2-21-2008

American Pension Services v. Cornerstone Home Builders Clerk's Record v. 1 Dckt. 34697

Vol. 1 of 4

LAW CLERK

IN THE volume 1 of 3

SUPREME COURT

OF THE

STATE OF IDAHO

COPY

AMERICAN PENSION SERVICES

Plaintiff and

Respondents

VS.

CORNER STONE HOME BUILDERS

Defendant and

Appelants

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Richard T. St. Clair, *District Judge*

Penny North Shaul, Esq.,

P.O. Box 277, Rigby, Idaho 83442-0277

Attorney for Appellant

Stephen Muhonen, Esq.,

P.O. Box 1391/Center Plaza, Pocatello, Idaho 83204-1391

FILED - COPY *Attorney for Respondent*

Filed this ____ *day of* ____, *20*____.

FEB 21 2008

Clerk

By ____ *Deputy*

Supreme Court ____ Court of Appeals ____

Entered on ATS by: ____

34697

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN PENSION SERVICES,
Plaintiff/Respondants,

vs.

CORNERSTONE HOME BUILERS,
Defendants/Appelants.

* * * * * * * * * * * * * *

SECOND AMENDED
CLERK'S RECORD ON APPEAL

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE Richard T. St. Clair, District Judge.

* * * * * * * * * * * * * *

Penny North Shaul, Esq.
P.O. Box 277
Pleasant Country Lane
Rigby, ID 83442-0277

Attorney for Appellant

Stephen J. Muhonen
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Attorney for Respondent

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
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HONORABLE Richard T. St. Clair, District Judge.

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Date	Code	User		Judge
12/13/2004	TRAN	SHULTS	Transcript Filed	Joel E. Tingey
1/10/2006	NCOT	EDDY	New Case Filed-All Other	Richard T St. Clair
	SMIS	EDDY	Summons Issued	Richard T St. Clair
	NOAP	EDDY	Plaintiff: American Pension Services, Inc. Notice Of Appearance Daniel C. Green	Richard T St. Clair
		EDDY	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Green, Daniel C. (attorney for American Pension Services, Inc.) Receipt number: 0001426 Dated: 1/10/2006 Amount: $82.00 (Check)	Richard T St. Clair
	COMP	EDDY	Complaint Filed	Richard T St. Clair
		EDDY	Lis Pendens	Richard T St. Clair
	APPL	EDDY	Application for Pre-Judgment Writ of Attachment and/or Temporary Restraining Order and Request for Order to Show Cause Hearing	Richard T St. Clair
	AFFD	EDDY	Affidavit in Support of Application for Writ of Attachment and/or Temporary Restraining Order	Richard T St. Clair
		EDDY	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: American Pension Services, Inc. Receipt number: 0001479 Dated: 1/10/2006 Amount: $1.00 (Cash)	Richard T St. Clair
		EDDY	Temporary Restraining Order	Richard T St. Clair
	OSCI	EDDY	Order To Show Cause Issued	Richard T St. Clair
1/11/2006	BNDC	DOOLITTL	Bond Posted - Cash (Receipt 1657 Dated 1/11/2006 for 5000.00)	Richard T St. Clair
	NOTC	DOOLITTL	Notice of Posting of Cash Bond	Richard T St. Clair
1/23/2006		DOOLITTL	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Holden Kidwell Receipt number: 0003054 Dated: 1/23/2006 Amount: $52.00 (Check)	Richard T St. Clair
	NOAP	DOOLITTL	Defendant: Cornerstone Home Builders, LLc Notice Of Appearance Karl R. Decker	Richard T St. Clair
	NOTC	DOOLITTL	Notice of Intention to Appear and Produce Testimony and Evidence	Richard T St. Clair
	NOTC	DOOLITTL	Notice of Intention to Produce Testimony and Evidence (fax)	Richard T St. Clair
1/24/2006	HRHD	SOUTHWIC	Hearing Held	Richard T St. Clair
	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
	STIP	SOUTHWIC	Stipulation to release lis pendens and vacate temporary restraining order	Richard T St. Clair
	ORDR	SOUTHWIC	Order releasing lis pendens and vacating temporary restrining order	Richard T St. Clair
	NOTC	EDDY	Notice of Intention to Produce Testimony and Evidence	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
1/25/2006	BNDE	DOOLITTL	Cash Bond Exonerated (Amount 5,000.00)	Richard T St. Clair
	RTOS	DOOLITTL	Return Of Service 1-12-06 (Cornerstone Home Builders, LLC by serving Wendy Nelson)	Richard T St. Clair
1/27/2006	STIP	SOUTHWIC	Amended Stipulation to release lis pendens	Richard T St. Clair
	ORDR	SOUTHWIC	Order releasing lis pendens	Richard T St. Clair
5/18/2006	ORPT	SOUTHWIC	Order Setting Pretrial Conference/trial	Richard T St. Clair
	HRSC	SOUTHWIC	Hearing Scheduled (Jury Trial 03/20/2007 10:00 AM)	Richard T St. Clair
	HRSC	SOUTHWIC	Hearing Scheduled (Pretrial Conference 03/07/2007 08:30 AM)	Richard T St. Clair
6/7/2006	NOTC	WILLIAMS	Notice of Withdrawal (Karl Decker f/defendant) (no order provided)	Richard T St. Clair
6/22/2006		DOOLITTL	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Dunn & Clark Receipt number: 0026581 Dated: 6/22/2006 Amount: $52.00 (Check)	Richard T St. Clair
	NOAP	DOOLITTL	Defendant: Cornerstone Home Builders, LLC Notice Of Appearance Penelope North Shaul	Richard T St. Clair
10/5/2006	COMP	DOOLITTL	Amended Complaint Filed	Richard T St. Clair
10/12/2006	NTOS	DOOLITTL	Notice Of Service (Plaintiff's 1st Discovery to Defendant)	Richard T St. Clair
10/24/2006		DOOLITTL	Filing: I1B - Civil Answer Or Appear. More Than $1000 With Prior Appearance Paid by: Shaul, Penelope North (attorney for Cornerstone Home Builders, LLC) Receipt number: 0044919 Dated: 10/24/2006 Amount: $14.00 (Check)	Richard T St. Clair
	ANSW	DOOLITTL	Defendant's Answer to Plaintiff's Amended Complaint	Richard T St. Clair
12/4/2006	NTOS	WILLIAMS	Notice Of Service (Discovery)	Richard T St. Clair
12/20/2006	NTOS	DOOLITTL	Notice Of Service Plaintiff's Responses to Defendant's 1st Discovery Requests	Richard T St. Clair
1/16/2007	MOTN	PHILLIPS	Joint Motion to Continue Trial	Richard T St. Clair
1/22/2007	MISC	SOUTHWIC	RTS read motion to continue did NOT sign order	Richard T St. Clair
2/5/2007	NOTH	PHILLIPS	Notice Of Hearing 2/22/07 @ 9:00 a.m.	Richard T St. Clair
	NOTC	PHILLIPS	Notice of Taking Deposition 3/5/7 @ 9:00 a.m.	Richard T St. Clair
2/8/2007	NOTC	DOOLITTL	Notice of Rule 30(b)(6) Deposition of Cornerstone Home Builders, LLC	Richard T St. Clair
2/22/2007	HRHD	SOUTHWIC	Hearing Held	Richard T St. Clair
	GRNT	SOUTHWIC	Motion to continue JT GRANTED	Richard T St. Clair
	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
	ORPT	SOUTHWIC	Order Setting Pretrial Conference/trial - AMENDED	Richard T St. Clair
	CONT	SOUTHWIC	Hearing result for Pretrial Conference held on 03/07/2007 08:30 AM: Continued	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson *vs. Cornerstone Home Builders, LLC*

Date	Code	User		Judge
2/22/2007	CONT	SOUTHWIC	Hearing result for Jury Trial held on 03/20/2007 10:00 AM: Continued	Richard T St. Clair
	HRSC	SOUTHWIC	Hearing Scheduled (Jury Trial 06/19/2007 10:00 AM)	Richard T St. Clair
	HRSC	SOUTHWIC	Hearing Scheduled (Pretrial Conference 06/06/2007 08:30 AM)	Richard T St. Clair
2/28/2007	NTOS	DOOLITTL	Notice Of Service (Plaintiff's Supplemental Responses to Defendant's Discovery Requests)	Richard T St. Clair
3/5/2007	NOTC	PHILLIPS	AMENDED Notice of Rule 30(b)(6) Deposition of American Pension Services, INc.	Richard T St. Clair
4/2/2007	NDDT	DOOLITTL	Notice Of Deposition Duces Tecum - Brad Kendrick	Richard T St. Clair
	NDDT	DOOLITTL	Notice Of Deposition Duces Tecum - Martin Pool	Richard T St. Clair
4/9/2007	NDDT	PHILLIPS	Notice Of Deposition Duces Tecum of Brad Kendrick 4/17/07 @ 9:00 a.m.	Richard T St. Clair
	NDDT	PHILLIPS	Notice Of Deposition Duces Tecum of Martin Pool 4/17/07 @ 1:30 p.m.	Richard T St. Clair
		PHILLIPS	Consent to Waiver of Jury Trial	Richard T St. Clair
4/10/2007	NTOS	WILLIAMS	Notice Of Service of Defendant's Second Set of Interrogatories and Requests for Production of Documents	Richard T St. Clair
4/12/2007	ORDR	SOUTHWIC	Order	Richard T St. Clair
4/16/2007	NTOS	DOOLITTL	Notice Of Service of Plaintiff's 2nd Discovery To Defendant	Richard T St. Clair
4/18/2007	MOTN	PHILLIPS	*Motion for Summary Judgment* ***FAX***	Richard T St. Clair
	NOTH	PHILLIPS	Notice Of Hearing 5/22/07 @ 9:00 a.m. ***FAX***	Richard T St. Clair
	NOTH	DOOLITTL	Notice Of Hearing on Defendant's Motion for Summary Judgment 5-22-07 @ 9:00 a.m.	Richard T St. Clair
	MOTN	DOOLITTL	Defendant's Motion for Summary Judgment	Richard T St. Clair
4/19/2007	MOTN	DOOLITTL	Motion for Summary Judgment	Richard T St. Clair
	NOTH	DOOLITTL	Notice Of Hearing 5-22-07 @ 9:00 a.m.	Richard T St. Clair
4/24/2007	MEMO	PHILLIPS	Defendant's Memorandum in Support of Motion for Summary Judgment	Richard T St. Clair
	MEMO	WILLIAMS	Memorandum in Support of Plaintiff's Motion for Summary Judgment	Richard T St. Clair
	AFFD	WILLIAMS	Affidavit of Martin Pool	Richard T St. Clair
	AFFD	WILLIAMS	Affidavit of Brad Kendrick	Richard T St. Clair
	AFFD	WILLIAMS	Affidavit of Stephen J. Muhonen	Richard T St. Clair
5/1/2007	NTOS	DOOLITTL	Notice Of Service (Plaintiff's Responses to Defnedant's 2nd Discovery to Defendant)	Richard T St. Clair
5/4/2007	NTOS	PHILLIPS	Notice Of Service 5/3/07 (Pl 2nd Suppl Resp to Def Discovery Requests)	Richard T St. Clair
5/8/2007	AFFD	PHILLIPS	2nd Affidavit of Scott Tallman	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson *vs. Cornerstone Home Builders, LLC*

Date	Code	User		Judge
5/8/2007	AFFD	PHILLIPS	2nd Affidavit of Penny North Shaul	Richard T St. Clair
	RESP	PHILLIPS	Defendant's Response to Plaintiff's Memorandum in Support of Motion for Summary Judgment	Richard T St. Clair
	AFFD	PHILLIPS	2nd Affidavit of Stephen J. Muhonen ***FAX***	Richard T St. Clair
	RESP	PHILLIPS	Plaintiff's Response to Defendant's Motion for Summary Judgment ***FAX***	Richard T St. Clair
5/10/2007	RESP	DOOLITTL	Plaintiff's Response to Defendant's Motion for Summary Judgment	Richard T St. Clair
	AFFD	DOOLITTL	2nd Affidavit of Stephen J. Muhonen	Richard T St. Clair
5/11/2007	NOTH	DOOLITTL	Notice Of Hearing on Defendant's Motion to Compel Response to Discovery Requests	Richard T St. Clair
	MOTN	DOOLITTL	Motion to Compel Response to Defendant's 2nd Set of Discovery to Plaintiff	Richard T St. Clair
	MEMO	DOOLITTL	Memorandum in Support of Motion to Copel Responses to 2nd Set of Discovery to Plaintiff	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Penny North Shaul in Support of Motion to Compel	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Scott R. Tallman In Support of Motion to Compel	Richard T St. Clair
5/15/2007	STIP	DOOLITTL	Stipulation to Shorten Time for Hearing on Defendant's Motion to Compel	Richard T St. Clair
	AFFD	DOOLITTL	2nd Affidavit of Penny North Shaul in Support of Motion to Compel	Richard T St. Clair
		DOOLITTL	Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment	Richard T St. Clair
		TAWILLIAMS	Plaintiff's Reply Memorandum in Support of Motion For Summary Judgment	Richard T St. Clair
	AFFD	TAWILLIAMS	Third Affidavit of Stephen J. Muhonen	Richard T St. Clair
5/16/2007	NTOS	DOOLITTL	Notice Of Service of Defendant's Answers to Plaintiff's 2nd Discovery to Defendant	Richard T St. Clair
	NDDT	DOOLITTL	Notice Of Deposition Duces Tecum of Bonneville Land & Title Company	Richard T St. Clair
5/17/2007	NOAP	PHILLIPS	Notice Of Appearance (W. Beard as co-counsel for def)	Richard T St. Clair
	ORDR	SOUTHWIC	Order Shortening Time For Hearing on Def's Motion to compel	Richard T St. Clair
5/21/2007	RESP	DOOLITTL	Response to Defendant's Motion to Compel	Richard T St. Clair
5/22/2007	HRHD	SOUTHWIC	Hearing Held	Richard T St. Clair
	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
5/29/2007	MOTN	DOOLITTL	Defendant's Motion to Continue Court Trial	Richard T St. Clair
	MOTN	DOOLITTL	Defendant's Motion to Extend Discovery Deadline	Richard T St. Clair
5/30/2007	NTOS	DOOLITTL	Notice Of Service of Defendant's 2nd Supplemental Answers to Plaintiff's 1st Discovery to Defendant	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
5/30/2007	RESP	DOOLITTL	Plaintiff's Response to Defendant's Motion to Extend Discovery Deadline (fax)	Richard T St. Clair
	RESP	DOOLITTL	Response to Defendant's Motion to Continue Court Trial (fax)	Richard T St. Clair
5/31/2007	RESP	DOOLITTL	Response to Defendant's Motion to Continue Court Trial	Richard T St. Clair
	RESP	DOOLITTL	Plaintiff's Response to Defendant's Motion to Extend Discovery Deadline	Richard T St. Clair
6/1/2007		DOOLITTL	Plaintiff's Witness And Exhibit List (fax)	Richard T St. Clair
		DOOLITTL	Defendant's Witness and Exhibit List	Richard T St. Clair
6/4/2007	NTOS	PHILLIPS	Notice Of Service 5/31/07 (Pl Supplemental Responses to Def's 2nd Set of Discovery)	Richard T St. Clair
6/5/2007	ORDR	SOUTHWIC	Order granting def's motion to compel discovery response	Richard T St. Clair
6/6/2007	HRHD	SOUTHWIC	Hearing result for Pretrial Conference held on 06/06/2007 08:30 AM: Hearing Held	Richard T St. Clair
	CONT	SOUTHWIC	Hearing result for Trial held on 06/19/2007 10:00 AM: Continued Court trial	Richard T St. Clair
	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
	ORPT	SOUTHWIC	Order Setting Pretrial Conference/trial - AMENDED	Richard T St. Clair
	HRSC	SOUTHWIC	Hearing Scheduled (Trial 08/28/2007 10:00 AM)	Richard T St. Clair
6/28/2007	MOTN	DOOLITTL	2nd Motion for Summary Judgment	Richard T St. Clair
	NOTH	DOOLITTL	Notice Of Hearing 7-31-07 @ 9:00 a.m.	Richard T St. Clair
6/29/2007	NOTH	PHILLIPS	Notice Of Hearing on Defendant's 2nd Motion for Summary Judgment 8/3/07 @ 9:00 a.m.	Richard T St. Clair
	MOTN	PHILLIPS	Defendant's 2nd Motion for Summary Judgment	Richard T St. Clair
7/6/2007	MOTN	DOOLITTL	Motion for Leave to Amend Answer	Richard T St. Clair
	MEMO	DOOLITTL	Memorandum in Support of Motion for Leave to Amend	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Michael D. Gaffney	Richard T St. Clair
	MOTN	DOOLITTL	Motion to Shorten Time	Richard T St. Clair
	NOTH	DOOLITTL	Notice Of Hearing 7-12-07 @ 10:00 a.m.	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Drew Downs	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Harry Segura	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Dean Deyoung	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Dale Henderson	Richard T St. Clair
	AFFD	DOOLITTL	Affidavit of Curtis DeYoung	Richard T St. Clair
	MEMO	DOOLITTL	Memorandum in Support of Plaintiff's 2nd Motion for Summary Judgment	Richard T St. Clair
7/9/2007	NDDT	PHILLIPS	AMENDED Notice Of Deposition Duces Tecum of American Pension Services, Inc. 7/13/07 @ 9:00 a.m.	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
7/9/2007	BRIF	DOOLITTL	*Brief Filed in Support of Defendant's 2nd Motion for Summary Judgment (2)*	Richard T St. Clair
7/12/2007	HRHD	SOUTHWIC	Hearing Held	Richard T St. Clair
	MINE	SOUTHWIC	*Minute Entry*	Richard T St. Clair
7/19/2007	NOTH	DOOLITTL	Amended Notice Of Hearing 8-3-07 @ 9:00 a.m.	Richard T St. Clair
7/20/2007	AFFD	PHILLIPS	*2nd Affidavit of Harry Segura*	Richard T St. Clair
	AFFD	PHILLIPS	2nd Affidavit of Dean DeYoungaffd	Richard T St. Clair
	AFFD	PHILLIPS	2nd Affidavit of Dale Henderson	Richard T St. Clair
	AFFD	PHILLIPS	2nd Affidavit of Curtis DeYoung	Richard T St. Clair
	AFFD	PHILLIPS	2nd Affidavit of Drew Downs	Richard T St. Clair
	RESP	PHILLIPS	Plaintiff's Response to Defendant's 2nd Motion for Summary Judgment	Richard T St. Clair
	AFFD	PHILLIPS	Affidavit of Michael D. Gaffney	Richard T St. Clair
7/23/2007	BRIF	PHILLIPS	Defendant's Brief Filed Supplementing Its 2nd Motion for Summary Judgment and in Opposition to Plaintiff's 2nd Motion for Summary Judgment	Richard T St. Clair
7/27/2007		WILLIAMS	Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment	Richard T St. Clair
	NOAP	TAWILLIAMS	Notice Of Appearance Jeffery Mandell - Co-Counsel for Plaintiff	Richard T St. Clair
	MEMO	TAWILLIAMS	Plaintiff's Reply Memorandum In Support of Plaintiff's Second Motion For Summary Judgment	Richard T St. Clair
7/30/2007	STIP	DOOLITTL	Stipulated Amended Notice of Hearing 8-3-07 *@ 9:00 a.m. (fax)*	Richard T St. Clair
7/31/2007		TAWILLIAMS	Defendant's Bried Supplementaing Its Second Motion For Summary Judgment and In Opposition to Plaintiff's Second Motion For Summary Judgment	Richard T St. Clair
8/1/2007	HRHD	SOUTHWIC	Hearing Held	Richard T St. Clair
	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
8/10/2007	ORDR	SOUTHWIC	Order regarding motions for summary judgment	Richard T St. Clair
		WILLIAMS	Defendant's Proposed Findings of Fact and Conclusins of Law	Richard T St. Clair
		WILLIAMS	Amended Defendant's Witness and Exhibit List	Richard T St. Clair
	NOTC	WILLIAMS	Notice of Offer of Judgment	Richard T St. Clair
	NTOS	WILLIAMS	Notice Of Service Defendant's Third Supplemental Answers to Plaintiff's First Discovery Requests	Richard T St. Clair
8/16/2007		DOOLITTL	Plaintiff's Amended Witness and Exhibit List	Richard T St. Clair
	NTOS	DOOLITTL	Notice Of Service (Plaintiff's 2nd Supplemental Responses to Defendant's Discovery Requests)	Richard T St. Clair

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
8/17/2007		DOOLITTL	Plaintiff American Pension Services, Inc.'s Trial Exhibits	Richard T St. Clair
	MEMO	DOOLITTL	Defendant's Memorandum in Support of Motion to Dismiss	Richard T St. Clair
	MOTN	DOOLITTL	Defendant's Motion to Dismiss	Richard T St. Clair
8/21/2007		DOOLITTL	Amended Defendant's Witness and Exhibit List	Richard T St. Clair
	NOAP	WILLIAMS	Plaintiff: Downs, Drew Notice Of Appearance Stephen J. Muhonen	Richard T St. Clair
	NOAP	WILLIAMS	Plaintiff: Deyoung, Curtis L Notice Of Appearance Stephen J. Muhonen	Richard T St. Clair
	NOAP	WILLIAMS	Plaintiff: Seguara, Harry Notice Of Appearance Stephen J. Muhonen	Richard T St. Clair
	NOAP	WILLIAMS	Plaintiff: Deyoung, Dean G Notice Of Appearance Stephen J. Muhonen	Richard T St. Clair
	NOAP	WILLIAMS	Plaintiff: Henderson, E Dale Notice Of Appearance Stephen J. Muhonen	Richard T St. Clair
8/24/2007		DOOLITTL	Defendant's 2nd Amended Exhibit List	Richard T St. Clair
		DOOLITTL	Defendant's Motion to Strike Notices of Appearance	Richard T St. Clair
	MEMO	DOOLITTL	Defendant's Memorandum in Support of Motion to Strike Notices of Appearance	Richard T St. Clair
	NOTH	DOOLITTL	Defendant's Notice Of Hearing 8-8-07 @ 10:00 a.m.	Richard T St. Clair
	MOTN	DOOLITTL	Defendant's Motion to Shorten Time	Richard T St. Clair
8/27/2007		DOOLITTL	Defendant's Supplemental Exhibit List	Richard T St. Clair
		WILLIAMS	Plaintiff's Supplemental Exhibit Lit	Richard T St. Clair
8/28/2007	TLST	SOUTHWIC	Hearing result for Trial held on 08/28/2007 10:00 AM: Trial Started	Richard T St. Clair
8/29/2007		WILLIAMS	Plaintiffs' Second Supplemental Exhibit List	Richard T St. Clair
	ORDR	SOUTHWIC	Order Shortening Time	Richard T St. Clair
8/30/2007	MINE	SOUTHWIC	Minute Entry	Richard T St. Clair
9/4/2007	JUDGE	MESSICK	Judge Change (batch process)	
9/7/2007	MEMO	PHILLIPS	Defendant's Memorandum RE: Oral Motion to AMEND Pursuant to Rule 15(b) ***FAX***	Joel E. Tingey
9/13/2007	RESP	PHILLIPS	Plaintiff's Reply Brief in Support of Plaintiff's Rule 15(b) Motion	Joel E. Tingey
		PHILLIPS	Plaintiff's Proprosed Findings of Fact and Conclusions of Law	Joel E. Tingey
		TAWILLIAMS	Defendant's Post Trial Brief	Joel E. Tingey
		TAWILLIAMS	Defendant's Proposed Findings of Fact And Conclusions of Law	Joel E. Tingey
9/28/2007	ORDR	SOUTHWIC	Order (granting Pl's motion to amend)	Joel E. Tingey
	DEOP	SOUTHWIC	Findings of Fact and Conclusions of Law	Joel E. Tingey

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
10/4/2007		PHILLIPS	OBJECTION to Proposed Judgment ***FAX***	Joel E. Tingey
10/5/2007	MEMO	DOOLITTL	Memorandum of Fees and Costs	Joel E. Tingey
	AFFD	DOOLITTL	Affidavit of Stephen J. Muhonen In Support of memorandum of Fees and Costs	Joel E. Tingey
	RESP	PHILLIPS	Plaintiff's Response to Defendants OBJECTION to Proposed Judgment	Joel E. Tingey
10/9/2007	NOTH	DOOLITTL	Notice Of Hearing on Defendant's Objection to Plaintiffs' Proposed Judgment (fax)	Joel E. Tingey
	NOTH	PHILLIPS	Notice Of Hearing on Defendant's OBJECTION to Plaintiff's Proposed Judgment 10/23/07 @ 9:00 a.m.	Joel E. Tingey
10/12/2007	JDMT	SOUTHWIC	Judgment ($105,750.00 for sale of 141 lots)	Joel E. Tingey
	CDIS	SOUTHWIC	Civil Disposition entered for: Cornerstone Home Builders, LLC, Defendant; American Pension Services, Inc., Plaintiff; Deyoung, Curtis L, Plaintiff; Deyoung, Dean G, Plaintiff; Downs, Drew, Plaintiff; Henderson, E Dale, Plaintiff; Seguara, Harry, Plaintiff. order date: 10/12/2007	Joel E. Tingey
	STATUS	SOUTHWIC	Case Status Changed: Closed	Joel E. Tingey
10/15/2007		DOOLITTL	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: American Pension Services, Inc. Receipt number: 0044407 Dated: 10/15/2007 Amount: $1.00 (Cash)	Joel E. Tingey
10/16/2007	ANSW	WILLIAMS	Defendant's Answer to Second Amended Complaint	Joel E. Tingey
10/17/2007		WILLIAMS	Filing: T - Civil Appeals To The Supreme Court ($86.00 Directly to Supreme Court Plus this amount to the District Court) Paid by: Shaul, Penelope North (attorney for Cornerstone Home Builders, LLC) Receipt number: 0044815 Dated: 10/17/2007 Amount: $15.00 (Check) For: Cornerstone Home Builders, LLC (defendant)	Joel E. Tingey
	NOTC	WILLIAMS	Notice of Appeal	Joel E. Tingey
	APDC	HAGERTY	Appeal Filed In District Court	Joel E. Tingey
	APSC	HAGERTY	Appealed To The Supreme Court	Joel E. Tingey
10/18/2007	MOTN	DOOLITTL	Motion to Disallow Costs and Fees / Objection to Memorandum of Fees and Costs (fax)	Joel E. Tingey
	MOTN	DOOLITTL	Motion to Disallow Costs and Fees / Objection to Memoramdum of Fees and Costs (fax)	Joel E. Tingey
10/19/2007	CERTAP	HAGERTY	Clerk's Certificate of Appeal	Joel E. Tingey
	BNDC	HAGERTY	Bond Posted - Cash (Receipt 45197 Dated 10/19/2007 for 100.00) - Deposit for prepartion of Clerk's record on appeal to the supreme court.	Joel E. Tingey
	STATUS	HAGERTY	Case Status Changed: Closed pending clerk action	Joel E. Tingey

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
10/22/2007	MOTN	WILLIAMS	Motion for Stay of Exeuction of Judgment	Joel E. Tingey
	MOTN	WILLIAMS	Motion for Award of Attorneys' Fees and Costs Against Plaintiff American Pension Services, Inc.	Joel E. Tingey
	NOTH	WILLIAMS	Amended Notice Of Hearing on Defendant's Post-Trial Motions/Objection	Joel E. Tingey
	MEMO	WILLIAMS	Defendant's Memorandum of costs and Fees and Affidavit of Counsel	Joel E. Tingey
	MOTN	WILLIAMS	Motion to Shorten Time	Joel E. Tingey
10/24/2007	NOTH	WILLIAMS	Notice Of Hearing on Defendant's Motion to Shorten Time - 10/31/07 @ 9:30 a.m. **fax**	Joel E. Tingey
10/29/2007	RESP	WILLIAMS	Plaintiffs' Respons/Objection to Defendants' Motion for Attorney Fees and Costs	Joel E. Tingey
	RESP	WILLIAMS	Plaintiffs' Response to Defendants' Motion for Stay of Execution	Joel E. Tingey
10/31/2007	HRHD	SOUTHWIC	Hearing Held	Joel E. Tingey
	MINE	SOUTHWIC	Minute Entry	Joel E. Tingey
11/1/2007	ORDR	SOUTHWIC	Memorandum Decision and ORDER on Costs and Attorney Fees	Joel E. Tingey
	JDMT	SOUTHWIC	Judgment of Costs and Attorney Fees $190,251.74	Joel E. Tingey
11/2/2007		WILLIAMS	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Racine, Olson, Nye, Budge & Bailey Receipt number: 0047266 Dated: 11/2/2007 Amount: $1.00 (Check)	Joel E. Tingey
		WILLIAMS	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Racine, Olson, Nye, Budge & Bailey Receipt number: 0047266 Dated: 11/2/2007 Amount: $1.00 (Check)	Joel E. Tingey
11/13/2007	MOTN	PHILLIPS	Motion for Order for Writ of Execution and Garnishment	Joel E. Tingey
	WRIT	PHILLIPS	Writ Issued $190,251.74 Bonneville	Joel E. Tingey
		PHILLIPS	Miscellaneous Payment: Writs Of Execution Paid by: Racine Olson Nye Budge & Bailey Receipt number: 0048702 Dated: 11/13/2007 Amount: $2.00 (Check)	Joel E. Tingey
11/14/2007	ORDR	SOUTHWIC	Order for writ of execution and garnishment	Joel E. Tingey
12/5/2007	MOTN	PHILLIPS	Motion for Additional Record	Joel E. Tingey
	NTOS	PHILLIPS	Notice Of Service 12/18/07 @ 9:00 a.m.	Joel E. Tingey
12/11/2007	BNDS	DOOLITTL	Bond Posted - Surety (Amount 257000.00)	Joel E. Tingey
12/12/2007	ORDR	SOUTHWIC	Order Granting Motion to Stay Execution of Judgment	Joel E. Tingey
12/13/2007	NOTH	PHILLIPS	Notice Of Hearing on Defendant's Motion for Additional Record 12/18/07 @ 9:00 a.m. ****FAX***	Joel E. Tingey

American Pension Services, Inc., Drew Downs, Curtis L Deyoung, Harry Seguara, Dean G Deyoung, E Dale Henderson vs. Cornerstone Home Builders, LLC

Date	Code	User		Judge
12/13/2007	MOTN	PHILLIPS	Motion for Additional Record ***FAX***	Joel E. Tingey
12/14/2007		TAWILLIAMS	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Dunn Law Offices Receipt number: 0053602 Dated: 12/14/2007 Amount: $1.50 (Check)	Joel E. Tingey
		TAWILLIAMS	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Dunn Law Offices Receipt number: 0053602 Dated: 12/14/2007 Amount: $1.00 (Check)	Joel E. Tingey
	NOTH	PHILLIPS	Notice Of Hearing on Defendant's Motion for Additonal Record	Joel E. Tingey
	MOTN	*PHILLIPS*	*Motion for Additional Record*	*Joel E. Tingey*
12/17/2007	STIP	WILLIAMS	Stipulation for Additional Record	Joel E. Tingey
12/18/2007	ORDR	QUINTANA	Order for Additional Record	Joel E. Tingey
1/9/2008	WRTU	DOOLITTL	Writ returned, Unsatisfied	Joel E. Tingey
1/23/2008	ORDR	SOUTHWIC	Order for Additional Record (nunc pro tunc to 12/18/07 document signed and lost)	Joel E. Tingey
	ORDR	SOUTHWIC	Amended Order Granting motion to Stay Execution of Judgment and Release of Judgment Liens Pursuant to IAR 13(B)(15)	Joel E. Tingey

CASE ... TO
... T. ST. CLAIR

DANIEL C. GREEN (ISB No. 3213)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

Attorney for Plaintiff

2006 JAN 10 AM 10:47

... COURT
... DIVISION
... COUNTY

ORIGINAL

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **COMPLAINT**

COMES NOW the above named Plaintiff, AMERICAN PENSION SERVICES, INC., and for its cause of action against the above-named Defendant, CORNERSTONE HOME BUILDERS, LLC, states and alleges as follows:

PARTIES

1. Plaintiff, AMERICAN PENSION SERVICES, INC. ("Plaintiff") is a Corporation, incorporated by the laws of the State of Utah. Plaintiff has its place of business at 11027 S. State Street, Sandy, County of Salt Lake, State of Utah.

2. Defendant, CORNERSTONE HOME BUILDERS, LLC., (hereafter "Defendant") is a Utah Limited Liability Company and is now and at all times relevant hereto has conducted

business in the State of Idaho. Defendant's Idaho address is 1675 N. Stevens, Idaho Falls, Bonneville County, Idaho.

