acting as an AGENT for the BUYER(\$).  B. The brokerage working with the BUYER(\$) is acting as a LIMITED DUAL AGENT for the BUYER(\$), without an ASSIGNED AGENT.  The brokerage working with the BUYER(\$) is acting as a LIMITED DUAL AGENT for the BUYER(\$) and has an ASSIGNED AGENT exiting solely on behalf of the BUYER(\$) is acting as a NONAGENT for the BUYER(\$).										
278 278 277 278 279 280 281	Socion 2:    Socion 2:   Socion 3:   Socio										
282 283 284 289 289 280 287	Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review, EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.										
286 286 290 291	34, AUTHORITY OF SIGNATORY; If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.										
295 294 294 293 393	35. ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the perties and no warranties, including any warranty of habitability or representations have been made or shall be binding upon either party unless herein sol forth.										
297 298	36. Time is of the Essence in this agreement.										
200 200 301 302	37. ACCEPTANCE: This offer is made subject to the accepta/life of SELLER and BUYER on or before (Date)  Auc. (200)  Time in which PROPERTY is located)  [ 20										
	RUYER'S Initials ( / )   Date 8   P SELLER'S Initials ( )   Date 9   Date 9										

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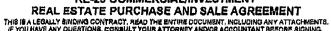
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38. BUYER'S SIGNA	•	•			
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	-		BUYER (Print Name)		
			Phone #		
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37. SELLER'S SIGNA	ATI IDEC:				
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SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, SPECIFIC PERFORMANCE AND BREACH OF CONTRACT AND BREACH OF CONSUMER PROTECTION- 21

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JULY 2008 EDITION

## **RE-23 COMMERCIAL/INVESTMENT**





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1. BUYER:		RE Holdin	45 prin	zweizh za			
	CNI44 "BUYER"	) agrees to purchase, as	d'ine undersigne	d SELLER agrees to s	all the following descri	bed real extate had	einafter referred to
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avidano	o of sufficient fur	nds and/or proceeds necession or contract(s) for the	essary to close fra	nsaciton, Acceptable di	cumentation includes.	but is not timited to	, a copy of a recer
	BINNINGS RESIDEN		1816 01 60 1 64 6 1	With the following of the	ar property to be sold.		
(C). S	ional financial le	, FINANCING; rms are specified under 1	he heading "OTH	ER TERMS AND/OR C	ONDITIONS' (Section	5 below).	
Addit	ional financial te	rms are contained in a fir	anding addendur	of same date, attache	d hereto, signed by bot	n parties.	
(D). 6 0 00 by BUYER		APPROXIMATE FUND DD FUNDS, includes: cat				ng casta) Cush at	diosing to be paid
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he "Exchang	er." If elitter bo	x above is checked, the and sale of the PROPE by cooperating with each	n the parties rec	ognize that a malerial	part of the Exchanger	's consideration fo	r entering into the
completion of not incur any	such exchange ilabilities, costs,	by cooperating with east lees, or laxes in excess	other by signing of those which the	any and all relevant do I party would have incu	sumants provided that I tred had this transactio	ihe perly noi doing n not been an Excl	the Exchange sha lange,
5, OTHER T	PERMS AND/O	R CONDITIONS: THE	Agreement is me	ide subject to the follow	ing special terms, cons	alderations and/or o	onlingonglas which
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and ordinances of any govern	menisi unit, urchase mor	and rights rey at date	of way and of closing, h	easéan , anail oi	ramanty deed ⊡special warranty deed late or rakhoad deeds, building or use nite established or of record. Llens, er engumbrancas or defects which are to emant.	icumbrano	en or defect	s to be discr	arged b
					ages available other than those lis liable that will give the buyer additio			es to this ag	reemei
(A), PRELIMINARY TITLE CO	MMITMENT	: Prior to cl	asing the We	neactio	SELLER OF BUYER Shall furni	sh to BUYE	R a prelimi	inary commit	ment of
title insurance policy showing I	he condition	of the title i	to said PRO	PERTY	BOYER shall have 5 be to writing to the cond	isiness day	er moti (e)	eipt of the pr	eliminar
commitment if RUYER doss	not so obje	al BUYER	h ad ileda i	nomed	is have accepted the conditions of t	he lilie it	la acread i	har if the titl	a of eal
PROPERTY is not marketable. SELLER, BUYER'S Earnest &	or cannot b ioney depot	e mage so v sit will be re	withinC sturned to B	UYER	business day(s) after notice containing and SELLER shall pay for the cost of	g a written i Ulie insurai	ilaisment d ise cancell	i doinci is de ation les, es	Hverad 1 Crow an
logal foos, if any.			1,	_					
(B), YTTLE COMPANY: The pa	rdes agree t	hai ZZ	1 and	<u>l</u>	inf9			Title (	Compan
located at		***************************************			shall provide the title	policy and	preliminary	report of com	milmeni
(C). STANDARD COVERAGE	OWNER'S	POLICY:	BELLER oh	eli withi	y w reseasable time after closing fumi	th to BUY	ER a tille ir	ieurance pol	by in the
amount of the purchase price of	the PROP	ERTY show	ing marketa	bia and	insurable title subject to the ilens, one	umbrances	and defect	s elsewhere	sot out i
coverage bolley is limited to	mutters of t	nez ny cio public rece	rd. BUYER	witting .	ise provided herein. The risk essum paive a ILTA/ALTA Owner's Policy of T	ille insurer	one quarp	any in line a ombany, at E	LYER'
raquest, can provide informet	on about the	evallability	, desirabili	y, cove	age and cost of various title insurance	e coverage	s and end	orsements.	BUYE
desires title goverage other the otherwise provided harein.	an that requ	uired by thi	s paragrapi	h, BUY	ER shall instruct closing agency in w	riting and i	oay any inc	reaso in co:	it unles
					The lander may require that BUYER of public record and additionally insul				
public record. This extended c									
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119 120 121 122 123	deemed to have; (2) transaction and (c) a agreed in writing to re	MOVAL OF INSPI not within the stite completed all ins assumed all liability pair or correct.	ECTION DUE Il lime perio pections, in y, responsib	E DILIGEN Id specified vestigation lifty and e	CE CO 1 giva i 1s, revit 1spense	NTINGENCIES: o BEILLER wilten notice of disap- w of applicable documents and of for repairs or corrections other if	disclosures han for ite	r; (b) electe ma which S	ed to proceed SELLER has	ed with the sotherwise
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31	3), if SELLER elects have the option of eli written notice within p	not to corrept the the has continuing the business	disapproved transaction days that the	items, or a without they will not o	does no la SELI lantinua	ot respond in writing within the stri LER being responsible for correcti with the transaction and demand t	ct time per ng these o ne relum o	iod specifia leficiencies I their Same	d, then the or giving the st Money.	BUYER(S) • SELLER
36 37 38 39 40 41	elected to proceed wi correct. SELLER shall hald SELLER harmies may be made by any local law.	th the transaction in make the PROPE is from all liability, governmental buil	wilhoul raps ERTY availal claims, dem ding or zoni	ilis or carri ble for all i lands, dam log inspect	ecliona nspecii iagaa a or or g	the strict time periods specified, B other than for items with SELLER ons. BUYER shall keep the PROP no costs; and repair any demages overnment employee without the p	has other ERTY free erising fre other conse	wise agreed in the inspe of of SELLI	d in writing of liens; indi of liens; indi odlors, No i ER uniess r	to repair or amnify and inapections equired by
41 43 44	10. MINGRAL RIGHTS: agreed to by the panies in t		ral righta ap	purtenant I	o the p	roperty are included in and are part	of the ask	e of this pro	perty unless	olherwise
47						to water systems, wells, oprings, se a part of the sale of this property				
51	12. ADDITIONAL COST by law or required by lends SELLER agrees to pay up required repair costs in exce	r, or otherwise sta	on to those li ted herein. T	The below	oosis w	v incurred by BUYER and SELLER fill be paid as indicated. Some cost quired repair costs only. BUYER	s are subje	ect to loan p	yogram req	uiremenis.
	COSTS Apprehenties	BUYER	SELLER	SHARED EQUALLY	N/A	COSTS Flood certification / tracking fee	BUYER	SELLER	SHARED EQUALLY	
	Long term Escrow lees			سسا		Title ins. Signiderd Coverage owners policy	<del> </del>			-
	Closing fee			-		Lendara Extended Policy	<del>                                     </del>			-
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	Weter Rights		<del></del>		-		1	<u></u>	<del></del>	$\vdash$
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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 4.0	ə <i>1</i> 6
	PROPERTY ADDRESS: App. 2 Adams 1 397 ID#: 17200	_
772 774 776 778 778 779 80 81 82 83 84	The subject properly II is _is not defined as "Target Housing" regarding lead-based paint or lead-based paint hazard paint hazards. If yes, BUYER here exhausted the following: (a) BUYER has been provided an EPA approved lead-based paint hazard information pempinter, "Protect Your Pamp!" (b) receipt of the Seller's Disclosure of Information and Asknowledgment Form and have been provided with all records, rets reports other information. If any, related to the presence of lead-based paint hazards on said property. (c) that this contract is contingent upon BUYER8 right to hat the property tested for lead-based paint hazards to be completed no leter than	ON CON
85 87 88 89 89 00	17. COVENANTS, CONDITIONS AND RESTRICTIONS (CC2Rs); As part of the BUYER'S inspection of the PROPERTY as set forth above Section 9, BUYER is responsible for obtaining and reviewing a copy of any CC2R's which may affect the PROPERTY. BUYER shall have	ne ?'s iny
93 93	18. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materiall damaged by fire or other destructive cause prior to closing, this agreement shall be voldable at the option of the BUYER.	lly
95 96 97 98	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the haperston/Due Diligence period and thereafter, BUYER agrees to purchas the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing BUYER will assume all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the closing in its present condition, ordinar wear and test excepted.	æ.
)4 (4)	20. CLOSING AGENCY: The Closing Agency for this transaction shall be Title One	
)2 )3 )4 )5	21. CLOSING DATE: On or before the closing date, BUYER and SELLER' shall deposit with the Closing Agency all funds and instruments necessary to complete the sale. The closing date shall be no later than	to ali
77 14 15 15 15	22. POSSESSION/PROPATION: BUYER shell be entitled to possession VPON CLOSING or DATE TIME DAM DPM. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest and reserve on liens, anoumbrances or orbigations assumed and utilities shall be prorated as of the day of closing or Any tenent deposits hold by SELLER shall be credited to BUYER at closing.	51 '
2	23. "NOT APPLICABLE" DEFINED: The letters "n/a," "WA," "n.a." and "N.A." as used herein are abbreviations of the term "not applicable." Where this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated cartain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.	ib G
7 8	24. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.	)T /•
2 3 4	25. BUSINESS DAYS & HOURS: A business day is baselin defined as Monday through Friday, 8:00 A.M. to 6:00 P.M. In the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any logal holiday recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any sot required under this agreement is to be performed shall be computed by excluding the date of execution, if the last day is a legal holiday, then the time for performance shall be the Post subsequent business day,	y
3 4 5	26. DEFAULT: [I_RUYER_defaults in the performance of this Agreament, SELLER has the option of: (1) accepting the Barnest Money as liquidated damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make domand upon the holder of the Barnest Money, the casts incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without fimitation, the costs of title insurance, escrew fees, credit report fees, inspection fees and attorney's fees; and said holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER's Groker, provided that the amount to be paid to SELLER's sloke shall not exceed the Broker's great to commission. SELLER and BUYER pedifically acknowledge and agree that if SELLER's sloke shall not exceed the Broker's great to commission. SELLER and BUYER specifically acknowledge and agree that if SELLER's sloke shall not be considered a penalty or forteliure, if SELLER elects to proceed under (2), the holder of the Earnest Money shall be entitled to pay the costs incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, title insurance, excrew fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the returned to him/her and SELLER shall pay for the costs of title insurance, excrew fees, credit report fees, inspection fees, Brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.	erydses:
	BUYER'S Initials (	 j

