2-21-2008

American Pension Services v. Cornerstone Home Builders Clerk's Record v. 2 Dckt. 34697

vol. 2 of 4

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IN THE volume 2 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

Attorney for Respondent

FILED - COPY

Filed this _____ *day of* FEB 21 2008 , *20*____.

Clerk

Supreme Court _____ Court of Appeals _____
Entered on ATS by: _____

By _____ *Deputy*

34697

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 May, 2007, Defendant's motion to compel discovery and cross-motions for summary judgment 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.

Mr. Winston Beard and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was in attendance at counsel table.

Mr. Beard presented Defendant's motion to compel discovery. Mr. Muhonen argued in opposition to the motion. Mr. Beard presented rebuttal argument.

The Court will grant the motion in favor of Defendant Cornerstone. The subject matter may sensitive information, so the Court will impose a protective order wherein only Mr. Beard and Ms. Shaul will be permitted to view the subject matter. In order for anyone else to review, they will have to have

permission from the Court.

Mr. Beard will prepare a proposed order for the Court's signature.

Mr. Muhonen presented Plaintiff's motion for summary judgment. Ms. Shaul argued in opposition to Plaintiff's motion for summary judgment and presented Defendant's motion for summary judgment.

The Court will take the motions under advisement and issue a decision as soon as possible.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

H:aps.21mo
052207AM5StClair

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of May, 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
(Pl - American Pension Services, Inc.)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

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

Winston Beard

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 6th day of June, 2007, a pretrial conference and Defendant's motion to continue trial and to extend discovery deadline 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. Lane Erickson appeared on behalf of the Plaintiff.

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

Trial is scheduled for June 19, 2007.

Mrs. Shaul presented Defendant's motion to continue trial and to extend discovery deadline. Mr. Erickson responded.

The Court granted the motion to continue the trial and reset the matter for court trial on August 28, 2007. No pretrial conference will be scheduled. Discovery deadline will be August 15th.

The Court denied the cross-motions for summary judgment.

Mr. Erickson will prepare a proposed order for the Court's signature.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

H:cv06140.23pt
060607AM5StClair

CERTIFICATE OF MAILING

I hereby certify that on the 6 day of June, 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
Lane V. Erickson
PO Box 1391
Pocatello, ID 83204-1391
(Pl - American Pension Services, Inc.)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

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

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
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 **SECOND 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 and affidavits in support of the same, which will be filed in accordance with Rule 56, together with the Court files and records.

ORAL ARGUMENT IS REQUESTED.

DATED this 27 day of June, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of June, 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*
[ ] Email

Winston V. Beard
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[✓] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[✓] Facsimile — *529-9732*
[ ] Email

STEPHEN J. MUHONEN

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, ISB No. 138
Michael Gaffney ISB No. 3558
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: winston@beardstclair.com
jeff@beardstclair.com

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 SECOND 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 Second Motion for Summary Judgment on Plaintiff's Amended Complaint. This motion is brought based upon newly

ORIGINAL

discovered evidence received by Defendant on May 31, 2007, after this Court ordered disclosure of said evidence by Plaintiff, upon Defendant's Motion to Compel. Defendant herein asserts its Second Motion for Summary Judgment must be granted on the following grounds: 1) Plaintiff has failed to state a claim upon which relief may be granted, pursuant to Idaho Rule of Civil Procedure 12(b)(6); 2) Plaintiff is not the real party in interest as defined by Idaho Rule of Civil Procedure 17, and therefore cannot prosecute its Amended Complaint; 3) Plaintiff has no standing to assert the claims alleged in its Amended Complaint, and is therefore barred from recovery upon said complaint; 4) Idaho Code §9-508 precludes Plaintiff from any recovery against Defendant; and 5) Plaintiff's claim, as alleged in the Amended Complaint, is an illegal transaction, and therefore, any recovery upon said complaint is barred. *Further, 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 Second 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 Defendant's Memorandum in Support of Second Motion for Summary Judgment. Oral argument is requested.

RESPECTFULLY SUBMITTED this 29th day of June, 2007.

Penny North Shaul, Esq.
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 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

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

Stephen J. Muhonen, Esq.
RACINE, OLSEN, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, ID 83204-1391

Winston V. Beard
Michael Gaffney
BEARD ST. CLAIR GAFFNEY, P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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.,	Case No. CV-06-140
Plaintiff,	MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND
vs.	
CORNERSTONE HOME BUILDERS, LLC.,	
Defendant.	

COMES NOW the Defendant, by and through its undersigned attorneys of record, and files this Memorandum in Support of Motion for Leave to Amend.

MEMORANDUM

Defendant has filed a Motion for Leave to Amend and requests this Court's order granting leave to the Defendant to file an Amended Answer to Plaintiff's Amended Complaint. Defendant makes this request pursuant to Idaho Rule of Civil Procedure 15(a) which states that "leave shall be freely given when justice so requires."

Justice requires that leave be given for the simple reason that the Plaintiff mailed its Supplemental Responses to Defendant's Second Set of Discovery on the Defendant on May 31st. (See Exhibit A to Affidavit of Michael D. Gaffney). The responses were not received by Defendant's counsel until June 4th, 2007. (Affidavit of Michael D. Gaffney).

These responses confirm that the Plaintiff possessed information that was brought to the Court's attention during argument related to the Motion to Compel that brings the Plaintiff's investment scheme under ERISA rules and regulations since the funding of APS comes exclusively through pension monies, and more particularly IRAs, making the Plaintiff an ERISA functional fiduciary. In fact, the supplemental responses supplied by the Plaintiff, particularly the response to Request for Production No. 9, show that APS is *exclusively* funded with IRA pension monies. Thus, the amounts claimed in the Amended Complaint are either finder fees and are illegal under ERISA § 1106(b)(3) or are being collected for the benefit of the pension trusts (a position the Plaintiff appears to have recently adopted). *See* Plaintiff's Supplemental Response to Interrogatory No. 19. However, if that is the case, the Plaintiff cannot act as the real party in interest and /or has no standing to prosecute this lawsuit.

It has already been established that Curtis DeYoung is the president and sole shareholder of APS and therefore cannot qualify as a nonbank trustee of IRAs. U.S. Treasury Regulations §1.408-2(b)(4)(e); Defendant's Memorandum in Support of Summary Judgment, Ex. C,

Deposition excerpt of Curtis L. Young, 5 (6 – 18).

In the recently produced Plaintiff's Supplemental Response to Request for Production No. 9, is a document entitled "American Pension Services, Inc. Trust Agreement." Section 6 of that agreement explicitly refers to the "Administrator's rights powers and duties *as trustee*...." The enumerated powers that follow are clearly those of a trustee. Thus APS cannot claim to be simply a pension administrator but is clearly attempting to act, improperly, as the trustee of said pension, which, as indicated consists exclusively of IRA funds. Since APS cannot legally act in this capacity, it cannot sue as a party who is "actually and substantially interested in the subject matter" as defined in Idaho R. Civ. Pro. 17(a) and is therefore not a real party in interest. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 870 (Idaho 1999). The Defendant should therefore be allowed to assert Rule 17(a), standing and illegality as affirmative defenses and should be allowed to proceed with the defense of this case based upon Plaintiff's recent supplemental disclosures.

DATED this 3rd day of July, 2007.

Michael D. Gaffney, ISB No. 3558
Of Beard St. Clair Gaffney P.A.

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on July 3, 2007, I served a true and correct copy of the MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO AMEND on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney, ISB No. 3558
Of BEARD ST. CLAIR GAFFNEY P.A.
Attorney for Defendant

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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.,	Case No. CV-06-140
Plaintiff,	MOTION FOR LEAVE TO AMEND ANSWER
vs.	
CORNERSTONE HOME BUILDERS, LLC.,	
Defendant.	

COMES NOW the Defendant, by and through its undersigned attorneys of record, and moves for this Court's leave allowing Defendant to file the attached Amended Answer adding

Ninth, Tenth and Eleventh Affirmative Defenses based upon recently received discovery responses pursuant to the Court's most recent Order Compelling Discovery. In support of this Motion Defendant's file the Affidavit of Counsel and Memorandum in Support of Motion for Leave to Amend. Defendant also requests a hearing and the opportunity to present oral argument to the Court.

DATED this 3rd day of July, 2007.

Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY P.A.

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on July 3, 2007, I served a true and correct copy of the MOTION FOR LEAVE TO AMEND on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY P.A.
Attorney for Defendant

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
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 SECOND MOTION FOR SUMMARY JUDGMENT**

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

I. RELIEF SOUGHT

APS seeks an entry of Judgment in its favor holding the illegality defense alleged by Defendant CORNERSTONE HOME BUILDERS, LLC., an Idaho Limited Liability Corporation (hereafter "Cornerstone") does not apply.

II. STATEMENT OF FACTS AND BACKGROUND

APS is seeking payment from Cornerstone in an amount equal to $750 per lot sold or to be sold, in the real property development project identified in Exhibit B of the Amended Complaint. (*See* Am. Compl.). APS' claim for payment is based on an agreement between APS and Cornerstone wherein APS agreed to lend Cornerstone approximately twenty percent (20%) of the purchase price of certain real property, which would be repaid at 10% interest. In addition, the parties agreed that since APS brought the development project to Cornerstone's attention, Cornerstone would pay APS $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 and development in the development project. Cornerstone has answered APS's Amended Complaint and admitted to the foregoing agreement, including the 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 has paid APS the outstanding principal and interest on amounts APS loaned Cornerstone. There are only two remaining issues: (1) whether Cornerstone's illegality defense applies and (2) whether APS' entitlement to $750 per lot is contingent upon Cornerstone's allegation that APS provide financing for the entire development project.

Both parties have previously submitted Motions for Summary Judgment. Cornerstone alleged illegality as a defense in its Reply Memorandum in Support of Motion for Summary Judgment. (Def's. Reply Mem. Supp. Summ. J. at 3). Cornerstone also alleged illegality in its Memorandum in Support of Motion to Compel Response to Second Set of Discovery to Plaintiff. (Def's. Mem Supp. Mot. Compel Resp. Second Disc. to Pl. at 4-9). Because Cornerstone's

illegality defense was not raised until after APS's Response Memorandum, APS was not afforded the opportunity to respond to this newly raised issue.

The basis for Cornerstone's illegality defense appears to be that Cornerstone believes that the funds lent by APS to Cornerstone may have been obtained either unlawfully or in breach of a fiduciary duty APS had with its investors, thus making the consideration paid by APS illegal and subsequently, the contract between APS and Cornerstone illegal. *Id.*

Curtis DeYoung, Dean DeYoung, Drew Downs, Dale Henderson and Harry Segura each established their own IRA account with APS. (Aff. of Curtis DeYoung ¶ 4, Aff. of Dean DeYoung ¶ 2, Aff. of Drew Downs ¶ 2, Aff. of Dale Henderson ¶ 2, Aff. of Harry Segura ¶ 2). Dean DeYoung, Drew Downs, Dale Henderson and Harry Segura all gave authority to Curtis DeYoung to invest their IRA funds in a manner he deemed beneficial to them. (Aff. of Dean DeYoung ¶ 3-5, Aff. of Drew Downs ¶ 3-5, Aff. of Dale Henderson ¶ 3-5, Aff. of Harry Segura ¶ 3-5). Curtis DeYoung utilized his authority granted by the four individuals and directed APS to invest funds from his own and the other four individuals IRA accounts, into the property development project which is the subject matter of this litigation. (Aff. of Curtis DeYoung ¶ 5-8). APS invested the aforementioned individual's funds into the property development project as more particularly described above. (Id.).

III. STANDARD FOR SUMMARY JUDGMENT

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and 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). 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). 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.