FACTS AND BACKGROUND

3. On or about January 22, 2004, P&B Enterprises, Inc., a Utah Corporation, and S.R. Tallman Construction, Inc., a Utah Corporation, as grantors, executed a Corporation Warranty Deed transferring certain real property located in Bonneville County, Idaho to Defendant. The Corporation Warranty Deed was recorded on March 7, 2004 as Bonneville County Recorders Instrument No. 1146311. A true and correct copy of the Corporation Warranty Deed and description of the real property described therein is attached hereto as **Exhibit "A"** and incorporated herein by reference as if set forth fully.

4. The Plaintiff is informed and believes and therefore alleges that the property was acquired by the Defendant for the purpose of subdividing and constructing homes thereon for resale. The project was to be completed in five phases.

5. In order to proceed with the project, Defendant sought investors to inject capital into the project. In return, Defendant agreed to provide the investors with a Promissory Note, Deed of Trust and Repayment Schedule.

6. On several prior occasions, Plaintiff had loaned funds to Defendant and each time received a Promissory Note and Deed of Trust as agreed.

7. In reliance upon Defendant's representations and based upon the prior course of dealing between the parties, on September 30, 2003, Plaintiff wired to Defendant the sum of $226,218.70. A true and correct copy of the wire transfer instructions is attached hereto a**Exhibit "B"** and incorporated herein by reference as if set forth fully.

8. As a result of interest accrual and other charges, there is currently due and owing to Plaintiff the sum of $260,000.00. Despite repeated demands, and contrary to the parties agreement, Defendant has failed and refused and continues to fail and refuse to provide Plaintiff with a Promissory Note and Deed of Trust evidencing the loan and detailing the terms of repayment as represented and agreed to by Defendant.

FIRST CAUSE OF ACTION
[Breach of Contract]

9. Plaintiff realleges the allegations contained in Paragraphs 1-8 above, and incorporates the same herein by reference as if set forth fully.

10. In exchange for Plaintiff's investment and payment of the sum of $226,218.70, Defendant promised to provide to Plaintiff a Promissory Note containing the terms of repayment together with a Deed of Trust to secure said Promissory Note. Defendant's failure to provide said Promissory Note and Deed of Trust as described above constitutes a breach of said agreement.

11. As a result of said breach, Plaintiff has been damaged in the amount which is currently unknown and which is to be proven at the time of trial.

SECOND CAUSE OF ACTION
[Fraud]

12. Plaintiff realleges the allegations in Paragraphs 1-11 above and incorporates the same herein by reference as if set forth fully.

13. Defendant's representations to Plaintiff as described above constituted a representation of material fact that Defendant knew was false at the time it was made.

14. Defendant intended that Plaintiff would act upon the representation and loan funds to Defendant in the contemplated manner.

15. Plaintiff did not know the representation was false and that Defendant did not intend to provide a Promissory Note and Deed of Trust. Plaintiff had a right to rely on, and did rely on, the truth of Defendant's representations.

16. As result of Plaintiff's reliance on Defendant's representations, Plaintiff has suffered consequential and approximate damages in an amount to be proven at the time of trial.

THIRD CAUSE OF ACTION
[Specific Performance]

17. Plaintiff realleges the allegations in Paragraphs 1-16 above and incorporates the same herein by reference as if set forth fully.

18. The real property associated with the representations and agreements made by Defendant to Plaintiff, as specifically identified in the Corporation Warranty Deed attached hereto as Exhibit "A", is unique and created the motivation and intent of the Plaintiff to pay to Defendant the sum of $226,218.70, Plaintiff thereby being entitled to obtain, and Defendant being obligated to provide to Plaintiff a proper and valid security interest in the real property by way of a Promissory Note and Deed of Trust.

19. Plaintiff paid these sums to Defendant in anticipation of receiving the agreed upon Promissory Note and Deed of Trust for the above-described real property as was the common practice of the parties based upon their previous course of dealing. However, Defendant failed to provide the Promissory Note and Deed of Trust to Plaintiff.

20. Under the facts and circumstances of this transaction and the course of dealing between the parties Plaintiff's payment to Defendant of the sum of $226,218.70 constitutes part

performance in satisfaction of the Statute of Frauds with regard to contracts involving the real property at issue, and Defendant's failure and refusal to provide to Plaintiff the agreed upon Promissory Note and Deed of Trust constitutes a breach of the understanding and agreement between the parties.

21. Due to the unique nature of the real property involved in this transaction Plaintiff is unable to obtain or receive an adequate remedy at law and therefore seeks and is entitled under Idaho law to receive the remedy of specific performance requiring Defendant to provide to Plaintiff the Promissory Note and Deed of Trust as contemplated and agreed upon by the parties.

FOURTH CAUSE OF ACTION
[Unjust Enrichment/Rescission]

22. Plaintiff realleges the allegations in Paragraphs 1-21 above and incorporates the same herein by reference as if set forth fully.

23. In the alternative to the remedy of specific performance, or in the event the Court determines that Plaintiff is unable to obtain relief by way of specific performance Plaintiff is entitled to the remedy of rescission.

24. Plaintiff paid to Defendant the sum of $226,218.70 in anticipation of receiving in exchange a Promissory Note and Deed of Trust securing the sums paid through the real property described herein.

25. Defendant has failed and refused and continues to fail and to refuse to provide to Plaintiff the promised Promissory Note and Deed of Trust.

26. Additionally, Defendant has retained Plaintiffs monies and has failed and refused and continues to fail and to refuse to refund to Plaintiff the monies paid. As a result of interest accrual and other charges, there is currently due and owing to Plaintiff the sum of $260,000.00.

27. Plaintiff is entitled to the complete and full refund of all monies paid to Defendant with interest as set forth herein by reason of Defendant's breach of the understanding and agreement between the parties.

FIFTH CAUSE OF ACTION
[Request for Attorney's Fees]

17. Plaintiff realleges the allegations contained in Paragraphs 1-16 above, and incorporates the same herein by reference as if set forth fully.

18. It has been necessary for Plaintiff to employ counsel to represent it in this action and has obligated itself to pay reasonable fees for such services. Pursuant to Idaho Code § 12-120(3)Defendant is obligated for payment of attorney's fees, Title Search costs, and all expenses incurred by Plaintiff to prosecute this action.

SMALL LAWSUIT RESOLUTION ACT DECLARATION

Pursuant to IRCP 85(b) and Idaho Code § 7-1501 et seq., Plaintiffs' claims, excluding costs and attorneys fees, exceed the $25,000.00 statutory limitation of the Small Lawsuit Resolution Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment and Decree of this Court as follows:

A. That the Court find that a contract existed between the parties with regard to the payment and real property described herein and that the Defendant has breached this contract;

B. That Defendant be immediately required to provide to Plaintiff a Promissory Note in the sum of $226,218.70 together with interest thereon at a rate established by the Court

together with a Deed of Trust securing the Promissory Note with the real property described herein;

C. That in the alternative, the Defendant be immediately required to repay and/or refund to Plaintiff the entire sum of $226,218.70 with interest at the statutory established rate;

D. That Plaintiff recover from Defendant all of its attorney fees associated with this action;

E. That Plaintiff recover from Defendant all of its costs and expenses associated with this action; and

F. For all other relief that the Court deems just and proper under these premises.

DATED this 5 day of ~~December~~ January, 2005.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By D. Nelson, for
DANIEL C .GREEN
Attorney for Plaintiff

BONNEVILLE COUNTY RECORDER
1146311 MAR1904 AM1033

CORPORATION WARRANTY DEED

P & B ENTERPRISES, INC., a Utah corporation, and S. B. TALLMAN CONSTRUCTION, INC., a Utah corporation, as GRANTOR,
for good and valuable considerations, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto
CORNERSTONE HOME BUILDERS, LLC., a Utah Limited Liability Company, as GRANTEE,
whose address is 553 East 1300 South - Bldg 2, Suite 8, Ogden, Utah 84401 and Grantee's successors and assigns, all of the following described real property, towit:

AS PER EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

TOGETHER WITH any and all improvements, water and ditch rights, easements, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and any reversion, remainder, rents, issues, and profits thereof.
Grantor, for itself and its successors and assigns, does hereby warrant and agree to forever defend the Grantee, and Grantee's successors and assigns, in the quiet and peaceful possession of said premises against the lawful claims of any and all persons.
In construing this Deed and where the context so requires, the singular includes the plural, and the masculine, the feminine and neuter.
Dated: 1-20-04

P & B Enterprises, Inc.
By: _____

S. B. TALLMAN, INC.
By: _____

STATE OF UTAH)
COUNTY OF Weber) ss

On 1/22/04, *before me, the undersigned, personally appeared* Martha Peel
known or identified to me to be the President *of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.*

Notary Public for the State of Utah
Commission Expiration Date: 5-8-07

NOTARY PUBLIC
THOMAS E DEFRIGHTY
2568 Washington Blvd Ste #200
Ogden UT 84401
My Commission Expires Mar 8, 2007
State of Utah

INSTRUMENT NO. 1146311
DATE 3-19-04
TIME 2:56
DEPUTY POS
FEE 15.00
STATE OF IDAHO } ss
COUNTY OF BONNEVILLE }
I hereby certify that the within instrument was recorded.
Ronald Longmore, Ex-Officio Recorder
By _____ Deputy
Request of Ann

STATE OF UTAH)
COUNTY OF Weber) ss

On 1-22-04, *before me, the undersigned, personally appeared* SCOTT B. TALLMAN
known or identified to me to be the President of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Notary Public for the State of Utah
Commission Expiration Date: 5-8-07

NOTARY PUBLIC
THOMAS E DEFRIGHTY
2568 Washington Blvd Ste #200
Ogden UT 84401
My Commission Expires Mar 8, 2007
State of Utah

EXHIBIT "A"

EXHIBIT "A"

TRACT I:

Lot 1, Block 11; Lots 1 through 10, Block 12; Lots 10 through 18, Block 10 and Lot 14, Block 5; Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

a. The West 17.0 feet of Lot 10, said Block 12, being more particularly described as follows: Beginning at the Southwest Corner of said Lot 10; running thence N89°57'04"E along the South line of Lot 10, 17.0 feet; thence N0°02'56"W 100.00 feet to the North line of Lot 10; thence S89°57'04"W along the North line of Lot 10, 17.0 feet to the Northwest Corner thereof; thence S0°02'56"E along the West line of Lot 10, 100.00 feet to the point of beginning.

AND: Lot 12; Lots 15 through 18, and Lots 20 through 23, Block 7 and Lots 1 through 5, Lots 7 through 10 and Lot 12, Block 8, Lincoln Park Subdivision, Division No. 4, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

AND: Lot 7, Block 5, Lincoln Park Subdivision, Division No. 5, First Amended, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

AND: Lots 5 through 9, and Lots 12 through 16, Block 6, Lincoln Park Subdivision, Division No. 5, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

TRACT II:

Lots 1 through 20, Block 1; Lots 1 through 21, Block 2; Lots 8 and 9, Block 9; Lots 8 and 9, Block 8; Lots 7 and 8, Block 10; and Lots 1 through 4, Block 3, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

a. The North 30.0 feet of Lot 8, said Block 10, being more particularly described as follows: Beginning at the Northwest Corner of Lot 8; running thence S0°02'56"E along the West line of Lot 8, 30.0 feet; thence S89°57'04"E 91.52 feet to the East line of Lot 8; thence N0°02'56"W along the East line of Lot 8, 30.0 feet to the Northeast Corner thereof; thence S89°57'04"W along the North line of Lot 8, 91.52 feet to the point of beginning.

TRACT III:

Lots 1 through 6, Block 10; Lots 1 through 7 and Lots 10 through 16, Block 9; Lots 1 through 7 and Lots 10 through 16, Block 8; Lot 5, Block 3; Lots 4 through 7, Block 4; and Lots 5 through 13, Block 5, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

ALSO:

Beginning at the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence N00°02'56"W 236.31 feet

to the Southwest Corner of Lot 5, Block 3 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S00°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence Southerly along the East line of a utilities easement as described in Instrument No. 1078440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 470.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 to the County of Bonneville, State of Idaho, and the point of beginning.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

Beginning at the Northwest Corner of Lot 1, Block 4, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; running thence S87°19'04"E 240.28 feet along the North line of said Lincoln Park Subdivision, Division 1, to the Northeast Corner of Lot 3, Block 4 of said Lincoln Park Subdivision; thence N0°02'56"W 80.00; thence N87°19'04"W 240.28 feet; thence S0°02'56"E 80.00 feet to the point of beginning.

TRACT IV:

Beginning at a point that is S87°10'42"E 990.00 feet along the Section line from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho, running thence S87°10'42"E 825.00 feet to an existing fence line; thence S0°04'33"E along said fence 2640.08 feet to the South line of the Northwest Quarter of said Section 14; thence N87°19'04"W 825.00 feet along said South line; thence North 2640.00 feet to the point of beginning.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTIES:

a. Beginning at the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence N00°02'56"W 236.31 feet to the Southwest Corner of Lot 5, Block 3 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S00°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence Southerly along the East line of a utilities easement as described in Instrument No. 1078440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 470.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 to the County of Bonneville, State of Idaho, and the point of beginning.

b. Beginning at a point that is S87°10'42"E 1464.56 feet along the Section line from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S87°10'42"E 350.40 feet along said Section line to an existing fence line extended; thence S0°04'33"E 777.08 feet along said fence line; thence N89°55'27"W 350.00 feet; thence N0°04'33"E 793.79 feet to the point of beginning.

c. Beginning at a point that is S87°10'42"E 1464.56 feet along the Section line and S0°04'39"W 793.78 feet from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S14°27'08"W 36.16 feet; thence S89°55'27"E 358.97 feet to an existing fence; thence N0°04'33"E 35.00 feet along said fence; thence N89°55'27"W 350.00 feet to the point of beginning.

d. That portion of the following described property lying within the boundaries of the above legal description: Lincoln Park Subdivision, Division Nos. 1, 3, 4, and 5 and Lincoln Park Subdivision, Division No. 5, First Amended, to the County of Bonneville, State of Idaho, according to the recorded plats thereof.

e. That portion of the following described property lying within the boundaries of the above legal description: Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

f. That portion of the above described property lying North of Cornerstone Community, Division No. 1, and West of Lincoln Park Subdivision, Division No. 4, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

TRACT IV:

Lot 29 & West 5 feet of Lot 28, Block 1:

Lot 29, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

AND ALSO the West 5 feet of Lot 28, said Block 1, being more particularly described as follows: Beginning at the Southwest corner of said Lot 28; and running thence N00°02'56"W along the West line of Lot 28, 100.0 feet to the Northwest corner thereof; thence N89°57'04"E along the North line of Lot 28, 5.0 feet; thence S0°02'56"E 100.0 feet to the South line of Lot 28; thence S89°57'04"W along said South line, 5.0 feet to the Point of Beginning.

East 55 feet of Lot 28 & West 5 feet of Lot 27, Block 1:

The East 55.0 feet of Lot 28, and the West 5.0 feet of Lot 27, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southeast corner of said Lot 28; and running thence N89°57'04"E along the South line of Lot 27, 5.0 feet; thence N0°02'56"W 100.0 feet to the North line of Lot 27; thence S89°57'04"W along the North line of Lot 27 extended, 60 feet to a point on the North line of said Lot 28; thence S0°02'56"E 100.0 feet to the South line of Lot 28; thence N89°57'04"E along said South line 55.0 feet to the Southeast corner of Lot 28, said point being the Point of Beginning.

East 55 feet of Lot 27 & West 5 feet of Lot 26, Block 1:

The East 55.0 feet of Lot 27, and the West 5.0 feet of Lot 26, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southwest corner of said Lot 26; and

running thence N89°57'04"E along the South line of Lot 26, 5.0 feet; thence N0°02'56"W 100.0 feet to the North line of Lot 26; thence S89°57'04"W along the North line of Lot 26 extended, 60 feet to a point on the North line of said Lot 27; thence S0°02'56"E 100.0 feet to the South line of Lot 27; thence N89°57'04"E along said South line 55.0 feet to the Southeast corner of Lot 27, said point being the Point of Beginning.

East 55 feet of Lot 26 & West 5 feet of Lot 25, Block 1:

The East 55.0 feet of Lot 26, and the West 5.0 feet of Lot 25, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southwest corner of said Lot 25; and running thence N89°57'04"E along the South line of Lot 25, 5.0 feet; thence N0°02'56"W 100.0 feet to the North line of Lot 25; thence S89°57'04"W along the North line of Lot 25 extended, 60 feet to a point on the North line of said Lot 26; thence S0°02'56"E 100.0 feet to the South line of Lot 26; thence N89°57'04"E along said South line 55.0 feet to the Southeast corner of Lot 26, said point being the Point of Beginning.

East 55 feet of Lot 25; West 5 feet of Lot 24 and the West 5 feet of the North 34.05 feet of Lot 23, Block 1:

A portion of Lots 23, 24 and 25, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southeast corner of Lot 25; and running thence S89°57'04"W along the South line of Lot 25, 55.0 feet; thence N0°02'56"W 100.0 feet to the North line of Lot 25; thence N89°57'04"E along the North line of Lot 25 extended, 60 feet to a point on the North line of said Lot 24; thence S0°02'56"E 100.0 feet; thence S89°57'04"W 5.0 feet to the Southeast corner of Lot 25, said point being the Point of Beginning.

Lot 24, less the West 5 feet; North 34.05 feet of Lot 23, less the West 5 feet, Block 1:

A portion of Lots 23 & 24, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at a point that is N89°57'04"E 5.0 feet from the Southeast corner of Lot 25; and running thence N89°57'04"E, parallel to the South line of Lot 24, 97.31 feet to the East line of Lot 23; thence N0°02'56"W 86.0 feet along the East line of Lots 23 and 24; thence N45°02'56"W 28.28 feet; thence S89°57'04"W 77.31 feet, to a point that is 5 feet East (measured along the North line of Lot 24) from the Northwest Corner of said Lot 24; thence S0°02'56"E 100 feet to the point of beginning.

Lot 23, less the North 34.05 feet and the West 5 feet and Lot 22, less the West 5 feet, Block 1:

A portion of Lots 22 & 23, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at a point that is N89°57'04"E 5.0 from the Southeast corner of Lot 25; and running thence N89°57'04"E, parallel to the South line of Lot 24, 97.31 feet to the East line of Lot 23; thence S0°02'56"E along the East line of Lots 23 and 22, 85 feet; thence S44°37'04"W 28.28 feet; thence S89°57'04"W 77.31 feet, to a point that is 5 feet

East (measured along the South line of Lot 22) from the Southwest Corner of said Lot 22; thence N0°02'58"W 105 feet to the point of beginning.

Lot 21: the West 5 feet of the South 25.95 feet of Lot 23 and the West 5 feet of Lot 22, Block 1:

Lot 21, Block 1, Cornerstone Community, Division No. 1, to the county of Bonneville, State of Idaho, according to the recorded plat thereof.

AND ALSO the West 5 feet of Lot 22 and the West 5 feet of the South 25.95 feet of Lot 23, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southwest corner of Lot 22; and running thence N89°57'04"E along the South line of Lot 22, 5.0 feet; thence N0°02'56"W 105.0 feet; thence S89°57'04"W 5 feet to the Northeast corner of Lot 21; thence S0°02'58"E 105.00 along the East line of Lot 21, to the point of beginning.

WIRE TRANSFER INSTRUCTIONS

BANK: KEY BANK OF IDAHO
1625 NORTHGATE MILE
IDAHO FALLS, IDAHO 83401

ROUTING NO.: 124101555

ACCOUNT: BONNEVILLE LAND & TITLE CO.
497 NORTH CAPITAL AVENUE, SUITE 100
IDAHO FALLS, IDAHO 83402

ACCOUNT NO.: 15-000262-6

INFORMATION NEEDED: OUR FILE (COMMITMENT) NUMBER
AMOUNT
NAME OF BORROWER

Phase I - $91,617.05
Phase II - $70,651.59
Phase III - $38,991.10
Phase IV & V - $15,958.96
½ prop taxes - $ 9000.00 --- This will stay in escrow until Dec 2 & then it will pay the taxes

$226,218.70

wired Sept 30, 2003

EXHIBIT "B"

Karl R. Decker, ISB #3390
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone 208-523-0620
Facsimile 208-523-9518

Penelope North-Shaul, ISB #4993
Dunn & Clark, P.A.
P.O. Box 277
Rigby, Idaho 83442
Telephone: 208-745-9202
Facsimilie: 208-745-8160

Attorneys for Cornerstone Home Builders, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC, Defendants.	**Case No.CV-06-140** **NOTICE OF INTENTION TO APPEAR AND PRODUCE TESTIMONY AND EVIDENCE** (I.R.Civ.P. 6(c)(4)) Fee Category: I.1.a Fee: $52.00

COMES NOW defendant Cornerstone Home Builders, LLC (hereafter "Cornerstone" or defendant) through Karl R. Decker, Attorney at Law, of Holden, Kidwell, Hahn & Crapo, P.L.L.C., and Penelope North-Shaul, Attorney at Law, of Dunn & Clark, P.A., pursuant to Idaho Rule of Civil Procedure 6(c)(4) and notifies the court and opposing counsel that Cornerstone Home Builders, LLC elects to appear and produce testimony and evidence at the hearing scheduled for 10:00 a.m. on January 24, 2006.

DATED this _____ day of January, 2006.

Holden, Kidwell, Hahn & Crapo, P.L.L.C.

_____
Karl R. Decker

DATED this 23rd day of January, 2006.

Dunn & Clark, P.A.

Penelope North-Shaul

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the _____ day of January, 2006, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered as defined by Rule 5(b), I.R.C.P.

Persons Served: Method of Service:

Daniel C. Green [ ] Mail [ ] Hand [x] Fax
Stephen J. Muhonen
Racine Olsen Nye Budge & Bailer Chartered
PO Box 1391
201 East Center
Pocatello, ID 83204-1391
Fax No. 232-7352

_____
Karl R. Decker

G:\WPDATA\KRD\12988-001, Cornerstone\03, Pleadings\Notice of Intention to Appear.wpd

DATED this 23 day of January, 2006.

Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Karl R. Decker

DATED this _____ day of January, 2006.

Dunn & Clark, P.A.

Penelope North-Shaul

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on the 23 day of January, 2006, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered as defined by Rule 5(b), I.R.C.P.

Persons Served:

Method of Service:

Daniel C. Green
Stephen J. Muhonen
Racine Olsen Nye Budge & Bailer Chartered
PO Box 1391
201 East Center
Pocatello, ID 83204-1391
Fax No. 232-7352

[ ] Mail [ ] Hand [x] Fax

Karl R. Decker

G:\WPDATA\KRD\12988-001, Cornerstone\03, Pleadings\Notice of Intention to Appear.wpd

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC.,

Plaintiff,

vs.

CORNERSTONE HOME BUILDERS, LLC,

Defendant.

Amended

MINUTE ENTRY
Case No. CV-06-140

On the 24th day of January, 2006, application for temporary restraining order came before the Honorable Richard T. St. Clair, District Judge, in open court at Idaho Falls, Idaho.

Mrs. Marlene Southwick, Deputy Court Clerk, was present.

Mr. Karl Decker and Ms. Penny North Shaul appeared on behalf of the ~~Plaintiffs~~ Defendant.

Mr. Stephen Muhonen appeared on behalf of the ~~Defendant(s)~~ Plaintiff.

Counsel waived reporting by court reporter. Hearing was digitally recorded.

The parties advised the Court that a resolution has been reached in this case.

Mr. Muhonen orally placed the resolution on the record. Mr. Decker stipulated to release the lis pendens, release the $5,000.00 cash bond back to the Plaintiff, and vacate the TRO.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2005, I caused a true and correct copy of the foregoing document to be delivered to the following:

RONALD LONGMORE

Deputy Court Clerk

Penny North Shaul
PO Box 277
Rigby, ID 83442

Karl R. Decker
PO Box 50130
Idaho Falls, ID 83405

Stephen J. Mahonen
PO Box 1391
Pocatello, ID 83204-1391

DUNN & CLARK, P.A.
Robin Dunn, Esq., ISB #2903
Stephen J. Clark, Esq., ISB #2961
Penny North Shaul, Esq., ISB #4993
P.O. Box 277
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC, Defendant.	Case No. CV-06-140 NOTICE OF APPEARANCE Fee Category: I.6(a) Filing Fee: $47.00

TO: THE ABOVE-NAMED PLAINTIFF, and its attorney, Stephen J. Muhonen, Esq.

YOU ARE HEREBY NOTIFIED that PENNY NORTH SHAUL, Attorney at Law, with residence at 240 So. 5th W., P.O. Box 277, Rigby, Idaho 83442, hereby enters an appearance as attorney of record for defendant, CORNERSTONE HOME BUILDERS, LLC, and the Clerk of this Court is hereby requested to make such entries as may be required to record such appearance, and take notice that such attorney demands that all papers, and notices be served on her at his above address.

DATED this 14th day of June, 2006.

Penny North Shaul, Esq.
DUNN & CLARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2006, a true and correct copy of the foregoing was delivered to the following person(s) by:

____ Hand Delivery

__X__ Postage-prepaid mail

____ Facsimile Transmission

Penny North Shaul, Esq.
DUNN & CLARK

Stephen J. Muhonen, Esq.
P.O. Box 1391
Pocatello, ID 83204

DANIEL C. GREEN (ISB No. 3213)
STEPHEN J. MUHONEN (ISB No. 6689)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

Attorneys for Plaintiff American Pension Services, Inc.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **AMENDED COMPLAINT**

COMES NOW the above named Plaintiff, AMERICAN PENSION SERVICES, INC., and for its amended cause of action against the above-named Defendant, CORNERSTONE HOME BUILDERS, LLC, states and alleges as follows:

PARTIES

1. Plaintiff, AMERICAN PENSION SERVICES, INC. ("Plaintiff") is a Corporation, incorporated by the laws of the State of Utah and authorized to conduct business in the state of Idaho. Plaintiff has its place of business at 11027 S. State Street, Sandy, County of Salt Lake, state of Utah.

2. Defendant, CORNERSTONE HOME BUILDERS, LLC., (hereafter "Cornerstone") was at all times relevant hereto a Utah limited liability company, conducting business in the state of

Idaho. Based upon information and belief, since the initial filing of this action, Cornerstone has become an Idaho limited liability company with its current mailing address at 3270 E. 17th Street, Suite 299 Ammon, Bonneville County, Idaho.

FACTS AND BACKGROUND

3. On September 29, 2003, Old West Annuity & Life Insurance Company, as Grantor, executed a Corporation Warranty Deed transferring certain real property located in Bonneville County, Idaho to P&B Enterprises, Inc., a Utah Corporation (hereinafter referred to as "P & B") and S.R. Tallman Construction, Inc. a Utah corporation (hereinafter referred to as "Tallman") as Grantees. The Corporation Warranty Deed was recorded on September 30, 2003 as Bonneville County Recorder's Instrument No. 1130070. A true and correct copy of said deed is attached hereto as **Exhibit A** and incorporated by reference as if set forth fully herein.

4. On or about January 22, 2004 P&B and Tallman, as Grantors, executed a Corporation Warranty Deed transferring certain real property located in Bonneville County, Idaho to Cornerstone, as Grantee. The Corporation Warranty Deed was recorded on March 19, 2004 as Bonneville County Recorders Instrument No. 1146311. A true and correct copy of said deed is attached hereto as **Exhibit B** and incorporated by reference as if set forth fully herein.

5. The Plaintiff, due to his knowledge, experience and relationships with individuals in the finance industry as well as the former owner of the property described above, was instrumental in setting up the foregoing purchase by Cornerstone.

6. Prior to Cornerstone's acquisition of the above described real property, Plaintiff had built four homes on the property and had a contract with Leon Harward, the former owner of the subdivision. Mr. Harward's subdivision project went into foreclosure.

7. When the project went into foreclosure, Plaintiff, utilizing his experience, contacts and knowledge in the finance industry, arranged a meeting with the project lender, Met Life of

Spokane Washington, himself and Cornerstone to determine what could be done to save the subdivision project.

8. Due to this meeting facilitated by Plaintiff, MetLife and Cornerstone were able to work out an arrangement where Cornerstone would and did purchase the subdivision property.

9. The Plaintiff is informed and believes and therefore alleges that the property was acquired by Cornerstone for the purpose of subdividing and constructing homes thereon for resale. The project was to be completed in five phases.

10. In order to proceed with the project, Cornerstone sought investors to inject capital into the project. In return, Cornerstone agreed to provide the investors with a promissory note, deed of trust and a repayment schedule.

11. In reliance upon Cornerstone's representations and based upon the prior course of dealing between the parties or individuals affiliated thereto, beginning in September, 2003 Plaintiff began wiring to Cornerstone and/or its manager(s) and/or member(s) or individual(s) affiliated thereto, capital to be utilized on the development of the land as described above and in the aforementioned Warranty Deeds.

12. Following the initial wire transfer to Cornerstone and/or its manager(s) and/or member(s) or individual(s) affiliated thereto, Plaintiff continued to provide capital to Cornerstone through February 2004, with such capital to be utilized on the development of the land as described above and in the aforementioned Warranty Deeds.

13. Prior to Plaintiff's agreement with Cornerstone and/or its manager(s) and/or member(s) or individual(s) affiliated thereto, to provide the foregoing stream of financing for the above mentioned construction and subdivision project, Cornerstone and Plaintiff verbally agreed to certain repayment terms, including, but not limited to, an interest rate of ten percent (10%) per annum on the monies lent, a promissory note and deed of trust on the land in the construction and

subdivision project, as well as an agreement between Cornerstone and Plaintiff that Plaintiff was to receive $750.00 per lot sold in the project.

14. This oral financing agreement made by Cornerstone with Plaintiff was based upon the parties prior course of dealings as well as in consideration to Plaintiff for his experience and knowledge and contacts in the finance industry, all of which ultimately led to Cornerstone's introduction and purchase of the subdivision property.

15. Since lending the above mentioned sums of money to Cornerstone, Plaintiff has not been provided a promissory note and deed of trust on the land pursuant to the agreement between the parties.

16. Furthermore, Plaintiff has not received the $750.00 per lot sold or to be sold by Cornerstone in the construction and subdivision project.

17. Following the filing of the original Complaint in this matter, the parties have negotiated resolution of the underlying principal and interest debt owed by Cornerstone on the sums lent by Plaintiff, for which Plaintiff has been paid in full.

18. Despite repeated demands and contrary to the parties agreement, Cornerstone has failed and refused and continues to fail and refuse to provide Plaintiff with a promissory note and deed of trust evidencing the loan and detailing the terms of repayment as represented and agreed to by Cornerstone and Plaintiff.

19. Despite repeated demands and contrary to the parties agreement, Cornerstone has failed and refused and continues to fail and refuse to pay Plaintiff $750.00 per lot for each lot sold or to be sold in the construction and subdivision project owned by Cornerstone and funded by or funded in part by Plaintiff.

FIRST CAUSE OF ACTION
[Breach of Express Contract]

20. Plaintiff realleges the allegations contained in Paragraphs 1-19 above, and incorporates the same herein by reference as if set forth fully.

21. In exchange for Plaintiff's investment and payment of capital into the construction and subdivision project owned by Cornerstone, as well as Plaintiff's knowledge, experience and contacts in the finance industry which ultimately led to Cornerstone's introduction to and purchase of the subdivision property, Cornerstone promised to provide to Plaintiff a promissory note containing the terms of repayment, including but not limited to an interest rate of ten percent (10%) and payment of $750.00 for each lot sold or to be sold by Cornerstone, together with a deed of trust to secure said promissory note.

22. Based upon information and belief, Cornerstone has sold lots within the construction and subdivision project owned by Cornerstone but has failed to pay Plaintiff $750.00 for each lot sold.

23. Cornerstone has also failed to provide Plaintiff with a promissory note and a deed of trust.

24. Cornerstone's failure to provide said promissory note and deed of trust as described above and Cornerstone's failure to pay Plaintiff $750.00 per lot sold, constitutes a breach of said agreement.

25. As a result of said breach, Plaintiff has been damaged in the amount which is currently unknown and which is to be proven at the time of trial.

SECOND CAUSE OF ACTION
[Breach of Implied In Fact Contract]

26. Plaintiff realleges the allegations contained in Paragraphs 1-25 above, and incorporates the same herein by reference as if set forth fully.

27. An implied in fact contract exists between the parties because the conduct of the parties shows the intent to make a contract.

28. The circumstances imply or demonstrate a request by Cornerstone for Plaintiff to provide certain funds to it for construction and/or subdivision development purposes.

29. The circumstances imply a promise by Cornerstone to compensate Plaintiff for its efforts in setting up the purchase of the subdivision project and providing the financing, which was to be secured by a promissory note and deed of trust.

30. Plaintiff provided the money as requested.

31. Cornerstone's failure to pay to or provide Plaintiff with a promissory note and deed of trust under the terms and conditions as outlined above constitutes a breach of their implied in fact contract.

32. As a result of said breach, Plaintiff has been damaged in the amount which is currently unknown and which is to be proven at the time of trial.

THIRD CAUSE OF ACTION
[Fraud]

33. Plaintiff realleges the allegations in Paragraphs 1-32 above and incorporates the same herein by reference as if set forth fully.