	JULY 2008 EDITION	RE-23 COMM	arrcial / inves	IMENT REA	AL ESTATE PURCHA	be and sale ac	REEMENT	Page 6 of 6
	PROPERTY ADDRESS;_	App à	Aus	A	3974		1081 1720	0
258 240 241 241 243	Agreement, the prevailing on appeal.	Si if eliher pa party shall be s	rty initiales or def smittled to recover f	ends any a rom the nor	rbitration or legal acili -pravailing party reaso	on or proceedings and a disco	which are in any way itorney's fees, including :	connected with this such costs and feed
244 245 246 247 248 248	28. EARNEST MONEY of any confeversy regards	ng the Earnest Yey and things y's option and	Money and Prings of Value, Broker of sole discretion, m	of value had or closing ag ay interples	d by Broker of Glosing Joncy Shall not be req Id all parties and dep	agency, unless m ulred to leke any	uwai written instructions action bui may awali an	are received by the w proceeding, or at
250 251 288	29. THE RESPONSIBLE	Broker Sha	LL BB	Janie	. Silly			
263 264 265 266 258	30. SEVERABILITY: In unenforceable in any respe	the case that a	my one or more of	the provisio	/ ns comsined in this A	greement, or any a shall not in any wa	ipplication thereof, shall y be affected of impaired	be invelid, Hlegal or Ithareby.
258 239 260 261	31. COUNTERPARTS: identical copies of the same shall together constitute on	ne agreomoni, i	Esch identical cop	nd in count y of an agre	arparts. Executing an rement signed in cour	agreement in cou nterparts is deeme	interparts shall mean th d to be an original, and	è signature of two attidentical copies
282 283 264	32. SALES PRICE INFO	ORMATION:	Pursuant to Idaho	Code §54-2	063(6)(d), a "sold" pric	e of real property i	a not confidential cilent in	formation.
265 266 267	33. REPRESENTATION brokerage(s) involved had it	I CONFIRMA the following re	TION: Check or lationship(s) with ti	e (1) box in Mabuyer(1	Section 1 and one (1) 3) and SELLER(S).	box in Section 21	below to confirm that in li	ris trenseption, the
169 270 271 272 273 274 278	B. The broker     C. The broker     acting sole     D. The broker	rage working w rage working w ily on behalf of	din the BUYER(5) Ith the BUYER(5) I the BUYER(5).	is acting a is acting a		GENT for the BU' GENT for the BU'	YER(S), without an ASS YER(S) and has an ASS	
176 177 178 179 160	☐ B. The broker. ☐ C. The broker acting sole	age working w age working w iy on behalf of	/ith (he SELLER(S /ith (he SELLER(S   the SELLER(S).	i) is acting i		AGENT for the SE AGENT for the BE	LLER(S), without an AS LLER(S) and has an AS	
87 84 84 86 87	Each party signing this doc real estate commission and was made available for Intel BROKERAGE UNLESS THE	i has consenter spection and r	d to the relationshi eview. EACH PAI	ip confirmed RTY UNDE	l above, in addition, a RSTANDS THAT HE	ach party confirma	rochure adopted or appr a thut the brokerage's ag R* AND IS NOT REPF	oved by the Ideho lency office policy LESENTED BY A
90 89 90 81	34. AUTHORITY OF SIG agreement on its behalf wan					o, trusi, estate, o	r other entity, the parso	ald guilly executing this
92 96 94 95 96	36, ENTIRE AGREEMEN Warraniles, including any wa	dT: This Agree irrenty of habita	ement, including a bility or representa	iny Addend ilions have t	iume or axhibite, con seen made of shall be	etilutes the antira binding upon eithe	Agreement between the party unless herein set	e parties and no forth.
97 98 98	38. TIME IS OF THE ES				mit sem and his isome	n au h-d (Onto)	Aug 6.20	<b>15</b>
00 91 12	37. ACCEPTANCE: TNI. Time in which PROPERTY is withdrawn and the ontire Eas	s over se made s localed) 5 most Money, if	any, shall be refun	M. (Z) P.M. I M. (Z) P.M. I dea to BUY	f acceptance of this A BR on demand.	Bissewaut is vor Lec v et noraus (nage)	coived within the time spa	at (Local icilied, the offer is
	BUYER'S Initials (	us by the Ideka Asso Ion of REALTORGO.	. USE BY ANY OTHER I	'Erbon ib Pri	SELLER'S Has have delighted and in pro- PHIBITED, OCCOPYINGH I GAIN ESTATE PURCHASE	ided for use by the few o	R&B, Inc. All rights reserved.	obers of the Page 5 of 6

PROPERTY ADDRI	1881 App.	2 Aus A	39 <u>T</u>	ID#:Z	200_
36, BUYER'S 81Q	NATURES:				
SEE ATTACHED	BUYER'S ADDEN	DUN(S):(Specify no	umber of BUYER addendum(s) alta	ched.)	
_	mster R				
BUYER Signature			BUYER (Print Name)		
Date 8 4 08	Time	14 DAM. DO.M.	Phone#		
Address			City		, , , , , , , , , , , , , , , , , , , ,
E-Mah			Fax#		
			BUYER (Print Name)		
Date	Time	DAM. [] P.M.	Phone #		
Address			City		
B-Mail			Fax #		
agler.  Signature(8) 8	eby approve and ac	ccepi the transaction set forth in CHED COUNTER OFFER CHED ADDENDUM(6) #	n the above Agreement and agree (	io carry out all the term	s thereof on the part o
On this date, I/We had agliler.  SIGNATURE(8) 8  SIGNATURE(8) 8	eby approve and so USJECT TO ATTAC	CHED COUNTER OFFER	Periodical	·	,
On this date, I/We her adulter.  SIGNATURE(6) 8  BIGNATURE(6) 8  SELLER Signature	eby approve and so USJECT TO ATTAC	CHED COUNTER OFFER	SELLER (Print Name)		<b>***</b> *********************************
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## **EXHIBIT "D"**