IV. CORNERSTONE'S ILLEGALITY DEFENSE DOES NOT APPLY

The Court should grant APS' motion for summary judgment and hold Cornerstone's illegality defense does not apply. The illegality defense asserted by Cornerstone involves two separate contracts. The "first contract" is the agreement between APS and its investors. Cornerstone is not a party to the agreement between APS and its investors. The "second contract" is the agreement between Cornerstone and APS regarding the loan of funds and Cornerstone paying $750 per lot. If APS understands it correctly, Cornerstone is arguing APS cannot enforce the "second contract" requiring Cornerstone to pay $750 per lot because APS allegedly violated the Employee Retirement Income Security Act ("ERISA"), something relating solely to the "first contract" between APS and its investors (and not involving Cornerstone).

The "first contract" is not at issue in this lawsuit and APS questions Cornerstone's ability to allege violations of a contract to which it is not a party. Regardless, APS did not violate ERISA and therefore, Cornerstone's alleged illegality defense does not apply and the "second contract" between APS and Cornerstone is enforceable.

The IRA funds lent to Cornerstone were lawfully obtained and lent. In addition, there was never a breach of the fiduciary relationship or other illegality involving APS and its investors. The funds lent by APS to Cornerstone in this matter were from five (5) Individual Retirement Accounts ("IRAs") with APS. (Aff. of Curtis DeYoung ¶ 7-8, Aff. of Dean DeYoung ¶ 5, Aff. of Drew Downs ¶ 5, Aff. of Dale Henderson ¶ 5, Aff. of Harry Segura ¶ 5).

Based on Cornerstone's Motion to Compel Responses to Second Set of Discovery, it is anticipated that Cornerstone will argue that various provisions of the ERISA were violated. However, ERISA is not at issue because ERISA governs "employee benefit plans" as that term is defined in Section 3(3) of ERISA. See also ERISA Section 4. This matter involves IRAs, as opposed to employee benefit plans. IRAs are governed by Section 408 of the Internal Revenue Code (hereafter "Code") and the corresponding regulations.

Code Section 408(e)(2) provides that an IRA may lose its tax exempt status if the individual for whose benefit the IRA was established (or his or her beneficiary) engages in a transaction prohibited by Code Section 4975. Statutory exemptions to prohibited transactions are found in Code Section 4975(d).

Code Section 4975[1] provides that a prohibited transaction means any direct or indirect:

[1]For convenience of the Court, 26 USC § 4975 is attached hereto as Appendix "A".

1. Sale or exchange, or leasing, of any property between a plan and a disqualified person;

2. Lending of money or other extension of credit between a plan and a disqualified person;

3. Furnishing of goods, services, or facilities between a plan and a disqualified person;

4. Transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

5. Act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

6. Receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

For purposes of the foregoing, a plan includes an IRA. See Code Section 4975(e)(1)(B). A disqualified person includes (1) a person who is a fiduciary; (2) a person providing services to the plan; (3) a member of the family of a person described in (1) or (2); and (4) a corporation of which 50 percent or more of its stock is owned by a person described in (1) or (2) . See Code Section 4975(e)(2).[2]

A fiduciary means any person who:

1. Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;

2. Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so;

[2] There are additional disqualified persons defined in Section 4975(e)(2). The full definition is not set forth, as it does not appear the remaining categories of the definition are at issue.

3. Has any discretionary authority or discretionary responsibility in the administration of such plan; or

4. Any person designated under Section 405(c)(1)(B) of ERISA.

See Code Section 4975(e)(3).

In the instant case, even if we assume for purposes of argument that APS and each of the five IRA holders are all disqualified persons, there is no identifiable prohibited transaction given the existing facts.

The purpose of Cornerstone's Second Set of Discovery was to obtain facts that would assist it in identifying a prohibited transaction. The responses to that discovery, as well as the other facts of this case illustrate that there was no prohibited transaction or other illegality.

IRA money can be and is routinely invested. Here, the IRAs each invested in the development project. Each IRA owner instructed and authorized Curtis DeYoung to make investments on their behalf. Each IRA was to share in proportion to the amount of its investment in any gains (or losses) on the investment. APS derived no benefit from these investments. APS was not paid any fee or commission, nor was Curtis DeYoung paid any fee or commission relative to these investments. As stated in Answer to Interrogatory No. 19, any recovery in this case will be paid to the IRAs.

There are no facts indicating there was any sale, exchange or leasing of property between any of the IRAs and any disqualified person. There are no facts indicating there was any lending of money between any of the IRAs and any disqualified person. There are no facts indicating there were any goods or services furnished between any of the IRAs and a disqualified person.[3]

[3] Administrative services are provided by APS to the IRAs. To the extent such services

There are no facts indicating there was any transfer of IRA assets to, or for the use by or benefit of, any disqualified person. There are no facts indicating there were any acts of self-dealing by a fiduciary. There are no facts indicating there was any consideration received by a disqualified person from any party dealing with the IRA (i.e., there were no kickbacks of any kind). Accordingly, there are no identifiable prohibited transactions.

V. CONCLUSION

Based upon the foregoing, the consideration utilized by APS in this matter was legal and APS did not breach any fiduciary duties, engage in any prohibited transactions, or other illegalities with regard to the IRAs that invested in the development project. The Court should grant APS' motion for summary judgment and hold Cornerstone's illegality defense does not apply.

DATED this 6th day of July, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

STEPHEN J. MUHONEN
Attorney for Plaintiff

---

are viewed as a prohibited transaction under Code Section 4975(c)(1)(C), this type of transaction is exempted, and thus is permissible. See Code Section 4975(d)(20).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 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

[X] U. S. Mail
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FOR STEPHEN J. MUHONEN

APPENDIX "A"

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Citation: ***26 uscs 4975***

26 USCS § 4975

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE D. MISCELLANEOUS EXCISE TAXES
CHAPTER 43. QUALIFIED PENSION, ETC., PLANS

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26 USCS § 4975

§ 4975. Tax on prohibited transactions.

(a) Initial taxes on disqualified person. There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

(b) Additional taxes on disqualified person. In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

(c) Prohibited transaction.
(1) General rule. For purposes of this section, the term "prohibited transaction" means any direct or indirect--
(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;
(B) lending of money or other extension of credit between a plan and a disqualified person;
(C) furnishing of goods, services, or facilities between a plan and a disqualified person;
(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;
(E) act by a disqualified person who is a fiduciary whereby he deals with the income or

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assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

(2) Special exemption. The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is--

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) [26 USCS § 408(a)] of title I of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(a)].

(3) Special rule for individual retirement accounts. An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) [26 USCS § 408(e)(2)(A)] or if section 408(e)(4) [26 USCS § 408(e)(4)] applies to such account.

(4) Special rule for Archer MSAs. An individual for whose benefit an Archer MSA (within the meaning of section 220(d) [26 USCS § 220(d)]) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) [26 USCS § 220(e)(2)] applies to such transaction.

(5) Special rule for Coverdell education savings accounts. An individual for whose benefit a Coverdell education savings account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) [26 USCS § 530(d)] applies with respect to such transaction.

(6) Special rule for health savings accounts. An individual for whose benefit a health savings account (within the meaning of section 223(d) [26 USCS § 223(d)]) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be a health savings account by reason of the application of section 223(e)(2) [26 USCS § 223(e)(2)] to such account.

(d) Exemptions. Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to--

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan--

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section 414(q) [26 USCS § 414(q)]) in an amount greater than the amount made available to other employees,

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(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to a leveraged employee stock ownership plan (as defined in subsection (e)(7)), if--

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if--

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is--

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if--

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service--

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if--

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable

compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan, but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 [29 USCS § 1344] (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act [29 USCS § 1106] by reason of section 408(e) of such Act [29 USCS § 1108(e)] (or which would be so exempt if such section 406 [26 USCS § 406] applied to such transaction) or which is exempt from section 406 of such Act [29 USCS § 1106] by reason of section 408(b)(12) of such Act [29 USCS § 1108(b)(12)];

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974 [29 USCS §§ 1381 et seq. or § 1403], but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F);

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act [29 USCS § 1411], but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F);

(16) a sale of stock held by a trust which constitutes an individual retirement account under section 408(a) [26 USCS § 408(a)] to the individual for whose benefit such account is established if--

(A) such stock is in a bank (as defined in section 581 [26 USCS § 581]) or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)(1)),

(B) such stock is held by such trust as of the date of the enactment of this paragraph [enacted Oct. 22, 2004],

(C) such sale is pursuant to an election under section 1362(a) [26 USCS § 1362(a)] by such bank or company,

(D) such sale is for fair market value at the time of sale (as established by an independent appraiser) and the terms of the sale are otherwise at least as favorable to such trust as the terms that would apply on a sale to an unrelated party,

(E) such trust does not pay any commissions, costs, or other expenses in connection with the sale, and

(F) the stock is sold in a single transaction for cash not later than 120 days after the S corporation election is made;

(17) Any transaction in connection with the provision of investment advice described in subsection (e)(3)(B) to a participant or beneficiary in a plan and that permits such participant or beneficiary to direct the investment of plan assets in an individual account, if--

(A) the transaction is--

(i) the provision of the investment advice to the participant or beneficiary of the plan

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with respect to a security or other property available as an investment under the plan,

(ii) the acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice, or

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice; and

(B) the requirements of subsection (f)(8) are met,

(18) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a party in interest (other than a fiduciary described in subsection (e)(3)(B)) with respect to a plan if--

(A) the transaction involves a block trade,

(B) at the time of the transaction, the interest of the plan (together with the interests of any other plans maintained by the same plan sponsor), does not exceed 10 percent of the aggregate size of the block trade,

(C) the terms of the transaction, including the price, are at least as favorable to the plan as an arm's length transaction, and

(D) the compensation associated with the purchase and sale is not greater than the compensation associated with an arm's length transaction with an unrelated party,[;]

(19) any transaction involving the purchase or sale of securities, or other property (as determined by the Secretary of Labor), between a plan and a party in interest if--

(A) the transaction is executed through an electronic communication network, alternative trading system, or similar execution system or trading venue subject to regulation and oversight by--

(i) the applicable Federal regulating entity, or

(ii) such foreign regulatory entity as the Secretary of Labor may determine by regulation,

(B) either--

(i) the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority, or

(ii) neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades,

(C) the price and compensation associated with the purchase and sale are not greater than the price and compensation associated with an arm's length transaction with an unrelated party,

(D) if the party in interest has an ownership interest in the system or venue described in subparagraph (A), the system or venue has been authorized by the plan sponsor or other independent fiduciary for transactions described in this paragraph, and

(E) not less than 30 days prior to the initial transaction described in this paragraph executed through any system or venue described in subparagraph (A), a plan fiduciary is provided written or electronic notice of the execution of such transaction through such system or venue,[;]

(20) transactions described in subparagraphs (A), (B), and (D) of subsection (c)(1) between a plan and a person that is a party in interest other than a fiduciary (or an affiliate) who has or exercises any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of subsection (e)(3)(B)) with respect to those assets, solely by reason of providing services to the plan or solely by reason of a relationship to such a service provider described in subparagraph (F), (G), (H), or (I) of subsection (e)(2), or both, but only if in connection with such transaction the plan receives no less, nor pays no more, than adequate consideration, [;]

(21) any foreign exchange transactions, between a bank or broker-dealer (or any affiliate of either) and a plan (as defined in this section) with respect to which such bank or broker-dealer (or affiliate) is a trustee, custodian, fiduciary, or other party in interest person, if--

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(A) the transaction is in connection with the purchase, holding, or sale of securities or other investment assets (other than a foreign exchange transaction unrelated to any other investment in securities or other investment assets),