34. Cornerstone's representations to Plaintiff as described above constituted a representation of material fact that Cornerstone knew was false at the time it was made.

35. Cornerstone intended that Plaintiff would act upon the representation and loan funds to Cornerstone in the contemplated manner.

36. Plaintiff did not know the representation was false and that Cornerstone did not intend to provide a promissory note and deed of trust, nor did Cornerstone intend on paying Plaintiff the

$750.00 per lot. Plaintiff had a right to rely on and did rely on the truth of Cornerstone's representations.

37. Plaintiff provided hundreds of thousands of dollars to Cornerstone based upon Cornerstone's representations, however, Cornerstone has failed to and continues to refuse to provide Plaintiff with a promissory note and deed of trust as well as $750.00 for each lot sold in the subdivision.

38. Attached hereto as **Exhibit C** is a fax dated memorandum dated April 7, 2005 from Cornerstone to Plaintiff. This memorandum memorializes that the above described agreement between Plaintiff and Cornerstone did in fact exist, including the promise by Cornerstone to Plaintiff to provide Plaintiff a promissory note and deed of trust as well as "an equity participation of either $550 or $725 per home to APS."

39. Based upon Cornerstone's failure and continued refusal to provide Plaintiff with a promissory note and deed of trust and refusal to pay Plaintiff $750.00 per lot sold, Cornerstone's representations to Plaintiff were false representations that induced Plaintiff to enter into the agreement.

40. Due to Cornerstone's fraudulent misrepresentations, Plaintiff has suffered consequential and approximate damages in an amount to be proven at the time of trial.

FOURTH CAUSE OF ACTION
[Unjust Enrichment]

41. Plaintiff realleges the allegations in Paragraphs 1-40 above and incorporates the same herein by reference as if set forth fully.

42. Plaintiff, utilizing his experience, knowledge and contacts in the finance industry, introduced Cornerstone to the underlying construction and subdivision project, as well as provided capital to Cornerstone. In exchange, Plaintiff anticipated receiving a promissory note and deed of trust securing the sums lent through the real property described herein, with such repayment terms

to include, but not limited to, the repayment of the sums lent, including interest and $750.00 per lot as outlined above.

43. Cornerstone has failed and refused and continues to fail and to refuse to provide to Plaintiff the promised promissory note and deed of trust.

44. Additionally, Cornerstone has retained Plaintiff's monies and has failed and refused and continues to fail and to refuse to pay to Plaintiff the $750.00 per lot sold.

45. Plaintiff is entitled to the value of the benefit bestowed upon Cornerstone as a result of Plaintiff's loan.

SEVENTH CAUSE OF ACTION
[Breach of Covenant of Good Faith and Fair Dealing]

46. Plaintiff realleges the allegations in Paragraphs 1-45 above and incorporates the same herein by reference as if set forth fully.

47. There is implied in the contract between the parties a covenant of good faith and fair dealing on the part of Cornerstone to pay Plaintiff and provide Plaintiff with a promissory note and deed of trust in accordance with the agreement reached between the parties so that Plaintiff may obtain all benefits available to it under the contract.

48. Through the actions alleged above, Cornerstone has materially breached the covenant of good faith and fair dealing.

49. As a result of said breach, Plaintiff has been damaged in the amount which is currently unknown and which is to be proven at the time of trial.

ATTORNEY S' FEES

It has been necessary for Plaintiff to employ counsel to represent it in this action and has obligated itself to pay reasonable fees for such services. Pursuant to Idaho Code § 12-120(3)

Cornerstone is obligated for payment of attorney's fees and costs incurred by Plaintiff to prosecute this action.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment and Decree of this Court as follows:

A. That the Court find that a valid contract existed between the parties with regard to the payment and real property described herein and that Cornerstone has breached this contract;

B. That Cornerstone should be immediately required to provide to Plaintiff a promissory note, together with a deed of trust securing the promissory note with the real property described above;

C. That Cornerstone be immediately required to pay to Plaintiff $750.00 per lot sold and to be sold by Cornerstone in the development describe above;

D. Alternatively, Cornerstone be ordered to pay to Plaintiff the value of the benefit bestowed upon Cornerstone resulting from the loan from Plaintiff;

E. That Plaintiff recover from Cornerstone all of its attorney fees associated with this action;

F. That Plaintiff recover from Cornerstone all of its costs and expenses associated with this action; and

G. For all other relief that the Court deems just and proper under these premises.

DATED this 4 day of October, 2006.

RACINE, OLSON, NYE, BUDGE

& BAILEY, CHARTERED

By _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

VERIFICATION

STATE OF UTAH)

: ss.

County of Salt Lake

I, Curtis DeYoung, President of American Pensions Services, Inc., being first duly sworn upon oath, depose and state that I have read the foregoing document, and based on my information and belief so acknowledge and agree voluntarily that the foregoing document is true and correct.

DATED this 4 day of October, 2006.

Curt L. DeYoung President
Curtis DeYoung

SUBSCRIBED AND SWORN TO before me this 4 day of October, 2006.

(SEAL)

JULIE ANN HANSEN
NOTARY PUBLIC • STATE of UTAH
11027 S STATE STREET
SANDY, UT 84070
COMM. EXP. 06/30/2009

Julie Ann Hansen
NOTARY PUBLIC FOR UTAH
Residing at: Salt Lake
My Commission Expires: 6/30/2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of October, 2006, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Karl R. Decker HOLDEN KIDWELL HAHN & CRAPO P.O. Box 50130 Idaho Falls, Idaho 83405-0130	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *523-9518*
Penelope North-Shaul DUNN & CLARK P. O. Box 277 Rigby, Idaho 83442	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *745-8160*

S. Muhonen

STEPHEN J. MUHONEN

DUNN & CLARK, P.A.
Robin D. Dunn, Esq., ISB #2903
Stephen J. Clark, Esq., ISB # 2961
Penny North Shaul, Esq., ISB # 4993
P.O. Box 277
240 South 5th West
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT Fee Category: I.1.b Fee: $14.00

COMES NOW, the Defendant, by and through its undersigned attorney of record, and answers that Amended Complaint as follows:

I

The Defendant denies each and every allegation of the Amended Complaint on file herein unless specifically admitted hereafter.

II

The Defendant answers each and every paragraph of the Amended Complaint herein according to the numerical paragraph markings of the plaintiff as follows:

1. This Defendant is without sufficient knowledge to answer in an informed fashion and therefore denies.
2. Admit.
3. Admit.
4. Admit.
5. Deny.
6. This Defendant is without sufficient knowledge to answer in an informed fashion and therefore denies.
7. Deny.
8. Defendant admits that the subdivision property was purchased and subsequently, said property was transferred to Cornerstone Home Builders, LLC. Defendant denies the balance of Paragraph 8 of Plaintiff's Amended Complaint.
9. Defendant purchased the subdivision for constructing homes upon it. Defendant denies the balance of Paragraph 9.
10. Defendant did seek investors. Defendant denies the balance of Paragraph 10.
11. Defendant admits Plaintiff began wiring funds to Defendant in September, 2003. Defendant denies the balance of Paragraph 11.
12. Defendant admits that Plaintiff wired funds to Defendant through February, 2004. Defendant denies the balance of Paragraph 12.
13. Defendant admits that a verbal agreement was entered into by Plaintiff and

Defendant regarding certain repayment terms for funds loaned by Plaintiff to Defendant, which was limited to an interest rate of ten (10) percent, per annum, on monies lent. Defendant admits there was a separate verbal agreement that Defendant would pay Plaintiff $750.00 per closing of final sale, per lot, *contingent* on Plaintiff providing *full* funding of the construction project at the subdivision. Defendant denies the balance of Paragraph 13.

14. Deny.
15. Deny. Any monies lent by Plaintiff to Defendant have been fully repaid with interest accrued at the rate agreed upon.
16. Deny. No such sums are due and owing to Plaintiff.
17. Defendant always acknowledged that sums were due for monies lent by Plaintiff to Defendant, and did, in fact, pay such sums once Plaintiff cooperated with Defendant to determine the fixed sum due and owing. Therefore, Defendant denies Paragraph 17 as alleged by Plaintiff.
18. Deny. Plaintiff was provided with several drafts of promissory notes and/or deeds of trust, up until the underlying principal and interest owed by Defendant to Plaintiff was paid in full.
19. Defendant admits it has refused to pay Plaintiff $750.00 per lot for each lot sold or to be sold in the construction and subdivision project, because no such sums are due and owing to Plaintiff. Defendant denies the balance of Paragraph 19.
20. Defendant realleges its answers to Paragraphs 1 through 19 of Plaintiff's Amended Complaint.
21. Defendant admits it agreed to enter into a promissory note which contained a

provision for assessment of interest in the amount of ten (10) percent per annum on funds loaned to Defendant by Plaintiff. Defendant admits there was a separate verbal agreement for payment to Plaintiff $750.00 per lot for each lot sold or to be sold in the construction and subdivision project, *contingent* upon Plaintiff providing *full* funding through the completion of the construction/development project at the subdivision. Plaintiff failed to provide full funding on the project. Defendant denies the balance Paragraph 21.

22. Defendant has sold lots in its subdivision. Defendant denies the balance of Paragraph 22.

23. Deny. Defendant sent several drafts of promissory notes and/or deeds of trust to Plaintiff. The underlying principal and interest have been paid in full by Defendant.

24. Deny.

25. Deny

26. Defendant realleges its answers to Paragraphs 1 through 25 of Plaintiff's Amended Complaint.

27. Deny.

28. Deny.

29. Deny.

30. Deny.

31. Deny

32. Deny.

33. Defendant realleges its answers to Paragraphs 1 through 32 of Plaintiff's

Amended Complaint.

34. Deny.

35. Deny.

36. Deny.

37. Defendant admits Plaintiff provided funding to Defendant through February, 2004. Defendant has paid Plaintiff in full for the principal and interest accrued upon funding provided by Plaintiff to Defendant, and therefore, the need for a promissory note and deed of trust is moot. Defendant denies the balance of Paragraph 37.

38. Defendant is without sufficient knowledge to verify the authorship of Plaintiff's Exhibit C to his Amended Complaint. Therefore, Defendant must deny Paragraph 38 as alleged in Plaintiff's Amended Complaint.

39. Deny.

40. Deny.

41. Defendant realleges its answers to Paragraphs 1 through 40 of Plaintiff's Amended Complaint.

42. Deny.

43. Deny.

44. Defendant denies it has retained Plaintiff's "monies". Plaintiff has been paid in full for the principal and interest owed by Defendant to Plaintiff. Defendant denies the balance of Paragraph 44.

45. Deny.

46. Defendant realleges its answers to Paragraphs 1 through 45 of Plaintiff's

Amended Complaint.

47. Deny.

48. Deny.

49. Deny.

III. ATTORNEYS' FEES

Defendant denies that Plaintiff is entitled to attorney's fees and costs pursuant to Idaho Code §12-120(3). Conversely, Defendant is entitled to attorneys' fees and costs pursuant to Idaho Code §12-120.

IV. FIRST AFFIRMATIVE DEFENSE

The Amended Complaint fails to state a claim upon which relief may be granted pursuant to IRCP 12(b)(6).

V. SECOND AFFIRMATIVE DEFENSE

The Amended Complaint is barred by the Statute of Frauds, in that this transaction involves real estate, and such transaction was never reduced to writing.

VI. THIRD AFFIRMATIVE DEFENSE

The Amended Complaint is barred because the underlying principal and interest have been fully paid and satisfied by Defendant.

VII. FOURTH AFFIRMATIVE DEFENSE

The Amended Complaint is barred by the doctrine of accord and satisfaction. Any debt owed to Plaintiff by Defendant has been paid in full.

VIII. FIFTH AFFIRMATIVE DEFENSE

The Amended Complaint is barred because Defendant detrimentally relied upon Plaintiff's assertion that he would not fund the subdivision project, thereby breaching

any verbal agreement that may have existed between the parties hereto.

IX. SIXTH AFFIRMATIVE DEFENSE

The Amended Complaint is barred because Plaintiff failed to provide funding for the entire subdivision project, thereby failing to confer a benefit on Defendant.

X. SEVENTH AFFIRMATIVE DEFENSE

The Amended Complaint herein is inconsistent in its claims, in that Plaintiff has alleged breach of contract, which confers a legal remedy, and also alleged unjust enrichment, which is equitable in nature. Plaintiff cannot proceed under both theories of recovery.

XI. EIGHTH AFFIRMATIVE DEFENSE

Defendant reserves the right to allege additional defenses and/or counterclaims after completion of discovery.

REQUEST FOR ATTORNEY FEES

Defendant herein requests attorney fees, to be awarded in a reasonable amount, along with reasonable costs associated with litigation pursuant to statute, rule and case law consistent in the State of Idaho.

WHEREFORE, Defendant prays for relief as follows:

1. The Complaint on file herein be dismissed with prejudice;
2. For reasonable attorneys fees as are just;
3. For related costs associated with litigation; and,
4. For all further just relief.

DATED this 24th day of October, 2006.

Penny North Shaul, Esq.
DUNN & CLARK, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2006, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

xx Postage-prepaid mail

X Facsimile Transmission

Penny North Shaul, Esq.
DUNN & CLARK

Stephen J. Muhonen, Esq.
P.O. Box 1391
Pocatello, ID 83204

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff(s), vs. CORNERSTONE HOME BUILDERS, LLC, Defendant(s).	MINUTE ENTRY CASE NO. CV-06-140

On the 22nd day of February, 2007, a status conference and motion to continue jury trial came before the Honorable Richard T. St. Clair, District Judge, in open court at Idaho Falls, Idaho.

Mr. Jack Fuller, Court Reporter, and Mrs. Marlene Southwick, Deputy Court Clerk, were present.

Mr. Stephen Muhonen appeared on behalf of the Plaintiff.

Ms. Penny North Shaul appeared on behalf of the Defendant.

Ms. Shaul advised the Court that the parties have made a joint motion to continue jury trial. Mr. Muhonen presented a statement in support of the motion to continue.

The parties have conducted a mediation; no settlement was reached.

The Court granted the motion for continuance and reset the matter for jury trial on June 19, 2007 at 10:00 a.m. Pretrial Conference was rescheduled for June 6, 2007 at 8:30 a.m. Discovery deadline is May 31, 2007.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of February, 2007, that I mailed or hand delivered a true and correct copy of the foregoing document to the following:

RONALD LONGMORE

BY _____
DEPUTY CLERK

Daniel C. Green
Stephen J. Muhonen
PO Box 1391
Pocatello, ID 83204-1391

Penny North Shaul
PO Box 277
Rigby, ID 83442

Karl R. Decker
PO Box 50130
Idaho Falls, ID 83405

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC.,

Plaintiff,

vs.

CORNERSTONE HOME BUILDERS, LLC.,

Defendant.

Case No. CV-06-140

ORDER

Based upon the Consent to Waiver of Jury Trial and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the jury trial previously scheduled in this matter for 10:00 a.m. on June 19, 2007, is hereby set as a court trial. The remaining terms and conditions of this Court's Order dated February 22, 2007 shall remain as ordered except for those matters relating to the jury trial, which is now ordered as WAIVED.

DATED this 11 day of April, 2007.

RICHARD T. ST. CLAIR
Seventh District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of April, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Penelope North-Shaul DUNN LAW OFFICES, PLLC P. O. Box 277 Rigby, Idaho 83442	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile — *745-8160*
Stephen J. Muhonen RACINE OLSON NYE BUDGE & BAILEY, CHARTERED P.O. 1391 Pocatello, Idaho 83204	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile — *232-6109*

CLERK OF THE COURT

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB #2903
Penny North Shaul, Esq., ISB # 4993
David L. Brown, Esq., ISB #7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Attorneys for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, CORNERSTONE HOME BUILDERS, LLC., by and through its attorney of record, Penny North Shaul, Esq., and hereby moves this Court for its Order Granting Defendant's Motion for Summary Judgment on Plaintiff's Amended Complaint. This motion is brought pursuant to Idaho Rule of Civil Procedure 56(c), based upon the record on file, and depositions and affidavits to be lodged with the Court with Defendant's Memorandum in Support of Motion for Summary Judgment; and wherein there are no genuine issues of material fact as to all Counts contained in Plaintiff's Amended Complaint, as set forth more fully in

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Defendant's Memorandum in Support of Motion for Summary Judgment. Oral argument is requested.

RESPECTFULLY SUBMITTED this 18th day of April, 2007.

Penny North Shaul, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of April, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

xx Postage-prepaid mail

____ Facsimile Transmission

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

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Stephen J. Muhonen (ISB No. 6689)
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Telephone: (208)232-6101
Fax: (208)232-6109
Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Plaintiff AMERICAN PENSION SERVICES, INC. ("Plaintiff"), by and through its counsel of record and for a cause of action against the Defendant CORNERSTONE HOME BUILDERS, LLC. ("Defendant"), and respectfully moves this Court, pursuant to Idaho Rules of Civil Procedure 56, for the entry of Summary Judgment in favor of Plaintiff on the grounds and for the reason that there are no genuine issues of material fact and that Plaintiff is entitled to judgment as a matter of law.

This motion is made and based upon the memorandum in support of the same, the Affidavit of Counsel and the Affidavits of Brad Kendrick and Martin Pool, which will be filed in accordance with Rule 56, together with the Court files and records.

56- 3

ORAL ARGUMENT IS REQUESTED.

DATED this 18 day of April, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

Daniel C. Green (ISB No. 3213)
Stephen J. Muhonen (ISB No. 6689)
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Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, AMERICAN PENSION SERVICES, INC., A Utah corporation (hereafter "APS"), that is authorized to do and is doing business in the State of Idaho by and through its attorneys of record, and hereby submits this Memorandum in Support of its Motion for Summary Judgment.

RELIEF SOUGHT

APS seeks an entry of Judgment in its favor awarding the relief prayed for in its Amended Complaint, which is verified, and filed with this Court on October 5, 2006, against the Defendant CORNERSTONE HOME BUILDERS, LLC., an Idaho Limited Liability Corporation (hereafter"Cornerstone"), for the unpaid balance in the sum of $750.00 per lot within the developed

subdivision identified and described in Plaintiff's Amended Complaint and all accrued interest on said sums together with its reasonable attorney fees and costs incurred.

STATEMENT OF FACTS

The following facts are material, undisputed and supported by the file, APS's Amended Complaint, supporting Affidavits and other pleadings, and entitle APS to Judgment against Cornerstone as a matter of law.

1. APS is a Utah corporation in business as a contract administrator for third party retirement plans. (Dep. of Curtis DeYoung at 7, lines 2-7.) In 2001, APS, through its President, Curtis DeYoung, approached P&B Enterprises Inc. and informed its CEO, Martin Pool of a real property development project located in Idaho that APS was involved in. Mr. DeYoung and inquired as to whether or not P&B would be interested in being involved in the project. P&B looked into the project and turned down the offer at that time. (Dep. of Curtis DeYoung at 5, line 8 and *generally* at pp. 23-26; Pool Aff. ¶ 6.) Later, in 2003, APS, once again through Mr. DeYoung, approached P&B and informed it that APS was involved in the Idaho project previously discussed. Mr. DeYoung advised that the Idaho project developer was trying to get out and that the project was going into foreclosure. Mr. DeYoung inquired whether P&B would be interested in picking up the project if APS provided funding the down payment to facilitate the purchase of the real property that was in foreclosure. (Dep. of Curtis DeYoung at 27, lines 4-17, 29, line 17; Pool Aff. ¶ 8.)

2. P&B agreed to look into the project and Brad Kendrick, the Chief Operations Officer of P&B was assigned to investigate the matter due to his previous experience with real property development. (Pool Aff.¶ 8; Kendrick Aff. ¶ 7.) The prospective development project was in or near Idaho Falls, Idaho. Mr. Pool and Mr. Kendrick thought Scott Tallman might be a good fit to assist

with the project since Mr. Tallman was a home builder, had built Mr. Pool's home and was from the Idaho Falls area. *Id.*

3. Shortly thereafter, Mr. Tallman came to the P&B office in Utah and it was agreed upon by Mr. Kendrick, Mr. Pool, Mr. Tallman and Jonathan Reyes, another individual involved with P&B, that they would form a new business entity and attempt to purchase the Idaho project. (Pool Aff.¶ 9; Kendrick Aff. ¶ 8; Dep. of Scott Tallman at 31-34, 59, line 15-25.) Mr. Kendrick, Mr. Pool, Mr. Tallman and Jonathan Reyes all agreed that APS, through Curtis DeYoung, would be the source of funding of the down payment to facilitate the purchase of the Idaho real property development project. (Pool Aff.¶ 9; Kendrick Aff. ¶ 8.)

4. The business entity formed by Mr. Kendrick, Mr. Pool, Mr. Tallman and Jonathan Reyes was called Cornerstone Homebuilders, LLC. Mr. Kendrick was designated to be the Member-Manager. (Pool Aff.¶ 10; Kendrick Aff. ¶ 9; Dep. of Scott Tallman at 13, lines 3-20.) A true and correct copy of the Articles of Organization for Cornerstone Homebuilders, LLC, which were filed in the state of Utah in October 2003 are attached as **Exhibit A** to the Affidavit of Brad Kendrick.

5. Though not yet formalized, Cornerstone agreed to enter into the project with APS. Thereafter, APS, by and through Mr. DeYoung, and Cornerstone, through its members Mr. Tallman and Mr. Kendrick, flew to Spokane, Washington to meet with Metropolitan Mortgage & Securities Co., Inc., and Old West Annuity & Life Insurance Company, the lenders involved in the Idaho development project, with the purpose of attempting to finalize the purchase of the Idaho real property. (Pool Aff.¶ 11; Kendrick Aff. ¶ 11; Dep. of Scott Tallman at 56-57, 68, lines 19-25.)

6. In Spokane, Cornerstone was able to reach an agreement on the purchase of the Idaho real property development project with Metropolitan Mortgage & Securities Co., Inc., and Old West

Annuity & Life Insurance Company for the purchase price of approximately1.1 million dollars. The title of the real property was to be put and was put into both P&B's name and Scott Tallman's business name, S.R. Tallman Construction, Inc., due to Cornerstone not yet being formalized. (Pool Aff.¶ 12; Kendrick Aff. ¶ 12.) In January, 2004 title to the Idaho real property was put into Cornerstone's name. (Pool Aff.¶ 13; Kendrick Aff. ¶ 13; Am. Compl. Ex. B.)

7. None of the members of Cornerstone knew of the Idaho development project until APS brought it to their attention. (Pool Aff.¶ 14; Kendrick Aff. ¶ 14; Dep. of Scott Tallman at 57, lines 12-14.) During Cornerstone's preliminary calculations, they projected to realize a profit in the Idaho development project in an amount over two(2) million dollars. (Pool Aff.¶ 15; Kendrick Aff. ¶ 15; Dep. of Scott Tallman at 55, lines 19-25.) Due to APS bringing the project to Cornerstone's attention, the funding agreement that was entered into, orally, between Cornerstone and APS for the Idaho real property development project was as follows: APS would provide the down payment of approximately twenty percent (20%), which would be repaid at 10% interest. In addition, APS would receive $750.00 per lot sold in the development project. Furthermore, APS was to have the option of being able to lend on the individual homes to be built in the development project. The lending of money from APS to Cornerstone was to be secured by APS through a Promissory Note and Deed of Trust issued by Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.)

8. During much of the analyzing, calculating and negotiations of the purchase of the Idaho development property, Brad Kendrick was with Scott Tallman. Attached as **Exhibit C** to the Affidavit of Brad Kendrick is a true and correct copy of notes he was working on with Mr. Tallman. In the upper right hand corner of the document is a note that reads "$750.00 Curtis." That note was

written by Mr. Tallman. The purpose of the note was to memorialize Cornerstone's $750.00 per lot obligation to APS for lending the 20 % down payment as Cornerstone was attempting to determine profitability, retail, etc. of the lots in the development project. (Kendrick Aff. ¶ 17; Dep. of Scott Tallman at 96, lines 12-25, 97, lines 1-4.)

9. While the parties were in Spokane, Washington, negotiating the purchase of the subject property, there was a break where Mr. DeYoung, Mr. Tallman and Mr. Kendrick were discussing life in general which eventually led into a discussion about retirement accounts. At the end of the conversation Mr. DeYoung mentioned he wanted his $750.00 equity position to be in writing. Mr. Kendrick was intrigued by the conversation and took notes, memorializing the topic of discussion and Mr. DeYoung's request. (Kendrick Aff. ¶ 18.)

10. When the agreement between Cornerstone and the lenders out of Spokane was finalized for the purchase of the Idaho property, on September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of $226,218.70, which was used to purchase the property. APS was not provided a Promissory Note or Deed of Trust at this time. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.)

11. On or about November 5, 2003, APS loaned Cornerstone an additional $49,476.30 for development of the Idaho project. APS was not provided a Promissory Note or Deed of Trust at this time. (Kendrick Aff. ¶ 20; Dep. of Scott Tallman at 123, lines 7-24.)

12. On or about December 5, 2003, APS loaned Cornerstone an additional $36,406.91 for development of the Idaho project. APS was not provided a Promissory Note or Deed of Trust at this time. (Kendrick Aff. ¶ 21; Dep. of Scott Tallman at 124, lines 3-11.)

13. On or about January 13, 2004, APS loaned Cornerstone an additional $78,280.28 for development of the Idaho project. APS was not provided a Promissory Note or Deed of Trust at this time. (Kendrick Aff. ¶ 22; Dep. of Scott Tallman at 125, lines 1-14.)

14. On or about February 26, 2004, APS loaned Cornerstone an additional $97,569.33 for development of the Idaho project. APS was not provided a Promissory Note or Deed of Trust at this time. (Kendrick Aff. ¶ 23.)

15. The combined amount of money lent by APS to Cornerstone, through February 2004 was in the approximate sum of $487,951.52, plus interest. (Kendrick Aff. ¶ 24.)

16. The reason APS was not provided a Promissory Note and Deed of Trust reflecting the agreement between the parties was because at the time of the initial purchase of the real property, Cornerstone had yet to be formalized. Once Cornerstone was formalized, the members of Cornerstone just didn't get around to following through with their end of the bargain and providing APS the documents as previously agreed. (Pool Aff. ¶ 20; Kendrick Aff. ¶ 25.)

17. Mr. DeYoung contacted members of Cornerstone several times after APS's initial loan and continued thereafter after the subsequent loans to Cornerstone, inquiring as to the status of the Promissory Note and Deed of Trust. (Pool Aff. ¶ 21; Kendrick Aff. ¶ 26; Dep. of Curtis DeYoung at 49, lines 15-25.)

18. In March 2004, APS refused to lend any additional funds to Cornerstone as a result of having lent approximately one-half million dollars to Cornerstone and having no security in place for said funds. (Pool Aff. ¶ 22; Kendrick Aff. ¶ 27; Dep. of Curtis DeYoung at 45, lines 18-23.)

When APS stopped lending money to Cornerstone Mr. Tallman told Brad Kendrick that Cornerstone would not be paying APS the $750.00 per lot because, from his perspective, the $750.00

per lot was only to be provided upon complete funding of the entire development project by APS. (Kendrick Aff. ¶ 28; *See generally* Am. Answer ¶ 13.) This contingency expressed by Mr. Tallman at this time was never part of the agreement between APS and Cornerstone. (Pool Aff. ¶ 17; Kendrick Aff. ¶ 28; Dep. of Curtis DeYoung at 59, lines 22-25, 60, lines 1-5.)

19. In March 2004, Martin Pool and Jonathan Reyes disassociated themselves from Cornerstone. At that time only Brad Kendrick and Scott Tallman remained as members of Cornerstone. (Pool Aff. ¶ 23; Kendrick Aff. ¶ 29; Dep. of Scott Tallman at 132, lines 8-9.)

20. In June, 2004, on behalf of Cornerstone, Mr. Kendrick sent a Promissory Note to APS for $250,000.00, interest free, signed by himself and Mr. Tallman, for APS's review. This is the first Note Cornerstone sent to APS and it was never recorded. (Kendrick Aff. ¶ 30, Ex. E; Dep. of Scott Tallman at 130.) Following APS's receipt of this Note, Mr. DeYoung informed Mr. Kendrick this Note was in error and was not acceptable as it did not reflect the agreement between APS and Cornerstone. (Kendrick Aff. ¶ 31; Dep. of Curtis DeYoung at 56, lines 11-21.)

21. In September 2005, Mr. Kendrick, on behalf of Cornerstone, sent APS another Promissory Note and a Deed of Trust which reflected an unpaid principal amount of $150,000.00 at 10% interest. These documents were never recorded. (Kendrick Aff. ¶ 32, Ex. F; Dep. of Scott Tallman at 126lines 14-24.) Following APS's receipt of this Note and Deed of Trust, Mr. DeYoung informed Mr. Kendrick this Note was also in error and was not acceptable as well as it did not reflect the agreement between APS and Cornerstone. (Kendrick Aff. ¶ 33.)

22. Commencing in April 2004, Cornerstone began paying back monies to APS, however, due to various internal problems, APS and Cornerstone could not agree upon an amount that was due and owing to APS for the principal amount plus interest. (Kendrick Aff. ¶ 34.) In April 2005 Mr.

Kendrick wrote a Financial Reconciliation to APS. This document itemized monies lent by APS to Cornerstone and amounts paid back. Additionally, the Reconciliation also addressed the principal and interest balance then believed to be due and owing, as well as the existence of the per lot agreement. Specifically, Mr. Kendrick wrote,

> Regarding the equity interest in the project to APS - I have searched my notes, and literally every file I have, but have found nothing. However, I specifically recall that we all discussed and agreed to an equity participation of either $550 or $725 per home to APS. I am therefore proposing a payment of $625 per home which would equate to $175,000 to you as an equity participant on the Single Family Homes and roughly $20,000 on the Multi-Family Units, for a total of $195,000. However, the last thing I want to do is short change you. Therefore if you remember the number to be different, then let me know.

(Kendrick Aff. ¶ 35, Ex. G.)

23. In the Reconciliation document Mr. Kendrick wrote "$550 or $725 per home to APS" because he was trying to negotiate between APS and Mr. Tallman since Mr. Tallman refused to pay what was owed to APS. (Kendrick Aff. ¶ 37.) Both Mr. Kendrick and Mr. Tallman knew all along that $750.00 was the agreed upon per lot amount. (Kendrick Aff. ¶ 16; Dep. of Scott Tallman at 117, line 18-25, 118, lines 17-20.) APS agreed to compromise the per lot amount to $650.00 per lot, but Cornerstone was to pay APS the amounts due within three weeks of the agreement. Mr. Kendrick memorialized this $650.00 agreement in a Cornerstone meeting agenda identified as Exhibit I in Mr. Kendrick's affidavit. Mr. Tallman still refused to pay this obligation to APS and Cornerstone never did pay it. (Kendrick Aff. ¶ 39, Ex. I.)

24. In March 2005 Mr. Kendrick had prepared another agenda for a Cornerstone business meeting. Paragraph 5 of the agenda starts with "Curtis." "Curtis" is the first name of Mr. DeYoung from APS. This agenda memorializes Cornerstone's obligation to APS regarding the per lot profit which remained due and owing, in addition to the outstanding principal and interest. Specifically,

regarding Curtis (APS), paragraph (c.) reads, "We committed to him. [sic] i. What if we didn't take his money, we would still have to honor our commitment - he is the reason we have this great opportunity." (Kendrick Aff. ¶ 38, Ex. H.)

25. Attached to Mr. Kendrick's affidavit as **Exhibit J** is a copy of the construction costs break down for lot #29 in the Cornerstone project. This document was given to Mr. Kendrick by Mr. Tallman on March 9, 2004 or sometime thereafter. Item number 1600, too, memorializes the $750.00 equity payment that was agreed upon with APS and Cornerstone. (Kendrick Aff. ¶ 40.)

26. In January 2006 Cornerstone was sued by APS for the outstanding principal and interest. Once Cornerstone resolved this portion of the obligation with APS, the parties agreed on the record that the $750.00 per lot was still in issue. (*See generally* Compl.; (Kendrick Aff. ¶ 41.)

27. In April 2006 Mr. Kendrick disassociated himself from Cornerstone. (Kendrick Aff. ¶ 43.) Cornerstone remains as an entity with Mr. Tallman's construction company, S.R. Tallman Construction being the owner and Mr. Tallman is the Managing Member. (Dep. of Scott Tallman at 10, lines 20-25, 11, line 1.) Mr. Tallman agreed that as part of the disassociation regarding Mr. Kendrick, Cornerstone is responsible for this litigation by their separation agreement. (Dep. of Scott Tallman at 30, lines 1-5.)

28. Since the parties resolved the underlying principal and interest issues, Plaintiff amended its Complaint, focusing on recovery of the $750.00 per lot issue, seeking recovery of $750.00 per lot already sold as well as $750.00 per lot to be sold and a Promissory Note and Deed of Trust to secure such future payments. (*See generally* Am. Compl.)

29. In Cornerstone's Answer to Plaintiff's Amended Complaint, Cornerstone admits there was an agreement to pay APS $750.00 per lot, but alleges such obligation was contingent upon APS providing full financing for the entire development project. (Answer ¶ 13.)