JULY 2008 EDITION



## RE-23 COMMERCIAL/INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT



			,	JON A LIONNI	EY AND/OR ACC	CUNIAN				DPPORTUNITY
10# 17.30C	2		_			DAT	E	1-6-0	08	
LISTING AGENCY	18/11/	act to	<u> </u>	Office	Phone #	166	1010	Fax	# 466	1006
Listing Agent	er, D	36.2145	E-Ma	lie				Phone	# 941	1075
SELLING AGENCY_	Bullo	alof Co	Leel til	Office	Phone #4	1661	40	Fax	#_466	1806
Selling Agent La	My Down	u / Grey B	Huck E-ME	ail li£				Phone	# 941-	1076
1. BUYER:	Jan 1	nkelow								
(Hereinafter called "BUY as "PROPERTY" COMMO	'ER") agrees l	o purchase, ar	nd the undersign عمد م	ned SELLER ا مراد سردی	agrees to sell	the follow	ing desci	lbed real es	state hereina	fler referred to
Marga	CIN	Vyen	County,	ID, Zip	lega	lly describ	ed as:	se al	erefid	
OR Legal Description A	Attached as a	ddendum #		(Addendun	n must accor	ppany o	rialnal c	offer.)		
2. \$ 453 285.00 P	URCHASE F	PRICE: For	ONS (not includ	Fuff // ring alosing ox	Pand Zer	J100 4	usal 1	tolly f	Tive_	DOLLARS
3. FINANCIAL TERMS	: Note: A+C	+D must add (	up to total purc	hase price.	i					
(A). \$.50.000.	EARNES	T MONEY: BU	YER hereby de	oosils -	f. Three	sand	2 and Ze	ro/100		
DOLLARS as Earner	si Monev evide	enced by: T ca	ash 🔽 personal	check / cas	hiers check	note (due	date):			
other upon receipt, or other	upon accep	lance by all pa	receipt is nereby inties and shall b	e held by:	ed. Earnest Mo ] Listing Broker	ney to be ☑Sellin	depositet g Broker			
other			<del></del>					for the l	benefit of the	parties hereto.
<ul> <li>B). ALL CASH OFFER: CONTINGENCY. BL evidence of sufficient bank or financial state</li> </ul>	JYER agréès to it funds and/or	o provide SELL proceeds nece	LER within	business ransaction. A	days from the cceptable docu	date of mentation	acceptar includes	nce of this , but is not it	ECT TO AN' agreement i imited to, a co	Y FINANCIAL by all parties, opy of a recent
C). \$	FINANCIA al terms are sp al terms are co	ecified under t	he heading "OTI lancing addendu	HER TERMS im of same d	AND/OR CON ate, attached h	DITIONS ereto, sign	" (Section ned by bo	5 below). th parties.		
D). \$ 0.00 by BUYER at closing in 0			S DUE FROM I					ng costs) C	ash at closi	ng to be paid
Buyer, Seller in Buyer, Seller in Bection 1031 of the Interner Exchanger." If either greement for the purcha ompletion of such exchange incur any llabilities, cos	ntends to use to all Revenue Con box above is also and sale conge by coopera	the purchase a ode (the "Exch checked, the of the PROPE ating with each	and sale of the F nange"). For purp in the parties re RTY is the suc- other by signing	PROPERTY a poses of this cognize that cessful comp gany and all	as an integral p paragraph, the a material par pletion of the e relevant docum	ert of a ta e party party of the E exchange. nents prov	ix deferre rtlcipating Exchange The parrided that	d like-kind e in the Exch r's consider ties agree t the party no	exchange as nange shall b ration for ent to assist eac of doing the E	allowed under e identified as ering into the h other in the ixchange shall
OTHER TERMS AND	D/OR CONDI	ITIONS: This	: Agreement is n	nade subject	to the following	special te	erms, con	siderations	and/or contin	
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If the The	et 6 th	DAG	EARNE	57 17	PONCY	772	BEG	me	Dore	- Deferral
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			<u> </u>				······································			***************************************
ITEMS INCLUDED &	& EXCLUDE!	D IN THIS SA	LE: All existin	g fixtures and	d fittings that a	ire attach	ed to the	PROPERT	Y are INCLU	DED IN THE
URCHASE PRICE (unle overlings, attached televis rindows, window covering replace equipment, awni quipment, that are now or	ess excluded be sion antennae, gs, garage doo ings, ventilatin n or used in co	elow), and sha satellite dish, a or opener(s) ar- ng, cooling and onnection with	all be transferred attached plumbir and transmitter(s) d heating syste the PROPERTY	d free of liening, bathroom, exterior tree ims, all range and shall be	s. These Inclue and lighting fix as, plants or st es, ovens, bui	de, but ar tures, wir nrubbery, It-in dishv	e not limi dow scre water hea vashers,	ted to, all s ens, screen iting appara fuel tanks :	eller-owned; doors, slorm atus and fixtuand irrigation	attached floor doors, storm res, attached fixtures and
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116 120 121 122 123		deemed to have: (a) complet	n the stric ed all ins all llabilit	ct time per	iod specifie investigation	d give ns, revi	ONTINGENCIES: Io SELLER wrillen notice of disag- ew of applicable documents and for repairs or corrections other t	disclosures	; (b) electe	d to procee	ed with the			
124 125 126 127 128 129		pertinent section(s) of written their option, may correct the it	n inspect iems as s er, then b	on reports pecified by	SELLER S	shall had RS in th	LLER written notice of disapprove business day(s) in a pelr letter or may elect not to do sull continue with the transaction ar	which to res	spond in w LLER agre	riting. The S	SELLER, at			
130 131 132 133 134		have the option of either conti	inuing the	transaction	n without th	he SEL	ot respond in writing willhin the stri LER being responsible for correct with the transaction and demand to	ng these d	eficiencies	or giving th				
135 136 137 138 139		elected to proceed with the tra correct. SELLER shall make the hold SELLER harmless from a	nsaction e PROPE Il liability,	without rep ERTY avail claims, de	pairs or com able for all i mands, dan	ections inspecti nages a	the strict time periods specified, B other than for items with SELLER ons. BUYER shall keep the PROP nd costs; and repair any damages overnment employee without the p	has other ERTY free arising fro	wise agree and clear m the inspe	d in writing I of liens; inde actions. No i	lo repair or emnify and inspections			
41 42 43 44	agi	reed to by the parties in writing.		-			roperty are included in and are par		•					
45 46 47	rigi						to water systems, wells, springs, re a part of the sale of this property							
48 49 50 51	by SE	12. ADDITIONAL COSTS: Costs in addition to those listed below may be incurred by BUYER and SELLER unless otherwise agreed herein, or provided by law or required by lender, or otherwise stated herein. The below costs will be paid as indicated. Some costs are subject to loan program requirements.												
-	164	uired repair costs in excess of this	T T T T T T T T T T T T T T T T T T T	T	SHARED	Γ	T		1	SHARED				
		COSTS Appraisal fee	BUYER	SELLER	EQUALLY		COSTS Flood certification / tracking fee	BUYER	SELLER	EQUALLY				
		Long term Escrow fees	-		X	×	Title Ins. Standard Coverage owners	<del> </del>		<u> </u>	12			
		Closing lee	<del> </del>		1		policy   Lenders Extended Policy	ļ	X	<del> </del>	- X			
		Additional Title ins.	<del> </del>	<del> </del>	<u> </u>	Y	Attorney contract preparation	<del> </del>		<del> </del>				
		Water Rights	<del> </del>			1	and/or review fee	ļ		<del> </del>	1			
	[		L					ļ						
9	14. real DIS	h party agrees to pay one-half of RESIDENTIAL PROPERTY of property deliver to the transfers CLOSURE FORM. "Residential of	escrow/co CONDITI se or his a sai proper	ollection fee ION DISC agent, with rty" means	LOSURE: in ten (10) o real proper	idaho C days of ty that is	Code §55-2501 et seq. requires that the acceptance of an offer to puro s improved by a building or other s	any persoi hase, a St tructure tha	ELLER PRO at has one (	OPERTY CC (1) to four (4	ONDITION    dwelling			
2	The	property is not subject to	the Prop	erty Condit	tion Disclosu	re Act.	plies to real property which has a							
4 5 6 7 8 9	hazi sou pers disa or a occu real	ards. The term lead-based paint rce of the lead. Pursuant to 42 L ons with disabilities (unless any c billties) or any zero-bedroom dwe single-famity dwelling unit in a supied, or intended to be used or c	hezard is ISCA § 48 hild who is lling. A "re structure is occupied, d one (1)	Intended to 351 of seq. s less than esidential di that contain In whole of	to identify le , "target hou six (6) year welling" mea ns more tha r in part, as	ad-base using" n s of age ans a si an one i the hor	leria of "larget housing" require cered paint and all residential lead-coneans any housing constructed price resides or is expected to reside in ngle-family dwelling, including attact (1) separate residential dwelling under or residence of one (1) or more used or occupied, or intended to be	ntaining du or to 1978, such housi hed struck nit, and in persons."	ists and so except hou ng for the e ires such as which each Residential	ils regardles sing for the siderly or per s porches are such unit is real propert	se of the elderly or sons with nd stoops; s used or ty" means			
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	BU	YER'S Initials ( <u>صن ل</u> )(	) Date	1/2	6/00	_	SELLER'S Initials (	)(	) Date _					
		National Association of REAL	TORSO USE	BY ANY OTH	IER PERSON IS	PROHIB	sen designed and is provided for use by the rei HTED. © Copyright Idaho Association of REALT	ORSO, Inc. Al	i nghis reserve	d.				
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	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 4 of 6 PROPERTY ADDRESS: Agg. 14 Access 13 39 72 ID#: 27300
	PROPERTY ADDRESS: Hay 14 Nous 11 39 ID#: 27360
172	
173 174	Lead in Your Home," (b) receipt of the Seller's Disclosure of Information and Acknowledgment Form and have been provided with all records, test reports or
175 176	7,70,10
177 178	hereby M waives LI does not waive this right, (e) that if test results show unacceptable amounts of lead-based paint on the property, BUYER has the right to
179	be accomplished before closing, (f) that if the contract is cancelled under this clause, BUYER's earnest money deposit will be returned to BUYER.
180 181 182	16, SQUARE FOOTAGE VERIFICATION: BUYER IS AWARE THAT ANY REFERENCE TO THE SQUARE FOOTAGE OF THE REAL PROPERTY
183	
185	
188 187 188	Section 9, BUYER is responsible for obtaining and reviewing a copy of any CC&R's which may affect the PROPERTY. BUYER shall have days (but in no event shall such time period exceed that time period set forth for inspections in Section 9) to review and approve of any such CC&Rs that may affect the PROPERTY. Unless BUYER delivers to SELLER a written and signed objection to the terms of any applicable CC&Rs with particularity describing BUYER's
189 190 191	reasonable objections within such time period as set forth above, SUYER shall be deemed to have conclusively waived any objection to the terms of any CC&Rs affecting the PROPERTY.
192 193 194	18. RISK OF LOSS: Prior to the closing of this sale, all risk of loss shall remain with SELLER. In addition, should the PROPERTY be materially damaged by fire or other destructive cause prior to closing, this agreement shall be voidable at the option of the BUYER.
195	19. CONDITION OF PROPERTY AT CLOSING: Upon expiration of the Inspection/Due Diligence period and thereafter, BUYER agrees to purchase
198 197 198	the PROPERTY in as-is-condition, where is, with all faults and with no further repairs required unless otherwise agreed upon by the parties in writing. BUYER will assume all obligations with respect to the PROPERTY. SELLER shall maintain the PROPERTY until the closing in its present condition, ordinary wear and lear excepted.
199 200	20. CLOSING AGENCY: The Closing Agency for this transaction shall be <u>ligner</u> Title
201 202	located at 167 Namper
203	21. CLOSING DATE: On or before the closing date, BUYER, and SELLER shall deposit with the Closing Agency all funds and instruments necessary to
204 205	complete the sale. The closing date shall be no later than
20 <b>6</b> 207	The state of the s
208	TIME AM PM. Taxes and water assessments (using the last available assessment as a basis), rents, insurance premiums, interest
209	and reserve on liens, encumbrances or obligations assumed and utilities shall be prorated as of the day of closing or
211 212	23. "NOT APPLICABLE" DEFINED: The letters "n/a," "N/A," "n.a.," and "N.A." as used herein are abbreviations of the term "not applicable." Where
213 214 215	this agreement uses the term "not applicable" or an abbreviation thereof, it shall be evidence that the parties have contemplated certain facts or conditions and have determined that such facts or conditions do not apply to the agreement or transaction herein.
218	24. FACSIMILE TRANSMISSION: Facsimile or electronic transmission of any signed original document, and retransmission of any signed facsimile or electronic transmission shall be the same as delivery of an original. At the request of either the BUYER or SELLER, or the LENDER, or the Closing Agency,
217 218 219	the BUYER and SELLER will confirm facsimile or electronic transmitted signatures by signing an original document.
220 221	25. BUSINESS DAYS & HOURS: A business day is herein defined as Monday through Friday, 8:00 A.M. to 5:00 P.M. in the local time zone where the subject real property is physically located. A business day shall not include any Saturday or Sunday, nor shall a business day include any legal holiday
222	recognized by the state of Idaho as found in Idaho Code §73-108. The time in which any act required under this agreement is to be performed shall be computed by excluding the date of execution and including the last day. The first day shall be the day after the date of execution. If the last day is a legal
224 225	holiday, then the time for performance shall be the next subsequent business day.
226	26. DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated
227 228	damages or (2) pursuing any other lawful right or remedy to which SELLER may be entitled. If SELLER elects to proceed under (1), SELLER shall make demand upon the holder of the Earnest Money, upon which demand said holder shall pay from the Earnest Money the costs incurred by SELLER's Broker
229 230	on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of title insurance, escrow fees, credit report fees, inspection fees and attorney's fees; and sald holder shall pay any balance of the Earnest Money, one-half to SELLER and one-half to SELLER's Broker,
231 232	provided that the amount to be paid to SELLER's Broker shall not exceed the Broker's agreed to commission. SELLER and BUYER specifically acknowledge and agree that if SELLER elects to accept the Earnest Money as liquidated damages, such shall be SELLER's sole and exclusive remedy, and
233	such shall not be considered a penalty or forfeiture. If SELLER elects to proceed under (2), the holder of the Earnest Money shall be enlitted to pay the costs
234 235	incurred by SELLER's Broker on behalf of SELLER and BUYER related to the transaction, including, without limitation, the costs of Brokerage fee, title insurance, escrow fees, credit report fees, inspection fees and attorney's fees, with any balance of the Earnest Money to be held pending resolution of the
236 237 238	matter. If SELLER defaults, having approved said sale and fails to consummate the same as herein agreed, BUYER'S Eamest Money deposit shall be returned to him/her and SELLER shall pay for the costs of title Insurance, escrow fees, credit report fees, inspection fees, Brokerage fees and attorney's fees, if any. This shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.
	1
	1 1
	BUYER'S Initials ( )( )Date 5/6/00 SELLER'S Initials ( )( )Date

	JULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 5 of 0
	PROPERTY ADDRESS: App. 14 Aug 5 17. 307 Th 10#: 27300
239 240 241 242	Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.
243 244 245 248 247 248 249	28. EARNEST MONEY DISPUTE / INTERPLEADER: Notwithstanding any termination of this contract, BUYER and SELLER agree that in the event of any controversy regarding the Earnest Money and things of value held by Broker or closing agency, unless mutual written instructions are received by the holder of the Earnest Money and things of value, Broker or closing agency shall not be required to take any action but may await any proceeding, or at Broker's or closing agency's option and sole discretion, may interplead all parties and deposit any moneys or Ihings of value into a court of competent jurisdiction and shall recover court costs and reasonable attorney's fees.
250 251 252 253	$\mathcal{C}$ $\mathcal{I}$ $\mathcal{L}$ $\mathcal{U}$
264 266 266 268	30. SEVERABILITY: In the case that any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired thereby.
258 259 260 281	31. COUNTERPARTS: This Agreement may be executed in counterparts. Executing an agreement in counterparts shall mean the signature of two identical copies of the same agreement. Each identical copy of an agreement signed in counterparts is deemed to be an original, and all identical copies shall together constitute one and the same instrument.
62 63 64 55	32. SALES PRICE INFORMATION: Pursuant to Idaho Code §54-2083(6)(d), a "sold" price of real property is not confidential client information.
66 67 68	33. REPRESENTATION CONFIRMATION: Check one (1) box in Section 1 and one (1) box in Section 2 below to confirm that in this transaction, the brokerage(s) involved had the following relationship(s) with the BUYER(S) and SELLER(S).
69 70 71 72 73	Section 1:  A. The brokerage working with the BUYER(S) is acting as an AGENT for the BUYER(S).  B. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S), without an ASSIGNED AGENT.  C. The brokerage working with the BUYER(S) is acting as a LIMITED DUAL AGENT for the BUYER(S) and has an ASSIGNED AGENT acting solely on behalf of the BUYER(S).
74 75 76	D. The brokerage working with the BUYER(S) is acting as a NONAGENT for the BUYER(S).  Section 2:
77 78 79	<ul> <li>X-A. The brokerage working with the SELLER(S) is acting as an AGENT for the SELLER(S).</li> <li>B. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S), without an ASSIGNED AGENT.</li> <li>C. The brokerage working with the SELLER(S) is acting as a LIMITED DUAL AGENT for the SELLER(S) and has an ASSIGNED AGENT acting solely on behalf of the SELLER(S).</li> </ul>
31	<ul> <li>D. The brokerage working with the SELLER(S) is acting as a NONAGENT for the SELLER(S).</li> </ul>
32 33 34 35 36	Each party signing this document confirms that he has received, read and understood the Agency Disclosure Brochure adopted or approved by the Idaho real estate commission and has consented to the relationship confirmed above. In addition, each party confirms that the brokerage's agency office policy was made available for inspection and review. EACH PARTY UNDERSTANDS THAT HE IS A "CUSTOMER" AND IS NOT REPRESENTED BY A BROKERAGE UNLESS THERE IS A SIGNED WRITTEN AGREEMENT FOR AGENCY REPRESENTATION.
18 19 10	34. AUTHORITY OF SIGNATORY: If BUYER or SELLER is a corporation, partnership, trust, estate, or other entity, the person executing this agreement on its behalf warrants his or her authority to do so and to bind BUYER or SELLER.
	35. ENTIRE AGREEMENT: This Agreement, including any Addendums or exhibits, constitutes the entire Agreement between the parties and no warranties, including any warranty of habitability or representations have been made or shall be binding upon either party unless herein set forth.
8 9	36. TIME IS OF THE ESSENCE IN THIS AGREEMENT.  Aug 6
0 1 2	37. ACCEPTANCE: This offer is made subject to the acceptance of SELLER and BUYER on or before (Date) at (Local Time in which PROPERTY is located) 5.00 A.M. M. P.M. If acceptance of this Agreement is not received within the time specified, the offer is withdrawn and the entire Earnest Money, if any, shall be refunded to BUYER on demand.
	Var 8/6/DF
	BUYER'S Initials ( )( ) Date ( ) C SELLER'S Initials ( )( ) Date
	This form is printed and distributed by the Idaho Association of REALTORS®, Inc. This form has been designed and is provided for use by the real salate professionals who are members of the National Association of REALTORS®, Inc. This form has been designed and is provided for use by the real salate professionals who are members of the National Association of REALTORS®, Inc. All rights reserved by the Land of the National Association of REALTORS®, Inc. All rights reserved by LULY 2008 EDITION RE-23 COMMERCIAL / INVESTMENT REAL ESTATE PURCHASE AND SALE AGREEMENT Page 5 of 6

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	PROPERTY ADDRESS: Apr. 14 Ares 1	). 39 Zz	_ ID#:	300
303 304				
305 306		imber of BUYER addendum(s) attached	d.)	r
307 308 309	BUYER Signature	BUYER (Print Name)		
310		Phone # 880 1516	Cer#	4676175
311 312 313	Address	city Nanpa	State	de Zip
314 315	E-Mail	Fax #		Third Things A Colonia of Transis Consequence of Consequent Colonia of Consequent Consequent Consequence of Co
316	DIMER Clarence	DIVER (Bulet Name)		
318 319	BUYER Signature	BUYER (Print Name)		
320 321	Date A.M. P.M.	Phone #		
322 323	Address	City		•
324 325	E-Mail	Fax#		
327 328 329 330 331 332 333 334 335	37. SELLER'S SIGNATURES:  On this date, I/We hereby approve and accept the transaction set forth in SELLER.  SIGNATURE(S) SUBJECT TO ATTACHED COUNTER OFFER	the above Agreement and agree to ca	irry oul all the terms t	hereof on the part of the
336 337 338	SIGNATURE(S) SUBJECT TO ATTACHED ADDENDUM(S) #			
33 <b>9</b> 340	SELLER Signature	SELLER (Print Name)		
341 342	Date Time DA.M. DP.M.	Phone #	Cell #	
343	Address	City	State	Zip
345	E-Mail	Fax#	<del>/************************************</del>	
346 347				
348 349 350	SELLER Signature	SELLER (Print Name)		
351	DateTimeA.M P.M.	Phone#	Ceil #	
	Address	City	State	Zip
	E-Mail	Fax#		
356 357 358	CONTRACTOR REGISTRATION # (if applicable)			

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Thomas E. Dvorak (ID State Bar ID# 5043) Angela M. Reed (ID State Bar ID# 7221) GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720

Telephone: 208-388-1200 Facsimile: 208-388-1300

S:\CLIENTS\10292\1\Memo in Support of Mtn to Amend.DOC

Attorneys for John Wakelum and Mike Ressler

### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

**Plaintiffs** 

٧.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

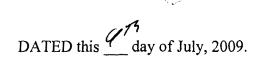
Third Party Defendants.

Case No. CV 08-8465

MEMORANDUM IN SUPPORT OF SECOND MOTION TO AMEND COMPLAINT

COMES NOW, Plaintiffs, Jon Wakelum and Mike Ressler, by and through their attorneys of record, Givens Pursley LLP, and submit this Memorandum in Support of Second Motion to Amend Complaint. This case arises out of an absolute auction sale, which was held by Defendant Hagood through his agents, the other defendants. At the conclusion of the sale. Defendant Hagood refused to proceed forward and sign a Memorandum of Sale. The Court has ruled that the Statute of Frauds bars enforcement of the contracts of sale due to the lack of a signed memorandum sufficient to satisfy the statute. Authority exists to the effect that the auctioneer conducting the sale becomes a dual agent for seller and buyer and does have authority to execute a sufficient memorandum to bind the seller. See e.g. Rohlfing v. Tommorrow Realty & Auction Co., Inc., 528 So.2d 463 (Fla.App. 5 Dist. 1988) ("[T]he law of agency peculiarly applies to an auctioneer, who, while primarily the agent of the seller in making a sale, is for some purposes the agent of both parties. His authority may be express or by implication or ratification. It has been held that the auctioneer may satisfy the statute of frauds by himself or his clerk unilaterally signing, as is apparently customary, a memorandum of the oral sale as agent for both parties); Sims v. Broughton, 589 N.E.2d 1056 (Ill.App. 5 Dist. 1992)(Citing prior case for proposition that "auctioneer is considered an agent for both the seller and the purchaser, and thus, a document signed by the auctioneer on behalf of the purchaser, if it contains the necessary information, binds the purchaser to the contract.").

In the present case, the amendment seeks to declare this law as the law of the state of Idaho and compel the auctioneer to sign a sufficient memorandum for the statute of frauds. In the event it is now too late for the auctioneer to sign a sufficient memorandum, an alternative count is plead for the auctioneer's negligence in failing to earlier execute such a document. Accordingly, leave to amend the complaint to plead such a claim is appropriate.



GIVENS PURSLEY LLP

Thomas E. Dvorak Attorneys for Plaintiffs



I hereby certify that on this \_\_\_\_\_\_\_ day of July, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following: Jay Gustavsen U.S. Mail Davison, Copple, Copple & Cox Overnight Mail Washington Mutual Capitol Plaza, Suite 600 Hand Delivery 199 North Capitol Blvd. √ Fax P.O. Box 1583 Boise, Idaho 83701 Phillip J. Collaer U.S. Mail Anderson, Julian & Hull, LLP Overnight Mail Hand Delivery P.O. Box 7426 Boise, ID 83707-7426 Fax Terry Michaelson U.S. Mail Hamilton Michaelson & Hilty, LLP Overnight Mail 1303 12th Avenue Road Hand Delivery P.O. Box 65 Nampa, ID 83653-0065 Thomas E. Dvorak

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JUL 15 2009

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Attorneys for Defendant Thomas A. Hagood

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	)	Case No. CV 08-8465
Plaintiffs, vs.	)	DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
THOMAS A. HAGOOD, an unmarried man,	)	701501A1171
Defendant.	) )	

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits this Reply Memorandum in Support of Motion for Summary Judgment.

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 1



The memorandum at bar is a reply to Plaintiffs' memorandum addressing the issue of whether Plaintiffs' cause of action under the Idaho Consumer Protection Act ("ICPA") is barred by the Statute of Frauds. In their brief, Plaintiffs contend that their ICPA claim should not be dismissed because: 1.) The rationale for barring Consumer Protection claims on unenforceable promises does not support dismissing Plaintiffs' ICPA claim; 2.) The representations at issue are factual and non-promissory; 3.) The foregoing representations are collateral to and thus separate from the unenforceable promise; and 4.) Plaintiffs do not seek contract damages, but rather actual damages or \$1,000.00 under I.C. § 48-608.