(B) at the time the foreign exchange transaction is entered into, the terms of the transaction are not less favorable to the plan than the terms generally available in comparable arm's length foreign exchange transactions between unrelated parties, or the terms afforded by the bank or broker-dealer (or any affiliate of either) in comparable arm's-length foreign exchange transactions involving unrelated parties,

(C) the exchange rate used by such bank or broker-dealer (or affiliate) for a particular foreign exchange transaction does not deviate by more or less than 3 percent from the interbank bid and asked rates for transactions of comparable size and maturity at the time of the transaction as displayed on an independent service that reports rates of exchange in the foreign currency market for such currency, and

(D) the bank or broker-dealer (or any affiliate of either) does not have investment discretion, or provide investment advice, with respect to the transaction,[;]

(22) any transaction described in subsection (c)(1)(A) involving the purchase and sale of a security between a plan and any other account managed by the same investment manager, if--

(A) the transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available,

(B) the transaction is effected at the independent current market price of the security (within the meaning of section 270.17a-7(b) of title 17, Code of Federal Regulations),

(C) no brokerage commission, fee (except for customary transfer fees, the fact of which is disclosed pursuant to subparagraph (D)), or other remuneration is paid in connection with the transaction,

(D) a fiduciary (other than the investment manager engaging in the cross-trades or any affiliate) for each plan participating in the transaction authorizes in advance of any cross-trades (in a document that is separate from any other written agreement of the parties) the investment manager to engage in cross trades at the investment manager's discretion, after such fiduciary has received disclosure regarding the conditions under which cross trades may take place (but only if such disclosure is separate from any other agreement or disclosure involving the asset management relationship), including the written policies and procedures of the investment manager described in subparagraph (H),

(E) each plan participating in the transaction has assets of at least $ 100,000,000, except that if the assets of a plan are invested in a master trust containing the assets of plans maintained by employers in the same controlled group (as defined in section 407(d)(7) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1107(d)(7)]), the master trust has assets of at least $ 100,000,000,

(F) the investment manager provides to the plan fiduciary who authorized cross trading under subparagraph (D) a quarterly report detailing all cross trades executed by the investment manager in which the plan participated during such quarter, including the following information, as applicable: (i) the identity of each security bought or sold; (ii) the number of shares or units traded; (iii) the parties involved in the cross-trade; and (iv) trade price and the method used to establish the trade price,

(G) the investment manager does not base its fee schedule on the plan's consent to cross trading, and no other service (other than the investment opportunities and cost savings available through a cross trade) is conditioned on the plan's consent to cross trading,

(H) the investment manager has adopted, and cross-trades are effected in accordance with, written cross-trading policies and procedures that are fair and equitable to all accounts participating in the cross-trading program, and that include a description of the manager's pricing policies and procedures, and the manager's policies and procedures for allocating cross trades in an objective manner among accounts participating in the cross-trading program, and

(I) the investment manager has designated an individual responsible for periodically reviewing such purchases and sales to ensure compliance with the written policies and procedures described in subparagraph (H), and following such review, the individual shall

issue an annual written report no later than 90 days following the period to which it relates signed under penalty of perjury to the plan fiduciary who authorized cross trading under subparagraph (D) describing the steps performed during the course of the review, the level of compliance, and any specific instances of non-compliance.

The written report shall also notify the plan fiduciary of the plan's right to terminate participation in the investment manager's cross-trading program at any time,[;] or

(23) except as provided in subsection (f)(11), a transaction described in subparagraph (A), (B), (C), or (D) of subsection (c)(1) in connection with the acquisition, holding, or disposition of any security or commodity, if the transaction is corrected before the end of the correction period.

The exemptions provided by this subsection (other than paragraphs (9) and (12)) shall not apply to any transaction with respect to a trust described in section 401(a) [26 USCS § 401(a)] which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3) [26 USCS § 401(c)(3)]) in which a plan directly or indirectly lends any part of the corpus or income of the plan to, pays any compensation for personal services rendered to the plan to, or acquires for the plan any property from or sells any property to, any such owner-employee, a member of the family (as defined in section 267(c)(4) [26 USCS § 267(c)(4)]) of any such owner-employee, or a corporation controlled by any such owner-employee through the ownership, directly or indirectly, of 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation. For purposes of the preceding sentence, a shareholder-employee (as defined in section 1379 [26 USCS § 1379], as in effect on the day before the date of the enactment of the Subchapter S Revision Act of 1982 [enacted Oct. 19, 1982]), a participant or beneficiary of an individual retirement account or an individual retirement annuity (as defined in section 408 [26 USCS § 408]), and an employer or association of employees which establishes such an account or annuity under section 408(c) [26 USCS § 408(c)] shall be deemed to be an owner-employee.

(e) Definitions.

(1) Plan. For purposes of this section, the term "plan" means--

(A) a trust described in section 401(a) [26 USCS § 401(a)] which forms a part of a plan, or a plan described in section 403(a) [26 USCS § 403(a)], which trust or plan is exempt from tax under section 501(a) [26 USCS § 501(a)],

(B) an individual retirement account described in section 408(a) [26 USCS § 408(a)],

(C) an individual retirement annuity described in section 408(b) [26 USCS § 408(b)],

(D) an Archer MSA described in section 220(d) [26 USCS § 220(d)],

(E) a health savings account described in section 223(d) [26 USCS § 223(d)],

(F) a Coverdell education savings account described in section 530 [26 USCS § 530], or

(G) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

(2) Disqualified person. For purposes of this section, the term "disqualified person" means a person who is--

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

(3) Fiduciary. For purposes of this section, the term "fiduciary" means any person who--

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1105(c)(1)(B)].

(4) Stockholdings. For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c) [26 USCS § 267(c)], except that, for purposes of this paragraph, section 267(c)(4) [26 USCS § 267(c)(4)] shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(5) Partnerships; trusts. For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) [26 USCS § 267(c)] (other than paragraph (3) thereof), except that section 267(c)(4) [26 USCS § 267(c)(4)] shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

(6) Member of family. For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

(7) Employee stock ownership plan. The term "employee stock ownership plan" means a defined contribution plan--

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a) [26 USCS § 401(a)], and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h) [26 USCS § 409(h)], section 409(o) [26 USCS § 409(o)], and, if applicable, section 409(n), 409(p) [26 USCS § 409(n), 409(p)], and section 664(g) [26 USCS § 664(g)] and, if the employer has a registration-type class of securities (as defined in section 409(e)(4) [26 USCS § 409(e)(4)]), it meets the requirements of section 409(e) [26 USCS § 409(e)].

(8) Qualifying employer security. The term "qualifying employer security" means any employer security within the meaning of section 409(1) [26 USCS § 409(1)].

If any moneys or other property of a plan are invested in shares of an investment company

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registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

(9) Section made applicable to withdrawal liability payment funds. For purposes of this section--

(A) In general. The term "plan" includes a trust described in section 501(c)(22) [26 USCS § 501(c)(22)].

(B) Disqualified person. In the case of any trust to which this section applies by reason of subparagraph (A), the term "disqualified person" includes any person who is a disqualified person with respect to any plan to which such trust is permitted to make payments under section 4223 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1403].

(f) Other definitions and special rules. For purposes of this section--

(1) Joint and several liability. If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

(2) Taxable period. The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of--

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212 [26 USCS § 6212],

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

(3) Sale or exchange; encumbered property. A transfer of real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

(4) Amount involved. The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value--

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

(5) Correction. The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

(6) Exemptions not to apply to certain transactions.

(A) In general. In the case of a trust described in section 401(a) [26 USCS § 401(a)] which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3) [26 USCS § 401(c)(3)]), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly--

(i) lends any part of the corpus or income of the plan to,

(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4) [26 USCS § 267(c)(4)]) of any such owner-employee, or any corporation in which any such

owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(B) Special rules for shareholder-employees, etc.

(i) In general. For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) [26 USCS § 7701(a)(37)]).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c) [26 USCS § 408(c)].

(ii) Exception for certain transactions involving shareholder-employees. Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) [26 USCS § 267(c)(4)]) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

(iii) Loan exception. For purposes of subparagraph (A)(i), the term "owner-employee" shall only include a person described in subclause (II) or (III) of clause (i).

(C) Shareholder-employee. For purposes of subparagraph (B), the term "shareholder-employee" means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1) [26 USCS § 318(a)(1)]) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(7) S corporation repayment of loans for qualifying employer securities. A plan shall not be treated as violating the requirements of section 401 or 409 [26 USCS § 401 or 409] or subsection (e)(7), or as engaging in a prohibited transaction for purposes of subsection (d)(3), merely by reason of any distribution (as described in section 1368(a) [26 USCS § 1368(a)]) with respect to S corporation stock that constitutes qualifying employer securities, which in accordance with the plan provisions is used to make payments on a loan described in subsection (d)(3) the proceeds of which were used to acquire such qualifying employer securities (whether or not allocated to participants). The preceding sentence shall not apply in the case of a distribution which is paid with respect to any employer security which is allocated to a participant unless the plan provides that employer securities with a fair market value of not less than the amount of such distribution are allocated to such participant for the year which (but for the preceding sentence) such distribution would have been allocated to such participant.

(8) Provision of investment advice to participant and beneficiaries.

(A) In general. The prohibitions provided in subsection (c) shall not apply to transactions described in subsection (b)(14) if the investment advice provided by a fiduciary adviser is provided under an eligible investment advice arrangement.

(B) Eligible investment advice arrangement. For purposes of this paragraph, the term "eligible investment advice arrangement" means an arrangement--

(i) which either--

(I) provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected, or

(II) uses a computer model under an investment advice program meeting the requirements of subparagraph (C) in connection with the provision of investment advice by a fiduciary adviser to a participant or beneficiary, and

(ii) with respect to which the requirements of subparagraphs (D), (E), (F), (G), (H), and (I) are met.

(C) Investment advice program using computer model.

(i) In general. An investment advice program meets the requirements of this subparagraph if the requirements of clauses (ii), (iii), and (iv) are met.

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(ii) Computer model. The requirements of this clause are met if the investment advice provided under the investment advice program is provided pursuant to a computer model that--

(I) applies generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time,

(II) utilizes relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments,

(III) utilizes prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan,

(IV) operates in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser, and

(V) takes into account all investment options under the plan in specifying how a participant's account balance should be invested and is not inappropriately weighted with respect to any investment option.

(iii) Certification.

(I) In general. The requirements of this clause are met with respect to any investment advice program if an eligible investment expert certifies, prior to the utilization of the computer model and in accordance with rules prescribed by the Secretary of Labor, that the computer model meets the requirements of clause (ii).

(II) Renewal of certifications. If, as determined under regulations prescribed by the Secretary of Labor, there are material modifications to a computer model, the requirements of this clause are met only if a certification described in subclause (I) is obtained with respect to the computer model as so modified.

(III) Eligible investment expert. The term "eligible investment expert" means any person which meets such requirements as the Secretary of Labor may provide and which does not bear any material affiliation or contractual relationship with any investment adviser or a related person thereof (or any employee, agent, or registered representative of the investment adviser or related person).

(iv) Exclusivity of recommendation. The requirements of this clause are met with respect to any investment advice program if--

(I) the only investment advice provided under the program is the advice generated by the computer model described in clause (ii), and

(II) any transaction described in subsection (b)(14)(B)(ii) occurs solely at the direction of the participant or beneficiary. Nothing in the preceding sentence shall preclude the participant or beneficiary from requesting investment advice other than that described in clause (i), but only if such request has not been solicited by any person connected with carrying out the arrangement.

(D) Express authorization by separate fiduciary. The requirements of this subparagraph are met with respect to an arrangement if the arrangement is expressly authorized by a plan fiduciary other than the person offering the investment advice program, any person providing investment options under the plan, or any affiliate of either.