30. In his deposition testimony, Mr. Tallman, the designated representative of Cornerstone, admits he does not know of any other individuals involved in the agreement between the parties that support him in his contingency position. Furthermore, Mr. Tallman admits there is no evidence whatsoever in the whole world that supports his contingency position. (Dep. of Scott Tallman at 119, lines 14-25, 120, lines 1-15.)

31. Finally, Mr. Tallman admitted that he learned about APS's role in the project through Martin Pool, not from any first hand information or conversations he had with APS directly. (Dep. of Tallman at 56, lines 9-21.) Mr. Tallman had an "understanding" and "understood from the get go" that APS was going to fund the entire development project. (Dep. of Tallman at 94, lines 22-24, 91, line17.)

32. Mr. Tallman later contradicts himself and states he learned of the agreement with Mr. DeYoung and Mr. Kendrick. (Dep. of Tallman at 119, lines 17-24.) However, Mr. Tallman admitted, "The agreement that I've always stood by *from day one* is that Curtis –we agreed that the $750 per lot upon full funding of the project. That was always the *agreement* and I've never changed." (Dep. of Scott Tallman at 118, lines 17-21.) (emphasis added)

33. A review of the plat map for the development project in issue was obtained from the Bonneville County Assessors office and is attached to the Affidavit of Stephen J. Muhonen as Exhibit A. There are 315 lots on the plat map. (Aff. of Stephen J. Muhonen ¶¶ 2-3.)

34. Prior to Cornerstone's purchase of the real property in issue, APS owned four (4) of the lots and three (3) lots were owned by someone else. (Dep. of Curtis DeYoung at11, lines 4-10; Dep. of Scott Tallman at 79, 80, lines 20-22.) There were 25 additional lots existing prior to development, below Green Willow Lane. (Dep. of Scott Tallman at 81, lines 13-22.) After the development started, Cornerstone bought additional pieces of real property appurtenant to the project in issue. This property is on both sides of Eve Drive and Portal Stone Drive consisting of 35 lots. APS is not seeking a $750.00 per lot recovery on these lots. (Dep. of Curtis DeYoung at 64, lines 18-25.) Calculating the above described number of lots, 248 lots remain which were developed or are to be developed and sold as a result of APS providing the down payment to begin the underlying property development project. (Aff. of Stephen J. Muhonen ¶ 4.) Approximately 150 lots have already been sold. (Dep. of Scott Tallman at 146, line 23.)

35. Damages sought by APS regarding the per lot issue are calculated as follows: 248 lots multiplied by $750.00 equals $186,000.00.

36. During the negotiations and purchase of the real property, Cornerstone also obtained a right of first refusal on a commercial piece of real property that was appurtenant to the real property being purchased. This right of first refusal on the commercial piece of property arose from the purchase of the underlying property from Old Standard and Metropolitan for which APS provided the down payment for. (Dep. of Scott Tallman at 78,lines 22-25.) This property has been purchased by Cornerstone and currently has not been subdivided or developed. (Dep. of Scott Tallman at 176, line 24, 177, lines 1-5.)

37. Cornerstone now estimates to realize a profit of over 3 million dollars in the underlying property development project. (Dep. of Scott Tallman at 174, lines 23-25, 175 lines 1-6.)

ISSUE

The undisputed facts and exhibits that are supported by the Affidavits filed herewith and which are described more fully above raise the following issue:

1. Did the contract between the parties require APS to provide full financing of the entire underlying property development project in order to receive $750.00 per lot?

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

The applicable standard in Idaho supports the Court's awarding summary judgment in favor of APS. Summary judgment is proper in Idaho when "the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact on the elements challenged by the moving party. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994).

It is also well settled in Idaho that in order to create a genuine issue of material fact, the party opposing the motion must present more than just a conclusory assertion that an issue of material fact exists. Coghlan, 987 P.2d at 312-13, Van Velson Corp. v. Westwood Mall Assoc., 126 Idaho 401, 406, 884 P.2d 414, 419, (1994). "Rather, the [opposing party] must respond to the summary judgment motion with specific facts showing that there is a genuine issue for trial." Coghlan, 987 P.2d at 312-13; Tuttle v. Sudenga Indus., Inc., 125 Idaho 145, 150, 868 P.2d 473, 478 (1994). The

opposing party, may not rest upon the mere allegations or denials stated in its pleadings, but its response must set forth specific facts showing that there is a genuine issue for trial. Idaho Rules of Civil Procedure 56(e); Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1987). In other words, mere allegations or claims and/or a scintilla of evidence will not suffice to create a genuine issue of fact. Eliopulos, 123 Idaho 400, 404, 848 P.2d 984 (Ct.App. 1992); Evans v. Twin Falls County, 118 Idaho 210, 796 P.2d 87 (1990).

A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Badell v.Beeks, 115 Idaho 101, 765 P.2d 126 (1998) (citing Celotex v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986)). In such a situation, the moving party is entitled to a judgment as a matter of law because the non-moving party has failed to make a sufficient showing on an essential element of its case with respect to which that party bears the burden of proof at trial. Celotex, 477 U.S. at 322-23; Coghlan, 987 P.2d at 312-13. This rule facilitates the dismissal of factually unsupported claims prior to trial and leads to the economy of judicial resources. Garzee v. Barkley, 121 Idaho 771, 828 P.2d 334 (Ct.App. 1992).

The facts of the present case cannot be disputed. APS, through its prior involvement in the Idaho construction development project, approached P&B and presented the possibility to P&B of becoming involved in the project with APS. (Dep. of Curtis DeYoung at 27, lines 4-17, 29, line 17; Pool Aff. ¶ 8.) Martin Pool, P&B's CEO then approached Jonathan Reyes, Brad Kendrick and Scott Tallman regarding the project. These four individuals agreed to form the entity Cornerstone Home Builders LLC and to become involved in the development project with APS. (Pool Aff.¶ 9; Kendrick Aff. ¶ 8; Dep. of Scott Tallman at 31-34, 59, line 15-25.) The agreement between the

individuals comprising both entities is undisputed except by Mr. Tallman, the only individual presently affiliated with Cornerstone.

Cornerstone agreed that since APS brought the development project to Cornerstone's attention, APS would be the money source to provide the initial down payment funds of 20% at 10% interest, so as to allow Cornerstone to purchase the real property. APS would also have the option of lending on the construction of the individual homes in the development should it so choose. Finally, it was agreed that APS would receive from Cornerstone $750.00 per lot sold in the development project. The foregoing was to be secured by a Promissory Note and Deed of Trust provided by Cornerstone to APS. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.)

APS provided the down payment as was obligated. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.) Cornerstone did not provide APS a correct Promissory Note and Deed of Trust and in fact, did not even provide APS a proposed draft of said security documents until approximately eight months after the original sums were lent. (Kendrick Aff. ¶ 30; Dep. of Scott Tallman at 130.) Furthermore, even though approximately 150 lots have been developed and sold in the development project, APS has yet to be paid the $750.00 per lot as promised. (Dep. of Scott Tallman at 146, line 23; *See generally* Answer ¶ 13.) Mr. Tallman, the only remaining individual affiliated with Cornerstone, who learned of the agreement second hand through Mr. Pool, refuses to allow Cornerstone to pay APS as obligated. (Dep. of Scott Tallman at 10, lines 20-25, 11, line 1; Dep. of Tallman at 56, lines 9-21; (Kendrick Aff. ¶ 28; *See generally* Answer ¶ 13.) Mr. Tallman's position is that the $750.00 agreement did exist, but payment of said sums was contingent upon APS providing full funding of the entire development

project. (Kendrick Aff. ¶ 28; *See generally* Answer ¶ 13.) Mr. Pool, the source of Mr. Tallman's "understanding" of the agreement has directly refuted Mr. Tallman's position, i.e. a contingency never existed. Mr. Kendrick, the Member Manager of Cornerstone, too, has stated that the $750.00 was never contingent upon APS providing full financing. (Pool Aff. ¶ 17; Kendrick Aff. ¶ 28; Dep. of Curtis DeYoung at 59, lines 22-25, 60, lines 1-5.)

In his deposition testimony, Mr. Tallman admits he has no evidence of any kind to support his contingency position, other than his own self serving position, which has been directly refuted. (*Dep. of Scott* Tallman at 119, lines 14-25, 120, lines 1-15.) By failing to produce such evidence, Cornerstone has completely failed to prove an essential element of its case. As a result, this Court should grant APS' motion for summary judgment for either $186,000.00 or $750 per lot sold and to be sold, plus $750.00 per lot should the commercial piece be subdivided, together with attorney fees and costs.

II. STANDARD WHEN COURT IS THE TRIER OF FACT.

With the Court acting as the trier of fact the Court is able to make all inferences and determinations at summary judgment that are necessary to dispose of this case in its entirety. When an action will be tried before the court without a jury, the trial court becomes and acts as the trier of fact. Shawver v. Huckleberry Estates, LLC, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). It is well established that "[a]s the trier of fact, the district court is free to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences." Brown v. Perkins, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). If any conflict between inferences exists, as the trier of fact, the trial court is responsible for resolving the possible conflict between the inferences. Brown, 129 Idaho at 191-92, 923 P.2d at 436-37. The test

for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences made by the trial court. Shawver, 140 Idaho at 361, 93 P.3d at 692.

By Cornerstone's own admissions through Mr. Tallman, Cornerstone has no evidence whatsoever to support its position that payment to APS of $750.00 per lot was subject to APS providing full financing of the development project. (Dep. of Scott Tallman at 119, lines 14-25, 120, lines 1-15.) The undisputed facts support that no such contingency ever existed. This Court is free to enter its order awarding summary judgment in favor of APS.

III. SATISFACTION OF THE STATUTE OF FRAUDS.

In its Answer, Cornerstone pled the affirmative defense of the Statute of Frauds stating, "[T]his transaction involves real estate, and such transaction was never reduced to writing." (Answer ¶V.) The Statute of Frauds is not applicable in the present case, but even if it were, the writings that exist fully satisfy all Statue of Frauds requirements. Idaho's Statute of Frauds is codified as Idaho Code (I.C.) § 9-501 *et. seq*. Pursuant to the Statute of Frauds certain agreements must be in writing to be enforceable. These contracts include any *transfer* of real property. See, I.C. § 9-503 (emphasis added).

A writing satisfies the Statute of Frauds requirement concerning a transfer in real property when an instrument in writing exists that is subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereto. See, I.C. § 9-503. Where there is no intended transfer of the real property the statute of frauds does not apply. Additionally, where a transfer of real property is intended by the parties to occur but no writing exists, the doctrine of partial performance relieves the requirement of a writing. Thorn Springs Ranch v. Smith, 137 Idaho 480, 484, 50 P.3d 975, 979 (2002).

The statute of frauds does not bar the recovery sought by APS for two reasons. First, the transaction in this case is simply contractual in nature. Under the terms of the contract between APS and Cornerstone, APS is entitled to receive the sum of $750.00 per lot once the lot is sold. This is purely contractual in nature. The parties never intended to *transfer* any property in a way that would bring the statute of frauds into play as to the payment of the $750.00 per lot agreement. Cornerstone's attempts to convince the Court that the statute of frauds is applicable by bringing in the issues and facts related to APS' seeking promissory notes and deeds of trust to secure these promissory notes. It is true that APS sought and continues to seek the promissory notes and deeds of trust. However, these facts only pertain to securing re-payment for the underlying loans and the payment of $750.00 per lot sold. The loans have now all been compromised and settled between APS and the Defendant. The only issue that remains is whether Cornerstone is bound and obligated to pay to APS the sum of $750.00 per lot sold or to be sold and to secure said payment by a Promissory Note and Deed of Trust. Nothing concerning this aspect of the agreement concerns the *transfer* of real property at the time the transaction is entered into.

The second reason the statute of frauds does not bar the recovery sought by APS is because the written agreements that do exist do fully satisfy all statute of frauds requirements. The undisputable evidence is that Cornerstone executed various memorandums, notes and agendas evidencing the $750 per lot agreement, including a memorandum agreement that acknowledges that APS will receive a per lot payment. The memorandum explains in detail how many homes and twin homes were then contemplated. The parties are identified by the agreement. The only term not specified in the agreement was the actual amount APS would receive per lot. (See Kendrick Aff. ¶ 35, Ex. G.) Cornerstone in its pleadings has admitted that the amount to be paid to APS is the sum

of $750 per lot. (Answer ¶ 13.) Additionally, the undisputed evidence itself specifically identifies that APS would receive $750 per lot.

The statute of frauds is simply not applicable in this case, despite the claims made by Cornerstone. For these reasons, APS is entitled to summary judgment against Cornerstone as to the issue of the statute of frauds. The next issues to be addressed is the breach of the contract by Cornerstone.

IV. CORNERSTONE BREACHED THE CONTRACT.

By failing to pay the amounts agreed for each lot in the subdivision, Cornerstone breached its contract with APS. A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes a duty." Atwood v. Western Const., Inc., 129 Idaho 234, 238, 923 P.2d 479, 483, (Ct.App. 1996). A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Atwood, 129 Idaho at 238, 923 P.2d at 483. Whether a promise amounts to a contract is a factual issue and is ordinarily to be determined by a jury. "However, if the evidence relating to the alleged promise is not conflicting and admits of but one inference, the court may decide the issue as a matter of law." Atwood, 129 Idaho at 238, 923 P.2d at 483, citing, Watson v. Idaho Falls Consolidated hospitals, Inc., 111 Idaho 44, 47, 720 P.2d 632, 635 (1986), and Johnson v. Allied Stores Corp., 106 Idaho 363, 368, 679 P.2d 640, 645 (1984).

The covenant of good faith and fair dealing is implied in every contract. See, Luzar v. Western Surety, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). A violation of the covenant occurs when "either party violates, nullifies or significantly impairs any benefit of the contract." Sorensen v. Comm Tek, Inc., 118 Idaho 664, 669, 799 P.2d 70, 75 (1990).

Generally, Idaho courts will not permit a party to avoid its contractual obligations. Smith v. Idaho State University Federal Credit Union, 114 Idaho 680, 284, 760 P.2d 19, 23, (1988). Idaho Courts have long held that "an agreement voluntarily made between competent persons is not lightly to be set aside . . . because it has turned out unfortunately for one party." Stearns v. Williams, 72 Idaho 276, 283, 240 P.2d 833, 837 (1952). Additionally, a contract should be construed most strongly against the party that prepared or wrote it. J.R. Simplot Company, v. Bosen, 2006 Ida. Lexis 150 *14.

In the present case the evidence illustrates the existence of the contract and the breach by Cornerstone. The parties' contract is evidenced by the notes, agendas and the April 2005 memorandum, all of which were written and/or signed by Cornerstone. (Kendrick Aff. ¶¶ 17, Ex. C, 18, Ex. D, 35, Ex. G, 38, Ex. H, 39, Ex. I, 40, Ex. J.) The April 2005 memorandum is particularly insightful since it was drafted by Cornerstone's Member Manager and reads in part, as follows.

> Regarding the equity interest in the project to APS - I have searched my notes, and literally every file I have, but have found nothing. However, I specifically recall that we all discussed and agreed to an equity participation of either $550 or $725 per home to APS. I am therefore proposing a payment of $625 per home which would equate to $175,000 to you as an equity participant on the Single Family Homes and roughly $20,000 on the Multi-Family Units, for a total of $195,000. However, the last thing I want to do is short change you. Therefore if you remember the number to be different, then let me know.

(Kendrick Aff. ¶ 35, Ex. G.)

The contract is further evidenced by Cornerstone's own admissions. In Cornerstone's Answer to Plaintiff's Amended Complaint, Cornerstone admits there was an agreement to pay APS $750.00 per lot, but alleges such obligation was contingent upon APS providing full financing for the entire development project. (Answer ¶ 13.)

Cornerstone's contingency argument is flawed and without merit. First, Mr. Tallman, is the

only member of Cornerstone to allege a contingency existed that required APS to provide complete funding in order to receive $750 per lot. Mr. Tallman bases his contingency argument on his "understanding" of the agreement, that he learned, second hand, from Mr. Pool, not APS. (Dep. of Tallman at 56, lines 9-21, 94, lines 22-24, 91, line17.) Furthermore, Mr. Pool, the source of Mr. Tallman's "understanding" and Mr. Kendrick, the Member Manager of Cornerstone, both state that there never existed any sort of contingency that required APS to provide full funding of the development project in order for APS to receive $750 per lot. (Pool Aff. ¶¶ 10, 17; Kendrick Aff. ¶¶ 1, 28; Dep. of Scott Tallman at 13, lines 3-20 (admitting Mr. Kendrick was the Member Manager of Cornerstone).) The second reason Mr. Tallman's contingency argument is flawed is because Mr. Tallman's position is an internal issue of Cornerstone that he must resolve that has no bearing on the agreement between APS and Cornerstone. Mr. Tallman is not a party in this action. Cornerstone is the Defendant and it is Cornerstone that entered into the agreement with APS.

The evidence unequivocally establishes that the agreement of $750 per lot was made between APS and Cornerstone. None of the members of Cornerstone knew of the Idaho development project until APS brought it to their attention, hence the $750 payment per lot. (Pool Aff.¶ 14; Kendrick Aff. ¶ 14; Dep. of Scott Tallman at 57, lines 12-14.) During Cornerstone's preliminary calculations, they projected to realize a profit in the Idaho development project in an amount over two(2) million dollars. (Pool Aff.¶ 15; Kendrick Aff. ¶ 15; Dep. of Scott Tallman at 55, lines 19-25.) That profit estimation/realization is now over three (3) million dollars. (Dep. of Scott Tallman at 174, lines 23-25, 175 lines 1-6.)

Due to APS bringing the project to Cornerstone's attention, the funding agreement that was entered into, orally, between Cornerstone and APS for the Idaho real property development project

was as follows: APS would provide the down payment of approximately twenty percent (20%), which would be repaid at 10% interest. In addition, APS would receive $750.00 per lot sold in the development project. Furthermore, APS was to have the option of being able to lend on the individual homes to be built in the development project. The lending of money from APS to Cornerstone was to be secured by APS through a Promissory Note and Deed of Trust issued by Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.)

In compliance with the agreement, on September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of $226,218.70, which was used to purchase the property. APS was not provided a Promissory Note or Deed of Trust at this time. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.) After providing the down payment as required, APS exercised its option to lend further monies on the project and did so by lending a combined total of $487,951.52 through February 2004. (Kendrick Aff. ¶ 24.) In March 2004, after more than five months of not receiving a Promissory Note and Deed of Trust securing the almost a half of a million dollars lent by APS' to Cornerstone, APS refused to lend further funds to Cornerstone. (Pool Aff. ¶ 22; Kendrick Aff. ¶ 27; Dep. of Curtis DeYoung at 45, lines 18-23.)

It was not until June, 2004, eight months after the original funds were lent, that Cornerstone finally got around to attempting to provide APS with a Promissory Note, which, by the way was inaccurate, as was each proposed draft submitted thereafter. (Kendrick Aff. ¶¶ 30, 33.); Dep. of Scott Tallman at 130.)

Cornerstone's only defense to the existence of the contract and it's breach of the contract is

its unsupported claim that the payment of $750 per lot was contingent on APS' providing financing for the entire project. However, there is no external evidence that supports Cornerstone's claim. There is nothing in writing that supports Cornerstone's defense. Additionally, there is no testimony from any other source that supports Cornerstone's defense. All Cornerstone can offer is it's own bald assertion that a contingency existed. Cornerstone has admitted that it has no evidence, whatsoever in this whole world that will support its contingency position. (Dep. of Scott Tallman at 119, lines 14-25, 120, lines 1-15.)

The Court is acting as the trial of fact in this case. All the evidence that will be presented to the Court at trial concerning the $750 per lot issue is on the record before the Court in these summary judgment proceedings. Because of this the Court is entitled and required"to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences." APS requests that the Court view the evidence on the record and that the Court grant summary judgment to APS finding that Cornerstone owes to APS the sum of $750 per lot as was agreed upon between the parties.

V. THE AFFIRMATIVE DEFENSES DO NOT BAR RECOVERY BY APS.

Cornerstone raises several affirmative defenses in its Answer to Plaintiff's Amended Complaint in an effort to bar recovery by APS. However, none of the affirmative defenses raised by Cornerstone are in fact applicable to this case. These affirmative defenses include: (a) I.R.C.P. 12(b)(6) (see First Affirmative Defense); (b) Statute of Frauds (see Second Affirmative Defense); (c) Accord and Satisfaction (see Third and Fourth Affirmative Defenses); (d) Detrimental Reliance (see Fifth Affirmative Defense); (e) Failure to Confer a Benefit (see Sixth Affirmative Defense); and (f) Inconsistent or alternative causes of action plead in Plaintiff's Amended Complaint (see Seventh

Affirmative Defense).

A. Defense of I.R.C.P. 12(b)(6).

The first affirmative defense raised by Cornerstone, which is I.R.C.P. 12(b)(6), is improperly plead and cannot act as a bar to recovery by APS. The prior version of I.R.C.P. 12(b)(6) allowed a party to plead in its answer to a complaint that the complaining party had failed to state a claim upon which relief could be granted. However I.R.C.P. 12(b)(6) was amended on July 1, 2004. I.R.C.P. 12(b)(6) now reads as follows: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, *except* that the following defenses *shall* be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . " See, I.R.C.P. 12(b)(6) (italics added). Cornerstone failed to raised its I.R.C.P. 12(b)(6) claim in a proper motion before it filed its answer to APS' complaint. For this reason, Cornerstone has failed to properly plead its I.R.C.P. 12(b)(6) claim and has therefore waived this defense. Because this defense has been waived it cannot prevent APS from obtaining summary judgment as requested.

B. Defense of Statute of Frauds.

The affirmative defense raised by Cornerstone under Statute of Frauds, in that this transaction involves real estate and wasn't reduced to writing cannot bar recovery by APS. This affirmative defense is set forth more fully in section III. Satisfaction of Statute of Frauds, above.

C. Defense of Accord and Satisfaction Does Not Apply.

Cornerstone's affirmative defense of accord and satisfaction is not applicable and does not bar recovery by APS. The elements of an accord and satisfaction are: (1) a bona fide dispute as to the amount owed; (2) that the debtor tendered an amount to the creditor with the intent that such

payment would be in *total satisfaction of the debt owed to the creditor*; and (3) that *the creditor agreed to accept payment in full satisfaction of the debt*, or that both the debtor and the creditor understood that the acceptance of the check was in full payment of all sums owed by the debtor. Beard v. George, 135 Idaho 685, 689 23 P.3d 147, 151 (2001) (italics added). Additionally, because accord and satisfaction is an affirmative defense, the burden is upon the Cornerstone to prove all the elements of an accord and satisfaction. See, Id. citing, Clay v. Rossi, 62 Idaho 140, 108 P.2d 506 (1940).

In the present case, APS initially sought recovery for the underlying amounts that were loaned by APS to Cornerstone. In the course of this litigation APS and the Cornerstones have settled the payment of the underlying amounts which were loaned by APS to the Cornerstone. The only issue that remains to be decided in this litigation is whether Cornerstone is also obligated to pay to APS the sum of $750 per lot.

Nothing in the settlement between APS and the Cornerstone of the underlying loan claims acted as an accord and satisfaction of the $750 per lot amounts that yet remain due and owing by Cornerstone to APS. Furthermore, the settlement of the underlying principal and interest dispute was placed on the record before this Court on January 24, 2006. During that proceeding, it was specifically put on the record, with Mr. Kendrick and Mr. Tallman present and representing Cornerstone, that the $750 per lot remained in issue and was not yet resolved. (Kendrick Aff. ¶41.)

Because the burden is on Cornerstone to prove all the elements of accord and satisfaction, Cornerstone cannot defeat summary judgment with nothing more than a bald assertion. The evidence outlined above and on the Court record evidences that the accord and satisfaction cannot be met. For this reason, in addition to those areas listed above, APS is also entitled to summary

judgment on the issue of accord and satisfaction.

D. Defense of Detrimental Reliance.

As with all previous discussed affirmative defenses, Cornerstone's affirmative defense of detrimental reliance cannot bar recovery by APS. The elements required to sustain a defense of equitable estoppel are: (1) a false representation or concealment of a material fact be made; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment be made with intent that it be relied upon; and (4) that the misrepresentation resulted in detrimental reliance on the part of the party asserting estoppel. Schoonover v. Bonner County, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988).

As outlined in the facts, there is no evidence whatsoever that APS made a false representation or concealed a material fact from Cornerstone. Cornerstone knew what the deal was from day one of the agreement as outlined by the affidavits and depositions described above. Mr. Tallman's false understanding of the agreement is an issue between himself and the other Cornerstone members, but has nothing to do with the fact that the agreement is what it is and was openly made between the parties. If Mr. Tallman needed to discover the "truth" of the agreement or representations, he needed to look no further than to the other individuals in Cornerstone, whom he learned about the agreement from. Cornerstone cannot establish that it relied upon, to its detriment, any false representations made by APS. Furthermore, it is difficult to understand the detrimental aspect of this affirmative defense made by Cornerstone when Cornerstone is realizing a million dollars more in profit than it originally expected.

The burden is on Cornerstone to prove all the elements of detrimental reliance or equitable estoppel. Cornerstone cannot defeat summary judgment with nothing more than a bald assertion.

The evidence outlined above and on the Court record evidences that there was an open, known and agreed upon agreement between APS and Cornerstone. Cornerstone cannot satisfy even one element of equitable estoppel. For this reason, in addition to those areas listed above, APS is also entitled to summary judgment on the issue of detrimental reliance.

E. Defense of Failure to Confer a Benefit.

Furthermore Cornerstone's affirmative defense that APS failed to confer a benefit is not supported by the record and cannot bar recovery by APS. This section is incorporated into section IV. Breach of Contract set forth more fully above. Simply put, APS brought Cornerstone a project that Cornerstone is realizing a benefit of more than three (3) million dollars.

F. Defense of Pleading in the Alternative.

APS's Amended Complaint, which states alternative causes of action, does not bar recovery by APS. I.R.C.P. 8(e)(2) states in pertinent part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

See, I.R.C.P. 8(e)(2).

In Cornerstone's Seventh Affirmative Defense, it alleges that APS cannot proceed under the theories of breach of contract and unjust enrichment. The foregoing rule explicitly allows APS to proceed under said alternative theories. Nonetheless, APS does hereby waive and withdraws its unjust enrichment claim as plead in its Amended Complaint.

VI. DAMAGES

APS is entitled to summary judgment on the damages it has suffered due to the Defendant's breach of the contract.

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Traylor v. Henkels & McCoy, Inc., 99 Idaho 560, 561-62, 585 P.2d 970, 971-72 (1978).

In the present case there are 248 lots for which APS is entitled to be paid $750 for each lot, for a total of $186,000.00. (Aff. of Stephen J. Muhonen ¶ 4.) Cornerstone admits that a right of first refusal existed on a commercial piece of real property located appurtenant to the underlying development project. This right of first refusal relative to the commercial piece of property arose directly from the purchase of the development real property for which APS provided the down payment funds. (Dep. of Scott Tallman at 78,lines 22-25.) Cornerstone has admitted it exercised its right of first refusal and purchased the commercial piece of property, bringing it within the development project. (Dep. of Scott Tallman at 176, line 24, 177, lines 1-5.)

The agreement between APS and Cornerstone contemplated that Cornerstone would pay APS $750 for each lot developed within the development project. For these reasons, in addition to those areas listed above, APS is also entitled to summary judgment awarding APS either $186,000.00, or $750 per lot sold and to be sold, plus $750 per lot on the commercial piece should it be subdivided.

VII. ATTORNEY FEES AND COSTS

In addition to receiving a money judgment against Cornerstone and/or a decree ordering

Cornerstone to provide APS with a Promissory Note and Deed of Trust securing payment on the lots to be sold within the development project, APS should also be awarded its attorney fees and costs in this case. Idaho Code § 12-120(3) specifically gives the Court the authority to award APS its attorney fees and costs. Specifically § 12-120(3) states:

> In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs. The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-120(3).

The monies loaned to Cornerstone pursuant to the agreement between the parties specifically qualify as a commercial transaction as defined by the Idaho Code. Because this litigation is concerning a commercial transaction, APS should be awarded its reasonable attorney fees and costs as a matter of law and the Court should grant summary judgment in favor of APS for these sums.

CONCLUSION

Based upon the foregoing, APS is entitled to judgment requiring Cornerstone to pay Plaintiff $186,000.00 or $750.00 per lot sold and to be sold in the development project, plus $750 per lot on the commercial piece of real property if and when it is subdivided.

DATED this 24 day of April, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24 day of April, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, CORNERSTONE HOME BUILDERS, LLC., by and through its attorney of record, Penny North Shaul, Esq., and hereby submits the following Memorandum in Support of Motion for Summary Judgment.

I. FACTS

Scott Tallman (hereinafter "Tallman") is the owner and sole shareholder of S.R. Tallman Construction, Inc., which originally operated in Ogden, Utah. *Affidavit of Scott Tallman.* In 2003, S.R. Tallman Construction, Inc. was the general contractor on a few houses in Utah for an entity called P& B Enterprises,

Inc. (hereinafter "P&B"), of which Martin Pool (hereinafter "Pool") was the sole shareholder. *Affidavit of Scott Tallman; Deposition of Martin Pool Transcript*, p. 12, ln. 12-15. Through Martin Pool, Tallman met Brad Kendrick (hereinafter "Kendrick"), and Jonathan Reyes (hereinafter "Reyes"). *Affidavit of Scott Tallman.* Prior to Tallman becoming involved with Pool, P&B had borrowed funding from Plaintiff, through Curtis DeYoung (hereinafter "DeYoung"). *Deposition of Curtis DeYoung*, p 112, ln. 1-4; *Deposition of Martin Pool*, p. 19, ln. 13- p. 21, ln. 15. DeYoung is the sole shareholder and president of Plaintiff, American Pension Services, Inc. *Deposition of Curtis DeYoung*, p. 5, ln. 6-18.

In the fall of 2003, as Tallman was leaving P&B's office one day, DeYoung was coming in, and Pool said "this is the guy we have been talking about" to DeYoung. *Deposition of Martin Pool*, p. 31, ln. 10- p. 32, ln. 14. DeYoung said he knew of an Idaho property for sale, and had someone Tallman needed to talk to. *Affidavit of Scott Tallman.* Within an hour or two, a representative from Old West Annuity and Life Insurance (hereinafter "Old West") called Tallman. *Affidavit of Scott Tallman.* Old West Annuity and Life owned a large parcel of real property located in Ammon, Idaho, known as Cornerstone Community Subdivision (hereinafter "the Subdivision"). *Affidavit of Scott Tallman.*

Within a few days, Tallman had arranged for DeYoung, Kendrick, and himself to fly to Spokane, Washington, to meet with a representative from Old West Annuity and Life Insurance. *Affidavit of Scott Tallman; Deposition of Brad Kendrick*, p. 71, ln. 10- p. 72, ln. 1. Tallman and Kendrick, as two of the four intended members of Defendant, which had not yet been legally formed,

negotiated a purchase and sale agreement between P&B Enterprises, Inc. and S.R. Tallman Construction, Inc., as purchasers, and Old West, as seller, for the Subdivision, in the approximate amount of one million two hundred thousand dollars, ($1,200,000.00). *Affidavit of Scott Tallman.* DeYoung agreed to provide financing, through his company, the named Plaintiff in this action, for the purchase of the property, and subsequent development/construction within the subdivision. *Affidavit of Scott Tallman; Deposition of Martin Pool* , p. 42, ln. 9-20. While still in Spokane, Washington, Tallman specifically asked DeYoung if he was onboard to provide financing for the down payment, infrastructure improvements, and construction loans on the residential construction intended for the Subdivision. *Affidavit of Scott Tallman.* DeYoung indicated to Tallman he agreed to provide all such funding for the completion of the Subdivision. *Affidavit of Scott Tallman.*

After the meeting, DeYoung, Kendrick and Tallman had a discussion wherein DeYoung wanted additional compensation, termed by Plaintiff as an "equity position" to be paid upon closing of sale of each residence constructed and sold within the subdivision, contingent upon Plaintiff providing full funding of the development and construction within the Subdivision. *Affidavit of Scott Tallman.* Plaintiff provided the down payment necessary to secure purchase of the property, in the amount of approximately $240,000.00. *Deposition ofBrad Kendrick,* p. 86, ln. 4-8. The Subdivision was purchased in September, 2003. *Affidavit of Scott Tallman.* The balance of the purchase price of the Subdivision, owed to Old West Annuity and Life Insurance, in excess of $1,000,000.00, was

paid for directly by Defendant from its own funds, without any subsidy from Plaintiff. *Affidavit of Scott Tallman.*

Cornerstone Home Builders, LLC was formed in the State of Utah on October 24, 2003. *Affidavit of Scott Tallman.* Its original members were Pool, Reyes, Kendrick and Tallman. *Deposition of Brad* Kendrick, p. 88, ln. 18-21. On January 22, 2004, P&B and S.R. Tallman Construction, Inc., executed a Corporation Warranty Deed transferring the Subdivision to Defendant. *Affidavit of Scott Tallman.*

While these legal maneuverings were occurring, Tallman was in the process of constructing residences in the Subdivision. *Affidavit of Scott Tallman.* Pursuant to the original agreement, Plaintiff provided funding to begin this construction. *Affidavit of Scott Tallman; Deposition of Curtis DeYoung,* p. 108, ln. 14-17. In February, 2004, only partial construction of no more than ten (10) homes within the Subdivision had occurred with the amount of funds provided by Plaintiff. *Affidavit of Scott Tallman.*

At the end of February, or first part of March, 2004, DeYoung called Tallman and indicated he was out of money and therefore was bowing out of the project. He wished Tallman luck, and said he was sorry he was unable to provide any further funding. *Affidavit of Scott Tallman; Deposition of Curtis DeYoung,* p. 48, ln. 10-16. At the point DeYoung indicated Plaintiff was no longer able to participate and uphold its obligations, only ten (10) residences were under construction, and were less than half finished. *Affidavit of Scott Tallman.* Tallman was forced to obtain alternate financing, which he did, through his

contact, Howard Kent. Kent began providing financing to Defendant in March, 2004. *Affidavit of Scott Tallman.* On March 23, 2004, Pool and Reyes withdrew as members, leaving Defendant and Kendrick as members.[1] *Affidavit of Scott Tallman.*

From the beginning of its relationship with Plaintiff, continuing through August, 2005, Defendant sent several drafts of promissory notes and deeds of trust to Plaintiff for approval, memorializing the principal and interest owed by Defendant to Plaintiff. *Deposition of Curtis DeYoung*, p. 51, ln. 19-24; *Deposition of Brad Kendrick*, p. 96, ln. 21-24. However, Plaintiff never approved any of the proposed promissory notes and/or deeds of trust. *Deposition of Curtis DeYoung*, p. 101, ln. 15 – p. 103, ln. 19. Notwithstanding, all loaned money, plus interest, has been re-paid to Plaintiff. *Affidavit of Scott Tallman.* No outstanding loan balance remains outstanding, as explained hereafter.