As will be discussed below, all of the foregoing claims are without merit.

#### II. ARGUMENT

Defendant's position is four-fold:

- 1. Plaintiffs' ICPA claim should be dismissed because it is logically untenable.
- 2. Plaintiffs' ICPA claim should be dismissed because Plaintiffs have failed to allege that they have suffered an "ascertainable loss."
- 3. Plaintiffs' ICPA claim should be dismissed because the rationale for barring Consumer Protection claims on unenforceable promises finds near perfect application to the facts of the instant matter.
- 4. <u>Plaintiffs' ICPA claim should be dismissed because the assertions upon which their claim is predicated are promissory and not factual and are not collateral to the unenforceable promise.</u>

#### III. ANALYSIS

1. Plaintiffs' ICPA claim should be dismissed because it is logically untenable.

Plaintiffs claim that Defendant's prior conduct in allegedly creating an advertisement for the auction was deceptive under I.C. § 48-608. Plaintiffs' claim should be dismissed because it

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 2

is both illogical and in discord with the policy of I.C. § 9-505. The following reasons substantiate this contention.

First, because there was no deception before the Court ruled that the alleged promise at issue was unenforceable, there can be no deception after the fact. If the alleged promise to convey Defendant's real property would have been deemed enforceable, Plaintiffs would have no claim under the ICPA. This, of course, makes perfect sense - if the auction went as planned and there was an actual conveyance of Defendant's property, the advertisement could not possibly have been fraudulent as there would have been a conveyance of property in precise accordance with said advertisement. Of course, the auction did not proceed as planned as the promise derived therefrom was later deemed by this Court to be unenforceable. Plaintiffs thus brought suit under the ICPA on the basis that the advertisement was deceptive. However, the nature of Defendant's conduct did not somehow make an ex ante change based on the Court's ruling. The advertisement at issue said what it said at the time it was said. The only difference in the status quo has been the Court's ruling. However, if the Defendant's conduct would not have been fraudulent if the promise was enforced, but became allegedly fraudulent only because the Court did not enforce the promise, there cannot have been any fraud or deception by the Defendant since the lynchpin therefor would be the Court's substantive decision and not the Defendant's actual conduct. The Court's later decision to render a promise unenforceable does not render fraudulent a representation relating to that promise if there was no fraud before the Court made its decision as to the later promise. In effect, this would classify conduct as fraudulent or not irrespective of the actual conduct of the fraud-feasor - that would make no sense. Whether conduct is fraudulent must depend on the conduct of the actor in question at the



time of the purported malfeasance; after the fact decisions of the Court do not render fraudulent conduct that was not fraudulent before the decision was made.

Second, if the Court were to rule that Plaintiffs have a claim under the ICPA, the Court would render every commercial oriented promise over which the Statute of Frauds applies potentially deceptive. Merely because a promise is ultimately unenforceable does not mean that the promise was predicated on fraud. The intent of the drafters of I.C. § 9-505 was to root out potential fraud, not give every disgruntled promisee a claim under the Consumer Protection Act. Kelly v. Hodges, 119 Idaho 872, 874, 811 P.2d 48, 50 (Ct. App. 1991). Likewise, the intent of the drafters of I.C. § 48-601 was to protect "consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices ...", not to give solace to every litigant whose promise failed to satisfy I.C. § 9-505.

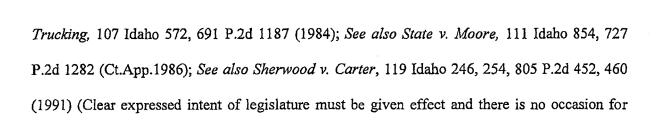
In the present case, Plaintiffs' claim is illogical as a matter of fact and spurious as a matter of policy. Accordingly, Plaintiffs' claim under the ICPA should be dismissed.<sup>1</sup>

2. <u>Plaintiffs' ICPA claim should be dismissed because Plaintiffs have failed to allege that</u> they have suffered an "ascertainable loss."

It is a basic rule of statutory construction that, unless the result is palpably absurd, Courts must assume that the legislature means what is clearly stated in the statute. *Miller v. State*, 110 Idaho 298, 715 P.2d 968 (1986); *See also State Dep't of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 158, 595 P.2d 299, 302 (1979); *See also Worley Highway Dist. v. Kootenai County*, 98 Idaho 925, 928, 576 P.2d 206, 209 (1978). Accordingly, in construing a statute the words of the statute must be given their plain, usual, and ordinary meaning. *Walker v. Hensley* 

<sup>&</sup>lt;sup>1</sup> Defendant's position is analogous to that taken by the litigants in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the United States Supreme Court ruled that a Defendant may move for summary judgment without filing affidavits on the narrow basis that even if all of the facts alleged by Plaintiff are proven, they are insufficient to make out the cause of action alleged.

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 4



Idaho Code § 48-608 provides that "any person who purchases ... goods ... and thereby suffers any ascertainable loss ... as a result ... of a method, act or practice declared unlawful by this act ... may bring an action to recover actual damages or one thousand dollars (\$1,000), whichever is greater." I.C. § 48-608(1) (emphasis added).

In the present case, Plaintiffs' Amended Complaint fails to allege that they have satisfied the above prerequisites to recover under I.C. § 48-608. The following reasons substantiate this contention.

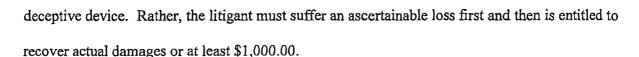
First, I.C. § 48-608 requires that three prerequisites must be satisfied in order to be able to recover actual damages or \$1,000.00:

- 1.) The person must first purchase the good in question;
- 2.) The person must suffer an ascertainable loss; and

construction where language of statute is unambiguous).

3.) Such loss must be the result of the "use or employment by another person of a method, act, or practice declared unlawful by this act." I.C. § 48-608.

A plain reading of I.C. § 48-608 bears out the foregoing interpretation. Plaintiffs, however, have put the cart in front of the horse, stating that they are entitled to recover at least \$1,000.00 under I.C. § 48-608 because Defendant employed a method, act, or practice declared unlawful under Title Forty-Eight (48). The statute does not state that a litigant may recover actual damages or at least \$1,000.00 if they have merely been affected by the employment of a



Second, Plaintiffs have failed to plead that they have suffered an ascertainable loss. Not one sentence in Plaintiffs' Amended Complaint alleges that they have suffered a loss because of the purported malfeasance, a dubious contention in light of the fact that Plaintiffs never even purchased the property at issue and therefore never suffered a change in status quo. Plaintiffs allege only that because of the purported malfeasance, they are entitled to at least \$1,000.00. This is in contradiction to the requirements of I.C. § 48-608.

In light of the above, Plaintiffs' ICPA claim should be dismissed because Plaintiffs have failed to allege that they have suffered an "ascertainable loss."

3. <u>Plaintiffs' ICPA claim should be dismissed because the rationale for barring Consumer Protection claims on unenforceable promises finds near perfect application to the facts of the instant matter.</u>

Plaintiffs cite the case of *McLure v. Duggan*, 674 F.Supp. 211, 221 (N.D. Tex. 1987) with approval. The *McLure* opinion contains an instructive discussion concerning the policy implications of the issue at bar, to wit, the rule that where a party is attempting to assert a Consumer Protection Act action in order to circumvent the Statute of Frauds, the Consumer Protection claim cannot stand:

"The judicial disregard of the statute [of frauds] should be limited to situations in which the essence of the action truly sounds in tort. Where plaintiff, although casting his complaint in the form of a cause of action for fraud, is attempting to recover damages for the breach of the promise, it is clear that he is, in effect, attempting to enforce the oral agreement."

Id (emphasis not added). 2

<sup>&</sup>lt;sup>2</sup> No doubt the reason for the heightened inquiry is because of the fact that in allowing a fraud claim to move forward which also relates to an unenforceable contract, the risk is that the Court may be allowing the litigant to obviate the Statute of Frauds and thus circumvent a directive from the legislature. Thus, it is incumbent on the Court to take a good look at the litigants' claim and determine whether it truly sounds in tort.

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 6





In light of the foregoing, the question before this Court is thus <u>not</u> whether Plaintiffs' claim under the ICPA sounds in tort. *McLure* requires a more exhaustive inquiry and in light of the tenor of Idaho Courts in enforcing the Statute of Frauds, there is no reason to believe that Idaho would deviate from the *McLure* analysis. Under *McLure* and its antecedent cases, the crucial issue for this Court to address is whether the "essence" of Plaintiffs' ICPA claim "truly" sounds in tort.

Fortunately for the Defendant and the Court, Plaintiffs have made it a point to include their motivation for filing the amendment at bar in their Memorandum in Support of Motion to Amend and their Amended Complaint. The advantage of such inclusion cannot be emphasized enough. This Court is now in a position to ascertain from the actual representations of the Plaintiffs whether the "essence" of their ICPA claim "truly" sounds in tort.

In the present case, the essence of Plaintiffs' ICPA claim does not truly sound in tort.

Accordingly, Plaintiffs' claim under the ICPA should be barred. The following reasons substantiate this contention.

First, Plaintiffs' Memorandum in Support of Motion to Amend states that the reason for amendment was merely to "protect their right a [sic] recovery." Plaintiffs' Memorandum in Support of Motion to Amend, P.2 ("Purely out of an abundance of caution, and in the event the court determines that Hagood's position is correct, the Plaintiffs desire to protect their right a [sic] recovery and therefore seek to amend their claim to add a claim under the Idaho Consumer Protection Act") (emphasis added).

The foregoing excerpt is significant because of what is not said. While Plaintiffs state that they are asserting their amended claim only to preserve recovery, they do not state nor even imply that the impetus of amendment is because they have actually suffered additional tort

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 7



damages. Of course, a litigant need not assert their motivations for amending a complaint.

However, if they do assert their motivations, it is incumbent that the Court analyze the impetus therefor. In this case, Plaintiffs have offered some degree of detail regarding why they have added their ICPA claim; omitted from their remarks is mention that they have suffered tort damages in addition to contract damages.

Second, Plaintiffs plead their Motion to Amend in the alternative. Plaintiffs' Amended Complaint ("Count 4 is plead in the alternative to Counts 1 through 3 and only in the event that the Court finds on the basis of the Statute of Frauds or similar basis that no enforceable contract for the sale of real property exists justifying specific performance or damages against Defendant Thomas A. Hagood under Counts 1 through 3") (emphasis added).

The fact that Plaintiffs plead their motion in the alternative is significant. For one, it highlights the issue raised above as to whether or not Plaintiffs truly suffered tort damages. If Plaintiffs did suffer tort and contract damages, pleading in the alternative would be irrational and would actually mean that Plaintiffs plead their damages in a manner that would fail to make Plaintiffs whole. However, the more instructive inquiry per the discussion at bar is to examine what would have happened if the Plaintiffs had prevailed on the Statute of Frauds issue. The answer is that Plaintiffs' Motion to Amend would have been withdrawn and there would have been no claim put forward to this Court under the ICPA. In light of this fact, Defendant requests that this Court ask itself the following: Can it be said that the essence of Plaintiffs' ICPA claim truly sounds in tort (See McLure, supra) where if Plaintiffs had prevailed on the Statute of Frauds issue, their claim under the ICPA never would have been submitted to the Court?