(E) Audits.

(i) In general. The requirements of this subparagraph are met if an independent auditor, who has appropriate technical training or experience and proficiency and so represents in writing--

(I) conducts an annual audit of the arrangement for compliance with the requirements of this paragraph, and

(II) following completion of the annual audit, issues a written report to the fiduciary who authorized use of the arrangement which presents its specific findings regarding compliance of the arrangement with the requirements of this paragraph.

(ii) Special rule for individual retirement and similar plans. In the case of a plan described in subparagraphs (B) through (F) (and so much of subparagraph (G) as relates to such subparagraphs) of subsection (e)(1), in lieu of the requirements of clause (i), audits of the arrangement shall be conducted at such times and in such manner as the Secretary of

Labor may prescribe.

(iii) Independent auditor. For purposes of this subparagraph, an auditor is considered independent if it is not related to the person offering the arrangement to the plan and is not related to any person providing investment options under the plan.

(F) Disclosure. The requirements of this subparagraph are met if--

(i) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)--

(I) of the role of any party that has a material affiliation or contractual relationship with the financial adviser in the development of the investment advice program and in the selection of investment options available under the plan,

(II) of the past performance and historical rates of return of the investment options available under the plan,

(III) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(IV) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(V) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed,

(VI) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser,

(VII) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and

(VIII) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(ii) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser--

(I) maintains the information described in clause (i) in accurate form and in the manner described in subparagraph (H),

(II) provides, without charge, accurate information to the recipient of the advice no less frequently than annually,

(III) provides, without charge, accurate information to the recipient of the advice upon request of the recipient, and

(IV) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

(G) Other conditions. The requirements of this subparagraph are met if--

(i) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(ii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iii) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(iv) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(H) Standards for presentation of information.

(i) In general. The requirements of this subparagraph are met if the notification required to be provided to participants and beneficiaries under subparagraph (F)(i) is written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and is sufficiently accurate and comprehensive to reasonably apprise

such participants and beneficiaries of the information required to be provided in the notification.

(ii) Model form for disclosure of fees and other compensation. The Secretary of Labor shall issue a model form for the disclosure of fees and other compensation required in subparagraph (F)(i)(III) which meets the requirements of clause (i).

(I) Maintenance for 6 years of evidence of compliance. The requirements of this subparagraph are met if a fiduciary adviser who has provided advice referred to in subparagraph (A) maintains, for a period of not less than 6 years after the provision of the advice, any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(17) have been met. A transaction prohibited under section 406 [29 USCS § 1106] shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(J) Definitions. For purposes of this paragraph and subsection (d)(17)--

(i) Fiduciary adviser. The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the participant or beneficiary of the plan and who is--

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in section 408(b)(4) [29 USCS § 408(b)(4)] or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by Federal or State banking authorities,

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice. For purposes of this title, a person who develops the computer model described in subparagraph (C)(ii) or markets the investment advice program or computer model shall be treated as a person who is a fiduciary of the plan by reason of the provision of investment advice referred to in subsection (e)(3)(B) to the participant or beneficiary and shall be treated as a fiduciary adviser for purposes of this paragraph and subsection (d)(17), except that the Secretary of Labor may prescribe rules under which only 1 fiduciary adviser may elect to be treated as a fiduciary with respect to the plan.

(ii) Affiliate. The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3))).

(iii) Registered representative. The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

(9) Block trade. The term "block trade" means any trade of at least 10,000 shares or with a market value of at least $ 200,000 which will be allocated across two or more unrelated client accounts of a fiduciary.

(10) Adequate consideration. The term "adequate consideration" means--

(A) in the case of a security for which there is a generally recognized market--

(i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934 [15 USCS § 78f], taking into account factors such as the size of the transaction and marketability of the security, or

(ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of the party in interest, taking into account factors such as the size of the transaction and marketability of the security, and

(B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by a fiduciary or fiduciaries in accordance with regulations prescribed by the Secretary of Labor.

(11) Correction period.

(A) In general. For purposes of subsection (d)(23), the term "correction period" means the 14-day period beginning on the date on which the disqualified person discovers, or reasonably should have discovered, that the transaction would (without regard to this paragraph and subsection (d)(23)) constitute a prohibited transaction.

(B) Exceptions.

(i) Employer securities. Subsection (d)(23) does not apply to any transaction between a plan and a plan sponsor or its affiliates that involves the acquisition or sale of an employer security (as defined in section 407(d)(1) [of the Employee Retirement Income Security Act of 1974] [29 USCS § 1107(d)(1)]) or the acquisition, sale, or lease of employer real property (as defined in section 407(d)(2) [of such Act] [29 USCS § 1107(d)(2)]).

(ii) Knowing prohibited transaction. In the case of any disqualified person, subsection (d)(23) does not apply to a transaction if, at the time the transaction is entered into, the disqualified person knew (or reasonably should have known) that the transaction would (without regard to this paragraph) constitute a prohibited transaction.

(C) Abatement of tax where there is a correction. If a transaction is not treated as a prohibited transaction by reason of subsection (d)(23), then no tax under subsections (a) and (b) shall be assessed with respect to such transaction, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.

(D) Definitions. For purposes of this paragraph and subsection (d)(23)--

(i) Security. The term "security" has the meaning given such term by section 475(c)(2) [26 USCS § 475(c)(2)] (without regard to subparagraph (F)(iii) and the last sentence thereof).

(ii) Commodity. The term "commodity" has the meaning given such term by section 475(e)(2) [26 USCS § 475(e)(2)] (without regard to subparagraph (D)(iii) thereof).

(iii) Correct. The term "correct" means, with respect to a transaction--

(I) to undo the transaction to the extent possible and in any case to make good to the plan or affected account any losses resulting from the transaction, and

(II) to restore to the plan or affected account any profits made through the use of assets of the plan.

(g) Application of section. This section shall not apply--

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1101(b)(2)(B)]) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d) [26 USCS § 414(d)]); or

(3) to a church plan (within the meaning of section 414(e) [26 USCS § 414(e)]) with respect to which the election provided by section 410(d) [26 USCS § 410(d)] has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

(h) Notification of Secretary of Labor. Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor

and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

(i) Cross reference. For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974 [29 USCS § 1203].

History:

(Added Sept. 2, 1974, P.L. 93-406, Title II, § 2003(a), 88 Stat. 971; Oct. 4, 1976, P.L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834; Nov. 6, 1978, P.L. 95-600, Title I, § 141(f)(5), (6), 92 Stat. 2795; April 1, 1980, P.L. 96-222, Title I, § 101(a)(7)(C), (K), (L)(iv)(III), (v)(XI), 94 Stat. 198-201; Sept. 26, 1980, P.L. 96-364, Title II, §§ 208(b), 209(b), 94 Stat. 1289, 1290; Dec. 24, 1980, P.L. 96-596, § 2(a)(1)(K),(L), (2)(I), (3)(F), 94 Stat. 3469, 3471; Jan. 12, 1983, P.L. 97-448, Title III, § 305(d)(5), 96 Stat. 2400; July 18, 1984, P.L. 98-369, Div A, Title IV, § 491(d)(45), (46), (e)(7), (8), 98 Stat. 851-853; Oct. 22, 1986, P.L. 99-514, Title XI, § 1114(b)(15)(A), Title XVIII, §§ 1854(f)(3)(A), 1899A(51), 100 Stat. 2452, 2882, 2961; Nov. 5, 1990, P.L. 101-508, Title XI, § 11701(m), 104 Stat. 1388-513; Aug. 20, 1996, P.L. 104-188, Title I, §§ 1453(a), 1702(g)(3), 110 Stat. 1817, 1873; Aug. 21, 1996, P.L. 104-191, Title III, § 301(f), 110 Stat. 2051; Aug. 5, 1997, P.L. 105-34, Title II, § 213(b), Title X, § 1074(a), Title XV, §§ 1506(b)(1), 1530(c)(10), Title XVI, § 1602(a)(5), 111 Stat. 816, 949, 1065, 1079, 1094; July 22, 1998, P.L. 105-206, Title VI, § 6023(19), 112 Stat. 825; Dec. 21, 2000, P.L. 106-554, § 1(a)(7) (Title II, § 202(a)(7), (b)(7), (10)), 114 Stat. 2763, 2763A-628, 2763A-629; June 7, 2001, P.L. 107-16, Title VI, §§ 612(a), 656(b), 115 Stat. 100, 134; P.L. 107-22, § 1(b)(1)(D), (3)(D), July 26, 2001, 115 Stat. 197; Dec. 8, 2003, P.L. 108-173, Title XII, § 1201(f), 117 Stat. 2479; Oct. 22, 2004, P.L. 108-357, Title II, Subtitle D, §§ 233(c), 240(a), 118 Stat. 1434, 1437; Dec. 21, 2005, P.L. 109-135, Title IV, Subtitle A, § 413(a)(2), 119 Stat. 2641; Aug. 17, 2006, P.L. 109-280, Title VI, Subtitle A, § 601(b)(1), (2), Subtitle B, §§ 611(a)(2), (c)(2), (d)(2), (e)(2), (g)(2), 612(b), 120 Stat. 958, 967, 969, 970, 971, 974, 976.)

History; Ancillary Laws and Directives:

1. Explanatory notes
2. Amendments
3. Other provisions

1. Explanatory notes:

Bracketed semicolons have been inserted in subsec. (d)(17)(B), (18)(D), (19)(E), (20), (21)(D) and (22) to indicate the punctuation probably intended by Congress.

The words "of the Employee Retirement Income Security Act of 1974" and "of such Act" have been inserted in subsec. (f)(11) to indicate the probable intent of Congress to include such language.

2. Amendments:

In 2006, P.L. 109-280, Sec. 601(b)(1), (2) (applicable to advice referred to in subsec. (c)(3)(B) [(e)(3)(B)] of this section provided after 12/31/2006, as provided by Sec. 601(b)(4) of P.L. 109-280, which appears as a note to this section), amended subsec. (d) by deleting "or" at the end of para. (15), substituting ";or" for a concluding period in para. (16)(F), and adding para. (17); and added subsec. (f)(8).

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DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

Attorneys for Defendant

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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 BRIEF IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

Cornerstone submits this brief in support of its second motion for summary judgment.

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RELEVANT FACTS FOR SUMMARY JUDMENT

The facts presented here are abbreviated because this case has been previously briefed and this motion relies only on some very discrete parts of the record, most of which were just recently produced through compelled discovery on May 31, 2007. In its amended complaint, the plaintiff, American Pension Services, Inc. (APS) alleges:

> 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 contracts in the finance industry, all of which ultimately led to Cornerstone's introduction and purchase of the subdivision property.
>
> 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 . . .
>
> 24. Cornerstone's failure to . . . to pay Plaintiff $750.00 per lot sold, constitutes a breach of said agreement.

Amended Complaint, ¶¶ 13, 14, 19 and 24.

On May 31, 2007, the plaintiff served, pursuant to an order compelling production the following supplemental responses to Cornerstone's written discovery requests:

> Answer to interrogatory No. 19: . . . Plaintiff hoped and hopes to benefit by receiving $750.00 per closing, a mere fraction of what Defendant stood/stands to gain. If/when Plaintiff receives the $750.00 per lot from Defendants, such proceeds will be distributed to the individual accounts listed herein above.