In addition to attempting to finalize a Deed of Trust and Note, Defendant made several lump sum payments on the principal and interest owed to Plaintiff during the relevant time set forth above. *Affidavit of Scott Tallman; Deposition of Curtis DeYoung*, p. 108, ln. 17-20. In addition, Defendant attempted to obtain the payoff amount several times from DeYoung. *Deposition of Brad Kendrick*, p. 120, ln.

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[1] In June, 2006, Kendrick was removed as a member of the LLC pursuant to an agreement between Kendrick, Defendant and Scott Tallman. Scott Tallman is now the sole member of Cornerstone Home Builders, LLC. The original Utah LLC still exists, but a new Idaho LLC has been formed, as of July 6, 2006. All assets of the LLC are in Idaho, the subject real property is in Idaho. The real property still owned by Cornerstone Home Builders, LLC has been transferred from the Utah LLC to the Idaho LLC.

14 – p. 121, ln. 14. In September, 2005, in response to Defendant's last proposed promissory note and deed of trust, DeYoung stated to Mary TeNgaio of AmeriTitle in Idaho Falls, Idaho, that Plaintiff would not loan Defendant any more money. *Affidavit of Mary TeNgaio.* Thereafter, Defendant again made repeated attempts to ascertain the amount of principal and interest owed to Plaintiff, until such time as Plaintiff instituted this action, and filed a lis pendens on Defendant's real property, on January 10, 2006. *Affidavit of Scott Tallman.*

Defendant, at the time the lis pendens was filed by Plaintiff, was comprised of only two members: Tallman and Kendrick. *Affidavit of Scott Tallman.* Neither Tallman nor Kendrick denied that there was money owed to Plaintiff for monies loaned. *Affidavit of Scott Tallman.* Defendant had made several lump sum payments to Plaintiff to repay the original advance for purchase of the subdivision, as well as to repay the sums advanced by Plaintiff for beginning construction on approximately ten (10) homes within the subdivision. *Affidavit of Scott Tallman.* However, Plaintiff did not have a payoff amount for Defendant, despite repeated requests for such to Plaintiff, for several months. *Affidavit of Scott Tallman.*

Plaintiff claimed $226,218.00, plus interest, for a total of $260,000.00, in its original complaint. After careful review of all documents at its disposal, Defendant was able to ascertain the payoff amount, including interest accrued, to be $187,591.35. *Affidavit of Scott Tallman.* This amount was wired to Plaintiff, by Defendant, on January 24, 2006. *Affidavit of Scott Tallman.*

Upon payment of this sum, Plaintiff agreed to release its' lis pendens against Defendant's Subdivision. Defendant incurred approximately $40,000.00 in additional

interest accrued as a result of Plaintiff's refusal to give a payoff amount. *Affidavit of Scott Tallman.* Thus, the underlying principal and interest owed by Defendant to Plaintiff has been satisfied in full. *Affidavit of Scott Tallman.* The issue which remains for determination by the Court in this matter, per Plaintiff's Amended Complaint, is whether Defendant owes Plaintiff $750.00, per closing, on all residential construction within the Subdivision. The amount in dispute in this matter is roughly $186,000.00 (186,000 ÷ 750.00 = 248 homes). Defendant does not concede that there are any sums due, much less based upon 248 lots.

II. ARGUMENT

A. Standard of Review.

This Court is required to review a motion for summary judgment by applying the following standard:

> Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in the light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. The burden of proving the absence of material facts is upon the moving party. The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In other words, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.

Baxter v. Craney, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000) (citations omitted). The Court should "liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported

by the record in favor of that party. Walker v. Hollinger, 132 Idaho 172, 175, 968 P.2d 661, 664 (1998). Notwithstanding, the following also applies to the case herein:

> [W]hen a motion for summary judgment which has been properly supported with evidence indicating the absence of material factual issues, the burden shifts to the non-moving party to make a showing of the existence of a genuine material fact which would preclude summary judgment. This standard of review is not affected by the fact that both parties have filed motions for summary judgment. Rather, each motion must be separately considered on its own merits, with the court drawing all reasonable inferences against the party whose motion is under consideration.

Treasure Valley Gastroenterology Specialists, P.A., v. Woods, 135 Idaho 485, 488-489 20 P.3d 21, 24-25 (2001). In the instant case, both Plaintiff and Defendant have filed Motions for Summary Judgment.

B. Plaintiff has failed to state a claim upon which relief may be granted.

In Paragraph IV, First Affirmative Defense, of its Answer to Plaintiff's Amended Complaint, Defendant alleges that Plaintiff has failed to state a claim upon which relief may be granted, pursuant to IRCP 12(b)(6).

In instant case, Plaintiff wired funds on September 30, 2003, to AmeriTitle (formerly known as Bonneville Land & Title) in Idaho Falls, Idaho, intended for use as a down-payment in the real estate transaction which subsequently resulted in purchase of the Subdivision by P&B and S.R. Tallman Construction. This same real property was transferred into Defendant's name, once said entity was legally formed.

Plaintiff wired approximately $49,000.00 in several smaller wires, also for Defendant's use in the development of the Subdivision. Over the course of approximately two (2) years, Defendant wired several payments to Plaintiff to pay off the funds loaned. Each of these wire transfers were sent, by instruction of Plaintiff,

to the following: American Pension Services, Inc., Master Trust Account No. 11014222. Payments were sent by Defendant to said Master Trust Account on August 2, 2004; January 21, 2005; March 16, 2005; April 1, 2005; April 20, 2005; May 6, 2005; and December 14, 2005. *Affidavit of Scott Tallman.*

According to Plaintiff's deposition testimony, it is a third party administrator for pension plans. *Deposition of Curtis DeYoung*, p. 7, ln. 2-17. All funds paid by Defendant were sent to a master trust account managed by Plaintiff. *Affidavit of Scott Tallman.* It appears that Plaintiff was not actually lending the funds out, but administering such loans for pension plan or IRA participants who lodged their funds with Plaintiff. Plaintiff admitted at deposition that it forwards funds from pension funds without first obtaining security documents. *Deposition of Curtis DeYoung*, p. 112, ln. 17-23. Any payments owed under an enforceable contract would be owed to the actual participants in such pension plans or IRAs, and not the Plaintiff herein. (Defendant does not herein concede that there is an enforceable contract, however.) Thus, Plaintiff is not entitled to the payments it now claims, and therefore, it has failed to state a claim upon which relief may be granted, and its Amended Complaint must be dismissed in its entirety. Plaintiff is entitled to nothing and has no standing in the instant case.

C. The Idaho Statute of Frauds renders any oral contract entered into in this case unenforceable.

In Plaintiff's Amended Complaint, it alleges breach of express contract (First Cause of Action), and breach of implied contract (Second Cause of Action). However, as discussed more fully below, Plaintiff cannot maintain either its First

Cause of Action or Second Cause of Action, by application of the Idaho Statute of Frauds to the facts of this litigation.

1. Idaho Code §9-505(4) prevents enforcement of any oral agreement in this case.

Idaho Code §9-505(4) sets forth, in relevant part, the following rule:

> Certain agreements to be in writing.—In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
>
> ...
>
> 4. An agreement...for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

Idaho Code §9-505(4).

In the instant case, Plaintiff claims entitlement to payment from Defendant, in the amount of $750.00, per closing, on residential lots located within the subdivision. Plaintiff characterizes its claim as an "equity position" or "equity participation" in the Subdivision. Plaintiff alleged repeatedly during its deposition that it was entitled to a Deed of Trust and Promissory Note from Defendant, evidencing the alleged debt of $750.00, per closing, on residential construction within the Subdivision. Clearly, it is claiming an interest in the Subdivision. However, Plaintiff acknowledges there is no written document which memorializes any such agreement. Thus, the Statute of Frauds renders any such agreement for an "equity position" or other interest in the Subdivision unenforceable, and Defendant is

entitled to summary judgment as matter of law.

2. Idaho Code §9-505(5) prevents enforcement of any oral agreement in this case.

Idaho Code §9-505(5) sets forth, in relevant part, the following rule:

> Certain agreements to be in writing.—In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:
> ...
> 5. A promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand dollars ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit.

The basis of this litigation arises from Plaintiff's promise or commitment to lend two hundred forty thousand dollars ($240,000.00) for initial down payment on the purchase of the Subdivision, as well as all such additional funding as needed by Defendant to complete the residential construction within the Subdivision. Construction costs to date within the Subdivision, all of which have been financed, including the down payment and initial construction loans from Plaintiff, have exceeded twenty million dollars. These sums clearly exceed the fifty thousand dollar ($50,000) requirement contained in I.C. 9-505(5), as set forth above.

Plaintiff described its business as third party administrator of pension funds, but it also admitted that it engaged in providing numerous loans to third parties,

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connected with its same business. *Deposition of Curtis DeYoung*, p. 112, ln. 1-23. Plaintiff indicated it had loaned approximately $5,000,000 to P&B before it ever began its relationship with Defendant. *Ibid.* Plaintiff described its practice to loan funds and subsequently obtain security documents on such transactions. *Ibid.* Plaintiff loaned approximately $400,000 to Defendant through February 2004. In addition, all funds loaned to Defendant were repaid through transactions directed to Plaintiff's Master Trust Account. *Affidavit of Scott Tallman.* Thus, Plaintiff is an entity engaged in the business of lending or extending credit. Even if this Court accepts that Plaintiff's version of the oral agreement is correct, it still must determine that such oral agreement, for an amount in excess of $50,000, and involving an entity engaged in the business of lending or extending credit, is invalid because it so obviously violates the Statute of Frauds. *Lettunich v. KeyBank National Association*, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005). Therefore, Defendant is entitled to summary judgment as a matter of law.

3. Partial performance of any such oral contract does not preclude application of the Statute of Frauds to the facts this case.

Defendant anticipates that Plaintiff will argue that partial performance by the parties will preclude application of the Statute of Frauds (I.C. §9-505(4) and (5)) to the facts of this case, thereby rendering any oral agreement between the parties hereto enforceable by this Court. As support for this contention, Plaintiff will in all likelihood argue that it loaned $240,000 as a down payment on the purchase of the Subdivision, and that constitutes its entire obligation to Defendant, thereby indicating part performance of the contract. However, the Idaho Supreme Court stated:

> Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather '[t]he doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel.'" To be specifically enforced by operation of the doctrine of part performance, an oral agreement "must be complete, definite and certain in all its material terms, or contain provisions which are capable in themselves of being reduced to certainty."

Lettunich v. KeyBank National Association, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005), *citations omitted.*

The crux of this case rests upon the disputed terms of an oral agreement. Plaintiff maintains its only responsibility to Defendant under the terms of the oral agreement was that it lend $240,000 as a down payment on the purchase of the subdivision, to be repaid at ten percent interest (10%). In return, it claims it is entitled to not only full repayment of monies loaned, plus interest, but also approximately $186,000 in additional compensation ($750.00 per closing on residential lots in the Subdivision, on approximately 248 lots) as an "equity participation" or "equity position" in the Subdivision. Defendant, as noted above, believes the terms of the agreement were substantially different.

In *Lettunich*, the court determined that notwithstanding an inference that Lettunich had partially performed, there was "no evidence in the record of a complete and enforceable agreement." *Lettunich v. KeyBank National Association,* 141 Idaho at 367, 109 P.3d at 1109. The court looked at the following factors in reaching its decision:

> For example, there is no indication of the amount of the loan, the interest rate, the disbursement schedule, the terms of the repayment, the security for the loan, or the parties' rights after default. While none of these terms

> individually may be determinative, the lack of all of them in this case makes the oral agreement to lend money vague, incomplete and unenforceable. Consequently, the doctrine of part performance does not apply to this case.

Ibid. In the instant case, the same factors are completely absent in regards to any oral agreement reached by Plaintiff and Defendant.

The parties hereto are in complete disagreement as to the amount of funds Plaintiff was obligated to provide to Defendant. Plaintiff claims it was only obligated to provide one specific amount ($240,000); Defendant believes it was entitled to full funding of the Subdivision project by Plaintiff. There is no evidence of any agreed-upon disbursement schedule. There is no evidence regarding terms of repayment—there is no agreement regarding minimum payments, repayment schedules, or even the maturity date of any such repayment agreement. In fact, at deposition, DeYoung asserted that the principal and interest were to be repaid within twelve (12) months from the date said funds were advanced, but none of the proposed Deeds of Trust or Promissory Notes contained such language. *Deposition of Curtis DeYoung*, p. 108, ln. 9-16. Of the proposed Deeds of Trust and Promissory Notes submitted to Plaintiff for approval, not one contains a provision that the maturity date of the Note was within twelve (12) months from the date funds were advanced, or from the date of the Note itself. *Affidavit of Scott Tallman.* Nor did Plaintiff ever send any written objections regarding the proposed maturity date(s) of proposed Notes. *Affidavit of Scott Tallman.*

Furthermore, in its Response to Request for Admission No. 2, Plaintiff admitted it exhausted its funds to be loaned at ten percent (10%) interest, and then offered funds to Defendant at twelve percent (12%) interest. This arguably provides

support that no definite agreement existed between the parties such that this Court could find part performance of an oral contract with specific, definite and complete terms. No evidence exists as to any defined right of either party after default, as well.

Of more import, however, is the fact that there is no definite agreement as to the form of security required in this agreement. Plaintiff claims it was entitled to $750.00, per closing, on lots in the Subdivision secured by a Deed of Trust and Promissory Note. At deposition, Plaintiff claimed it did not accept proposed Deeds of Trust and Promissory Notes from Defendant, for a variety of reasons: there was no interest provided for; there was no provision of payment of the $750.00 per closing; the date of disbursement was incorrect; and the Deed of Trust was correct, but the Note did not contain the $750.00 per closing. At deposition, Kendrick indicated there was no reason to include the $750.00 per closing in a proposed Deed of Trust. *Deposition of Brad Kendrick*, p. 111, ln. 14 – p. 112, ln. 23. Yet, a promissory note without the security of the correct amount, lodged in a deed of trust, is at best an unsecured promise of future payment. It appears even Kendrick and DeYoung do not agree on what obligations were truly owed by Defendant to Plaintiff in this regard. Therefore, there is no definite agreement, with specific terms, which this Court could find from the facts of the case. It is clear that the parties did not even have a specific agreement as to whether the $750.00 per closing on residential construction was to be secured by interest in the property, or was simply an unsecured obligation. Again, the facts indicate the oral agreement lacked such crucial terms that it became vague and incomplete in its terms, and therefore, is unenforceable. Therefore, the Defendant is entitled to summary judgment herein.

4. Idaho Code §9-508 renders any oral agreement between the parties herto unenforceable.

Idaho Code §9-508 states the following:

> Real estate commission contracts to be in writing.—No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative.

In the instant case, Plaintiff claims that it is entitled to a fee of $750.00, per closing, on residential construction within the subdivision, because it brought the opportunity to purchase the subdivision to the attention of Defendant. It claims that it brought the purchaser (Defendant) to the sellers (Old West), and facilitated the sale of the Subdivision to Defendant. Kendrick indicated that the "equity position" was derived from providing this information to Defendant. Kendrick states as follows:

> A. ...He would lend—he—APS would lend the monies needed for the down payment on the project.
> And he said—I can't give you a verbatim, but I remember again us talking about, wow, that's very generous.
> And he said, "Guys, I don't want to be—I don't want to be in your project as a partner in it." He said, "I just want a small equity piece in the project."
> And that's when we first talked about $750 a lot for him bringing the deal to us.

Deposition of Brad Kendrick, p. 82, ln. 6-16.

When asked what an "equity position" or "stake" meant, Kendrick responded as follows:

> Q. What does that term mean to you?
> A. Well, Mrs. Shaul, as long as I have been doing real

estate deals, development deals, there's typically an equity participant, somebody that bring the project or makes the project happen, that they get an equity piece of the project for bringing the project. Sometimes that's all they do, no more, no less. I've gotten hundreds of thousands of dollars as an equity participant. I didn't put one dime in the project, but I brought the project and—

Q. So an equity position is a payoff for bringing a real estate deal, a realty—

A. That's one definition. I mean, multiple definitions. But yes, absolutely.

Q. In this context, Mr. Kendrick, what did it mean?

A. In this context, it meant Curtis was going to have APS lend 200 some odd thousand dollars in addition to other costs to get us started. And for that, he wanted a $750 per lot equity position for bringing the project. End of story.

Deposition of Brad Kendrick, p. 83, ln. 2-24.

Essentially, Plaintiff is claiming a "reward" from Defendant for notifying Pool, Tallman, Kendrick and Reyes, who subsequently formed the members of Defendant in late 2003, that the Subdivision was available for purchase. Plaintiff had no ownership interest in the Subdivision as it was owned by Old West. Plaintiff did not become a member of Defendant's legal entity. Thus, Plaintiff is really claiming a finder's fee, or commission for bringing the purchaser and seller of real estate together. Such transaction requires a written agreement, which does not exist in this case, to be enforceable. Hence, Plaintiff's claim is unenforceable. Therefore, Defendant is entitled to summary judgment as a matter of law.

D. Defendant has not been unjustly enriched.

In Plaintiff's Amended Complaint, Fourth Cause of Action, Plaintiff alleges that Defendant was unjustly enriched as follows: Plaintiff introduced Defendant to the Subdivision project and provided capital to Defendant, expecting in return a

promissory note and deed of trust securing the funds loaned, and said funds were to be repaid with interest, and a further payment of $750.00 per lot; Defendant has failed and refused to provide a promissory note and deed of trust, and has retained Plaintiff's funds, as well as refused to pay the $750.00 per lot.

In order to sustain an allegation of unjust enrichment, Plaintiff must prove the following elements: "(1) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof." *BHA Investments, Inc. v. State of Idaho, Alcohol Beverage Control Board*, 138 Idaho 348, 355, 63 P.3d 474, 481 (2003). The Idaho Supreme Court stated:

> Unjust enrichment, or restitution, is the measure of recovery under a contract implied in law. A contract implied in law, or quasi-contract, "is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent of the agreement of the parties, and some cases, in spite of an agreement between the parties"....Recovery under unjust enrichment theory...is limited to the amount by which the defendant was unjustly enriched.

Barry v. Pacific West Const., Inc., 140 Idaho 827, 834, 103 P.3d 440, 447 (2004).

Finally the following rule applies to a claim based upon unjust enrichment:

> Generally, a party cannot recover under the equitable theory of unjust enrichment where there is an enforceable express contract covering the same subject matter. However,
> [t]he existence of an express agreement does not in and of itself signify that an action for unjust enrichment cannot be brought. Rather, only when the express agreement is found to be enforceable is a court precluded from applying the equitable doctrine of

> unjust enrichment in contravention of the express contract.

Blaser v. Cameron, 121 Idaho 1012, 1017, 829 P.2d 1361, ___ (Ct.App. 1992).

As set forth above, Defendant submits that any agreement between the parties hereto is rendered unenforceable by application of the Statute of Frauds. In the instant case, Plaintiff had no ownership interest in the Subdivision—it was owned by Old West. Thus, Plaintiff has no right to an "equity" position in the Subdivision. Plaintiff had very limited involvement overall in the project itself. Plaintiff made a phone call to put Tallman in touch with Old West, and subsequently flew to Spokane with Tallman and Kendrick, primarily to approve the financing of the purchase of the Subdivision. Plaintiff loaned the down payment required for purchase of the Subdivision, as well as smaller loans for infrastructure, and several construction loans.

All of these funds have been paid back to Plaintiff by Defendant, plus interest (at ten percent (10%)). Thus, Plaintiff has been completely made whole for any benefit it conferred on Defendant, plus compensation for said benefit in the form of the interest which accrued and was paid by Defendant. It would be an injustice to allow Plaintiff to recover not only the interest paid by Defendant, but more than $186,000 in "payments per lot" as claimed by Plaintiff. Plaintiff essentially is attempting to get double recovery for the funds loaned to Defendant. Further, Plaintiff is attempting to circumvent I.C. §9-508, which requires that any payment for *procuring* a purchaser of the real estate of another must be in writing to be enforceable. Plaintiff should not be allowed to nullify the effect of the statute in this instance. Therefore, based upon the foregoing application of law, Defendant is

entitled to summary judgment.

E. Plaintiff cannot support its claim of fraud against Defendant.

1. Plaintiff has failed to set forth its allegation of fraud against Defendant with particularity.

In its Amended Complaint, Third Cause of Action, Plaintiff has alleged that Defendant has perpetrated fraud upon Plaintiff. Idaho Rule of Civil Procedure 9(b) requires that Plaintiff state "the circumstances constituting fraud...with particularity". IRCP 9(b). Plaintiff fails to particularly identify any misrepresentations made by any member of Defendant at the time the oral agreement to provide financing was entered into by Plaintiff and Defendant. Plaintiff merely alleges in its Amended Complaint that Defendant "made representations" without identifying what the same may be. Defendant is unable to identify what such representations may be, but if Plaintiff is relying upon the substance of the oral agreement, set forth above, its claim based in fraud must still fail. In *Eastern Idaho Economic Development Council v. Lockwood,* 139 Idaho 492, 80 P.3d 1093 (2003), the Idaho Supreme Court held that promises made the lender (EIEDC) to secure execution of a continuing guaranty document "were, at best, promises of future performance" and the same "did not amount to a particular allegation of misrepresentation in the inducement". *Eastern Idaho Economic Development Council v. Lockwood,* 139 Idaho 492, 497, 80 P.3d 1093, ___ (2003).

In the instant case, the intentions or agreement by Defendant to execute a Deed of Trust or Promissory Note in favor of Plaintiff were, at best, promises of future performance, the terms of which were not even specifically agreed upon, as discussed above. Thus, Plaintiff has failed to state a claim upon which relief can be

granted and therefore, Plaintiff's Third Cause of Action, Fraud, must be dismissed in its entirety.

2. Plaintiff is unable to prove all required elements to sustain an action of fraud against Defendant.

As noted above, in its Amended Complaint, Third Cause of Action, Plaintiff has alleged that Defendant has perpetrated fraud upon Plaintiff. In order to prove this allegation, Plaintiff must prove the following elements: "(1) a statement or representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's *ignorance* of the falsity; (7) reliance by the hearer; (8) justifiable reliance; (9) resultant injury". *Lettunich v. KeyBank National Association*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005).

As set forth above, Plaintiff has failed to set forth its claim based upon fraud with particularity. Therefore, Defendant is unable to coherently discuss the first three (3) required elements of a claim of fraud. As for the fourth element, knowledge of falsity of the statement, Plaintiff is unable to prove that, at the time the oral agreement was discussed or entered into between the parties was made, Defendant did not intend to sign a Promissory Note and Deed of Trust in favor of Plaintiff. At deposition, Plaintiff, through its designee, DeYoung, admitted Plaintiff has no proof that Defendant did not intend to execute such a Note and Deed of Trust:

> Q. All right. At the time the money was loaned, do you have any factual information that the—the intended members of CornerStone did not intend, at that point, to sign a note and deed of trust?
> A. No, I have none.
> Q. Okay. And in fact, you could have provided a note and deed of trust that comported with what you

believed to be the oral agreement, correct?
A. It's possible, yes.

Deposition of Curtis L. DeYoung, Transcript, p. 106, ln. 19 - pg. 107, ln. 3. Further, DeYoung admitted that several proposed trust deeds and promissory notes were presented to him for approval, including a signed Deed of Trust, but he never approved or recorded any of the proposed documents. At deposition, he testified as follows:

Q. Would you agree with me that a trust deed was, in fact, supplied to you in August of 2005?
A. You can provide as many trust deeds as you want, but without a recordation, they don't mean anything.
Q. Could you have recorded it when it was provided to you?
A. I presume so, if they were signed. The trust deed prior to—I'm sure which one you're talking about. But a lot the trust deeds that I—the copy of the two trust deeds were not signed.
Q. Okay.
A. I was sent copies unsigned.
Q. Okay. Did you approve of any of those trust deeds?
A. Recorded interests can be recorded by anybody.
Q. That's not—
A. By the owner of the property.
Q. Mr. DeYoung, that's not what I asked you. What I asked you is: did you approve of any of the trust deeds that were sent you by CornerStone?
A. The trust deeds were fine. The notes were not fine.
Q. Okay. So you could have recorded any of the trust deeds if they were fine; is that not correct?
A. Yes.
Q. Okay. But you didn't record them yourself for your company?
A. They were to be recorded by CornerStone.
Q. That wasn't my question. My question was: Did you record them yourself?
A. No, I did not record them myself.
Q. Okay. And you did not record them on behalf of your company?
A. No, I did not.
Q. Okay. And did you provide, at any point, a promissory note and deed of trust that you were comfortable with to CornerStone for signature?

A. No.
Q. Could you have?
A. I could have.
Q. Okay. But you chose not to, correct?
A. A practice in waste of time for somebody who wouldn't sign something, that wasn't what I was going to do.
Q. Okay. Who wouldn't sign something?
A. Neither Scott nor Brad.
Q. How do you know that?
A. The first note had no interest on it.
Q. Okay. That's—but I'm talking about if you had provided documents for them to sign, you never did that?
A. No, I did not.
Q. Okay. So you really don't know if you had provided such documents they have signed it, correct?
A. No, I don't know that.

Deposition of Curtis DeYoung, Transcript, pg. 101, ln. 15 – pg. 103, ln. 23. Thus, by Plaintiff's own admission, it received several drafts of Notes and Deeds of Trust, none of which it approved for recordation, and it failed or refused to provide its own drafts of such documents for signature by Defendant, throughout the relevant times to this proceeding. No evidence exists that Defendant fraudulently induced Plaintiff's agreement to provide funding of the Subdivision project. No evidence exists that Defendant did not intend to provide a Deed of Trust or Promissory Note. What is apparent, however, is that there was no meeting of the minds as to the rights and responsibilities of the parties, and there was no agreement as to how any agreement was to be carried out between the parties. As such, Defendant must be granted summary judgment on the Third Cause of Action (Fraud) in Plaintiff's Amended Complaint, because Plaintiff is unable to prove all material elements required to sustain this cause of action.

E. Plaintiff cannot maintain a cause of action for breach of implied covenant of good faith and fair dealing.

In the instant case, Plaintiff has alleged a breach of the covenant of good faith and fair dealing by Defendant in its Seventh (sic) Cause of Action in its Amended Complaint. Idaho law on this point is as follows:

> "The implied covenant of good faith and fair dealing is a covenant implied by law in the parties' contract." It "arises only regarding terms agreed to by the parties." "The covenant requires that the parties perform, in good faith, the obligations imposed by *their agreement*...."

Lettunich v. KeyBank National Association, 141 Idaho at 368, 109 P.3d at 1110, *citations omitted.* Defendant, notwithstanding Plaintiff's failure to provide full funding for the subdivision project, made several payments to Plaintiff throughout 2004 and 2005 to reimburse the principal and interest owed to Plaintiff for funds it actually lent to Defendant. Defendant has now paid the principal and interest owed to Plaintiff, in full. Defendant attempted numerous times to obtain a pay-off amount throughout 2004 and 2005, culminating in a payment in full in January, 2006. Defendant attempted numerous times to provide Plaintiff with a Note and Deed of Trust, requesting approval and acceptance by Plaintiff prior to recording any Deed of Trust. Approval, however, was never forthcoming from Plaintiff. Therefore, there is no material issue of fact that Defendant did in fact attempt to honor its agreement with Plaintiff to repay the principal and interest owed to Plaintiff.

Further, as noted above, any agreement entered into by Plaintiff and Defendant were oral, and therefore, the Statute of Frauds is applicable. As discussed above, the oral agreement of Plaintiff and Defendant is unenforceable under the plain language of I.C. §9-505(4) and (5) (as well as I.C. §9-508). Therefore, because the agreement between the parties is unenforceable by operation of I.C. §9-505(4) and (5), "there are no obligations imposed by the agreement that the parties are

RESPECTFULLY SUBMITTED this 24th day of April, 2007.

Penny North Shaul, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of April, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

xx Postage-prepaid mail

X Facsimile Transmission

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, CORNERSTONE HOME BUILDERS, LLC., by and through its attorney of record, Penny North Shaul, Esq., and hereby submits the following Response to Plaintiff's Memorandum in Support of Motion for Summary Judgment.

I. FACTS

Please see the Facts set forth in Defendant's Memorandum in Support of Motion for Summary Judgment, together with the affidavits and pleadings attached thereto.

II. ARGUMENT

A. Any agreement between Plaintiff and Defendant is unenforceable pursuant to the Statute of Frauds.

1. The Statute of Frauds is applicable to this case.

Plaintiff argues that the Statute of Frauds (I.C. §9-503) does not bar recovery because "the parties did not intend to *transfer* any property in any way that would bring the statute of frauds into play as to the payment of the $750.00 per lot agreement." Plaintiff claims that its sole contention, that Defendant has a contractual obligation to pay $750.00 per lot at closing, and to secure said obligation by note and deed of trust, does not involve a transfer of real property.

Idaho Code §9-503 states, in pertinent part:

> No estate or *interest* in real property...can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Idaho Code §9-503, emphasis added. The Idaho Supreme Court has held as follows:

> A deed of trust is a conveyance of real property. I.C. §45-1513. To be valid, a conveyance of property requires delivery of the instrument. *McLaws v. Casey*, 88 Idhao 348, 353, 400 P.2d 386, 389 (1965); *see also Walter e. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 547, 916 P.2d 1264, 1272 (1996). Delivery is sufficient when the grantor parts with control of the deed and does not retain a right to keep it. *Williams v. Williams*, 82 Idaho 451, 455, 354 P.2d 747, 749 (1960). Delivery has not been accomplished merely when the grantee knows of the existence of a deed. *Glander v. Glander*, 72 Idaho 195,

199, 239 P.2d 254, 256 (1951).

> Although for practical purposes a deed of trust is only a mortgage with power of sale, title to the real estate does pass for the purpose of the trust. *Long v. Williams*, 105 Idaho 585, 587-88, 671 P.2d 1048, 1050-51 (1983). Legal title to the property is conveyed by deed of trust to the trustee. I.C. §45-1502(4). Like any deed of trust, a deed of trust must be delivered to give it effect. Only *after* the obligation secured by the deed of trust is satisfied is the deed of trust *re*-conveyed to the grantor. I.C. §§ 45-1202, 45-1203.

Defendant A v. Idaho State Bar, 132 Idaho 662, 664-65, 978 P.2d 222, 225-26 (1999). Thus it is clear, that a deed of trust does in fact convey an interest in real property. Plaintiff indicates it has sought and continues to seek a deed of trust and promissory note from Defendant to secure funds it claims are due from Defendant. Plaintiff is clearly seeking creation of an interest in the real property owned by Defendant. As such, the Statute of Frauds is applicable to the facts of this case.