In light of the above, the essence of Plaintiffs' ICPA claim does not truly sound in tort.

Accordingly, under *McLure* (a case that Plaintiffs cite with approval) Plaintiffs' ICPA claim should be barred.

4. Plaintiffs' ICPA claim should be dismissed because the assertions upon which their claim is predicated are promissory and not factual and are not collateral to the unenforceable promise.

Plaintiffs assert that their ICPA claim is not barred by the Statute of Frauds because the malfeasance in question was a factual assertion which was collateral to the unenforceable promise. Plaintiffs' claim is without merit. The following reasons substantiate this contention.

First, the advertisement upon which Plaintiffs' entire ICPA claim is predicated is not a factual assertion. The advertisement in question was created by Downs Auction (not Defendant Thomas A. Hagood<sup>3</sup>) and related to an auction to occur in the <u>future</u> and thus a potential sale to occur in the <u>future</u>. Moreover, the advertisement contains statements of <u>future</u> promise. Conspicuously stated thereon is the following: "TERMS: We <u>will offer</u> at ABSOLUTE AUCTION ... we <u>will offer</u> lots 1, 2, 3 individual and then as a whole." See Exhibit "B" to Plaintiffs' Amended Complaint (emphasis added). Thus, the language on the advertisement relating to the <u>future</u> auction was likewise <u>promissory</u> in nature. Accordingly, it cannot be said that the advertisement was purely factual. Moreover, insomuch as the advertisement contained representations of offer, the advertisement itself contained the very same promise that this Court has already deemed unenforceable.

Second, in light of the fact that the advertisement contains the promise which this Court has already barred, it cannot be said that the assertions thereon are collateral to the unenforceable

<sup>&</sup>lt;sup>3</sup> See I.C. § 54-2093 (A client ... whether buyer or seller, shall not be liable for a wrongful act, error, omission or misrepresentation of his broker, his broker's licensees, or subagents unless the client had actual knowledge of or reasonably should have known of the wrongful act, error, omission or misrepresentation").

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT - 9

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promise. The assertions at issue appear on the very same document on which the unenforceable promise is also present.

Third, the above facts render this case distinguishable from all of the cases cited by Plaintiffs. In none of the cases cited by Plaintiffs do the facts state that the litigants plead their consumer protection claim purely out of caution, just to preserve recovery, in the alternative to contract damages, and only in the event that they do not prevail on the contract claims. Moreover, in none of the cases cited by Plaintiffs are there the same statements implicating future events and future promises. Each case pertained to present factual assertions unrelated to the later promise. Accordingly, none of the cases cited by Plaintiffs control the disposition of the instant matter.

In light of the above and the arguments contained in Defendant's prior memoranda, Plaintiffs' ICPA claim should be barred.

#### IV. <u>CONCLUSION</u>

Defendant respectfully requests that this Court grant his Motion for Summary Judgment, filed previously, and dismiss Plaintiffs' claim against the Defendant Hagood for violation of the ICPA.

DATED this Fof July, 2009

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: \_\_

Alex P. McLaughlin, of the firm Attorneys for the Defendant

#### **CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 15 day of July, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

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Nampa, ID 83653-0065	
	Alex P. McLaughlin

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JAY GUSTAVSEN (ISB No. 5293) ALEX P. MCLAUGHLIN (ISB No. 7977) DAVISON, COPPLE, COPPLE & COPPLE Washington Mutual Capitol Plaza 199 North Capitol Boulevard Suite 600 Post Office Box 1583

CANYON COUNTY CLERK J HEIDEMAN, DEPUTY

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Telephone: (208) 342-3658 Facsimile: (208) 386-9428

Attorneys for Defendant Thomas A. Hagood

### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	)	Case No. CV 08-8465
Plaintiffs, vs.	)	OBJECTION TO PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT
THOMAS A. HAGOOD, an unmarried man,	ý	
Defendant.		

COMES NOW the Defendant Thomas A. Hagood, by and through his attorneys of record, Jay Gustavsen and Alex P. McLaughlin, of the firm Davison, Copple, Copple & Copple of Boise, Idaho and hereby submits this Objection to Plaintiffs' Second Motion to Amend Complaint.

OBJECTION TO PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT - 1

ORIGINAL

#### I. <u>INTRODUCTION</u>

The memorandum at bar is an Objection to Plaintiffs' Second Motion to Amend Complaint. While Idaho Rule of Civil Procedure ("I.R.C.P") 15(a) states that Courts should favor liberal grants of leave to amend complaints, the Court may deny such leave where the amendment fails to "raise a valid claim recognized in Idaho." See Stonewall Surplus Lines Insurance Company v. Farmers Insurance Company of Idaho, 132 Idaho 318, 325, 971 P.2d 1145, 1149 (1999) (citation omitted). In the instant matter, Plaintiffs are attempting to both add a claim that is not recognized in Idaho and have this Court declare new law in Idaho. Accordingly, Defendant requests that this Court DENY, in part, Plaintiffs' Second Motion to Amend Complaint.

#### II. ARGUMENT

Because Plaintiffs do not raise a valid claim recognized in Idaho, the Court should deny Plaintiffs' Second Motion to Amend Complaint.

#### III. ANALYSIS

I.R.C.P 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." *Id.* If a responsive pleading has been served, then "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.* 

The decision to grant or deny a motion for leave to amend a complaint is within the sound discretion of the trial court. *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). The Idaho Supreme Court has recognized that in the interest of justice, courts should favor liberal grants of leave to amend. *Id.*; *Wickstrom v. North Idaho College*, 111 Idaho 450, 453,

<sup>&</sup>lt;sup>1</sup> The second claim sought to be added by amendment does not implicate the Defendant Thomas A. Hagood, Therefore, Defendant Hagood only seeks denial pertaining to Count five (5).

OBJECTION TO PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT - 2

725 P.2d 155, 158. The Court has also recognized, however, that a trial court has not abused its discretion in denying a request for leave to amend a complaint if the new claims proposed to be inserted fail to state a valid claim. Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 119 Idaho 171, 175, 804 P.2d 900, 904 (1991); See also Bissett v. State, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct. App. 1986).

In the present case, Plaintiffs' Second Motion to Amend Complaint should be denied.

The following reasons substantiate this contention.

First, the claim proffered in Count five (5) of Plaintiffs' Second Amended Complaint does not appear to be recognized in Idaho. Plaintiffs' Memorandum in Support of Second Motion to Amend Complaint contains no reference to statute or common law, whether in Idaho or other jurisdictions, which actually states that the relief sought is permissible. In fact, the cases cited by Plaintiffs do not even involve the quasi-mandamus/injunctive relief which Plaintiffs seek. Plaintiffs' Memorandum is thus a perplexing patchwork of inapplicable out-of-state cases and one provision of the Idaho Code, incorporated together to somehow reach the conclusion that Plaintiffs are entitled to equitable relief, i.e., an order compelling the auctioneer to sign the Purchase and Sale memoranda that this Court has already ruled is unenforceable under the Statute of Frauds. As is sometimes said of "quasi-estoppel," Count five (5) of Plaintiffs' Second Amended Complaint appears, at best, to be a "last-gasp theory." See Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002).

Second, in urging amendment, Plaintiffs openly request that this Court invade the province of the legislature. On page two (2) of Plaintiffs' Memorandum in Support of Second

<sup>&</sup>lt;sup>2</sup> It should also be noted that Count five (5) is inapposite to the Court's prior ruling. This Court previously dismissed Plaintiffs' claims for breach of contract and specific performance because the alleged contract at issue was unenforceable under the Statute of Frauds. Plaintiffs are simply attempting to circumvent the Court's Judgment. This Court has ruled on this issue. The alleged contract is unenforceable.

OBJECTION TO PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT - 3



Motion to Amend Complaint, Plaintiffs state: "[T]he amendment seeks to declare this law as the law of the state of Idaho." Under the Declaratory Judgment Act, a Court may declare rights and legal relations between and among parties. However, it is well outside the scope of I.C. § 10-1205 and the power of the judiciary to declare what is or is not the law of Idaho. See Electrical Wholesale Supply Co. Inc., v. Nielson, 136 Idaho 814, 41 P.3d 242 (2002) ("The power invested to this Court is limited to interpretation of the constitution and laws ... The power to make law and declare public policy is vested with the legislature. This Court will not intrude upon the province of the legislature").

In light of the above, Plaintiffs' Second Motion to Amend Complaint should be denied.

#### IV. <u>CONCLUSION</u>

Defendant respectfully requests that this Court DENY Plaintiffs' Second Motion to Amend Complaint.

DATED this of July, 2009

DAVISON, COPPLE, COPPLE & COPPLE, LLP

Alex P. McLaughlin, of the firm

Attorneys for the Defendant

#### **CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the day of July, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack	X_ U.S. MAIL
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Boise, Idaho 83701	
Phillip J. Collaer Anderson, Julian & Hull, LLP PO Box 7426. Boise, Idaho 83707	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Terry Michaelson Hamilton, Michaelson & Hilty, LLP 1303 12 <sup>th</sup> Avenue Road PO Box 65 Nampa, ID 83653-0065	X_ U.S. MAIL Hand Delivery Facsimile Transmission
	Alex P. McLaughlin

PRESIDING: RENAE J. HOFF DATE: July 23, 2009

COURT MINUTE JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings", CASE NO: CV2008-8465\*C Plaintiffs, REPORTED BY: Carole Bull TIME: 9:00 A.M. VS. THOMAS A. HAGOOD, an unmarried man, DCRT3 (10:40-11:15) Defendants. THOMAS A. HAGOOD, an unmarried man, Third Party Plaintiff, VS. BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

This having been the time heretofore set for motion for summary judgment and motion to amend complaint in the above entitled matter, the plaintiffs were not

COURT MINUTES July 23, 2009 Page 1

Third Party Defendants.

personally present in court, but were represented by counsel, Mr. Thomas E. Dvorak, the third party defendant Bill Downs Auction Service was represented by counsel, Mr. Aaron Seable and the defendant Hagood was not personally present, but was represented by counsel Mr. Alex P. McLaughlin.

The Court noted the motion for summary judgment brought by the defendant and the plaintiff's were seeking to amend the Complaint to have the auctioneer sign a memorandum sufficient for the statute of frauds, or to be held responsible for damages to the plaintiff.

Mr. McLaughlin advised the Court that there were two issues before the Court. The first being the Idaho Consumer Protection Act claim and whether it should be dismissed and the second was the motion to amend which they were objecting to on the basis of claim 5 not claim 6. Mr. McLaughlin presented argument to the Court in support of the ICPA claim and in opposition to the motion to amend with respect to claim 5.