> Answer to interrogatory no. 14: . . . Additionally Curtis DeYoung has the verbal and/or written authority of each previously identified individual to "contribute to, withdraw from and deposit funds in any type of retirement plan . . .; select and change payment options for the principal under any retirement plan; make rollover contributions from any retirement plan to other retirement plans or individual retirement accounts; exercise all investment powers available under any type of self directed retirement plan; and, in general, exercise all powers with respect to retirement plans and retirement plan account balances which the principal could if present and under not disability.
>
> Answer to interrogatory no. 15: . . . The owners of each IRA Account as set forth herein above are fiduciaries along with Curtis L. DeYoung and APS, who are fiduciaries as well.
>
> Answer to interrogatory no. 17: . . . Each answer to Interrogatory No. 11 is a separate account as identified therein, for which Plaintiff has the right to exercise control over or exercise discretion regarding the investment, use, or disbursement. Curtis L. DeYoung exercised control over and/or discretion regarding the investment, use, or disbursement of the funds distributed in this matter.

Affidavit of Michael D. Gaffney, Ex. A, submitted with Defendant's Motion to Amend Answer (Gaffney Aff.)

Also attached to plaintiffs' supplemental responses to defendant's request for production second set of discovery is a document entitled *American Pension Services, Inc., Trust Agreement*, identifying American Pension Services Inc., as the "Administrator" and First Utah Bank as the "Custodian". Paragraph 6 of that agreement states that " . . . subject to the provisions of this Agreement that empower you to direct the Administrator, Administrator's rights, powers, and duties *as trustee of your monies and other assets* shall include but not be limited to the following . . . . *Id.* [emphasis added]

The following testimony from page 5 of deposition of Curtis L. DeYoung has been previously submitted to the court:

> Q. (Ms. Shaul): All right. And is this a company – it's an incorporation, correct?
>
> A. Yes.

Q. Okay. And are there shareholders?

A. Yes.

Q. Okay. Approximately how many?

A. One.

Q. Okay. And so does that mean you are the only shareholder?

A. Yes.

Defendant's Memorandum in Support of [First] Summary Judgment, Ex. C, Deposition excerpt of Curtis L. DeYoung, p. 5, lines 6-18.

Answer to Interrogatory No. 11 of the supplemental responses identifies five individuals for whom APS was acting as an administrator. Those five are Drew Downs, Dale Henderson, Dean DeYoung, Harry Segura, and Curtis L. DeYoung. Included in the documents attached to the plaintiff's supplemental responses is an IRA account agreement with each of those five persons. *Gaffney Affidavit, Ex. A.*

COMMENTS

In the amended complaint, APS alleges it is contractually entitled to the $750.00 per lot fee. All causes of action are plead as contract or quasicontract claims. Nowhere in the amended complaint can one glean a trustee-beneficiary claim. Only in the supplemental responses to Cornerstone's second set of discovery is it claimed that APS was going to pass the money to the IRA accounts. *See* Gaffney Aff., Ex. A, Response to Interrogatory 19. Moreover, this position *first appears* in supplemental response served after an order compelling production less than 60 days ago. APS has never alleged it made a contract with Cornerstone under which the IRA accounts were third party beneficiaries and in the facts set forth it claims it was acting as a trustee.

At the hearing regarding the motion to compel, it was argued that it appeared that the $750/lot fee was to be paid to APS and that any such payment would be illegal. The amended complaint is explicit in claiming the $750/lot fee was due to APS. This view is consistent with Martin Pool's deposition testimony:

> Q. Did you ever participate in any conversations with Curtis regarding the funding and the terms that would be required to obtain funding from – from him?
>
> A. You know we had talked about, you know, Curtis putting up some capital in the deal, Curtis getting a – you know, an equity piece, participating in the profit on the deal, you know, Curtis potentially providing construction dollars. And that was – you know, that was – that was really it.

Defendant's Memorandum in Support of [First] Summary Judgment, Ex. B, Deposition excerpt of Martin Pool, p. 42, lines 9-18.

Brad Kendrick, in his deposition stated:

> 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.

Defendant's Memorandum in Support of [First] Summary Judgment, Ex. A, Deposition excerpt of Brad Kendrick, p. 83, lines 18-24.

It has already been factually established that the underlying loan transaction has been fulfilled. In response to Request for Admission No. 1, the plaintiff admitted that "The principal and interest has been paid in full, however, $750 per lot is owing *for additional consideration* for the arrangement of the loans and financing. *Defendant's Memorandum in Support of [First]*

Summary Judgment, Ex. D, Plaintiff's Responses to Defendant's Discovery Requests, p. 5 [emphasis added]. In answer to Interrogatory No. 19, the plaintiff has said that all recoveries will be distributed to the five IRAs that funded the loans. The IRAs did not arrange for the loans and the financing; yet the fee was to be paid in consideration for arranging for the financing – not for the financing itself. It is only logical that the consideration was supposed to be paid to the one that had access to the IRA funds. That payment would have been illegal as was argued in the Memorandum in Support of Motion to Compel Response to Second Set of Discovery to Plaintiff. However, the seeming change of position in the supplemental answer to interrogatory no. 19 does not avoid the problem. It avoids one illegality only to step into another illegality. The second illegality is that it is illegal for APS to be the trustee of an IRA. If it was illegal for APS to be the trustee, then it cannot bring a claim as a real party in interest and cannot have standing to sue.

PLAINTIFF IS NOT THE REAL PARTY IN INTEREST

The issue raised in this second motion for summary judgment is whether APS possesses a legal right giving it standing to sue and making it a real party in interest under IRCP 17(a). If a party is not the real party in interest then it "lacks standing." *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 985 P.2d 1145 (1999). If a party is not the real party in interest, and thereby lacks standing, that party and the corresponding lawsuit brought by that party should be dismissed. *Pro Indiviso v. Mid-Mile Holding Trust*, 131 Idaho 741, 746 (Idaho 1998). Idaho Courts have ruled that a real party in interest "is the person who will be entitled to the benefits of the action if successful." *Id.* at 288, 985 P.2d at 1150; *citing Carrington v. Crandall*, 63 Idaho 651, 658, 124 P.2d 914, 917 (1942). Similarly, the following is from Moore's Federal Practice – Civil

paragraph 17.10 (3d ed. 2007):

> 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.

A. Status of American Pension Services, Inc.

APS is not suing for money owed to APS. It has stated that the money will be distributed to the IRA's for which it is the administrator. Thus APS is not a real party in interest and does not have standing unless it comes under one of the exceptions under Rule 17. Those exceptions allow persons acting as a guardian, administrator, executor, bailee, etc to sue in their own name for the benefit of the person they are acting for. There are two exceptions under Rule 17(a) that might apply to this case – trustee and third party beneficiary.

B. APS cannot sue as a trustee

Treasury Regulation 1.408-2 provides in pertinent part:

> (a) An individual retirement account must be a trust or a custodial account. . . .
> (b) An individual retirement account must be a trust created or organized in the United States . . . for the exclusive benefit of an individual or h is beneficiaries. . .
> (2) The trustee must be a bank (as defined in section 408(n) and the regulations there under) or another person who demonstrates in the manner described in paragraph (e) of this section to the satisfaction of the commissioner, that the manner in which the trust will be administered will be consistent with the requirements of section 408 and this section. (Emphasis added).

APS is not a bank nor a credit union nor any other type of regulated financial institution. Furthermore, it is not "another person" that applied and obtained the authorization of the Treasury to serve as a trustee of IRA accounts. That can be definitively stated because the requirements to obtain that authorization include a diversity requirement as follows:

> (A). . . the applicant cannot be an individual (B) Sufficient diversity in the

> ownership of an incorporated applicant is demonstrated in the following circumstances: (1) individuals each of whom owns more than 20 percent of the voting stock in the applicant own, in the aggregate, no more than 50% of such stock . . .

APS is a corporation and is wholly owned by Curtis DeYoung. Therefore it cannot qualify to act as a trustee under the Treasury regulations.

Even though APS is not a bank and is not authorized to be a trustee of IRAs, it has illegally assumed trustee powers and has illegally acted as a trustee. Since those actions are illegal, APS cannot be allowed to claim any benefit or rights under the trustee exception to Rule 17. *See: Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952).

It should be noted that an administrator of retirement funds does not handle funds. It does the accounting and files the necessary reports for compliance with Department of Labor and Department of the Treasury regulations. It has no fiduciary function. Administration is separate and distinction from fiduciary holding and control of funds. In the case of IRAs, the fiduciary role is restricted to banks. The five IRAs at issue were self directed IRAs. The self direction is a right of a participant to direct his/her own investments. The regulations require that the owner of the IRA exercise independent control. The following is from 29 CFR 2440.404c-1(c)(2):

> Whether a participant or beneficiary has exercised independent control in fact with respect to a transaction depends on the facts and circumstances of the particular case. However, a participant's or beneficiary's exercise of control is not independent in fact if: (i) the participant or beneficiary is subjected to improper influence by a plan fiduciary or a plan sponsor with respect to the transaction.

The right of a participant to independently direct a bank to make certain investments is different from APS's outright exercise of fiduciary powers as a trustee. APS's misuse or misunderstanding of its position as an administrator does not give it the right to act for the IRA as if it were a

trustee.

C. APS cannot sue for the benefit of a third party.

Allowing APS to sue under the contract made for the benefit of another would allow APS to have the rights of a trustee which is a position it has illegally assumed. It would give to APS the fruits of its illegal activity. Generally courts should not allow a party to benefit from their illegal activity.

However, a proper understanding of the Rule 17 exception of a contract made for the benefit of another, leads to the conclusion that it does not give APS the right to sue in this instance. The notes of the advisory committee for the original Rule 17 states that it was taken verbatim from a former equity rule. The same language was in the old Idaho Procedure Code section 5-301 which has been replaced by Rule 17. The purpose of the "contract for the benefit of another" portion of Rule 17 was explained in *United States v. Thomas B. Bourne Associates*, 367 F. Supp. 919 (ED PA 1973). In that case the United States government contracted with an engineering firm for services relating to the construction of an airport in Guyana. The government sued the engineering firm for breach of contract. The issue before the court was whether the US government was the real party in interest. The court said:

> The inclusion of a "party with whom or in whose name a contract as been made for the benefit of another, however was purely
>
> ". . . upon the ground of caution. The inclusion was to make clear that a party with whom or in whose name a contract had been made for the benefit of another was not to be deprived of his common law right because another was the beneficial owner, and also to make certain that he need not join the beneficial owner."
>
> *3A Moore's Federal Practice para. 17.13 (2d ed. 1970).*
>
> Its purpose then was to protect the right of the promisee to sue, where he had such a right under the substantive law. That is, if the promisee had such a substantive right, then it was the real party in interest under Rule 17. But since Rule 17 is simply a rule of procedure, it did not, and could not, create rights were none exist under the substantive law. *McDaniel v. Durst Manufacturing Company*, 184 F.

> Supp. 430, 432 (D.D. C. 1960). Thus the words of art "real party in interest" should be understood, as Moore suggests, ibid., para. 17.07 to mean that "[a]n action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

Another way of saying this is that if the promisee does not have a right at common law to sue, this provision protected the promisee's right to relief. However, if the statutory law gives the promisee the right to sue then, the promisee becomes the only real party in interest. In *Thomas B. Bourne*, the United States was not allowed to recover the damages that belonged to Guyana.

The Idaho court came to the same position under the prior equity section of the Procedure Code that incorporate the same language. In *Gauchey v. George Jensen & Sons*, 74 Idaho 132, 258 P.2d 357 (1953), the court approved the following:

> The real party in interest is the one who has a real, actual, material or substantial interest in the subject matter of the action, the primary object being to save the defendant from further suits covering the same demand or subject matter, i.e., the real party in interest is the person who can discharge the claim upon which the suit is brought and control the action brought to enforce it, and who is entitled to the benefits of the action, if successful, and can fully protect the one paying the claim or judgment against subsequent suits covering the same subject matter, by other persons.