2. No written documents exist that fully satisfy the Statute of Frauds.

Plaintiff attempts to piece together a written memorandum of a third party to satisfy the Statute of Frauds, through several documents, alleging "various memorandums, notes and agendas evidencing the $750 per lot agreement" exist. Idaho Code §9-503 requires that an instrument intended to create an interest in real property be subscribed by the party intending to create the interest. Black's Law Dictionary defines the word "subscribe" as follows: "Literally to write underneath, as one's name. To sign at the end of the document". *See also* "subscriber" (one who writes his name under a written instrument; one affixes his signature to any document, whether for the purpose of authenticating or attesting it, of adopting its

terms as his own expressions, or of binding himself by an engagement which it contains". BLACKS' LAW DICTIONARY 1427 (6th ed. 1990). In the instant case, only one of the documents relied upon by Plaintiff, and purported to memorialize the alleged agreement is "subscribed" by anyone (Brad Kendrick, acting without authority): an April 7, 2005 document titled "APS Financial Reconciliation, and attached as Exhibit G to an affidavit of Brad Kendrick, submitted by Plaintiff in support of its Memorandum in Support of Motion for Summary Judgment. *Second Affidavit of Scott Tallman.*

The relevant portion of the "APS Financial Reconciliation" document is as follows:

> Regarding the NOTE amount – Based on the above numbers, the note amount should be $300,054.42. I would like to get this Note and Deed of Trust recorded, in APS's name, if we all agree on this amount.
>
> Regarding the equity interest in the project to APS – I have searched my notes, and literally every file I have, but have found nothing. However, I specifically recall that we all discussed and agreed to an equity participation of either $550 or $725 per home to APS. I am therefore proposing a payment of $625 per home which would equate to $175,000 to you as an equity participant on the Single Family Homes and roughly $20,000 on the Multi-Family Units, for a total of $195,000. However, the last thing I want to do is short change you. Therefore if you remember the number to be different, then let me know.

Nothing in the above language details the number of lots contemplated, or number of twin homes. There is no duration or due date; no discussion of the necessity to provide a Deed of Trust or promissory note to secure any amount; and no discussion of the respective parties' right and obligations relating to any agreement. In fact, the

only reference to preparation of a note and deed of trust is in regards to funds actually loaned by Plaintiff to Defendant, not to any sums owed on a per lot basis. Further, Kendrick's memorandum does not reflect a fixed payment per lot amount, either. As the Idaho Supreme Court held in *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526:

> With respect to the Statute of Frauds, the issue is not whether the parties had reached an agreement. The issue is whether that agreement is adequately reflected in their written memorandum. "[E]xecutory contracts and agreements for the sale of real estate must be complete and speak in definite terms of all the conditions, terms, and descriptions necessary to constitute the contract." *Allen v. Kitchen*, 16 Idaho 133, 141, 100 P. 1052, 1055 (1909).

Lexington Heights v. Crandlemire, 140 Idaho 276, 282, 92 P.3d 526, ____ (2004).

Further, the mere fact that Defendant acknowledged that the correct sum discussed was $750.00, per lot, at closing, does not prevent application of the statute of frauds herein. The Idaho Court of Appeals, quoting WILLISTON ON CONTRACTS, §27:10 at 89-90 (4th ed. 1999), stated:

> "[i]n order for the admission to operate to remove the bar of the Statute, it must in fact be an acknowledgment of the contract alleged, whether the admission is contained in a complaint, responsive pleading, deposition, other testimony, or otherwise in a judicial proceeding."

Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho 485, 492, 20 P.3d 21, 27 (Ct.App. 2001). In *Treasure Valley*, the defendant refused to accept several drafts of an employment contract, which included a non-compete clause, prior to actually beginning employment with plaintiff. During discovery, the

defendant acknowledged receiving drafts of the employment contract which contained the non-compete clause. The *Treasure Valley* court affirmatively stated as follows:

> "[W]here the 'admission' consists of statements merely confirming ...that the defendant had agreed to certain terms different from those alleged by the plaintiff, it will not operate to remove the alleged contract from the Statute..." WILLISTON, §27:10, at 91-92. *See also Frantz*, 111 Idaho at 1009, 729 P.2d at 1072, where we held that there was no acknowledgment of an employment contract with a noncompetition clause even though the defendant did admit to a contract with all the other terms as alleged.

Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho at 491-492, 20 P.3d at 27-28. Defendant has never admitted to the alleged oral contract in the form in which Plaintiff has alleged. Therefore, Plaintiff cannot now claim that Defendant's statements and pleadings have removed the facts of this case from operation of the Statute of Frauds.

While the agreement at issue is not for the sale of real property, it involves conveyance of an interest in real property, as discussed above. The memorandum upon which Plaintiff attempts to rely is vague and indefinite, and completely fails to set forth the necessary terms of the agreement, as discussed above. Therefore, this memorandum fails to satisfy the requirements of the Statute of Frauds, and Defendant is entitled to summary judgment as a matter of law.

3. The doctrine of part performance does not prevent application of the Statute of Frauds to the facts of this case.

"Under Idaho law part performance *per se* does not remove a contract from

the operation of the statute of frauds. Rather, '[t]he doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel.'" *Treasure Valley Gastroenterology Specialists, P.A. v. Woods,* 135 Idaho at 491-492, 20 P.3d at 27-28; see also *Lettunich v. Key Bank National Association,* 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005). The elements of equitable estoppel are as follows (as to the party to be estopped):

> (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least an expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts.

As to the party asserting estoppel applies, the following elements apply:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question[;] (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho at 490, 20 P.3d at 26.

In the instant case, Plaintiff has failed to provide any evidence to this Court that Defendant falsely represented or concealed material facts from Plaintiff at any time relevant hereto. In fact, Plaintiff, through Curtis DeYoung, conceded it had no evidence that Defendant did not intend to sign a Promissory Note and Deed of Trust at the time funds were loaned to it by Plaintiff. *Deposition of Curtis DeYoung,* p. 106, ln. 19-24. In addition, there is no evidence before this Court that Defendant induced

Plaintiff to lend funds to it while intending to not repay the same. Further, there is no evidence that Defendant did not originally intend to pay Plaintiff the sums it now claims, per lot, at closing. Rather, the evidence before this Court is that Plaintiff failed and refused to provide full funding for the subdivision project, and by virtue of this breach by Plaintiff, Defendant was relieved of any oral obligation it chose to honor. Thus, Plaintiff is unable to prove the elements of equitable estoppel, and therefore, the doctrine of part performance does not bar operation of the Statute of Frauds to this case.

In regards to the elements applicable to Plaintiff in an equitable estoppel claim, Plaintiff is unable to prove "that the reliance by the party claiming estoppel [is] referable only to the contractual term that is in dispute." *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho at 490, 20 P.3d at 26. Plaintiff has alleged that it is entitled to $750.00, per lot, at closing, due to Plaintiff bringing the subdivision project to Defendant's attention, and for loaning the down payment required to purchase the subdivision. However, Plaintiff brought the subdivision to the attention of Martin Pool nearly two years before Defendant was involved in the project—there is no evidence before this Court that an agreement was entered into at that time. *Deposition of Martin Pool*, p. 34, ln. 13 – p. 35, ln. 2. Plaintiff did in fact loan funds to Defendant, but the fact that funds were loaned does not provide evidence of the terms of the alleged oral agreement. It simply provides proof that there was some form of oral agreement between the parties. Further, Plaintiff and Defendant both agree that the funds actually loaned by Plaintiff were to be repaid at ten percent (10%) interest, and in fact, were paid in full, including accrued interest,

in January, 2006. Again, these facts do not provide proof of the actual terms of the alleged oral agreement. The standard which must be applied is that "performance in reliance upon an oral promise must be explainable only by existence of the promise. The performance must evidence the promise." *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho at 490, 20 P.3d at 26, quoting *Frantz v. Parke*, 111 Idaho 1005, 1111, 729 P.2d 1068, 1074 (Ct.App. 1986). Plaintiff's conduct with Defendant (discussing the project, loaning funds) is certainly equally explainable by the fact that it was negotiating to receive, and did in fact receive a fixed interest rate on funds loaned. Therefore, Plaintiff cannot prove its reliance upon the conduct of the parties is referable only to the alleged agreement to pay $750.00, per lot, at closing. Thus, the Statute of Frauds applies to the oral agreement herein, and Defendant is entitled to summary judgment as a matter of law.

B. Plaintiff cannot support any causes of action against Defendant arising out of a claim based upon breach of contract.

The Idaho Court of Appeals set forth the applicable definition and elements of a contract in *Atwood v. Western Construction, Inc.*, 129 Idaho 234, 923 P.2d 479, ___ (Ct.App. 1996):

> A contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS, 1 (1981). A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made. *Id.*, §2. A distinction must be recognized between promises and mere statements of opinion or prediction. In making this distinction, the inquiry is whether a reasonable

> person in the position of the listener would conclude that the speaker had made a promise or only expressed an opinion, prediction or expectation. See RESTATMENT (SECOND) OF CONTRACTS, 2, Comment f (1981); J. Perillo, CORBIN ON CONTRACTS, §1.15 (1993). This is a factual issue and therefore ordinarily is to be determined by a jury. However, if the evidence relating to the alleged promise is not conflicting and admits but one inference, the court may decide the issue as a matter of law. *Watson v. Idaho Falls Consolidated Hospitals, Inc.*, 111 Idaho 44, 47, 720 P.2d 632, 635 (1986); *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 368, 679 P.2d 640, 645 (1984).

Atwood v. Western Construction, Inc., 129 Idaho 234, 238, 923 P.2d 479, ___ (Ct.App. 1996). "There are essentially three types of contractual arrangements: express contracts, contracts implied in fact, and contracts implied in law." *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 942, 854 P.2d 280, 285 (Ct.App. 1993). The *Podolan* court stated:

> Express contracts require that the parties expressly agree regarding a transaction. Contracts implied in fact are those where there is no express agreement but the conduct of the parties implies an agreement from which the contractual obligation arises. To find such a contract, the facts must be such that the intent to make a contract may be fairly inferred. Contracts implied in law—also known as quasi contracts, unjust enrichment, or restitution—are not contracts at all but are obligations imposed by law to provide a remedy without reference to the intentions or expressions of the parties.

Podolan v. Idaho Legal Aid Services, Inc., 123 Idaho 937, 942, 854 P.2d 280, 285 (Ct.App. 1993), *citations omitted.*

1. <u>There is no express contract between the parties hereto.</u>

Black's Law Dictionary defines an "express contract" as "an actual agreement between the parties, the terms of which are openly uttered or declared at

the time of making it, being stated in distinct and explicit language, either orally or in writing." BLACK'S LAW DICTIONARY 323 (6th ed. 1990). In the instant case, there is no dispute that any agreement alleged between the parties was oral—no written contract exists. Defendant has not denied that there was an oral agreement between the parties hereto, to the extent that in exchange for Plaintiff providing full funding to the subdivision project, Defendant would repay all funds loaned at ten percent (10%) interest, plus $750.00, per lot, at closing. Further, Defendant has even admitted that the sum discussed was to be fixed at $750.00, per lot, at closing. However, Defendant has always alleged that the oral agreement to pay the contested sums was contingent upon Plaintiff providing full funding of the subdivision project.

Plaintiff claims there is no factual support for Defendant's position that the $750.00, per lot, at closing, was contingent upon full funding of the subdivision. However, Plaintiff's Amended Complaint (which is verified), filed with the Court on October 4, 2006, alleges as follows:

> 12. Following the initial wire transfer to Cornerstone and/or it manager(s) and/or its member(s) or individual(s) affiliated thereto, Plaintiff continued to provide capital to Cornerstone through February 2004, with such capital to be utilized on the development of the land as described above and in the aforementioned Warranty Deeds.
>
> 13. Prior to Plaintiff's agreement with Cornerstone and/or it manager(s) and/or member(s) or individual(s) affiliated thereto, to provide the foregoing *stream of financing* for the above mentioned construction and subdivision project, Cornerstone and Plaintiff verbally agreed to certain repayment terms, including but not limited to, an interest rate of ten percent (10%) per annum on the monies lent, a promissory note and deed of trust on the land in the construction and subdivision project,

> as well as an agreement between Cornerstone and Plaintiff that Plaintiff was to receive $750.00 per lot sold in the project.

Second Affidavit of Penny North Shaul, (emphasis added to quoted paragraphs). Plaintiff's own pleadings support the testimony of Scott Tallman, the sole remaining member of Defendant. Tallman testified at deposition that he always understood the agreement to be that Plaintiff would provide the down payment to purchase the subdivision, but also that Plaintiff would fund the project through completion. Plaintiff now tries to explain that it sent subsequent wires (after the original wire on September 30, 2003) "to help them get going" (meaning Defendant). *Deposition of Curtis DeYoung*, p. 72, ln. 22—p.73, ln. 1.

Plaintiff also now is claiming it had an option to loan additional funds to Defendant, but not a duty pursuant to any agreement. However, this contention is not supported by Plaintiff's own pleadings, as set forth above—Plaintiff alleged that it entered into an agreement to provide a "stream of financing" to Defendant to be used in the subdivision project. No where, until recently, has Plaintiff alleged it had an optional agreement to provide funding. There is factually no reason for Plaintiff to have continued to provide funding to Defendant but for the fact that it had an obligation to Defendant to continue to provide a "stream of financing".

Plaintiff attempts to show that Scott Tallman did not have first hand knowledge of any alleged oral agreement between Plaintiff and Defendant. In fact, Scott Tallman did first hear of the project from Martin Pool. However, he was present during numerous conversations with Pool, Reyes, Kendrick and DeYoung, wherein these individuals were all discussing the project. *Second Affidavit of Scott*

Tallman; Deposition of Curtis DeYoung, p. 67, ln. 10-16. Further, Scott Tallman spoke with Curtis DeYoung personally regarding Plaintiff's commitment to provide full funding of the project to Defendant. This conversation took place while he was still in Spokane with DeYoung and Kendrick, when these individuals were there negotiating the purchase of the subdivision. *Second Affidavit of Scott Tallman.* Clearly, Scott Tallman had first hand knowledge of any agreements and/or negotiations between Plaintiff and Defendant.

In addition to the contested provision of the oral agreement, as noted above, Plaintiff has failed to provide evidence to this Court that the terms and conditions of the oral agreement were concise and detailed: there is no maturity date or due date; there is no legal description of the real property implicated; there is no defined number of lots implicated; there is no documentation which references a note and deed of trust specific to the oral agreement. Thus, Plaintiff cannot prove that there was an express oral contract between the parties hereto.

As discussed above, the terms of the alleged oral agreement are not definite and concise, and fail to form a complete express contract. It follows, then, that Defendant cannot be held to have breached an express oral contract, given that one did not, in fact, exist. Therefore, Defendant is entitled to summary judgment as a matter of law.

2. <u>There is no implied in fact contract between the parties hereto.</u>

As discussed above, an implied in fact contract is one in which there is no express agreement, but the conduct of the parties is such that it implies an agreement from which obligations arise. As noted above, there is no express oral

agreement in this case. Neither, however, is there an implied in fact contract. The only implied in fact contract that can be inferred from the conduct of the parties is that Plaintiff agreed to loan funds to Defendant, which Defendant agreed to repay. Plaintiff had disclosed the subdivision project to Martin Pool nearly two years before Defendant even existed—no money was owed by any party to any party for that disclosure. Plaintiff loaned funds, through several transactions, from September 2003 through February 2004—all these funds were repaid, at the agreed-upon interest, in several installments, and in any event, in full by January 2006. Even Brad Kendrick's memorandum dated April 7, 2005, fails to provide support for an implied in fact contract—again, it fails to specify a sum certain, lots implicated, duration of agreement, or any requirement of security documents.

3. Defendant did not breach any contract.

As noted above, there is factual support in Plaintiff's own pleadings in its Amended Complaint that Plaintiff was obligated to provide a "stream of financing" to Defendant to complete the subdivision. After the original wire transfer in September, 2003, Plaintiff wired several smaller loans to Defendant. Altogether, these sums totaled just under $500,000.00. Plaintiff never provided a promissory note or deed of trust for Defendant's execution to secure these sums. *Second Affidavit of Scott Tallman.* Plaintiff certainly had the opportunity to provide such documents as the lender in this transaction. *Deposition of Curtis DeYoung*, p. 103, ln. 2-7. In February 2004, Scott Tallman received a call from Curtis DeYoung, on behalf of Plaintiff, indicating it had run out of funds, and was bowing out of the project. *Second Affidavit of Scott Tallman.* On behalf of Defendant, Scott Tallman was then

forced to seek financing from an alternate source in order to keep the subdivision project going. *Second Affidavit of Scott Tallman.*

As noted above, Defendant does not concede that there was either an express or implied in fact contract in this case. Further, the Statute of Frauds precludes enforcement of any contract that may exist in the instant case. However, assuming for the sake of discussion only, that an oral contract existed that was enforceable, the party who initially breached such agreement is Plaintiff. Plaintiff claims there is no factual support for Scott Tallman's testimony regarding the call he received from Curtis DeYoung. However, at deposition, the following exchange occurred:

> Q. Okay. Are you specifically denying today that you informed Mr. Tallman you were not going to provide any further funding for CornerStone Home Builders because you were out of money?
> A. No, I am not denying that. I'm just saying, I don't recall a conversation that went like that.

Deposition of Curtis DeYoung, p. 48, ln. 10-16. According to Scott Tallman, DeYoung indicated Plaintiff was "out of money". DeYoung did not deny this conversation at deposition, but did, in fact, deny that he was out of money. *Deposition of Curtis DeYoung*, p. 49, ln. 8. Further, in response to Defendant's written discovery request (Request for Admission No. 2), Plaintiff's verified response was, in pertinent part, as follows:

> Plaintiff did loan all the money which it agreed to loan and when such funds were exhausted, plaintiff provided funding sources which were willing and able to provide additional funding. Plaintiff specifically indicated that it was ready, willing and able to provide funding at the rate of 12% per annum and with 4 basis points on the loan, but defendant indicated that it could obtain a cheaper loan elsewhere and refused plaintiff's offer to provide

additional funding ....

Affidavit of Penny North Shaul. Clearly, Plaintiff has admitted it exhausted the sources it was using to provide funds at the agreed-upon interest to Defendant. Clearly, Plaintiff was not capable of completing its obligation to provide funding at ten percent (10%) interest. Thus, Defendant herein submits that Plaintiff breached any oral agreement then in existence between the parties hereto by failing to provide funding at the agreed-upon rate of interest, throughout the subdivision project.

According to Scott Tallman, as well as Brad Kendrick, Defendant made numerous attempts to determine the amount of funds owed to Plaintiff, and to submit proposed Deeds of Trust and Promissory Notes. According to Scott Tallman, a proposed Note was sent to Plaintiff, in June, 2004, to try to get Plaintiff's attention, due to its failure to communicate with Defendant. *Second Affidavit of Scott Tallman.* In September 2005, in response to a proposed Deed of Trust and Promissory Note, which accurately reflected the remaining principal owed, Plaintiff indicated, through DeYoung, it would not loan any further funds to Defendant. *Second Affidavit of Scott Tallman.* At deposition, Plaintiff admitted the Deed of Trust was accurate. *Deposition of Curtis DeYoung*, p. 102, ln. 10-17. It could have been recorded, in fact. Further, Defendant was not trying to borrow more funds from Plaintiff—it was merely trying to fulfill its obligations regarding the funds loaned by providing security documents. *Second Affidavit of Scott Tallman.* In any event, at the point when Plaintiff again stated it would not provide funding to Defendant (affirming its intention to not honor any oral commitment it had to Defendant), only approximately forty-nine (49) houses were completed. *Second Affidavit of Scott*

Tallman.

Defendant attempted repeatedly to obtain correct figures to include in intended promissory notes and/or deeds of trust. *Second Affidavit of Scott Tallman*; *Deposition of Brad Kendrick*, p. 120, ln. 14—p. 121, ln. 1. Defendant was forced to obtain alternate financing in the midst of a huge financial undertaking, after relying on Plaintiff's promise to provide a "stream of financing" for the project. Unfortunately, Defendant relied upon Plaintiff's promise, to its detriment. Further, Defendant relied upon Plaintiff's assertion that it was bowing out of the project, thereby releasing Defendant from any obligation to Plaintiff, since Plaintiff was unable to provide full funding of the project. Plaintiff breached any oral agreement that may have existed first, and therefore, Defendant was released from any further obligations to Plaintiff. As such, Defendant is entitled to summary judgment as a matter of law.

C. Defendant's defense pursuant to IRCP 12(b)(6) can be treated as a motion for summary judgment by this Court.

Defendant concedes it did not file a separate motion pursuant to IRCP 12(b)(6). However, this Court may treat Defendant's affirmative defense as a motion for summary judgment, based upon the record herein, the pleadings on file, and the affidavits and deposition testimony submitted by the parties. Idaho Rule of Civil Procedure 12(b). In the instant case, all payments made by Defendant were required by Plaintiff to be sent to a Master Trust Account maintained by Plaintiff, presumably on behalf of its self-directed IRA/retirement clients. Defendant has directed discovery to Plaintiff to determine the true source of funds loaned, or held out by

Plaintiff to have originated from it. However, Plaintiff has refused to answer such discovery to date. Defendant can only surmise that the true source of the funds loaned to Defendant are in fact from the self-directed IRA/retirement clientele of Plaintiff, and therefore not from Plaintiff itself. Thus, Plaintiff is not entitled to the relief it is requesting, in that it truly did not lend the funds, and all funds loaned by the actual sources have since been repaid, plus interest. Thus, Defendant is entitled to summary judgment as a matter of law because nothing is owed to the Plaintiff. The Plaintiff is entitled to nothing because the funds were supplied by third parties. Summary judgment must be granted in favor of the Plaintiff.

D. Defendant is entitled to the protection of the Statute of Frauds.

Defendant has set forth its affirmative defense that Plaintiff is barred from recovery by application of the Statute of Frauds. Defendant has discussed this defense exhaustively in both its Memorandum in Support of Motion for Summary Judgment, filed with the Court on April 24, 2007, as well as above. Defendant will not herein revisit the same arguments, but incorporates and realleges them by reference herein.

E. Defendant is entitled to summary judgment based upon accord and satisfaction.

Defendant does not dispute the elements of accord and satisfaction as set forth by Plaintiff. Defendant is entitled to summary judgment as a matter of law on this issue. First, there is no question there is a bona fide dispute as to whether any amount is owed to Plaintiff. Hence, the instant litigation exists. Second, Defendant did in fact tender $187,591.35, to satisfy the debt owed to Plaintiff by Defendant for

funds loaned to Defendant. This payment was addressed on the record on January 24, 2006. From Defendant's perspective, said sums were certainly tendered to totally satisfy the debt it owed to Plaintiff. Plaintiff accepted said payment in total satisfaction of the repayment of loans made to Defendant. While Defendant agreed that Plaintiff would be allowed to amend its complaint, it in no way conceded that there was a continued debt owed to Plaintiff. As argued above, there is no enforceable contract regarding the claims Plaintiff now raises. Therefore, because the actual loans to Defendant by Plaintiff have now been satisfied, Plaintiff's claims are barred by accord and satisfaction. Defendant is entitled to summary judgment as a matter of law.

F. Plaintiff is not entitled to recovery from Defendant pursuant to the affirmative defense of detrimental reliance.

In order to sustain a defense of detrimental reliance, Defendant must establish the following: Defendant "must show that [it] reasonably and justifiably relied on a specific promise of the offending party and suffered substantial and foreseeable economic loss when relying on the promise." *Podolan v. Legal Aid Services, Inc.*, 123 Idaho 937, 943, 854 P.2d 280, 286 (Ct.App. 1993). In the instant case, Plaintiff, through DeYoung, specifically promised to Defendant, through Scott Tallman, immediately following the meeting with Old West, while still in Spokane, Washington, that Plaintiff would fund the subdivision project to completion. *Second Affidavit of Scott Tallman.* This is borne out by Plaintiff's allegations in its Amended Complaint, wherein in it alleges it was to provide a "stream of financing" to Defendant to be used in the subdivision project.

Defendant began construction and improvements in the subdivision, based upon Plaintiff's promise to provide funding. *Second Affidavit of Scott Tallman.* Of necessity, Defendant was required to hire subcontractor crews to perform construction work within the subdivision. *Second Affidavit of Scott Tallman.*

Defendant incurred the liability of paying the subcontractors for the work they performed relating to construction within the subdivision. *Second Affidavit of Scott Tallman.* Thus, when DeYoung called Tallman at the end of February 2004, and notified him that Plaintiff was bowing out of the project, Defendant was forced to try to find another source of funding for the subdivision, suffering the foreseeable economic hardship of inability to pay its debts, including payment of subcontractors who had already performed work within the subdivision. *Second Affidavit of Scott Tallman.* Based upon Plaintiff's history of providing funding to Defendant relating to the subdivision project, Defendant's reliance upon the promise of a "stream of financing" was reasonable and justifiable. Defendant incurred the debt and liability owed to the subcontractors in reliance upon said specific promise, and was only able to satisfy its obligations to the subcontractors through its own efforts with another lender. Further, had Defendant not obtained another source of funding, once Plaintiff breached its specific promise to fund the project, Defendant could have foreseeably lost its ability to satisfy the outstanding balance owed to Old West on the property, and therefore, lost its ownership of the subdivision.

Defendant was also given a second specific promise from Plaintiff, in the form of its notice that it was out of funding, and was bowing out of the project. Defendant relied up DeYoung's statement on behalf of Plaintiff, and obtained

alternate financing. Further, relying on Plaintiff's notice that it was no longer going to be involved in the project, Defendant assumed Plaintiff was no longer entitled to any payment other than to repay funds loaned by Plaintiff. Defendant's reliance upon Plaintiff's withdrawal from the project was reasonable and justified under the circumstances—Plaintiff was no longer actively participating in the project in that it was no longer funding the project.

Defendant is now subjected to this litigation and potential liability for relying upon Plaintiff's refusal to provide any further funding of the project. Plaintiff has been reimbursed fully for all funds loaned, plus interest. It now attempts to recover essentially half again of the funds it actually loaned to Defendant. Defendant relied to its detriment on Plaintiff's promise to remove itself from the project, and therefore, Plaintiff is estopped from asserting it is now owed any sums by Defendant, when Plaintiff failed to complete the terms of its agreement with Defendant. Therefore, Defendant is entitled to summary judgment as a matter on law on this point.

G. Plaintiff has failed to confer a benefit on Defendant.

Defendant is entitled to prevail on the defense that Plaintiff failed to confer a benefit on Defendant. Defendant herein realleges its argument above regarding Plaintiff's breach of contract claim. Plaintiff brought the subdivision project to Martin Pool's attention nearly two years before Defendant became involved in the project. *Deposition of Martin Pool*, p. 30, ln. 4-8. At that time, Pool declined to engage in the project. *Id.* Importantly, Plaintiff itself did not embark on the project at that time, either. *Deposition of Curtis DeYoung*, p. 26, ln. 23-25. Nearly two years later, when Scott Tallman entered the picture, the subdivision project became more

viable. However, until his involvement, no action was being taken in regards to the subdivision, by Pool, Kendrick, Reyes, DeYoung, or Plaintiff. *Deposition of Martin Pool*, p. 34, ln. 3-12. Plaintiff had no ownership interest in the subdivision—at best, it had knowledge of a potential project, but it had shared that same knowledge nearly two years earlier, with no result, to Martin Pool. Plaintiff could not and did not develop the subdivision on its own. Plaintiff was not the only party with knowledge of the subdivision—any third party could have stepped in and developed the project.

In fact, had Plaintiff not offered to fund the subdivision project, Tallman would have still pursued the project himself. *Affidaivt of Scott Tallman.* Had Tallman pursued the project himself, he would have found financing, and repaid said financing pursuant to a financing agreement—just as Defendant did with Plaintiff. It is true that Defendant was able to borrow the original down payment on the property, due to Plaintiff's agreement to loan funds. It is also true that Plaintiff provided several smaller loans through February 2004. The only benefit Plaintiff conferred on Defendant was loaning funds (and not even as fully agreed upon) to Defendant—for this benefit, Plaintiff has been reimbursed in full, plus accrued interest. The fact that Defendant is now realizing nearly three (3) million dollars through its own efforts at construction and development within the subdivision is not relevant—it does not prove that Plaintiff conferred a benefit on Defendant. Defendant is entitled to summary judgment as a matter of law on this point.

H. Plaintiff is not entitled to damages.

Plaintiff alleges it is entitled to damages for breach of contract. Defendant herein realleges its arguments set forth in its Memorandum in Support of Motion for

Summary Judgment. Further, as set forth above, there is no enforceable agreement between the parties hereto. It follows that any property purchased by Defendant within the subdivision, pursuant to a right of first refusal, is not subject to any unenforceable oral agreement between the parties, as well. Defendant is entitled to summary judgment as a matter of law that Plaintiff is not entitled to any damages.

I. Plaintiff is not entitled to an award of attorneys fees and costs.

Defendant agrees that the parties hereto were involved in a commercial transaction, and thus, I.C. §12-120(3) is applicable. However, based upon the case law and statutes set forth above, there is no enforceable contract between the parties hereto, and thus, Plaintiff is not entitled to the relief it seeks against Defendant. Given that no enforceable contract exists between Plaintiff and Defendant, Defendant is entitled to prevail in this case as a matter of law. As such, Defendant is entitled to an award of attorneys fees and costs against Plaintiff pursuant I.C. §12-120(3).

III. CONCLUSION

Based upon the foregoing, Defendant is entitled to summary judgment against Plaintiff, on Plaintiff's Amended Complaint, in its entirety. Further, Defendant is entitled to an award of attorneys fees and costs against Plaintiff, pursuant to I.C. §12-120(3).

RESPECTFULLY SUBMITTED this 8th day of May, 2007.

Penny North Shaul, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of May, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

xx Postage-prepaid mail

xx Facsimile Transmission

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, AMERICAN PENSION SERVICES, INC., a Utah corporation (hereafter "APS"), that is authorized to do and is doing business in the State of Idaho by and through its attorneys of record, and hereby submits its response to Defendant's ("Cornerstone's") Motion for Summary Judgment.

INTRODUCTION

Cornerstone is seeking an entry of Judgment in its favor based upon its Memorandum in Support of its Motion for Summary Judgment. In its memorandum, Cornerstone argues it is entitled to judgment in its favor as a matter of law based upon the following defenses: (1) APS's Verified Complaint fails to state a claim for which relief may be granted; (2) Recovery sought by APS is

prevented by the Statute of Frauds; (3) Cornerstone has not been unjustly enriched; (4) APS cannot maintain its action for fraud; and (5) APS cannot maintain its action against Cornerstone for Cornerstone's alleged breach of the covenant of good faith and fair dealings.

For the following reasons and those outlined in APS's Motion for Summary Judgment, with its supporting memorandum and affidavits, as well as the Second Affidavit of Stephen J. Muhonen submitted herewith, each and every defense raised by Cornerstone fails. APS is entitled to this Court's denial of Cornerstone's Motion for Summary Judgment and entry of Judgment awarding APS the unpaid balance in the sum of $750.00 per lot within the developed subdivision identified and described in Plaintiff's Amended Complaint, together with all accrued interest on said sums and together with its reasonable attorney fees and costs incurred.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

In its memorandum in support of its Motion for Summary Judgment, APS has already briefed the applicable standard in Idaho which supports this Court's awarding summary judgment in favor of APS. As a convenience for the Court, APS incorporates in this response the standard for summary judgment set forth in its original memorandum and respectfully refers the Court to said memorandum.

II. APS's AMENDED COMPLAINT STATES VALID CLAIMS.

As asserted in APS's Memorandum in Support of its Motion for Summary Judgment, the first affirmative defense raised by Cornerstone, which is I.R.C.P. 12(b)(6), is improperly plead and cannot act as a bar to recovery by APS. The prior version of I.R.C.P. 12(b)(6) allowed a party to plead in its answer to a complaint that the complaining party had failed to state a claim upon which relief

could be granted. However I.R.C.P. 12(b)(6) was amended on July 1, 2004. I.R.C.P. 12(b)(6) now reads as follows: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, *except* that the following defenses *shall* be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . ." See, I.R.C.P. 12(b)(6) (italics added). Cornerstone failed to raise its I.R.C.P. 12(b)(6) claim in a proper motion before it filed its answer to APS's complaint. For this reason, Cornerstone has failed to properly plead its I.R.C.P. 12(b)(6) claim and has therefore waived this defense. Because this defense has been waived it cannot prevent APS from obtaining summary judgment as requested.

Even if Cornerstone were allowed to proceed with its 12(b)(6) defense, Cornerstone cannot sustain its own burden that APS's Amended Complaint fails to state a claim for which relief may be granted. "In determining whether a complaint states a cause of action, every reasonable intendment will be made to sustain it." Ernst v. Hemenway and Moser, Co, Inc., 120 Idaho 941, 945, 821 P.2d 996, 1000 (Idaho Ct. App. 1991), modified, 126 Idaho 980, 895 P.2d 581 (1995). "For a complaint to be dismissed under Rule 12(b)(6) on the ground that the complaint fails to state a claim, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id at 946, 821 P.2d at 1001.