Mr. Dvorak advised the Court that with regards to the motion to amend, he did not receive the reply brief until yesterday afternoon, objected to that as an untimely response and to the Court considering it.

The Court so noted.

Mr. Dvorak presented argument to the Court in support of the motion to amend and in opposition to the motion for summary judgment.

Mr. McLaughlin responded with further argument in support of the motion for summary judgment and in opposition to the motion to amend.

COURT MINUTES July 23, 2009 Page 2

Mr. Dvorak responded with further argument.

The Court announced Findings of Fact and Conclusions of Law. The Court concluded there would not have been a deceptive practice if the defendant would have signed the sale agreement, therefore, it appeared under the Consumer Protection Act in Idaho that the claim and the breach of contract claim were the same. There was no evidence that Mr. Hagood or the auctioneers set up this transaction with the intent that they would never go through with the actual sale. Once the sale was over, then Mr. Hagood refused to sign the documents, so the Court concluded that the matter was unenforceable under the statute of frauds. It was the opinion of the Court that there was a question as to whether there was the suffering of an actual ascertainable loss. The Court determined it was precluded from entertaining the new amendment to the Complaint and the Court had authority to deny the amendment. The Court further concluded that summary judgment should once again be granted in favor of the defendant, Mr. Hagood, and the motion to amend the Complaint was denied.

The Court instructed Mr. McLaughlin to prepare an order for the Court's signature and noted the Court's comments would stand for the record.

Mr. Dvorak advised the Court with respect to the denial of the motion to amend the Complaint, the opposition was directed just to Count 5 and requested clarification if the Court's ruling was with regards to Counts 5 and 6.

Mr. McLaughlin advised the Court that he was only addressing Count 5.

The Court noted that clarified that issue and the amendment would be allowed as to Count 6.

COURT MINUTES July 23, 2009

Page 3

Mr. Dvorak further inquired if the Court's ruling applied to the other defendant's as well.

The Court indicated they did not make the argument so the Court still saw this case as pending.

Mr. Dvorak noted the other defendant's did not join in the motion for summary judgment.

The Court agreed.

Mr. Seable advised the Court for the record that he had nothing to add to the arguments.

The Court so noted.

Deputy Clerk



JAY GUSTAVSEN (ISB No. 5293) ALEX P. MCLAUGHLIN (ISB No. 7977) DAVISON, COPPLE, COPPLE & COPPLE Attorneys at Law Washington Mutual Capitol Plaza 199 North Capitol Boulevard Suite 600 Post Office Box 1583 Boise, Idaho 83701 Telephone: (208) 342-3658 Facsimile:

(208) 386-9428

AUG 0 6 2009

CANYON COUNTY CLERK T. CRAWFORD, DEPUTY

Attorneys for Defendant Thomas A. Hagood

#### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

#### STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE	)	
RESSLER, an individual doing business as	)	Case No. CV 08-8465
"M&M RE Holdings",	)	
	)	
Plaintiffs,	)	ORDER GRANTING
VS.	)	DEFENDANT'S MOTION
	)	SUMMARY JUDGMENT
	·	AND DENYING
THOMAS A. HAGOOD, an unmarried man,	í	PLAINTIFFS' SECOND
, , , , , , , , , , , , , , , , , , , ,	í	MOTION TO AMEND
Defendant.	j )	COMPLAINT
	í	
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	/	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT - 1

THIS MATTER having come regularly before the Court for hearing on Defendant's Motion For Summary Judgment regarding Plaintiffs' claims under the Idaho Consumer Protection Act, on Thursday, the 23<sup>rd</sup> day of July, 2009, at 9:00 o'clock a.m., with the Plaintiffs appearing by and through their attorney of record, Tom Dvorak of the firm Givens Pursley, LLP, and the Defendant appearing by and through his attorney of record, Alex P. McLaughlin of the firm Davison, Copple, Copple & Copple, LLP, and the Court having considered the briefs, affidavits and oral argument of counsel and the Court having announced its decision in open court and good cause appearing therefore;

IT IS HEREBY ORDERED that based upon there being no genuine issues as to any material facts, Defendant Thomas A. Hagood's Motion for Summary Judgment is granted and thus all of Plaintiffs' claims against the Defendants under the Idaho Consumer Protection Act are hereby dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that Plaintiffs' Second Motion to Amend Complaint is denied as to Count five (5) thereof and granted as to Count six (6).

DATED this	day of	, 2009.	AUG	<b>3</b> 2009
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ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' SECOND MOTION TO AMEND COMPLAINT - 2



Tom Dvorack Givens Pursley, LLP 601 W. Bannock St. P.O. Box 2720 Boise, Idaho 83701	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Phillip J. Collaer Anderson, Julian & Hull, LLP PO Box 7426. Boise, Idaho 83707	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Terry Michaelson Hamilton, Michaelson & Hilty, LLP 1303 12 <sup>th</sup> Avenue Road PO Box 65 Nampa, ID 83653-0065	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Jay Gustavsen Alex P. McLaughlin Davison, Copple, Copple & Copple P.O. Box 1583 Boise, Idaho 83701	X_ U.S. MAIL Hand Delivery Facsimile Transmission

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AUG 0 6 2009

CANYON COUNTY CLERK T. CRAWFORD, DEPUTY

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Attorneys for Defendant Thomas A. Hagood

Facsimile:

#### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",	) Case No. CV 08-8465
Plaintiffs, vs.	) ) SUMMARY JUDGMENT )
THOMAS A. HAGOOD, an unmarried man,  Defendant.	) ) ) )

**SUMMARY JUDGMENT - 1** 

THIS MATTER having come regularly before the Court for hearing on Defendant's Motion For Summary Judgment regarding Plaintiffs' claims under the Idaho Consumer Protection Act, on Thursday, the 23<sup>rd</sup> day of July, 2009, at 9:00 o'clock a.m., with the Plaintiffs appearing by and through their attorney of record, Tom Dvorak of the firm Givens Pursley, LLP, and the Defendant appearing by and through his attorney of record, Alex P. McLaughlin of the firm Davison, Copple, Copple & Copple, LLP, and the Court having considered the briefs, affidavits and oral argument of counsel and the Court having announced its decision in open court and entered its Order granting Summary Judgment and cause appearing therefor, and based upon there being no genuine issues as to any material facts, and Defendant being entitled to the entry of Summary Judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Thomas A.

Hagood's Motion for Summary Judgment is granted and thus all of Plaintiffs' claims against the

Defendants under the Idaho Consumer Protection Act are hereby dismissed with prejudice.

DATED th	is day	of July	, 2009.

AUG 5 2009

JUDGE RENAE J. HOFN



AUG 2 0 2009

#### CANYON COUNTY CLERK T. CRAWFORD, DEPUTY

#### RULE 54(b) CERTIFICATE

With respect to the issues determined by the above Judgment, it is hereby CERTIFIED, in accordance with Rule 54(b) of the Idaho Rules of Civil Procedure, that the Court has determined that there is no just reason for delay of the entry of judgment as to the claims filed against the Defendant Thomas A. Hagood and that the Court has and does hereby direct that the above Judgment shall be a final judgment upon which an appeal be taken as provided by the Idaho Appellate Rules.

DATED this \_\_\_\_ day of July, 2009.

AUG 1 8 2009

IUDGE RENAE I HOLI

#### **CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the day of July, 2009, I served a true and accurate copy of the foregoing instrument by placing the same in the United States Mail, postage prepaid, first class mail, to the following:

Tom Dvorack Givens Pursley, LLP 601 W. Bannock St.	X_ U.S. MAIL Hand Delivery Facsimile Transmission
P.O. Box 2720 Boise, Idaho 83701	
Phillip J. Collaer Anderson, Julian & Hull, LLP PO Box 7426.	X_ U.S. MAIL Hand Delivery Facsimile Transmission
Boise, Idaho 83707 Terry Michaelson	X U.S. MAIL
Hamilton, Michaelson & Hilty, LLP 1303 12 <sup>th</sup> Avenue Road PO Box 65	Hand Delivery Facsimile Transmission
Nampa, ID 83653-0065	
Jay Gustavsen Alex P. McLaughlin Davison, Copple, Copple & Copple P.O. Box 1583 Boise, Idaho 83701	X_ U.S. MAIL Hand Delivery Facsimile Transmission
_	Clerk

Thomas E. Dvorak (ID State Bar ID# 5043) Angela M. Reed (ID State Bar ID# 7221) GIVENS PURSLEY LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720

Telephone: 208-388-1200 Facsimile: 208-388-1300

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SEP 16 2009

CANYON COUNTY CLERK T. CRAWFORD, DEPUTY

Attorneys for John Wakelum and Mike Ressler

#### IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as "M&M RE Holdings",

Plaintiffs

Case No. CV 08-8465

NOTICE OF APPEAL

Flaillill

v.

THOMAS A. HAGOOD, an unmarried man,

Defendant.

THOMAS A. HAGOOD, an unmarried man,

Third Party Plaintiff,

v.

BULLOCK AND COMPANY REALTORS L.L.C., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE INC., an Idaho corporation, and Scott Bullock, an individual and LARRY DOWNS, an individual,

Third Party Defendants.

TO: DEFENDANT THOMAS A. HAGOOD AND THIRD PARTY DEFENDANTS, BULLOCK AND COMPANY REALTORS L.L.C.,SCOTT BULLOCK, BILL DOWNS AUCTION SERVICE INC., LARRY DOWNS AND THEIR ATTORNEYS OF RECORD, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

#### NOTICE IS HEREBY GIVEN THAT:

- 1. Pursuant to Idaho Appellate Rule 17, the above named Plaintiffs Jon Wakelum, an individual; and Mike Ressler, an individual doing business as "M&M RE Holdings" (hereinafter "Wakelum and Ressler") appeal to the Idaho Supreme Court from the final Judgment entered in the above-entitled action on the 6th day of August, 2009 (and certified as a final judgment by the Court on the 18<sup>th</sup> day of August 2009 by the Honorable Renae J. Hoff, presiding). This Notice of Appeal, pursuant to Idaho Appellate Rule 17(e)(1), shall be deemed to include and present on appeal all interlocutory judgments, orders and decrees entered prior to the foregoing named Judgment (including without limitation that certain Order Granting Defendant's Motion for Partial Summary Judgment and Granting Plaintiff's Motion to Amend Complaint entered on June 10, 2009); all judgments, orders and decrees entered prior to the judgment, order or decree appealed from for which the time for appeal has not expired and all interlocutory or final judgments, orders and decrees entered after the foregoing named Judgment.
- 2. Wakelum and Ressler have the right to appeal to the Idaho Supreme Court and the judgments and orders described or incorporated herein pursuant to Idaho Appellate Rule 11(a)(1).