Idaho Code section 29-102 changed the common law rule that "no claim can be sued upon contractually unless it is in a contract between the parties to the suit." *17A Am Jur 2d 435.* Idaho Code section 29-102 is important to this case because it gave the third party beneficiary the right to sue. It provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

This simple rule is important in this case because it gives a right to the holders of the IRAs that APS cannot take away or diminish. Thus, if APS is allowed to sue Cornerstone and if it recovers from Cornerstone and does not pay the money in full to the IRAs, the IRA holders would still be entitled to sue Cornerstone and recover again. The purpose of Rule 17 would be

defeated since it would not protect Cornerstone from subsequent litigation. The only reasonable conclusion is that the owners of the IRAs are indispensable. A secondary conclusion is that since APS is not suing to recover anything for itself and does not claim any right to the supposed $750 per lot fee, it is not only an unnecessary party, but a party without an interest, or in legal terminology a party without standing.

DATED this 6th day of July, 2007.

Michael D. Gaffney, ISB No. 3558
Of Beard St. Clair Gaffney P.A.

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on July 6, 2007, I served a true and correct copy of the BRIEF IN SUPPORT OF DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Michael D. Gaffney, ISB No. 3558
Of BEARD ST. CLAIR GAFFNEY P.A.
Attorney 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(s), vs. CORNERSTONE HOME BUILDERS, LLC, Defendant(s).	MINUTE ENTRY CASE NO. CV-06-140

On the 12th day of July, 2007, Plaintiff's motion to amend answer 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. Lane Erickson appeared on behalf of the Plaintiff.

No one appeared for or on behalf of the Defendant. (After the hearing counsel were found waiting on the bench in the hall.)

Mr. Erickson presented argument in opposition to Plaintiff's motion to amend answer.

The Court granted Plaintiff's motion to amend answer.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

H:cv06140.28mo
071207AM3StClair

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of July, 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
(Pl - American Pension Services, Inc.)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

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(s), vs. CORNERSTONE HOME BUILDERS, LLC, Defendant(s).	AMENDED MINUTE ENTRY CASE NO. CV-06-140

On the 12th day of July, 2007, Defendant's motion to amend answer 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. Lane Erickson appeared on behalf of the Plaintiff.

No one appeared for or on behalf of the Defendant. (After the hearing counsel were found waiting on the bench in the hall.)

Mr. Erickson presented argument in opposition to Defendant's motion to amend answer.

The Court granted Defendant's motion to amend answer.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

H:cv06140.28mo
071207AM3StClair

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of Aug, 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
(Pl - American Pension Services, Inc.)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

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

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 Brief Supplementing its Second Motion for Summary Judgment and in Opposition to Plaintiff's Second Motion for Summary Judgment

The defendant, through counsel of record, files this brief supplementing its second motion for summary judgment and in opposition to the plaintiff's second motion for summary judgment. This memorandum is supported by the Affidavit of Michael D.

Gaffney filed contemporaneously.

INTRODUCTION

The facts in this matter are in a state of flux. The deposition of Curtis DeYoung (DeYoung), the president of American Pension Services Inc. (APS) was taken last Friday, July 13, 2007. From that deposition have come new facts directly relevant to defendant's second motion for summary judgment.

The defense of illegality is also in a state of flux. The defenses are changing as new facts come to light. Initially the evidence suggested the $750/lot finder's fee was to be paid to and received by APS. That raised question that the payment of that fee would be illegal. Additional discovery was allowed to determine the facts relevant to that suspected illegality. As soon as the defendant's motion to compel was granted supplemental answers to interrogatories were served. In those Mr. DeYoung stated that the finder's fee was to be paid to 5 IRA accounts and that APS would not be receiving it. That was confirmed in his subsequent deposition testimony.

As a result of the recent deposition of DeYoung, the defendant submits the following supplemental brief in support of its second motion for summary judgment and in opposition to the defendant's second motion for summary judgment.

FACTS

The facts in this matter have previously been asserted by the defendant and are incorporated here as if set forth in their entirety. Additionally, the deposition of Curtis DeYoung (DeYoung), the president of American Pension Services Inc. (APS) was taken July 13, 2007. From that deposition have come new facts directly relevant to the parties'

cross motions for summary judgment.

1. APS or DeYoung never talked to any of the five IRA account holders about investing in Cornerstone. DeYoung Dep. 47:9-13.

2. DeYoung individually and not APS made the decisions with regard to the Cornerstone investment. DeYoung Dep. 49:5-9.

3. According to DeYoung, APS filed the present lawsuit as the IRA account holders' agent. DeYoung Dep. 49:10-20.

4. However, DeYoung admits that the five IRA account holders did not authorize him to file the present lawsuit. DeYoung Dep. 33:19-21.

5. DeYoung claims that APS was not acting as the IRA account holders' trustee or custodian. DeYoung Dep. 49:21-50:1.

6. APS admits that it does not have any interest or right in the $750-per-lot-fee which is the subject of this litigation. DeYoung Dep. 50:2-12.

7. The following exchange from DeYoung's deposition demonstrates APS' lack of interest in this litigation:

> Q. [By defense counsel] But APS did not, itself, expect to get paid and, itself, receive money did it?
>
> A. No. It was doing it on behalf of the accounts.
>
> Q. All right. In bringing this litigation, what benefit does APS expect to get out of this litigation?
>
> A. Nothing.

DeYoung Dep. 64:14-22.

8. Of the five IRA account holders the only one who signed a power of attorney to allow DeYoung to act on his behalf was Drew Downs. DeYoung Dep. 48:4-6, Ex. 14.

9. All of the other IRA account holders orally gave general statements to go ahead and invest their money. DeYoung Dep. 48:7-49:1.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted "if the pleadings, depositions, and 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." IDAHO R. CIV. P. 56(c) (2007); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). It is recognized that when assessing the motion for summary judgment, the court must draw all facts and inferences in favor of the non-moving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho at 517, 808 P.2d at 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994); *Haessley v. Safeco Title Ins. Co. of Idaho,* 121 Idaho 463, 825 P.2d 1119 (1992).

The moving party bears the burden of establishing the lack of a genuine issue of material fact. *Tingly v. Harrison,* 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). The non-moving party is entitled to show a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990), *citing*, *Celotex v. Catrett*, 477 U.S. 317 (1986); *see also Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

If reasonable people could reach different conclusions or inferences from the evidence, the motion for summary judgment must be denied. *Thompson v. Pike*, 125 Idaho 897, 900, 876 P.2d 595, 598 (1994); *Doe v. Durtschi,* 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

ARGUMENT

The defendant's second motion for summary judgment has five bases. Bases two and three are that the plaintiff has no standing and is not the real party in interest. Those two bases came about because of the inquiry into the perceived illegality, but are not based on an illegality defense. The recent deposition of DeYoung clearly shows that APS lacks standing and is not the real party in interest and APS' complaint warrants dismissal.

The defendant's fifth basis for its second motion for summary judgment is that the plaintiff's claim is an illegal transaction. It is this sole basis which the plaintiff takes issue with in its second motion for summary judgment. The claimed agreement on the $750/lot fee was at most an oral discussion between APS and Cornerstone. APS was acting under a general power of attorney that for four of the five IRA account holders that was as general as "do whatever you want." Four of the five IRA accounts had not adopted any written IRA agreement of an existing financial institution. Those IRA accounts were oral and a bank was not acting as a trustee or custodian of the funds after they were loaned to Cornerstone. There was no note. Such conduct is a gross violation of the rules applicable to IRAs. The defendant is entitled to assert its defense of illegality.

I. APS lacks standing and is not a real party in interest.

Since APS lacks standing, its complaint warrants dismissal. If a party is not the real party in interest then it "lacks standing." *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 985 P.2d 1145 (1999). If a party is not the real party in interest, and thereby lacks standing, that party and the corresponding lawsuit brought by that party should be dismissed. *Pro Indiviso v. Mid-Mile Holding Trust*, 131 Idaho 741, 746 (Idaho 1998).

Idaho Courts have ruled that a real party in interest "is the person who will be entitled to the benefits of the action if successful." *Scona, Inc.*, a133 Idaho at 288, 985 P.2d at 1150.

Standing is the legal right to initiate a lawsuit. To do so, a person must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action. There are three requirements for standing: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Standing is founded "in concern about the proper--and properly limited--role of the courts in a democratic society. " *Warth*, 422 U.S. at 498. When an individual seeks to avail himself of the courts, he must show that he "is immediately in danger of sustaining a direct injury." *Ex parte Levitt*, 302 U.S. 633, 634 (1937). This requirement is necessary to ensure that courts reserve their judicial power for `concrete legal issues, presented in actual cases, not abstractions. *Assoc. Gen. Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1406 (9th Cir. 1991)

DeYoung unequivocally testified that APS has no right to the claimed $750 fee. DeYoung Dep. 50:2-12. When asked what APS expected to get out of the litigation

DeYoung responded, "nothing." DeYoung Dep. 64:14-22. Under those circumstances APS has sustained no injury and, therefore, has no standing to bring this case.

The plaintiff has tried to use the real party in interest rule to circumvent its lack of standing. IRCP rule 17 recognizes that a suit can be brought in the name of a trustee or a contracting party that makes a contract giving right to a third party beneficiary. It should be noted that Rule 17 does not allow an agent who makes a contract for a principal to sue in the agent's name. If the president of a company makes a contract for his company, the company is the proper party plaintiff not the president. DeYoung's deposition closes the door on APS' ability to assert its trustee, third party beneficiary, and agent arguments.

The plaintiff cannot and does not claim it is suing as trustee. The following exchange from DeYoung's deposition demonstrates:

> Q. Okay. And the five individuals have authorized the corporation to do it as its agent?
>
> A. Yes.
>
> Q. Okay. You're not doing that as a trustee because you're not a trustee, right?
>
> A. That's correct.

DeYoung Dep. 49:15-23. Therefore, the plaintiff cannot claim he was acting as the trustee in bringing the lawsuit.

Further, the plaintiff did not claim to have made a contract with the defendant in which the IRA's were third party beneficiaries. DeYoung was clear that he made the contract as an agent of the IRA's and under the oral, and in the case of one IRA written, power of attorneys. *Id.*; 48:4-13.

The legal analysis of why the third party beneficiary exception to Rule 17 does not apply in this case was set forth in the brief in support of defendant's second motion for summary judgment and will not be restated here. In essence the rule is to allow a third party beneficiary to sue to enforce the rights conferred on him/her. That is not an issue in Idaho since the common law rule now allowing third party beneficiaries to sue directly was changed by statute.

Rule 17 does not specify that an agent may sue in his own name. Therefore, the question with regard to agent and principal is a traditional analysis of standing. It is a question of who has been injured. In the case of a president making a contract for company A; if the contract is breached it is company A that has been injured. There is no injury to the president who merely acted as an agent. The reverse is also true, the agent on a contract has no liability for a breach by the principal. It is solely the principal that can sue or be sued because only the principal has standing, that is, an injury for which redress can be sought.

Only parties to a contract can sue on the contract. "It is axiomatic in the law of contract that a person not in privity cannot sue on a contract. 'Privity' refers to 'those who exchange the [contractual] promissory words or those to whom the promissory words are directed." *Wing v. Martin*, 107 Idaho 267, 272 (1984). The Court in *Wing* further elaborated that "[a] party must look to that person with whom he is in a direct contractual relationship for relief, in the event that his expectations under the contract are not met." *Id.* Further, neither unjust enrichment or quantum meruit allow recovery by a party who lacks a direct contractual relationship to the defaulting party. *Great Plains Equip. v. N.W. Pipeline*, 132 Idaho 754, 767 (1999).