Cornerstone argues that the Amended Complaint fails to state a claim because APS is a third party administrator for pension plans, thus "[a]ny payments owed under an enforceable contract would be owed to the actual participants in such pension plans or IRAs, and not the Plaintiff herein." (Def's. Mem. Supp. Mot. Summ. J. at 9). Cornerstone then asserts that APS does not have standing in this case since if money is owed, it is owed to pension plan participants and not APS. Id. This

argument is without merit and fails for several reasons. First, Cornerstone, unequivocally admits there is a contract between APS and Cornerstone. (Answer ¶ 13.) The only issue, from Cornerstone's perspective, is not whether there was a $750 per lot agreement (Cornerstone readily admits that it made the $750 agreement with APS), but whether payment of $750 per lot to APS by Cornerstone was contingent upon APS providing full funding for the entire development project. Id.

Additionally, Idaho Rule of Civil Procedure 17(a) provides, in pertinent part:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, personal representative, guardian, conservator, bailee, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a party authorized by statute *may sue in this capacity without joining the party for whose benefit the action is brought*; and when a statute of the state of Idaho so provides, an action for the use or benefit of another shall be brought in the name of the state of Idaho.

IDAHO R. CIV. P. 17(a) (emphasis added).

This rule *specifically* allows and supports APS's ability to bring this action. Whatever relationship APS has with its pension plan participants literally has no bearing in this case with Cornerstone. However the funds collected by APS are distributed to pension plan participants, once again, has absolutely no bearing on the contract between APS and Cornerstone. Cornerstone is not a pension plan participant with APS and as such, APS has no fiduciary obligation, disclosure obligation or otherwise to Cornerstone regarding the collection and distribution of the $750 per lot owed to APS.

For these reasons and those enumerated in APS's memorandum submitted in support of its Motion for Summary Judgment, Cornerstone's affirmative defense of failure to state a claim fails and APS is entitled to judgment on this issue as a matter of law.

III. CORNERSTONE'S STATUTE OF FRAUDS DEFENSE DOES NOT APPLY.

In its Answer, Cornerstone pled the affirmative defense of the Statute of Frauds stating, "[T]his transaction involves real estate, and such transaction was never reduced to writing." (Answer ¶V.) The Statute of Frauds as it relates to real estate is the only portion of the Statute of Frauds pled as an affirmative defense in Cornerstone's Answer. Id. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of frauds . . . and any other matter constituting an avoidance or affirmative defense." IDAHO R. CIV. P. 8(c). "The statute of frauds defense is an affirmative defense *which must be specifically raised* by the pleadings." Paloukos v. Intermountain Chevrolet Co., 99 Idaho 740, 744, 588 P.2d 939,943 (1978)(emphasis added).

The Statute of Frauds as it relates to real estate is found in Idaho Code 9-505(4). In Cornerstone's Memorandum in Support of Motion for Summary Judgment, Cornerstone argues the applicability of I.C. 9-505(4), but then also argues I.C. 9-505(5), which relates to the promise to lend money, and I.C. 9-508, which deals with real estate commissions. By failing to affirmatively and specifically plead the other sections of the Statute of Frauds in its Answer, Cornerstone has waived its ability to present these additional defenses.

Assuming arguendo that Cornerstone has not waived its right to utilize these other sections of the Statute of Frauds, as explained in APS's Memorandum in Support of Motion for Summary Judgment and herein below, the Statute of Frauds is not applicable in this case. Even if it were, the writings that exist and which are part of the record before the Court fully satisfy any Statute of Frauds requirements.

A. Idaho Code 9-505(4) is not applicable in this case.

Idaho Code 9-505(4) pertains to "An agreement . . . for the *sale*, of real property, or of an interest therein. . . ." IDAHO CODE § 9-505(4) (Michie 2004). Neither APS nor Cornerstone is selling any real property. No facts alleged and no evidence produced by either party evidences any "sale" of real property. This case relates to monies lent by APS to Cornerstone so that Cornerstone could buy real property from a third party. (Am. Compl. ¶ 13; Answer ¶ 13.) The agreement in issue pertains to security for monies lent by APS to Cornerstone and payment of the $750 per lot to APS, which was a condition of payment by Cornerstone to APS due to APS bringing the project opportunity to Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.) Idaho Code 9-505(4) simply does not apply because neither of the parties were selling real property or selling an interest in real property to the other party.

Most importantly, even if I.C. 9-505(4) were somehow deemed by the Court to apply to this case, a sufficient writing exists which fully satisfies the Statute of Frauds. The Statute of Frauds requirement concerning a transfer in real property is satisfied when an instrument in writing exists that is subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereto. *See* IDAHO CODE § 9-503 (Michie 2004). In this case Cornerstone admitted that Brad Kendrick was the Member Manager of Cornerstone. (Pool Aff.¶ 10; Kendrick Aff. ¶ 9; Dep. of Scott Tallman at 13, lines 3-20.)

Cornerstone's agent, Mr. Kendrick drafted multiple memorandums, agendas and notes memorializing the agreement of payment of $750 per lot by Cornerstone to APS. (Kendrick Aff. ¶¶ 17, Ex. C, 18, Ex. D, 35, Ex. G, 38, Ex. H, 39, Ex. I, 40, Ex. J.) The April 2005 memorandum

identified as Exhibit G in Mr. Kendrick's affidavit, which is signed by Mr. Kendrick is particularly *insightful since it was drafted by Cornerstone's Member Manager* and reads in part, as follows:

> Regarding the equity interest in the project to APS - I have searched my notes, and literally every file I have, but have found nothing. However, I specifically recall that we all discussed and agreed to an equity participation of either $550 or $725 per home to APS. I am therefore proposing a payment of $625 per home which would equate to $175,000 to you as an equity participant on the Single Family Homes and roughly $20,000 on the Multi-Family Units, for a total of $195,000. However, the last thing I want to do is short change you. Therefore if you remember the number to be different, then let me know.

(Kendrick Aff. ¶ 35, Ex. G.)

Any applicable Statute of Frauds requirements are further satisfied by Cornerstone's own admissions. In Cornerstone's Answer to Plaintiff's Amended Complaint, Cornerstone admits there was an agreement to pay APS $750.00 per lot, but alleges such obligation was contingent upon APS providing full financing for the entire development project. (Answer ¶ 13.)

In addition, the doctrine of partial performance, which relieves the requirement of a writing, actually is embolded in this case since there exists both a writing and actually, *complete* performance by APS. "The doctrine of part performance is a well-established exception to the strict application of the Statute of Frauds." Watson v. Watson, 2007 Ida. LEXIS 108, 8-9 (2007).

> Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the statute of frauds . . . the agreement may nevertheless be specifically enforced when the purchaser has partly performed the agreement. Before an oral agreement to convey land will be specifically enforced, the underlying contract must be proven by clear and convincing evidence. Further, the proof must show that the contract is complete, definite and certain in all its material terms, or that it contains provisions which were capable in themselves of being reduced to certainty. The material terms which must be identified in a contract to convey land include the parties to the contract, the subject matter of the contract, the price or consideration, and a description of the property.

Id.

The foregoing case law demonstrates, once again, that the Statute of Frauds relates to the conveyance of real property, which is not the issue in this case. However, as admitted by Cornerstone, APS performed its obligation and provided the agreed upon down payment, in the sum of $226,218.70, which was used to purchase the property. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.) The April 7, 2005 memorandum from Cornerstone evidences the complete agreement between APS and Cornerstone. The memorandum evidences monies received from APS, monies paid by Cornerstone to APS, a balance, interest incurred and the payment due per lot. This writing is complete, definite and certain in all its material terms. The only ambiguity was the amount of the per lot payment, not whether there was a per lot payment to be made at all. Furthermore, this writing was created after APS stopped providing additional funding due to not receiving a Promissory Note and Deed of Trust. No where in the document does it say anything about a contingency for APS to receive its per lot payment. As a matter of fundamental contractual and agency law, the agreement between APS and Cornerstone is lawful and binding.

The statute of frauds is simply not applicable in this case, despite the claims made by Cornerstone. For these reasons, APS is entitled to summary judgment against Cornerstone as to any and all of the Statute of Frauds affirmative defenses raised by Cornerstone in this case.

B. Idaho Code 9-505(5) does not apply in this case.

In addition to the satisfaction of any Statute of Frauds requirements, the facts do not support the application of other sections of the Statute of Frauds raised by Cornerstone. In essence, Cornerstone argues that because the principal amount loaned by APS to Cornerstone was greater

than $50,000, then for the loan from APS to Cornerstone to be valid, it had to be in writing. Idaho Code 9-505(5) is a mechanism of redress for lenders who are accused of making oral commitments to lend money, then fail to deliver the funds. "The apparent purpose of the statute is to protect banks and other businesses from claims that they made an oral commitment to lend money or to grant credit and breached such commitment by failing to deliver the funds. Once the loan funds have been delivered to the borrower, so there is no longer an executory promise to make a loan, the statute, by its plain language, has no further application." Rule Sales & Serv. v. United States Bank Nat'l. Ass'n., 133 Idaho 669, 673, 991 P.2d 857, 861 (Idaho Ct. App. 1999).

Idaho Code § 9-505(5) does not apply in this situation because Cornerstone is not seeking to force APS to further lend funds. To the contrary, Cornerstone is attempting to get out of its repayment obligations by incorrectly relying on a statute that was designed to protect lenders from unenforceable oral commitments to make loans. It is absurd that Cornerstone attempts to convince the Court that this statute applies when Cornerstone has failed to allege a single fact or introduce a single item of evidence in support of the statute. Either Cornerstone grossly misunderstands this statute or it is attempting to deliberately mislead the Court. The only conceivable situation where Idaho Code § 9-505(5) would apply to this case would be if Cornerstone was attempting to force APS to loan further funds (i.e. more money to complete the development). In that case, APS could validly assert Idaho Code § 9-505(5) as a defense and prevent Cornerstone from obtaining an order requiring APS to make a loan of further funds.

For these reasons, APS is entitled to summary judgment against Cornerstone as to this issue of the Statute of Frauds.

B. Idaho Code 9-508 is not relevant in this case.

Cornerstone also argues that APS is precluded from recovery in this matter due to Idaho Code 9-508. Idaho Code 9-508 deals with real estate commissions to be paid by the sellers of real property. Idaho Code 9-508 reads as follows:

> **Real estate commission contracts to be in writing.** – No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, *signed by the owner of such real estate*, or his legal, appointed and duly qualified representative.

IDAHO CODE § 9-508 (Michie 2004).

> The primary purpose of I.C. § 9-508 is to prevent fraudulent or unfounded claims of brokers. This particular portion of our code relates entirely to statutes of frauds and has as its objective avoiding disputes as to whether or not an agreement in fact exists, the amount of a commission and the exclusive or non-exclusive terms of a listing agreement.

Rexburg Realty, Inc. v. Compton, 101 Idaho 466, 467, 616 P.2d 245, 246 (1980).

Cornerstone admits and does not dispute that the real property purchased in this matter was purchased from a third party and not APS. APS was not the seller or the owner of the real estate purchased by Cornerstone. (Pool Aff.¶¶ 12, 13; Kendrick Aff. ¶¶ 12, 13; Am. Compl. ¶¶ 3-4; Answer ¶¶ 3-4.) Because APS was never the seller or owner of the real estate involved in this case, I.C. 9-508 is simply not applicable. Once again, Cornerstone attempts to rely on a statute that has no bearing in this case as a defense, either due to misunderstanding the statute or in a deliberate attempt to mislead the Court APS is entitled to summary judgment against Cornerstone as to this issue pertaining to the Statute of Frauds.

IV. APS WAIVES ITS UNJUST ENRICHMENT CLAIM.

APS's Amended Complaint, which states alternative causes of action, does not bar recovery by APS. I.R.C.P. 8(e)(2) states in pertinent part:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

See, I.R.C.P. 8(e)(2).

In Cornerstone's Seventh Affirmative Defense, it alleges that APS cannot proceed under the theories of breach of contract and unjust enrichment. The foregoing rule explicitly allows APS to proceed under said alternative theories. Nonetheless, APS does hereby waive and withdraws its unjust enrichment claim as plead in its Amended Complaint.

V. APS WAIVES ITS THIRD CAUSE OF ACTION, FRAUD.

APS hereby waives its third cause of action, fraud, as further identified in its Amended Complaint.

VI. THE COVENANT OF GOOD FAITH AND FAIR DEALINGS

Cornerstone has breached the agreement between itself and APS and likewise, has breached the covenant of good faith and fair dealings which is implied in every contract. See, Luzar v. Western Surety, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). A violation of the covenant occurs when "either party violates, nullifies or significantly impairs any benefit of the contract." Sorensen v. Comm Tek, Inc., 118 Idaho 664, 669, 799 P.2d 70, 75 (1990). "It is well settled that a contract includes not only that which is stated expressly, but also that which is ... implied from its language."

Independence Lead Mines Co. v. Hecla Mining Co., 2006 Ida. LEXIS 54, 9, 137 P.3d 409, 413 (2006) citing Star Phoenix Min. Co. v. Hecla Min. Co., 130 Idaho 223, 231, 939 P.2d 542, 550 (1997) (quoting Commercial Insurance Co. v. Hartwell Excavating Co., 89 Idaho 531, 541, 407 P.2d 312, 317 (1965)). The covenant of good faith and fair dealing may be implied, however, it arises only regarding terms agreed to by the parties, and requires that the parties perform, in good faith, the obligations imposed by their agreement. Independence, 2006 Ida. LEXIS 54 at 9, 137 P.3d at 413 citing Lettunich v. Key Bank Nat. Ass'n, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). "[T]he covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." Independence, 2006 Ida. LEXIS 54 at 10, 137 P.3d at 414 citing Jenkins v. Boise Cascade Corp., 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). "An objective determination can only be made by considering a party's reasonableness in carrying out the contract provisions." Independence, 2006 Ida. LEXIS 54 at 10, 137 P.3d at 414.

In this case the evidence unequivocally demonstrates the existence and terms of the agreement between APS and Cornerstone. The terms of the agreement were that APS would provide the down payment of approximately twenty percent (20%), which would be repaid at 10% interest. In addition, APS would receive $750.00 per lot sold in the development project. Furthermore, APS was to have the option of being able to lend on the individual homes to be built in the development project. The lending of money from APS to Cornerstone was to be secured by APS through a Promissory Note and Deed of Trust issued by Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.)

In compliance with the agreement, on September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of $226,218.70, which was used to

purchase the property. APS was not provided a Promissory Note or Deed of Trust at this time. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.) After providing the down payment as required, APS exercised its option to lend further monies on the project and did so by lending a combined total of $487,951.52 through February 2004. (Kendrick Aff. ¶ 24.) In March 2004, after more than five months of not receiving a Promissory Note and Deed of Trust securing the almost one half of a million dollars lent by APS to Cornerstone, APS refused to lend further funds to Cornerstone. (Pool Aff. ¶ 22; Kendrick Aff. ¶ 27; Dep. of Curtis DeYoung at 45, lines 18-23.)

It was not until June, 2004, eight (8) months after the original funds were lent, that Cornerstone finally attempted to provide APS with a Promissory Note, which was inaccurate, as was each proposed draft submitted thereafter. (Kendrick Aff. ¶¶ 30, 33.); Dep. of Scott Tallman at 130.)

The contract is further evidenced by Cornerstone's own admissions. In Cornerstone's Answer to Plaintiff's Amended Complaint, Cornerstone admits there was an agreement to pay APS $750.00 per lot, but alleges such obligation was contingent upon APS providing full financing for the entire development project. (Answer ¶ 13.) However, there is no external evidence that supports Cornerstone's contingency claim. There is nothing in writing that supports Cornerstone's defense. Additionally, there is no testimony from any other source that supports Cornerstone's defense. All Cornerstone can offer is it's own bald assertion that a contingency existed. (Tallman Aff. ¶¶ 9-10.) Cornerstone has admitted that it has no evidence, whatsoever in this whole world that will support its contingency position. (Dep. of Scott Tallman at 119, lines 14-25, 120, lines 1-15.)

Fundamental agency law is being ignored by Cornerstone in its analysis of this case. This is a case involving a contract between two entities, APS and Cornerstone. Idaho Code 53-616 describes the authority of LLC agents to bind their companies.

> 53-616. AGENCY POWER OF MEMBERS AND MANAGERS. (1) Except as provided in subsection (2) of this section or as provided in the articles of organization, every member is an agent of the limited liability company for the purpose of its business or affairs, and the act of any member, including, but not limited to, *the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company*, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom the member is dealing has knowledge of the fact that the member has no such authority.
>
> (2) If the articles of organization provide that management of the limited liability company is vested in a manager or managers: (a) No member, solely by reason of being a member, is an agent of the limited liability company; and (b) Every manager is an agent of the limited liability company for the purpose of its business or affairs, and the act of any manager, including, but not limited to, *the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a manager binds the limited liability company*, unless the manager so acting has, in fact, no authority to act for the limited liability company in the particular matter, and the person with whom the manager is dealing has knowledge of the fact that the manager has no such authority.

IDAHO CODE § 53-616 (Michie 2004)(emphasis added).

Curtis DeYoung, the agent for APS, negotiated and finalized this agreement through Cornerstone's agents Martin Pool, a member of Cornerstone and Brad Kendrick, the Member Manager of Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20; Dep. of Scott Tallman at 13, lines 3-20 (admitting Mr. Kendrick was the Managing Member of Cornerstone).) APS was told that Mr. Kendrick was Cornerstone's manager, and for this reason directed the majority of its discussions surrounding the agreement and the development

project with Mr. Pool and Mr. Kendrick. (Dep. of Curtis DeYoung at 46, lines 22-25, 47, lines 1-2, 50, lines 19-20.) As the Member-Manager, Mr. Kendrick had full, apparent authority to bind Cornerstone with the agreement it made with APS. Furthermore, as discussed above, it was Cornerstone's Member Manager that drafted the April 7, 2005 memorandum that memorialized the agreement between the parties.

Mr. Tallman, is the only member of Cornerstone to ever allege a contingency existed that required APS to provide complete funding in order to receive $750 per lot. In his deposition, Mr. Tallman stated it was his "understanding from the get go" that APS was going to fund the entire development project. (Dep. of Tallman at 94, lines 22-24, 91, line17.) Mr. Tallman also conceded, though, that he based his "understanding" of the agreement, on information he learned, second hand, from Mr. Pool, not from his personal dealings with APS. (Dep. of Tallman at 56, lines 9-21, 94, lines 22-24, 91, line17.) Furthermore, in his deposition testimony, Mr. Tallman also stated, "I didn't really talk to Curtis. It was mostly through Martin or Brad . . . ." (Dep. Of Tallman at 50, lines 20-21.) Mr. Pool, the alleged source of Mr. Tallman's "understanding" and Mr. Kendrick, the Member Manager of Cornerstone, both state that there never was any sort of contingency discussed or agreed to that required APS to provide full funding of the development project in order for APS to receive $750 per lot. (Pool Aff. ¶¶ 10, 17; Kendrick Aff. ¶¶ 1, 28;.)

Based upon the foregoing, Mr. Tallman cannot even personally testify as to what the agreement was between APS and Cornerstone nor can he produce any evidence demonstrating that Cornerstone cannot be bound by the agreement entered into with APS. All Mr. Tallman can present is his own self serving affidavit which contains nothing more than bald assertions that cannot unwind the agreement between the entities. By his own admission, Mr. Tallman was not present or involved

in the formation of the agreement between these two entities. The agreement was made by other members of Cornerstone. These members all testify that the amounts are due and owing and were never contingent. In fact, the key piece of evidence before the Court is the valid April 7, 2005 memorandum written and signed by Mr. Kendrick, acting as the Managing Member of Cornerstone. The fact that Mr. Tallman does not like the agreement is irrelevant as to whether it is valid and enforceable.

Based upon the foregoing, the evidence is manifestly clear that there was an agreement between the entities and what the terms of the agreement were. The covenant of good faith and fair dealing applies in this case. The terms were agreed upon between the parties and each entity was required to perform in good faith. APS held up its end of the bargain by providing funds as required and it is Cornerstone who first, failed to provide APS with a Promissory Note or Deed of Trust and never even attempted to provide said security documents for over eight (8) months after the funds had been lent. Secondly, Cornerstone refuses to pay the $750 per lot that it agreed to pay.

For these reasons and those enumerated in APS's memorandum submitted in support of its Motion for Summary Judgment, the covenant of good faith and fair dealings does exist in the agreement between the parties and APS is entitled to judgment on this issue as a matter of law.

CONCLUSION

Based upon the foregoing, Cornerstone cannot sustain even one of its affirmative defenses in this case. The Court is acting as the trier of fact in this case. All the evidence that will be presented to the Court at trial concerning the $750 per lot issue is already on the record before the Court in these summary judgment proceedings. Because of this the Court is entitled and required

"to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences." APS respectfully requests that the Court view the evidence on the record and that the Court grant summary judgment to APS, denying all of Cornerstone's defenses and finding that Cornerstone owes to APS the sum of $750 per lot as was agreed upon between the parties.

DATED this 8 day of May, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of May, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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Postage Prepaid
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[ ] Overnight Mail
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STEPHEN J. MUHONEN

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 MOTION TO COMPEL RESPONSE TO DEFENDANT'S SECOND SET OF DISCOVERY TO PLAINTIFF

COMES NOW, the Defendant, CORNERSTONE HOME BUILDERS, LLC, by and through Penny North Shaul, Esq., its attorney of record and hereby moves this Court for its order compelling Plaintiff, AMERICAN PENSION SERVICES, INC., to respond to *Defendant's Second Set of Discovery to Plaintiff* which was served upon plaintiff, via US Mail, on April 6, 2007. This motion is brought pursuant to IRCP Rule 37(a).

Defendant also seeks an award of attorney fees pursuant to IRCP Rule 37(a).

This motion is based upon the file herein, and the Affidavit in Penny North

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Shaul in Support of Motion to Compel, filed herewith.

Defendant desires to present oral argument at the time of hearing.

DATED this 11th day of May, 2007.

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May, 2007 a true and correct copy of the foregoing was delivered to the following persons(s) by:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. DEFENDANT HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 MEMORANDUM IN SUPPORT OF MOTION TO COMPEL RESPONSE TO SECOND SET OF DISCOVERY TO PLAINTIFF

COMES NOW, the Defendant, DEFENDANT HOME BUILDERS, LLC, by and through Penny North Shaul, Esq., its attorney of record and hereby submits the following Memorandum in Support of Motion to Compel Response to Discovery.

I. FACTS

The facts are set forth in detail in the previously filed memorandum in support of Defendant's motion for summary judgment and supporting affidavits. Defendant reincorporates those facts as if fully set forth herein. Notwithstanding, the following facts are pertinent to the present motion:

1. Plaintiff is governed by ERISA in regards to how it administers retirement plans. *Deposition of Curtis DeYoung*, p. 7, ln. 18-22.

2. Plaintiff performs decision making functions regarding loans. *See Deposition of Curtis DeYoung*, p. 111, ln 11—p. 112, ln. 23; *Deposition of Martin Pool*, p. 22, ln. 8—p. 23, ln. 15.

3. The loaned money was paid back to Plaintiff's master trust account. *Depositon of Martin Pool*, p. 21, ln. 4-9.

4. Defendant made payments directly to Plaintiff's master trust account. *Affidavit of Scott Tallman*, ¶¶ 2 and 3.

II. PROCEDURAL BACKGROUND

1. On April 6, 2007 Defendant served its second set of discovery on the Plaintiff. Shaul Aff. ¶ 3.

2. On April 30, 2007 Plaintiff served its objections and responses on Defendant. Shaul Aff. ¶ 5.

3. On May 9, 2007 counsel for Defendant notified Plaintiff that it would like to confer regarding Plaintiff's discovery responses pursuant to Idaho Rule 37(a)(2). Shaul Aff. ¶ 10.

4. On May 11, 2007, counsel for Plaintiff and Defendant conferred via telephone, wherein Plaintiff refused to supplement its previous responses and provide the information requested in Defendant's Second Discovery to Plaintiff.

4. On May 11, 2007 the present motion was filed.

III. LEGAL STANDARD

It has long been established that Rule 26 allows for the broadest possible discovery of unprivileged relevant information. *Hickman v. Taylor*, 329 U.S. 495

(1947); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). Idaho Rule of Civil Procedure 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

IDAHO R. CIV. P. 26(b)(1) (emphasis added). One of the most significant aspects of discovery under the rules is that the information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 6-26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL ¶ 26.42 (3d ed. 2007). "This aspect of discovery is integral to maintaining discovery as largely party directed, and without immediate judicial participation. *Information is discoverable if it is relevant to the claims or defenses of any party; inadmissibility at trial does not bar a discovery request.*" *Id.*

Rule 26(b)(1) permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is "reasonably calculated to lead to the discovery of admissible evidence." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 703-04, 116 P.3d 27, 33-34 (2005) (quoting IDAHO R. CIV. P. 26(b)(1)). "The discovery rules require a defendant's answer to be responsive, full, complete and unevasive." *Lester v. Salvino*, 141 Idaho 937, 941, 120 P.3d 755, 759 (Ct. App. 2005).

IV. ARGUMENT

Defendant's second set of discovery is reasonably calculated to lead to the discovery of admissible evidence. The objections and responses submitted by

Plaintiff are incomplete and evasive.

A. Idaho recognizes an illegality defense.

The elicited responses for discovery will determine if Defendant has an illegality defense. An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy. *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002) (citations omitted). The general rule is that a contract prohibited by law is illegal and unenforceable. *Id.* A contract which is made for the purpose of furthering any matter prohibited by statute is void. *Id.* This rule applies on the ground of public policy to every contract which is founded on a transaction prohibited by statute. *Id.* Where a statute intends to prohibit an act, it must be held that its violation is illegal, without regard to the reason of the inhibition or to the ignorance of the parties as to the prohibiting statute. *Id.*

Whether the illegality defense is viable here depends on whether Plaintiff violated provisions of ERISA. Defendant's second set of discovery is specifically designed to determine the answer. Thus, an order compelling Plaintiff's response is appropriate.

B. Violations of ERISA establish an illegality defense.

Defendant's second set of discovery to Plaintiff is necessary to define Plaintiff's legal role in administration of pension plans and to determine whether Plaintiff is seeking to recover an illegal benefit. If retirement funds were utilized by Plaintiff to loan money to Defendant, then ERISA is implicated. Interrogatory Nos. 11-13, 17-21 and Requests for Production Nos. 9-13, 16, 19-20 seek facts and

documents pertaining to this issue.

Numerous provisions of ERISA may have been violated by Plaintiff in furtherance of its purported contract with Defendant.[1] If ERISA was violated by Plaintiff, then Defendant has a viable illegality defense.

First, it must be determined whether Plaintiff is a fiduciary under the plans. A fiduciary, with respect to a plan, is anyone who has discretionary control or gives investment advice for a fee. See 29 USC § 1002(21). If Plaintiff exercised any discretion in recommending loans, disbursing money on its own without authorization from a person acting independently or if it received or is to receive compensation for recommending the loans, it would be a fiduciary. See *Id.* Fiduciary duties are set forth in 29 USC § 1104. The entire second set of discovery seeks to obtain facts and documents pertinent to determining whether (1) Plaintiff is a fiduciary; and (2) Plaintiff breached a fiduciary duty.[2]

Second, it must be determined whether Plaintiff is a party in interest. Anyone who provides services to the plans is a party in interest. See 29 USC § 1002(14)(B). Plaintiff provided services to the plans and is a party in interest.

Third, it must be determined whether Plaintiff engaged in prohibited transactions under ERISA. As a party in interest and a fiduciary, Plaintiff must not be involved in prohibited transactions. See 29 USC § 1106. Section 1106(a) prohibits: the sale of any property between the plan and the party in interest; lending of money between the plan and a party in interest; furnishing goods or services between the plan and a party in interest; transfer to, or use by or for the benefit of, a party in

---

[1] There is no way Defendant can be certain until Plaintiff fully complies with the discovery requests.
[2] See specifically Interrogatories Nos. 14-16 and Requests for Production Nos. 14-15, 14-18.

interest, of any assets of the plan; the acquisition, on behalf of the plan, of any employer security or employer real property in violation of 29 USC § 1106(a), or; any fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates 29 USC § 1106(a).

Section 1106(b) prohibits a fiduciary from: dealing with the assets of the plan in his own interest or for his own account; in his individual, or in any other capacity, act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or; receiving any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. The second discovery requests specifically request facts and documents in order to determine if Plaintiff engaged in any prohibited transactions pursuant to 29 USC § 1106.

The second discovery responses will determine whether Plaintiff or plan participants are supposed to receive funds from the purported $750 lot arrangement Plaintiff is seeking to recover. If the plan participants are to receive the equity interest, then Plaintiff has failed to name a necessary party. If Plaintiff is to receive the equity interest, then Plaintiff is seeking to recover an illegal benefit by receiving consideration for its own personal account in violation of section 1106(b). Either way Plaintiff's claim fails. Plaintiff did not file suit on behalf of anyone else, but rather sought amounts owing on its own behalf. See generally *Plaintiff's Amended Complaint*, ¶¶ 1-49.

In its response to summary judgment, Plaintiff argues that pursuant to Idaho Rule of Civil Procedure 17(a) it is entitled to sue on behalf a contract beneficiary. However, by stonewalling Defendant in its response to the second set of discovery, Plaintiff has refused to disclose the names of those people on whose behalf it is it purportedly is now suing. The Amended Complaint in this case is clear: Plaintiff sued Defendant on its own behalf. Plaintiff for the first time in its response to summary judgment suggested that it is suing on behalf of the plan participants. If this is truly the case, then Plaintiff is not a real party in interest.

> Real parties in interest are the persons or entities possessing the right or interest to be enforced through the litigation. The real party's right or interest must be legally protected. A party not possessing a substantive legal right is not the real party in interest with respect to that right.

4-17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL ¶ 17.10 (3d ed. 2007). In other words, if the plan participants are the ones with substantive legal rights, then they are the real parties in interest and should have been named as parties.

This is not a real party in interest issue. This is an improper Plaintiff issue. The real party in interest rule is designed to allow the holder of the interest, whether through assignment, equitable conversion, or otherwise, to sue. It does not authorize someone who does not hold any interest in a claim to assert the claim for the benefit of someone else. In this case, it is even worse because the Plaintiff wants the right to refuse to say who really has the claim, and wants to prevent all discovery aimed towards identifying the owner of the claim. It is like a collection agency with no assignment of a claim, asserting a collection claim in its own name and refusing to say who the original creditor was and refusing to allow any discovery against the original creditor. It would be almost impossible to defend against such a claim and

that is why it is not allowed.

Notwithstanding the above, Plaintiff argues that its relationship with pension plan participants has no bearing on this case. Such an assertion is contradictory to its suggestion that the plan participants are third party beneficiaries and ignores the provisions of ERISA which may have been violated.

There are two scenarios under which Plaintiff could distribute the claimed equity interest.[3] Both scenarios would result in the same end result: dismissal of the lawsuit. Under the first scenario, Plaintiff would recover the claimed equity for itself. Such an action is a prohibited transaction under ERISA and would constitute an illegal benefit to Plaintiff. Any purported contract would be void based on illegality. Under the second scenario, the amounts would go to the plan participants. However, the plan participants are not named parties and have never been identified. No claim has ever been asserted on their behalf. Plaintiff has objected to and refused to answer all interrogatories and requests for production regarding the plan participant's existence and relationship with Plaintiff. It is that refusal which is the subject of the present motion to compel. Defendant cannot assert or prove its valid defenses until Plaintiffresponds to the second set of discovery. Defendant must have a meaningful opportunity to obtain discovery from the party who claims to have rights against Defendant. Defendant has learned only within the last few days that the Plaintiff may not be claiming any rights to recover against Defendant, but is only asserting rights held by someone else. Due process demands that Defendant know who claims to have rights against it and that it have the opportunity to confront that

[3] Importantly, the only scenario suggested by the Complaint is the first scenario. Not until its response to summary judgment did Plaintiff suggest otherwise.

party and defend itself against the claims of that party. Thus, an order requiring Plaintiff to do so is appropriate.

Plaintiff will likely argue that the accounts in question are self-directed and that it is protected pursuant to 29 USC § 1104(c). This argument is problematic for several reasons. The only way Defendant can independently verify that the accounts in question are self-directed is to obtain responses to its second discovery requests.

Further, even if the accounts are self-directed they are still subject to the independent control and fairness tests. See 29 CFR 2550.404c-1(c)(2),(3). If a participant has exercised independent control depends on the facts and circumstances of the particular case. *Id.* Similarly, if a transaction is not fair and reasonable there is no 1104(c) protection. *Id.* The second discovery requests seek information vital to this determination. Thus, an order compelling Plaintiff's response is appropriate.

Plaintiff cannot claim a possible injury to retirement beneficiaries as an argument to negate the illegality defense. The United States Supreme Court has ruled on this actual issue. The highest court found: "[P]ension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts. Only Congress could create such an exemption and . . . it has not done so." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). Idaho law frowns upon a party which breaches its fiduciary duty for his own personal benefit. See *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952). Here, Defendant has made the necessary inquiries to establish its illegality defense. These inquiries are reasonably calculated to lead to the discovery admissible evidence and the Court should compel their response.