#### 3. PRELIMINARY STATEMENT OF ISSUES ON APPEAL:

The following includes a non-exhaustive list of preliminarily identified issues on appeal, and Wakelum and Ressler reserve the right to present additional issues on appeal:

A. Whether the District Court erred in determining that the Statute of Frauds ("SOF") prohibits an enforceable "absolute" or "no reserve" auction of real estate in the State of Idaho;

- B. Whether the District Court erred in determining that the alleged contracts were unenforceable under the Statute of Frauds;
- C. Whether the District Court erred in disregarding evidence that should satisfy any requirement imposed by the SOF or exception to the SOF, including the seller's signature on a Representation Agreement describing and consenting to the absolute auction in question;
- D. Whether the District Court erred in not determining that Hagood should be barred as a matter of equity (including principles of part performance, estoppel, and unclean hands) from using the SOF to withdraw his property from sale;
- E. Whether the District Court erred in failing to determine that equity should regard this case as being removed from the operation of the SOF;
- F. Whether the District Court erred in determining that the Plaintiffs were not third party beneficiaries of the absolute auction described in the Seller's Representation Agreement;
- G. Whether the District Court erred in determining that the Plaintiffs' Idaho

  Consumer Protection Act ("I.C.P.A.") for, *inter alia*, deceptive advertising

  of an absolute auction without reserve, should be dismissed;
- H. Whether the District Court erred in determining that the pre-auction deceptive representations regarding the nature of the auction were not separate from the contract held to be unenforceable based on the SOF; and
- I. Whether the District Court erred in denying in part Plaintiffs' Second
   Motion to Amend, including without limitation, by denying the requested

amended to add a Count 5 seeking a declaratory judgment to the effect that the auctioneers were agents of the Defendant Hagood and still have the authority to sign the sales contracts on his behalf.

- 4. **REPORTER'S TRANSCRIPT.** Wakelum and Ressler request transcripts of the entirety of the following proceedings:
  - A. Transcript of hearing on Plaintiffs' Motion for Leave to File Amended Complaint and other pending matters in case held on 7/23/2009;
  - B. Transcript of hearing on Cross Motions for Summary Judgment and other pending matters in case held on 5/21/2009;
  - C. Transcript of Telephonic Conference held on 4/02/2009;
  - D. Transcript of hearing on Cross Motions for Summary Judgment and other pending matters in case held on 3/26/2009.; and
  - E. Transcripts of all other hearings not specifically listed above held by theDistrict Court in this matter.
- 5. CLERK'S RECORD: Wakelum and Ressler request that in addition to all documents automatically included in the record pursuant to Rule 28, I.A.R., that the Court include the following additional documents in the record (identified below as they are in the Court's ):

	<u>Date</u>	<u>Document</u>
1	08/14/2008	Lis Pendens
2	10/20/2008	Plaintiffs' Motion for Summary Judgment
3	10/20/2008	Affidavit of Mike Ressler in Support of Plaintiffs' Motion for Summary Judgment

4	10/20/2008	Affidavit of Angela M Reed in Support of Plaintiffs' Motion for Summary Judgment
5	10/20/2008	Memorandum in Support of Plaintiffs' Motion for Summary Judgment
6	11/12/2008	Defendant's Opposition to Plaintiffs' Motion for Summary Judgment
7	11/12/2008	Affidavit of Thomas Hagood
8	11/12/2008	Defendant's Motion for Partial Summary Judgment
9	03/12/2009	Affidavit of Mike Ressler in Opposition to Defendant Hagood's Motion for Partial Summary Judgment and in Reply to Hagood's Opposition to Plaintiffs' Motion for Summary Judgment
10	03/12/2009	Affidavit of Angela M. Reed in Opposition to Defendant Hagood's Motion for Partial Summary Judgment and in Reply to Hagood's Opposition to Plaintiffs' Motion for Summary Judgment
11	03/12/2009	Affidavit of Kevin Seward in Support of Plaintiffs' Motion for Summary Judgment
12	03/12/2009	Affidavit of Jon Wakelum in Opposition to Defendant Hagood's Motion for Partial Summary Judgment and in Reply to Hagood's Opposition to Plaintiffs' Motion for Summary Judgment
13	03/12/2009	Plaintiffs' Memorandum in Opposition to Defendant Hagood's Motion for Partial Summary Judgment and in Reply to Hagood's Opposition to Plaintiffs' Motion for Summary Judgment
14	03/12/2009	Reply Memorandum in Support of Plaintiffs' Motion to Amend Complaint
15	03/20/2009	Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment
16	05/07/2009	Supplemental Memorandum in Support of Defendant's Motion for Partial Summary Judgment
17	05/08/2009	Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant Hagood's Motion for Partial Summary Judgment
18	05/15/2009	Defendant's Response to Plaintiffs' Supplemental Memorandum
19	05/15/2009	Plaintiffs' Supplemental Memorandum Response to Defendant Hagood's Supplemental Memorandum
20	05/21/2009	Hearing result for Motion Hearing held on 5/21/09 01:30 PM: District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages-cross motions for summary

#### judgment/motion to amend

21	05/21/2009	Hearing result for Motion Hearing held on 5/21/09 01:30 PM: In
22	06/01/2009	Partial Summary Judgment
23	06/10/2009	Order Granting Defendant's Motion for Partial Summary Judgment and Granting Plaintiffs' Motion to Amend Complaint
24	06/16/2009	Defendant's Motion for Summary Judgment
25	06/16/2009	Memorandum in Support of Motion
26	07/09/2009	2 <sup>nd</sup> Motion to Amend Complaint
27	07/09/2009	Memorandum in Support of 2 <sup>nd</sup> Motion to Amend Complaint
28	07/15/2009	Defendant's Reply Memorandum in Support of Motion for Summary Judgment
29	07/21/2009	Objection to Plaintiffs' Second Motion to Amend Complaint
30	07/23/2009	Motion Granted Defendant's Summary Judgment Granted-Motion to Amend Complaint denied as to Count 5 only
31	07/23/2009	Hearing result for Motion Hearing held on 7/23/09 09:00 AM: District Court Hearing Held Court Reporter: Carole Bull Number of Transcript Pages for this hearing estimated: less than 100 pages
32	08/06/2009	Order Granting Defendant's Motion Summary Judgment and Denying Plaintiffs' Second Motion to Amend Complaint
33	08/06/2009	Summary Judgment (Claims against Defendant Hagood dismissed with Prejudice)(certified as 54(b) final judgment on 8/18/2009).

#### 6. I CERTIFY:

- (a). That a copy of this notice of appeal has been served on the reporter.
- (b). That the clerk of the district court has been paid \$200.00, the estimated fee for preparation of the reporter's transcript.

- (c). That the estimated fee of \$100.00, for preparation of the clerk's record has been paid.
- (d). That the appellate filing fee of \$101.00 has been paid.
- (e). That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 6 day of September, 2009.

GIVENS PURSLEY, LLP

Angela MoReed

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this <u>Moralda</u> of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Gustavsen Davison, Copple, Copple & Copple Washington Mutual Capitol Plaza, Suite 600 199 North Capitol Blvd. P.O. Box 1583	U.S. Mail Overnight Mail Hand Delivery Fax
Boise, Idaho 83701	
Phillip J. Collaer Anderson, Julian & Hull, LLP P.O. Box 7426 Boise, ID 83707-7426	U.S. Mail Overnight Mail Hand Delivery Fax
Terry Michaelson Hamilton Michaelson & Hilty, LLP 1303 12th Avenue Road P.O. Box 65 Nampa, ID 83653-0065	U.S. Mail Overnight Mail Hand Delivery Fax

Angela M. Réed

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as M & M RE Holdings,	) ) )
Plaintiffs-Appellants,	) Case No. CV-08-08465*C
-VS-	) CERTIFICATE OF EXHIBIT
THOMAS A. HAGOOD, an unmarried man,	)
Defendant-Third Party Plaintiff- Respondent, And	) ) )
BULLOCK AND COMPANY REALTORS, LLC., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE, INC., an Idaho corporation, and LARRY DOWN, an individual,	
I, WILLIAM H. HURST, Clerk of the Dis	strict Court of the Third Judicial District o
the State of Idaho, in and for the County of Can	yon, do hereby certify that the following is
being sent as an exhibit:	
NONE	
IN WITNESS WHEREOF, I have hereun	to set my hand and affixed the seal of
the said Court at Caldwell, Idaho this	day of <u>December</u> , 2009.
WILI CERTIFICATE OF EXHIBIT	LIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon. By: Deputy

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as M & M RE Holdings,	) ) )			
Plaintiffs-Appellants,	) Case No. CV-08-08465*C			
-VS-	) CERTIFICATE OF CLERK			
THOMAS A. HAGOOD, an unmarried man,	)			
Defendant-Third Party Plaintiff- Respondent, And	) ) )			
BULLOCK AND COMPANY REALTORS, LLC., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE, INC., an Idaho corporation, and LARRY DOWN, an individual,	) ) ) ) ) ) ) ) )			
I, WILLIAM H. HURST, Clerk of the Dist	rict Court of the Third Judicial District of			
the State of Idaho, in and for the County of Canyon, do hereby certify that the above and				
foregoing Record in the above entitled cause was	s compiled and bound under my			
direction as, and is a true, full correct Record of the pleadings and documents under				
Rule 28 of the Idaho Appellate Rules, including	specific documents as requested.			
IN WITNESS WHEREOF, I have hereunt	to set my hand and affixed the seal of			
the said Court at Caldwell, Idaho this d	ay of <u>December</u> , 2009.			
	AM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon. By:  Deputy			

JON WAKELUM, an individual; and MIKE RESSLER, an individual doing business as M & M RE Holdings,	) ) )
Plaintiffs-Appellants,	) Supreme Court No. 36940
-VS-	) CERTIFICATE OF SERVICE
THOMAS A. HAGOOD, an unmarried man,	)
Defendant-Third Party Plaintiff- Respondent, And	) ) )
BULLOCK AND COMPANY REALTORS, LLC., an Idaho limited liability company, SCOTT BULLOCK, an individual, BILL DOWNS AUCTION SERVICE, INC., an Idaho corporation, and LARRY DOWNS, an individual,	) ) ) ) ) ) )
Defendants-Third Party Defendants- Respondents.	) )

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's mail, postage prepaid, one copy of the Reporter's transcript and one copy of the Clerk's Record to the attorney of record:

Thomas E. Dvorak and Angela M. Reed, GIVENS PURSLEY LLP., P. O. Box 2720, Boise, Idaho 83701-2720

Jay Gustavsen and Alex P. McLaughlin, DAVISON COPPLE & COPPLE, P. O. Box 1583, Boise, Idaho 83701

CERTIFICATE OF SERVICE

IN WITNESS WHEREOF, I have hereunto set my han-	d and affixed the seal of
the said Court at Caldwell, Idaho this day of _	December, 2009.
WILLIAM H	I. HURST, Clerk of the District Court of the Third Judicial
	District of the State of Idaho, in and for the County of Canyon
By:	Deputy

CERTIFICATE OF SERVICE