The determination of whether APS is a proper party plaintiff turns on whether APS has any rights under the agreement about the $750/lot fee and whether APS will be injured by its non-payment. DeYoung foreclosed any argument that would suggest otherwise. Thus, APS lacks standing and its claims warrant dismissal.

II. Cornerstone is entitled to assert its illegality defense.

A. Cornerstone is entitled to assert its illegality defense as it relates to standing.

The issue of illegality, while not central to the issue of standing, does have some relevance. If APS had any rights to the $750/lot fee, it would then be an illegal agreement. There has been some confusion about the application of ERISA. The ERISA legislation was divided into four titles. Title one applied to Department of Labor and title two applied to the Department of the Treasury or IRS. It is true that title one does not apply to IRAs, but title two was amended to make it specifically applicable to IRAs.

The ERISA title two prohibited transactions are set forth in 26 USC § 4975. Subsection (e) states: "For purposes of this section the term 'plan' means . . . an individual retirement account described in section 408(a)."

The illegality arises under 26 USC 4975(c) which lists the prohibited transactions and specifically lists as a prohibited transactions "any act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest and for his own account," and "receipt of any consideration for his own personal account by a disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan." 26 USC § 4975(c)(1)(E) and (F). A disqualified person includes any fiduciary and any person providing services

to the plan. 26 USC 4975(e)(2). Additionally, APS is a fiduciary. 26 USC 4975 (e)(3) defines a fiduciary as "any person who exercises any discretionary authority or discretionary control respecting management of such plan." DeYoung testified that he exercised total discretionary control over the IRAs. DeYoung Dep.71:8-72:21; 74:20-77:12.

The plaintiff seeks to avoid the illegality argument on the basis that the prohibited transactions applicable to IRAs are mere tax rules that have tax penalties and that only Title 1 prohibited transactions are illegal. However, the purpose of courts in recognizing an illegality defense is so that the courts do not condone or act in furtherance of activities that are not permitted by statute or that are in breach of fiduciary duties. The Idaho Supreme Court has held that courts should not take any action that would have the effect of recognizing or giving effect to a breach of fiduciary duty that would result in a benefit to the fiduciary. *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833 (1952).

The illegality defense is being asserted in this instance as an additional reason for APS not being allowed to claim it is a proper party plaintiff. If it is a proper party plaintiff it must have an interest in the $750/lot fee. It has disclaimed having such an interest, it is not a trustee, there was no contract for the benefit of a third party. There was an alleged contract made by an agent for the benefit of a principal and if the agent has any benefit from or rights in that contract it would be an illegal right or benefit. Thus, APS simply is not and cannot be a proper party plaintiff.

This is not even a Rule 17 issue. Since APS does not claim to be suing as a trustee and since it did not make a contract that incidentally gave a third party a benefit, rule 17 does not apply. Rather the correct analysis is that APS was a mere agent and has no

standing to sue. An agent is not a party to a contract and has no rights under the contract it is making for its principal. Thus, the portions of Rule 17(a) that provide for a change in parties rather than a dismissal or not applicable. This case should be dismissed because standing is a jurisdictional issue. If a plaintiff has no rights and there is no controversy between these parties the court has no jurisdiction.

B. Cornerstone's illegality defense goes beyond the standing issue.

The illegality defense in this case goes beyond its application to the standing issue. The claimed agreement on the $750/lot fee was at most an oral discussion between APS and Cornerstone. APS was acting under a general power of attorney that for four of the five IRA account holders was as about as general as "do whatever you want." The following exchange for DeYoung's deposition demonstrates:

> Q. [By counsel for the defendant] At least, Mr. Downs gave you a power of attorney?
>
> A. He gave me a written power of attorney.
>
> Q. And the others, what did they give you?
>
> A. Verbal.
>
> Q. What, just a general statement, go ahead and invest it?
>
> A. Yes.
>
> Q. And that was adequate?
>
> A. Adequate for me, yes.

DeYoung Dep. 48:4-13.

That is a gross violation of the rules applicable to IRAs. Generally the IRA account must be held by a bank. 26 USC § 408(a)(2) and Treasury Regulation 1.408-2.

Bank for that purpose includes any regulated financial institution There is an exception for entities that get approval from the IRS to act as a bank, but Mr. DeYoung said APS had not applied for nor obtained permission to so act. *See* DeYoung Dep. 21:9-20, Ex. 2.

Under ERISA title I individual account plans are allowed to be self directed. 29 CFR § 2550.404(c). That same thinking has been applied to IRAs since they are individual account plans; however, there are no regulations specifically dealing with self directed IRAs. The title one regulations give some idea of what self direction under title two means. In essence it means the owner must direct the investment without influence from disqualified persons. In this case, there was no self direction, the owners did not direct the loan to Cornerstone and did not ask for a $750/lot fee. They didn't even know of the transaction. DeYoung Dep. 47:9-13. DeYoung in his deposition said he never talked to them about the loan to Cornerstone. DeYoung Dep. 47:9-13; 106:7-10.

Additionally, each of the IRA owners other than DeYoung has submitted an affidavit stating they have no knowledge of any facts or circumstances of the underlying litigation. APS pursued a possible loan to Cornerstone, got the parties together, and participated in the entire transaction without any involvement of the IRA owners. The only self direction was the general oral directed to invest the funds as you see fit. When the funds were disbursed to Cornerstone, APS did not obtain a promissory note and thus was not the custodian of that asset.

The actions of APS were one of an agent exercising total discretion. ?The agent was acting like a trustee, but the law does not allow APS to be a trustee or custodian of an IRA. 26 USC 408(a) without express written permission of the Department of the

Treasury and there was no such authorization. APS was exercising discretion illegally. APS seemed to think that a power of attorney was equivalent to being a trustee. The master trust agreement that APS had each IRS participate adopt says that APS is a trustee, yet in his deposition he said that was a typing error. DeYoung Dep. 36:10-44:2; 74:1-19; Ex. 2, ¶ 6. That is only the start of the illegality. That document is between APS and First Utah Bank. Only one of the five IRA account holders adopted that agreement. 26 USC section 408(a) requires that the IRA agreement be in writing. DeYoung admitted there was no current adoption agreement on four of the five IRAs and there had been no adoption agreement for many years. *See* DeYoung Dep. 36:10-52:23; Ex. 2.

This court should not lend the sanctity of its decisions and the power of its judgments to confirm rights that APS is seeking which would only validate its gross disregard of the law. Thus, the defendant's second motion for summary judgment should be granted and the plaintiff's claims should be dismissed.

CONCLUSION

Based on the foregoing, the defendant respectfully requests that it's summary judgment be granted and the plaintiff's claims dismissed in their entirety.

Dated: July 20, 2007

Michael D. Gaffney, ISB No. 3558
Of Beard St. Clair Gaffney PA

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on July 20, 2007, I served a true and correct copy of the Defendant's Brief Supplementing its Second Motion for Summary Judgment and in Opposition to Plaintiff's Second Motion for Summary Judgment on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☒ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☒ Hand-delivered ☒ Facsimile

Michael D. Gaffney, ISB No. 3558
Of BEARD ST. CLAIR GAFFNEY PA
Attorney for Defendant

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
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 **PLAINTIFF'S RESPONSE TO DEFENDANT'S SECOND 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") Second Motion for Summary Judgment.

INTRODUCTION

Cornerstone is seeking an entry of Judgment in its favor based upon its Brief in Support of its Second Motion for Summary Judgment. In its memorandum, Cornerstone argues it is entitled to judgment in its favor as a matter of law based upon Cornerstone's allegation that APS is not the real party in interest. For the following reasons APS is properly named in this action and is the real

party in interest in accordance with Rule 17(a) of the Idaho Rules of Civil Procedure. APS is entitled to this Court's denial of Cornerstone's Second Motion for Summary Judgment and this Court's entry of Judgment that APS is the proper party in this action.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

In its prior memorandums submitted in support of its Motions 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 previously submitted memorandums and respectfully refers the Court to said memorandums.

II. APS IS PROPERLY NAMED IN THIS ACTION .

APS has standing in this action and has been properly named in accordance with Rule 17(a) of the Idaho Rules of Civil Procedure.

> It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). Standing is a preliminary question to be determined by this Court before reaching the merits of the case. Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). The doctrine of standing is a subcategory of justiciability. Id. at 639, 778 P.2d at 761. As this Court has previously noted, the doctrine is imprecise and difficult to apply. Id. at 641, 778 P.2d at 763 (citing Valley Forge College v. Americans United, 454 U.S. 464 (1982)). Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. Van Valkenburgh at 124, 15 P.3d at 1132; Boundary Backpackers v. Boundary County, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (quoting Miles at 639, 778 P.2d at 761). To satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." Id. (citations omitted). This requires a showing of a "distinct palpable injury" and "fairly traceable causal connection between the claimed injury and the challenged conduct." Miles at 639, 778 P.2d at 761 (internal quotations omitted).

Young v. City of Ketchum, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

Idaho Rule of Civil Procedure 17(a) provides:

> 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. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; *and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.*

IRCP 17(a) (emphasis added).

"A real party in interest is the person who will be entitled to the benefits of the action if successful, one who is actually and substantially interested in the subject matter." Taylor v. Maile, 142 Idaho 253, 258 (2005).

In this action Cornerstone readily admits it entered into the contract in issue with APS. (Answer ¶ 13). Cornerstone is now attempting to rid itself of its contractual obligations by alleging that APS is not the real party in interest, thus not entitled to recover under the contract. (See Def's. Br. Supp. Second Mot. Summ. J.). As established in APS's discovery responses in this matter as well as the affidavits submitted in support of APS's Second Motion for Summary Judgment, five individuals, Curtis DeYoung, Drew Downs, Harry Segura, Dale Henderson and Dean DeYoung each had and continue to have their own Individual Retirement Accounts (IRAs) maintained by APS. (Aff. Michael D. Gaffney ¶ 2); (Aff. of Curtis DeYoung ¶ 4, Aff. of Dean DeYoung ¶ 2, Aff. of Drew Downs ¶ 2, Aff. of Dale Henderson ¶ 2, Aff. of Harry Segura ¶ 2). Four of these five individuals authorized Curtis DeYoung (the fifth IRA holder) to invest their IRA funds as he deemed would be beneficial to them. (Aff. of Dean DeYoung ¶ 3, Aff. of Drew Downs ¶ 3, Aff. of Dale

Henderson ¶ 3, Aff. of Harry Segura ¶ 3). Curtis DeYoung did exercise the authority given to him by these four IRA holders by having APS invest these four IRA holders funds, as well as his own personal IRA funds, into a property development project, which is the subject matter of this litigation, which APS subsequently did. (Aff. of Curtis DeYoung ¶¶ 5-8)

Each of the five IRA holders signed an Adoption Agreement to the A.P.S. Master Individual Retirement Trust Account as evidenced by the documents submitted in the Affidavit of Michael D. Gaffney. (Aff. Michael D. Gaffney ¶ 2, Adoption Agreement to the A.P.S. Master Individual Retirement Trust Account). In the APS Master Individual Retirement Trust Agreement ("Trust Agreement"), the five individuals contractually entered into an agreement wherein APS was granted certain administrative rights and duties. Specifically, each of the five investors authorized APS "To settle, compromise, or submit to arbitration any claims, debts, or damages, due or owing to or from your interest in the Depository Account and to commence or defend suits or legal proceedings with respect to such interest in the Depository Account, and to represent you in all such suits or legal proceedings." (Aff. Michael D. Gaffney ¶ 2, APS Master Individual Retirement Trust Agreement, ¶6.12) APS's filing of suit in this matter was done so in compliance of this contractual obligation.