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V. CONCLUSION

Based on the foregoing, Defendant respectfully requests that its Motion to Compel Response to Defendant's Second Set of Discovery to Plaintiff be granted.

DATED this 11th day of May, 2007.

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May, 2007 a true and correct copy of the foregoing was delivered to the following persons(s) by:

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC., Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, CORNERSTONE HOME BUILDERS, LLC., by and through its attorney of record, Penny North Shaul, Esq., and hereby submits the following Reply to Plaintiff's Response to Defendant's Memorandum in Support of Motion for Summary Judgment.

I. FACTS

Please see the Facts set forth in Defendant's Memorandum in Support of Motion for Summary Judgment, together with the affidavits and pleadings attached thereto; and Defendant's Response to Plaintiff's Motion for Summary Judgment,

together with the affidavits and pleadings attached thereto.

II. ARGUMENT

A. Plaintiff has no standing to pursue it Amended Complaint.

1. Plaintiff has failed to establish that it has authority to sue on behalf of pension plan participants.

As reflected by the pleadings in this case, Plaintiff brought this action in its own name—American Pension Services, Inc. See generally *Plaintiff's Amended Complaint*, ¶¶ 1-49. Plaintiff operates as a third party pension/IRA plan administrator, as alleged previously. *Deposition of Curtis DeYoung*, p. 7, ln. 6-7. From all appearances, the funds loaned to Defendant came from plan participants who have lodged their funds with Plaintiff. Defendant previously submitted testimony by sworn affidavit to this Court averring that it had made all payments to Plaintiff's Master Trust Account. These payments are documented by seven (7) Outgoing Wire Transfer sheets. *Third Affidavit of Scott Tallman*, ¶ 2.

Presumably, Plaintiff's Master Trust Account manages all pension plan participant and IRA funds. Defendant has been unable to specifically ascertain the nature of Plaintiff's authority in regards to negotiating and finalizing loans on behalf of the pension plan and IRA participants, due to Plaintiff's refusal to provide any such information requested through written discovery. At this point, Defendant has been unable to determine if in fact Plaintiff is the intended recipient of the alleged $750.00 per lot.

In its Response to Defendant's Motion for Summary Judgment, Plaintiff alludes that it is suing on behalf of plan participants, emphasizing those portions of

IRCP 17(a) which specifically authorize suit on behalf of "a party with whom or in whose name a contract has been made for the benefit of another...without joining the party for whose benefit the action is brought". However, Plaintiff has refused to submit any proof of contractual ability to enter into a contract on behalf of the pension plan and IRA participants. Plaintiff's Amended Complaint names itself as the aggrieved party, not any other entity or person. See generally, *Plaintiff's Amended Complaint*, ¶¶ 1-49. Plaintiff has failed to establish that it in fact has the right to sue on behalf of said plan participants, and therefore, cannot be considered the real party in interest as defined by IRCP 17(a).

2. Plaintiff cannot enforce an illegal transaction against Defendant.

Plaintiff also argues that its relationship with the pension plan participants has no bearing on this case. However, Plaintiff's relationship to the plan participants is of significant importance. There are two scenarios under which Plaintiff could distribute the monies it now claims. Both scenarios result in dismissal of this lawsuit. Under the first scenario, Plaintiff would recover the alleged $750.00 per lot closing itself. However, under federal law, specifically ERISA, as a third party administrator of pension plans owing a fiduciary duty to the plan participants, such an action is a prohibited transaction, and therefore, its alleged agreement with Defendant is illegal and unenforceable.

B. Defendant is entitled to the protections afforded by the Statute of Frauds against Plaintiff's claims.

In Defendant's Answer to Plaintiff's Amended Complaint, Defendant pled as follows, its Second Affirmative Defense: "The Amended Complaint is barred by the

Statute of Frauds, in that this transaction involves real estate, and such transaction was never reduced to writing." In its Memorandum in Support of Motion for Summary Judgment, Defendant also argued that application of I.C. §9-505(5) and I.C. §5-508 also bar Plaintiff's attempts at recovery from Defendant. Plaintiff now attempts to rely upon IRCP 8(c) to prevent Defendant from raising any portion of the Statute of Frauds, other than I.C. §9-505(4), as a defense against Plaintiff's alleged claims, citing *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978) as support for its contentions. Plaintiff's reliance is misplaced. In *Paulokos*, Intermountain did not raise the Statute of Frauds as a defense until appeal on oral argument. *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 744, 588 P.2d 939, ___ (1978).

The Idaho Supreme Court addresses a fact pattern very similar to the case at bar in *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982). In *Bluestone*, the plaintiff filed a complaint, and defendant filed an answer and cross-complaint. In answering the cross-complaint, plaintiff did not raise the affirmative defense of the statute of frauds. Plaintiff raised the defense of the statute of frauds for the first time in her motion for summary judgment. The Supreme Court stated as follows:

> where the defense was raised before trial and the defendant was given time to present argument in opposition, the defense of statute of frauds can be raised for the first time in motion for summary judgment even though the reply to the counterclaim has been filed.

Bluestone v. Mathewson, 103 Idaho 453, 455, 649 P.2d 1209, ____ (1982). In the instant case, then, Defendant is clearly entitled to argue all sections of the Statute of Frauds as may be applicable, regardless of the form of its affirmative defense

referenced above.

1. Idaho Code §9-505(4) bars Plaintiff from recovering from Defendant.

Defendant incorporates by reference herein the arguments and case law previously set forth in its Memorandum in Support of Motion for Summary Judgment, as well as its Response to Plaintiff's Motion for Summary Judgment, specifically as it relates to application of Idaho Code §9-505(4). This matter involves Plaintiff's attempt to create an interest in real property owned by Defendant. Both parties hereto agree there was no specific written contract memorializing any alleged agreement between the parties.

Instead, Plaintiff attempts to cobble together an agreement which meets the requirements of the Statute Frauds. However, as previously discussed, the memorandum identified as Exhibit G to the Affidavit of Brad Kendrick, submitted by Plaintiff in support of its Memorandum in Support of Motion for Summary Judgment, fails to satisfy the strict application of the Statute of Frauds. The memorandum fails to provide a legal description or any parameters regarding the property alleged to be affected by any agreement to the parties. It fails to specify an amount owed, either in total, or on a per lot basis. It fails to provide a maturity date, or even reference if a note and deed of trust are contemplated by the parties.

In order to overcome application of the Statute of Frauds in this case, where clearly any agreement was oral, and the transaction between the parties hereto involved creation of an interest in real property, the Plaintiff must prove by clear and convincing evidence to this Court, that the alleged contract is "complete, definite and certain in all its material terms". *Watson v. Watson*, 2007 WL 1229120, p. 4,

April 27, (No. 32237). In the instant case, there is not even agreement as to the number of lots which may have been implicated in the any oral agreement, because the parties hereto never actually defined said term or condition. In fact, Plaintiff now claims that two hundred and forty eight lots exist in the subdivision. However, only two hundred and twelve lots exist. *Third Affidavit of Scott Tallman*, ¶¶ 3 and 4. Further, there is no writing that memorializes that the "commercial piece" now claimed by Plaintiff was ever discussed by the parties hereto. *Third Affidavit of Scott Tallman*, ¶ 4. Plaintiff is unable to prove the terms of any oral agreement between the parties hereto, to the standard set forth above, and therefore, Defendant is entitled to summary judgment as a matter of law.

2. Idaho Code §9-505(5) bars Plaintiff from recovering from Defendant.

Idaho Code §9-505(5) does in fact require that "a promise or commitment to lend money or to grant or extend credit in an original principal amount of fifty thousand ($50,000) or more, made by a person or entity engaged in the business of lending money or extending credit" must be in writing in order to be enforceable. Defendant does not disagree that Plaintiff has correctly quoted *Rule Sales & Serv. v. U.S. Bank Nat'l. Ass'n.*, 133 Idaho 669, 673, 991 P.2d 857, 861 (Ct.App. 1999), for the proposition that the "apparent purpose of the statute is to protect banks and other businesses from claims that they made an oral commitment to lend money or to grant credit and breached such commitment by failing to deliver the funds."

That is exactly the point in this case: there was no written agreement regarding the lending of funds and/or terms of such financing between the parties hereto—as such it is unenforceable pursuant to the Statute of Frauds. Plaintiff made

an oral commitment, to Scott Tallman, that it would provide full funding for the subdivision project. *Affidavit of Scott Tallman,* ¶9; *Second Affidavit of Scott Tallman,* ¶4. Plaintiff made several lump sum advances to Defendant. Plaintiff's conduct in advancing several lump sums establishes that Plaintiff's obligation was not confined to one wire transfer. Plaintiff then failed to uphold its oral obligation, by refusing to provide full funding for the subdivision project. *Affidavit of Scott Tallman,* ¶17. Defendant, acting in detrimental reliance upon Plaintiff's breach of its commitment, was then released from any further obligations to Plaintiff. At the time that Plaintiff breached its obligation, Defendant was required to obtain alternate funding in the amount of $481,300.00 to pay off existing invoices and bills submitted by subcontractors, as well as to finish construction on ten (10) homes within the subdivision. *Third Affidavit of Scott Tallman,* ¶ 5.

In any event, any alleged agreement, regardless of the alleged terms thereto, was oral. While Defendant is not attempting to force Plaintiff to provide further funds to it, it does assert that Plaintiff breached its obligations to it. There is nothing that prevents a borrower (Defendant) from asserting that a lender has failed to protect itself by providing a written agreement that sets forth its lending commitments, thereby implicating the Statute of Frauds as a sword instead of a shield against broken commitments to lend funds.

3. Idaho Code §9-508 bars recovery by Plaintiff in this case.

In the instant case, the "equity participation" now claimed by Plaintiff is nothing less than a finder's fee or commission for bringing a purchaser and seller together, for "bringing the project to Cornerstone's attention". Pool Aff. ¶16;

Kendrick Aff. ¶16. There is no question that Old West, the original seller of the property subsequently purchased by Defendant, did not sign an agreement authorizing payment to Plaintiff in conjunction with the purchase of the subdivision. Plaintiff asserts that this portion of the statute does not prohibit it from recovering a commission from Defendant because it is not a broker, relying upon *Rexburg Realty, Inc.*, 101 Idaho 466, 467, 616 P.2d 245, 246 (1980), quoting, in relevant part, that "[t]he primary purpose of I.C. 9-508 is to prevent fraudulent or unfounded claims of brokers." Plaintiff's argument overlooks that there can be other purposes for which a statute is intended—the fact that the *Rexburg Realty* court stated a primary purpose does not preclude other purposes from existing. In the instant case, Kendrick and Pool both stated the alleged funds now claimed were intended to compensate Plaintiff "for bringing the project to [Defendant's] attention. Kendrick even conceded that this alleged agreement was essentially a payoff for bringing a real estate deal to the Defendant. *Deposition of Brad Kendrick*, p. 83, ln. 14-17. The reasoning behind the Statute of Frauds is glaringly apparent in the instant case: the terms and conditions which give rise to alleged claim of commission or payoff for bringing a purchaser and seller together must be set forth in writing to adequately protect all parties to the deal. In the instant case, such an agreement was not in writing, and therefore is not enforceable. Therefore, Defendant is entitled to summary judgment as a matter of law.

III. CONCLUSION

Based upon the foregoing, Defendant is entitled to summary judgment against Plaintiff, on Plaintiff's Amended Complaint, in its entirety. Further,

Defendant is entitled to an award of attorneys fees and costs against Plaintiff, pursuant to I.C. §12-120(3).

RESPECTFULLY SUBMITTED this 15th day of May, 2007.

Penny North Shaul, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

____ Hand Delivery

xx Postage-prepaid mail

xx Facsimile Transmission

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES, INC. Plaintiff, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, AMERICAN PENSION SERVICES, INC., A Utah corporation (hereafter "APS"), that is authorized to do and is doing business in the State of Idaho by and through its attorneys of record, and hereby submits this Reply Memorandum in Support of its Motion for Summary Judgment.

INTRODUCTION

The sole issue before this Court is whether there existed a contingency that APS had to provide full funding of the property development project in issue in order to be paid $750.00 per lot developed or to be developed. Cornerstone admits there was an agreement between the parties. APS lent funds that it was required to lend and exercised its option to lend additional funds. Cornerstone

accepted the lent money and has since acknowledged its obligation and paid back the principle and interest owed to APS. The contract between the parties has basically been totally performed by both parties, except for the remaining issue of APS being paid $750.00 per lot. There are no other remaining obligations by either party to perform.

In Cornerstone's Response Memorandum, it continues to argue, as it did in its Memorandum in Support of Motion for Summary Judgment, that the Statute of Frauds is applicable in this case. Cornerstone then argues, interestingly enough after admitting in their Answer and briefing that there was a contract between the parties, that there was no contract between the parties. Next, Cornerstone argues that APS's Amended Complaint fails to state a claim due Cornerstone's allegation that funds lent by APS were someone else's, thus APS is not entitled to recovery since APS allegedly lent third party funds. Remarkably, Cornerstone also continues to argue that accord and satisfaction is a complete bar to recovery in this case. Finally, Cornerstone argues that APS is precluded from an award of Summary Judgment pursuant to the defense of detrimental reliance.

For the following reasons and those outlined in APS's Motion for Summary Judgment, with its supporting memorandum and affidavits, and APS's Response Memorandum to Cornerstone's Memorandum in support of its Motion for Summary Judgment with its supporting affidavit, and the Third Affidavit of Stephen J. Muhonen submitted herewith, each and every defense raised by Cornerstone fails. APS is entitled to this Court's award granting Summary Judgment in favor of APS on the unpaid balance in the sum of $750.00 per lot within the developed and to be developed portions of the subdivision identified and described in APS's Amended Complaint, together with all accrued interest on said sums and together with its reasonable attorney fees and costs incurred.

ARGUMENT

I. THE STATUTE OF FRAUDS IS NOT APPLICABLE.

A. I.C. 9-503 does not support Cornerstone's defense.

As argued in APS's Memorandum in Support of Motion for Summary Judgment and APS's Response to Cornerstone's Motion for Summary Judgment, the Statute of Frauds is not applicable in this case. This is a case about a contract to lend money, not the transfer of or ownership interest of real property. This is matter of factly substantiated by Cornerstone's own admission and argument found in its response memorandum. "Plaintiff had no ownership interest in the subdivision – at best, it had knowledge of a potential project. . . ." (Def.'s Resp. Summ. J. at 22) Even if the Statute of Frauds were somehow deemed to be applicable, there exists *both* performance and a sufficient writing, written by the Managing Member of Cornerstone, that both, independent of each other and collectively, satisfy any Statute of Frauds requirements.

In Cornerstone's Response Memorandum it focuses on the applicability of I.C. 9-503 in its apparent attempt to justify the lack of a valid agreement between the parties. Interestingly enough, when Cornerstone cited I.C. 9-503 it failed to cite the heading of the code, i.e. "TRANSFERS OF REAL PROPERTY TO BE IN WRITING." IDAHO CODE § 9-503 (Michie 2004). "Under I.C. § 9-503 a conveyance of an interest in real property requires an instrument in writing, *subscribed by the party disposing of the same,* or by his agent thereunto authorized by writing." Villager Condominium Ass'n v. Idaho Power Co., 121 Idaho 986, 991, 829 P.2d 1335, 1340 (1992)(Bake, C.J. dissenting)(emphasis added). The agreement in issue is what APS seeks to have enforced, i.e. that Cornerstone pay to APS $750.00 for each lot developed or to be developed in the subdivision. The Promissory Note and Deed of Trust that APS seeks is for *security* purposes to ensure payment

of the $750.00 on each lot closing. The request for security documents by APS from Cornerstone does not implicate the Statute of Frauds as to whether there was an agreement between the parties.

B. The writings by Cornerstone satisfy the Statute of Frauds.

APS has argued the validity and applicability of the April, 2005 Memorandum written by Cornerstone's Managing Member in APS's Memorandum in Support of Motion for Summary Judgment and in APS's Response Memorandum to Cornerstone's Motion for Summary Judgment. The memorandum absolutely satisfies any Statute of Frauds requirement. The memorandum identifies the parties, the monies lent and paid back, the interest incurred, the amount outstanding on the principal, what the note amount should be, and the agreement by Cornerstone to pay APS an uncertain amount per lot. (Kendrick Aff. ¶35, Ex. G.) This document was written by Cornerstone's Managing Member over a year *after* APS stopped lending money to Cornerstone due to not having any security on its approximately one-half of a million dollars lent; no where does the memorandum say anything about the per lot amount being contingent upon full financing. Id. The reality is that the document is an acknowledgment of amounts owed to APS. The other documents attached to Mr. Kendrick's Affidavit, too, support and evidence the existence of the per lot obligation to APS and none of those documents, either, say anything about a contingency agreement. See (Kendrick Aff. ¶¶ 17, Ex. C, 18, Ex. D, 35, Ex. H, 39, Ex. I, 40, Ex. J.)

Cornerstone argues that the memorandum is deficient because it fails to identify the number of lots for which payment is owed, the amount owed per lot, the identification of the real property, nor any discussion to provide security on any amount. Cornerstone is wrong. On the bottom of the first page of the memorandum it describes what the "Note" amount should be. Id. On page three of the memorandum, phases and names of various areas in the subdivision are named. Id. Couple

this with Cornerstone's Answer to the Amended Complaint, Cornerstone admits that the real property in issue has been correctly identified. (Answer ¶¶ 3-4.) The memorandum identifies monies are owed by Cornerstone to APS on each lot in the subdivision. The amount per lot is the only ambiguity, not if *any* is owed. This ambiguity is clarified by Cornerstone's Answer that the amount was in fact $750.00 per lot. Id. at ¶ 13. Finally, the memorandum also identifies the number of lots for which payment is owed. In the memorandum, Cornerstone suggested the amount owed per lot was $625.00 per lot and that $175,000.00 is owed to APS on the single family homes and $20,000.00 is owed on the multi-family units. (Kendrick Aff. ¶ 35, Ex. G.) By performing basic mathematics and dividing$625.00 into each of these amounts, the number of lots computes as 280 single family home lots and 32 multi-family home lots.

Cornerstone has also asserted that the Managing Member of Cornerstone was acting without authority when he drafted the memorandum. This assertion of lack of authority is contrary to the evidence and testimony before the Court in this matter. Mr. Kendrick was designated to be the Member-Manager. (Pool Aff.¶ 10; Kendrick Aff. ¶ 9.) Furthermore, in Mr. Tallman's deposition, he admitted that Mr. Kendrick was the Managing Member of Cornerstone. (Dep. of Scott Tallman at 13, lines 3-20.). As submitted in APS's Response Memorandum, fundamental agency law allows the Managing Member to bind the LLC as a matter of law. Cornerstone has not, nor can it produce any evidence that Mr. Kendrick could not bind Cornerstone. Even if there was an internal dispute amongst the Cornerstone members as to whom could bind, all APS knew was that Mr. Kendrick was the Managing Member, thus that is why APS dealt with Mr. Kendrick. (Dep. of Curtis DeYoung at 46, lines 22-25, 47, lines 1-2, 50, lines 19-20.) Cornerstone has not and cannot produce any evidence that APS was informed otherwise.

C. Partial performance satisfies the Statute of Frauds.

Once again, this is not an action regarding the conveyance of real property and the Statute of Frauds does not apply. Even if the Statute of Frauds were deemed to apply, APS has satisfied its obligations through partial performance. APS has previously argued its satisfaction of the Statute of Frauds through partial performance in both its Memorandum in Support of Motion for Summary Judgment and in APS's Response to Motion for Summary Judgment. In sum, the oral agreement between the parties was later reduced to writing by Cornerstone, as outlined in the memorandum described in prior briefing and herein above. The evidence before this Court shows that the contract is complete, definite and certain in all its material terms. The material terms are present in the memorandum and Answer, both of which identify the agreement, the parties to the agreement, the subject matter of the agreement, the consideration to be performed and the description of the property.

For these reasons and those outlined in APS's Memorandum in Support of Motion for Summary Judgment and APS's Response to Motion for Summary Judgment, the Statute of Frauds just does not apply in this case. APS is entitled to summary judgment against Cornerstone as to the issue of the Statute of Frauds.

II. THERE IS A LAWFUL, BINDING CONTRACT BETWEEN THE PARTIES.

As argued in APS's Memorandum in Support of Motion for Summary Judgment, there is a lawful binding contract between APS and Cornerstone, requiring Cornerstone to pay APS $750.00 per lot sold or to be sold in the subdivision in issue. In Cornerstone's Response Memorandum, it lays out the various types of contracts that exist, i.e. express contracts, contracts implied in fact and contracts implied in law. (Def.'s Resp. Mot. Summ. J. at 10.) What is puzzling is that Cornerstone

first states, "Plaintiff cannot support any causes of action against Defendant arising out of a claim based upon breach of contract." Id. at 9. Then states, "There is no express contract between the parties hereto." Id. at 10. This statement is followed by an explanation of what an express contract is and that it can be created either orally or in writing. Id. at 9-10. Cornerstone then *admits* there was an oral agreement between the parties, contingent upon full financing of the development project. Id. at 11. Cornerstone then sums up its express contract argument by stating that since the terms of the oral contract were not definite and concise, *there was no contract* to be breached at all. Id. at 13.

The only person claiming the agreement between the two entities required full financing is Mr. Tallman. The members of Cornerstone who made the agreement with APS, including the Managing Member, directly contradict Mr. Tallman's position. (Pool Aff. ¶17; Kendrick Aff. ¶28; Dep. of Curtis DeYoung at 59, lines 22-25, 60, lines 1-5.) Cornerstone has admitted that it has no evidence, whatsoever in this whole world that will support its contingency position. (Dep. of Scott Tallman at 119, lines 14-25, 120, lines 1-15.)

The agreement made is clear. Due to APS bringing the project to Cornerstone's attention, the funding agreement that was entered into, orally, between Cornerstone and APS for the Idaho real property development project was as follows: APS would provide the down payment of approximately twenty percent (20%), which would be repaid at 10% interest. In addition, APS would receive $750.00 per lot sold in the development project. Furthermore, APS was to have the option of being able to lend on the individual homes to be built in the development project. The lending of money from APS to Cornerstone was to be secured by APS through a Promissory Note

and Deed of Trust issued by Cornerstone. (Pool Aff.¶ 16; Kendrick Aff. ¶ 16; *See generally* Dep. of Curtis DeYoung at 99, lines 6-20.)

In compliance with the agreement, on September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of $226,218.70, which was used to purchase the property. APS was not provided a Promissory Note or Deed of Trust at this time. (Pool Aff.¶ 18; Kendrick Aff. ¶ 19; *See generally* Dep. of Scott Tallman at 122, lines 15-25, 123, lines 1-2.) This failure of Cornerstone to provide security documents to APS for the sums lent is actually the first breach of the agreement. This breach was by Cornerstone.

After providing the down payment as required, APS exercised its option to lend further monies on the project and did so by lending a combined total of $487,951.52 through February 2004. (Kendrick Aff. ¶ 24.) In March 2004, after more than five months of not receiving a Promissory Note and Deed of Trust securing the almost a half of a million dollars lent by APS' to Cornerstone, APS refused to lend further funds to Cornerstone. (Pool Aff. ¶ 22; Kendrick Aff. ¶ 27; Dep. of Curtis DeYoung at 45, lines 18-23.)

Cornerstone attempts to make much to do about APS calling Mr. Tallman and telling him that APS was out of money and would not be lending further funds. In APS's deposition, Mr. DeYoung explains this comment by stating, "I do recall being out of money for any project that won't provide a note and trust deed." (Dep. of Curtis DeYoung at 49, lines 10-11.)

It was not until June, 2004, eight months after the original funds were lent, that Cornerstone finally got around to attempting to provide APS with a Promissory Note, which, by the way was inaccurate, as was each proposed draft submitted thereafter. (Kendrick Aff. ¶¶ 30, 33.); Dep. of Scott Tallman at 130.)

As previously briefed, this agreement was made between APS and Cornerstone, for which Mr. Tallman had very little involvement in and learned about second hand from other members of Cornerstone. (Pls Resp. Summ. J. at 15.) Mr. Tallman attempts to invalidate his deposition testimony by stating that the contingency arrangement was created in Spokane, Washington after the agreement was reached between Cornerstone and the sellers of the real property. (Tallman Aff. at 2-3, ¶¶ 9-10.) This assertion is contrary to the evidence that the agreement was already made between the parties prior to going to Spokane. See (Kendrick Aff. ¶ 17 Ex. C.) The notes found in Exhibit C attached to the Kendrick Affidavit were written by Mr. Tallman. (Dep. of Scott Tallman at 96, lines 16-23.) When this exhibit was presented to Mr. Tallman at deposition, he initially did not know when the notes were written, but initially speculated they may have been written by him in Spokane, then, as the deposition continued, Mr. Tallman stated, "you know, maybe prior to that writing down ideas." (Dep. of Scott Tallman at 97, lines 1-3.) While still looking at the document and analyzing its content, Mr. Tallman then stated, "I might have done this before we even went up to Spokane." (Dep. of Scott Tallman at 104, lines 11-13.) Mr. Tallman then stated, "I don't specifically recall doing this up in Spokane. It might have been before we even went up there." Id. at lines 22-24.

The foregoing is important because on Exhibit C, in the upper right hand corner is a note written by Mr. Tallman that says "750.00 Curtis." (Dep. of Scott Tallman at 106, lines 11-17.) Mr. Tallman then explains that "750 Curtis" means, "I'm assuming that was when we originally made the deal that the $750 equity position for Curtis." Id. at 106, lines 15-17. This explanation is then followed by Mr. Tallman stating "You know, again, Steve, I really think I did this before we went

to Spokane and trying to figure out down payments and what we could get out of it. . . ." (Dep. of Scott Tallman at 111, lines 4-7.)

The Court is acting as the trier of fact in this case. All the evidence that will be presented to the Court at trial concerning the $750 per lot issue is on the record before the Court in these summary judgment proceedings. The foregoing solidifies the existence of the contract between the parties and what its terms were. Because of this, the Court is entitled and required"to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences." APS requests that the Court view the evidence on the record and that the Court grant summary judgment to APS finding that Cornerstone owes to APS the sum of $750 per lot as was agreed upon between the parties.

III. APS'S AMENDED COMPLAINT STATES A CLAIM.

APS's Amended Complaint states a claim for which relief can be granted. APS has visited this issue in its Memorandum in Support of Motion for Summary Judgment and in its Response to Cornerstone's Motion for Summary Judgment . Cornerstone admits it did not file a proper motion in accordance with Rule 12(b) of the Idaho Rules of Civil Procedure but then asserts that their Motion for Summary Judgment is sufficient. (Def.'s Resp. Summ. J. at 17-18.) This is blatantly contrary to the rule. The rule states that once the motion is made, it is then treated as one for summary judgment. See, I.R.C.P. 12(b).

Regardless of Cornerstone's procedural errors, the basis of Cornerstone's 12(b)(6) argument is that APS lacks standing. Cornerstone alleges that "The Plaintiff is entitled to nothing because the funds were supplied by third parties." (Def.'s Resp. Summ. J. at 18.) Cornerstone has absolutely no evidence where the funds lent by APS came from, whether they came from APS's own funds or

clientele of APS. As outlined by Rule 17(a) of the Idaho Rules of Civil Procedure, APS could bring suit under either scenario.

The source of the funds lent has absolutely no bearing in this case. How the source of the funds lent has any relevancy as to whether there was a contingency agreement to provide full funding of the development project is simply not comprehendible. The agreement between the parties, which Cornerstone admits exists, has been basically performed and satisfied by both of the parties. All that remains is the $750.00 per lot, for which the source of the monies lent has no relevance.

APS's Amended Complaint states a claim for which relief can be granted, thus APS is entitled to this Court's award of Summary Judgment as to this issue.

IV. AN ACCORD AND SATISFACTION HAS NOT OCCURRED .

Cornerstone's affirmative defense of accord and satisfaction is not applicable and does not bar recovery by APS. APS finds it remarkable that Cornerstone continues to assert this defense and brief it, even after acknowledging to this Court, on the record, that payment of the underlying principle and interest owed was not to be construed as a full and final settlement between the parties. Either Cornerstone does not understand what accord and satisfaction is or Cornerstone is deliberately attempting to mislead this Court.

On January 24, 2006 this Court held a hearing regarding the principle and interest payment to be made by Cornerstone to APS in order to get the then TRO and Lis Pendens in place, lifted. Due to Cornerstone's actions of continuing to maintain this defense, APS has incurred the expense to present the transcript of the hearing for this Court's review. On the record, counsel for the parties stated as follows:

Mr. Muhonen: (Counsel for APS) Thank you, Your Honor. In consideration of American Pension Services, Inc., not pursuing preliminary injunction or writ of attachment, American Pension Services, Inc., has agreed to release the TRO that is currently in place as well as the lis pendens that is also in place in consideration of receiving today a wire transfer from Cornerstone in the amount of $187,591.35.

By no means is this to be construed as full and final resolution of this matter, and this sum relates only to the lifting of the TRO and the release of the lis pendens as well.

The Court: All right. Mr. Decker (counsel for Cornerstone's Managing Member, Brad Kendrick), do you stipulate to that?

Mr. Decker: Yes, Your honor, with the clarification that the $187,591.35 has been arrived at by the parties as an amount that is – that is owed that is not in dispute. So it's not merely consideration for the release of the TRO, but it is not our understanding that it is a full and final settlement of all the claims.

The Court: It may be partial payment of some remaining claims?

Mr. Decker: Yes, Your Honor.

The Court: Is that all?

Mr. Muhonen: That's correct, Your Honor.

The Court: All right. Ms. Shaul.

Ms. Shaul: (Counsel for Mr. Tallman) Thank you, your Honor. I concur with what Counsel has represented, both Counsel have represented, and I

believe that Mr. Decker has clarified appropriately that this is an amount that is not contested by any of the parties at this point as due and owing; and therefore, that's why it's being tendered today.

The Court: All right. So with that proviso you're stipulating to it?

Ms. Shaul: We are, Your Honor.

Hr'g on Mot. to Extend Prelim. Inj., Writ of Attach. and T.R.O., Jan. 24, 2006 (Third Aff. Muhonen ¶ 4, Ex. C.)

Cornerstone's accord and satisfaction defense does not apply and APS is entitled to an award of Summary Judgment on this issue.

V. CORNERSTONE CANNOT SUSTAIN A DETRIMENTAL RELIANCE DEFENSE.

Cornerstone's affirmative defense of detrimental reliance cannot bar recovery by APS. APS has visited this issue in its Memorandum in Support of Motion for Summary Judgment and briefly replies to points made in Cornerstone's Response Memorandum. "To establish detrimental reliance, a party must show that she reasonably and justifiably relied on a specific promise of the offending party *and suffered substantial and foreseeable economic loss when relying on the promise.*" Podolan v. Legal Aid Services, Inc., 1223 Idaho 937, 943, 854 P.2d 280, 286 (Ct. App. 1993)(emphasis added).

Cornerstone has not produced one single piece of evidence demonstrating it "suffered substantial and foreseeable economic loss when relying on the promise." First, as demonstrated by the evidence, there was no promise by APS to provide complete funding of the entire development project. (Pool Aff. ¶¶ 10, 17; Kendrick Aff. ¶¶ 1, 28.) Second, Cornerstone admits that when it initially calculated its projected profit in the development project, it estimated it would realize an

amount over two (2) million dollars. (Pool Aff.¶ 15; Kendrick Aff. ¶ 15; Dep. of Scott Tallman at 55, lines 19-25.) Cornerstone now estimates to realize a profit of over 3 million dollars. (Dep. of Scott Tallman at 174, lines 23-25, 175 lines 1-6.)

The loss contemplated to sustain a detrimental reliance defense is not present in this case. Cornerstone has not presented one piece of evidence to sustain its burden and substantiating that it suffered substantial and foreseeable economic loss. For these reasons and those argued previously, APS is entitled to this Court's award of Summary Judgment on this issue.

VI. DAMAGES AND ATTORNEY FEES

APS has argued these issues in its Memorandum in Support of Motion for Summary Judgment and respectfully refers the Court to said briefing.

CONCLUSION

Based upon the arguments as presented above and in APS's Memorandum in Support of Motion for Summary Judgment and in APS's Response to Cornerstone's Motion for Summary Judgment, APS has established that a lawful, binding agreement was entered into between APS and Cornerstone. None of Cornerstone's defenses are applicable. APS is entitled to judgment requiring Cornerstone to pay APS $186,000.00 or $750.00 per lot sold and to be sold in the development project, plus $750 per lot on the commercial piece of real property if and when it is subdivided.

DATED this 15 day of May, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of May, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Penelope North-Shaul
DUNN LAW OFFICES, PLLC
P. O. Box 277
Rigby, Idaho 83442

[✓] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
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