Assuming arguendo that APS is not the real party in interest, which APS affirmatively asserts that it is as more fully described below, "[U]nder the terms of Rule 17(a), an action may not be dismissed if the real parties in interest have ratified its commencement by a third party." *Union Warehouse and Supply Co. Inc., v. Illinois R.B. Jones, Inc.*, 128 Idaho 660, 665, 917 P.2d 1300, 1305 (1996). As evidenced by the contractual provision outlined above, the IRA holders allowed APS to file suit in this matter. The affidavits of each IRA holder submitted herewith ratify APS's prosecution of this matter and as such, APS is the proper party in this case.

APS is also the real party in interest in this matter by the fact that APS has a contractual relationship with the IRA holders mentioned above. Since APS has a contractual relationship as the Administrator of each IRA holder's IRA funds and the fact that those IRA funds were utilized in this matter, APS is exposed to certain liabilities with each IRA holder. In Idaho Lumber v. Buck, 109 Idaho 737, (Idaho Ct. App. 1985) the Court was faced with a similar real party in interest issue. In Idaho Lumber, Plaintiff entered into a contractual agreement to remodel a building and construct a parking lot on property which Defendant had an interest in. Defendant defaulted on the contract and Plaintiff brought suit to recover under the terms of the contract. Id. at 739. On appeal, Defendant raised the proper party issue, arguing that a portion of the money allegedly owed to Plaintiff was actually owed to Plaintiff's subcontractors, thus Plaintiff was not the proper party to bring suit. Id. at 743. The Court denied Defendant's argument by acknowledging the sums owed to the subcontractors, then stating, "However, if Idaho Lumber has potential liability to these subcontractors then it would be a real party in interest as to the sum claimed. . . . We therefore reject the argument that Idaho Lumber is not the real party in interest as to the full amount of its claim." Id. at 743-44.

Such are the circumstances at hand in this case. By and through APS's contract with Cornerstone and the contractual agreement between APS and the IRA holders, APS is exposed to liability to the IRA holders. Because this liability exposure arises from the contract between APS and Cornerstone, APS is properly named and the real party in interest as it stands to benefit if this action is successful.

For the foregoing reasons, APS has standing and is the proper party in this action.

III. CORNERSTONE'S ALLEGATION OF APS SUING AS TRUSTEE IS MISPLACED

Cornerstone further argues that APS cannot sue as a trustee on behalf of the IRA holders because APS is not a trustee as defined under Treasury Regulation 1.408-2. (Def's. Br. Supp. Second Mot. Summ. J. at 6-8). Cornerstone's argument to the effect that APS cannot sue as a trustee is misplaced because APS is not making any assertion that it is a trustee under Internal Revenue Code ("Code") Section 408(a)(2) or Treasury Regulation 1.408-2(b)(2). APS is suing on behalf of the accounts as the "administrator." (Aff. of Curtis DeYoung ¶ 3); (Dep. of Curtis DeYoung at 7, lines 2-7.)

APS is clearly identified in the APS Master Individual Retirement Trust Agreement as the "Administrator." (Aff. Michael D. Gaffney ¶ 2, APS Master Individual Retirement Trust Agreement, opening ¶). The "Custodian" is First Utah Bank. Id. APS agrees that "[a]n individual retirement account must be a trust or a custodial account." Treas. Reg. 1.408-2(a). However, APS does not assert that it is the trustee or the custodian.

Cornerstone also contends that administrators cannot be fiduciaries. (Def's. Br. Supp. Second Mot. Summ. J. at 8). It is not clear how this unsupported contention relates to Cornerstone's instant motion regarding real parties; however, the statement is inaccurate.[1] With regard to prohibited transactions involving IRAs, a fiduciary means any person who:

---

[1] In this portion of Cornerstone's argument (page 8), Cornerstone also quotes 29 CFR 2440.404c-1(c)(2), which is a Department of Labor regulation under Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). ERISA Section 404(c) and the associated regulations pertain to participant directed investments under "employee benefit plans." See ERISA Section 401(a). There are no employee benefit plans at issue in this case, only IRAs are at issue in this case, and thus the cited regulation (and ERISA itself) has no relevance to the real party in interest issue raised by the instant motion or to this case as a whole. See ERISA Sections 3(3) and 4. The regulation cited by Cornerstone is further irrelevant because it applies to situations where a fiduciary of an employee benefit plan seeks to avoid liability for losses when a participant exercises control over the assets in his or her own account. See 29 CFR 2550.404c-1(a)(1) and (2). ERISA Section 404(c) and the safe harbor afforded thereunder has absolutely nothing to do with this case.

1. Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;

2. Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so;

3. Has any discretionary authority or discretionary responsibility in the administration of such plan; or

4. Any person designated under Section 405(c)(1)(B) of ERISA.

See Code Section 4975(e)(3).

Fiduciary responsibility is not limited to "trustees." Fiduciaries can be identified through various means and may often include administrators. There is nothing to prohibit IRA administrators from exercising discretion or administering IRA accounts. See Code Section 408. The suggestion that it is illegal for an IRA to have an administrator goes far beyond any identifiable statutory or regulatory prohibitions (and accepted practice). There is nothing illegal or uncommon about a trustee or custodian holding assets and taking direction from another party including an administrator.

The listing of improper IRA investments and the associated methodologies for accomplishing such is short. See Code Sections 408(a)(3) and 408(m). The acquisition of "collectibles" by an IRA are prohibited for all practical purposes. Id. Investments in collectibles are not expressly prohibited, rather, they are treated as distributions. Id. Collectibles are not at issue here. Investment in life insurance contracts is also prohibited. See Code Section 408(a)(3). Life insurance contracts are not at issue here. The other prohibitions are those listed as prohibited transactions in Code Section 4975. There are no prohibited transactions at issue here.[2]

[2] The issue of prohibited transactions is discussed in detail in Plaintiff's Second Motion for Summary Judgment.

CONCLUSION

For these reasons and those enumerated in APS's memorandum submitted in support of its Second Motion for Summary Judgment, Cornerstone's assertion that APS is not the real party in interest fails and APS is entitled to judgment on this issue as a matter of law.

DATED this 20th day of July, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: _____
FOR STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 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
[X] Facsimile — *745-8160*
[ ] Email

Winston V. Beard
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[ ] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile — *529-9732*
[ ] Email

FOR STEPHEN J. MUHONEN

SC.

BONNEVILLE COUNTY

7 JUL 27 P1:41

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Defendant, Cornerstone Home Builders, LLC, by and through counsel of record, hereby submit their reply to Plaintiff's memorandum in opposition to Defendant's Motion for Summary Judgment as follows.

Part I

In section II of its Memorandum in Opposition, American Pension Services, Inc. (APS) sets forth its factual argument for why APS is a real party in interest. The argument is premised on the claimed presence of a contract between APS and the IRA owners. That claim is incorrect.

To show the inconsistency between the APS brief and the facts, the key facts concerning the claimed contract as stated in section II of APS's brief are set forth below and after each claim the facts drawn from discovery are set forth.

Claimed fact 1: "Each of the five IRA holders signed an Adoption Agreement to the A.P.S. Master Individual Retirement Trust Account."

From Discovery:

The APS Master Individual Retirement Trust Agreement, along with all of the documents related to the underlying transaction, are attached under Exhibit A of the Affidavit of Michael Gaffney on record. The Trust Agreement is a 2006 agreement with First Utah Bank. That Trust Agreement was adopted only by Drew Downs

In 1982 Mr. Henderson and his wife signed an adoption agreement adopting a master trust agreement between APS and Utah C.V. Federal Credit Union. In 1982 Dean DeYoung and Curtis DeYoung similarly adopted an IRA with Utah C.V. Federal Credit Union. Finally, in 1993 Mr. Segura did the same. The following excerpt from Mr. Curtis DeYoung's deposition is typical:

> Q. Okay. Do you have anything signed by the Hendersons that would show they adopted Deposition Exhibit 2 as their IRA account agreement.
>
> A. No.
>
> Q All right. Do you have anything indicating -- anything in writing indicating that they knew that their account had been changed and that the adoption agreement was different?
>
> A. No.

Depo of Curtis DeYoung, page 38 lines 15-23.

Mr. DeYoung explained that the credit union went out of business so he changed the accounts. *Id.* at 40. Since the credit union is no longer in existence, the adoption agreements signed by four of the five IRA owners are no longer in force and there is no subsequent document showing that any of the four set up an IRA account under the First Utah Bank Master Trust document.

Analysis:

Thus four of the five so called IRAs are asserted where the owners had never signed an IRA agreement with the bank that was holding their money at the time it was loaned to Cornerstone. These accounts are not IRAs but mere savings accounts held by First Utah Bank for the benefit of the four owners. Only Mr. Downs signed an adoption agreement adopting the Master Trust established with First Utah Bank. He is the only IRA owner. The others are mere account owners.

There are strict rules for establishing IRA accounts. 26 USC 408(a) requires a trust arrangement setting up a written governing document that incorporates the restrictions imposed by section 408. IRAs do not simply exist because someone intended to create an IRA. They do not exist is the absence of a written trust document incorporating the terms of section 408. Any recognition of an account as an IRA when there is no written trust agreement adopted by the owner would amount to a judicial repeal of section 408.

Claimed fact 2: "In the APS Master Individual Retirement Trust Agreement . . . the five individuals contractually entered into an agreement wherein APS was granted certain administrative rights and duties." Specifically each of the five investors authorized APS "to settle, compromise, or submit to arbitration any claims, debts, or damages, due or owning to or from [their] interest in the Depository Account and to commence or defend suits or legal proceedings with respect to such interest in the Depository Account, and to represent [them] in all such suits or legal proceedings."

From Discovery:

The facts are that the quoted material giving APS authority to file suit is in paragraph 6.12 of the Master Trust Agreement with First Utah Bank. Only Mr. Downs adopted that

agreement. The other four account owners never adopted that agreement and never gave the claimed authorization.

Although APS's brief does not mention the power of attorney that has been at issue in this case, it should be noted that the only one power of attorney exists and that was signed by Mr. Downs. The other account owners gave no power of attorney and signed no agreement adopting the First Utah Bank Master Trust. That single power of attorney is in the documents attached to Mr. Gaffney's affidavit.

With regard to Mr. Downs, the Master Trust Agreement with First Utah Bank that he adopted provides:

"6.17.2 The responsibility for initiating any investment transaction is solely that of you [the account owner]."

On page 47 of his deposition, Mr. DeYoung states:

> Q. Okay. And, in fact with regard to the Cornerstone loans that we're talking about here, did you ever go back and talk to any of the five IRA accounts about making that investment?
>
> A. No.

Thus, even the investment of Mr. Downs' funds was made outside the context of Master Trust agreement.

It could be argued that the investment was made under APS's trust powers that are set forth in the First Utah Master Trust Agreement. However, Mr. DeYoung said that the reference in the Master Trust Agreement to APS having trust powers was a typographical error and that APS was not acting as a trustee. *Id.* at page 74.

Analysis:

After claiming that a contract existed between APS and the account holders, APS in its brief analogizes the APS/account holder relationship to a contractor / subcontractor relationship and cites *Idaho Lumber v. Buck*, which is a contractor/subcontractor case. Property owners contract directly with builders. The builder then subcontracts portions of the construction project such as the roofing. The builder has a direct contractual relationship with the owner. A

subcontractor has no contract with the homeowner. That fact scenario is inapplicable here. First, there are no documents between any account owner and any trustee or custodian of the account. Second, under no circumstances would a Bank acting as trustee or custodian be a subcontractor of APS nor would APS be a subcontractor of the bank. There are no documents to suggest such a subcontractor relation existed.

Since APS could not be a trustee or custodian, it had no right to hold the accounts. It would have been illegal for APS to hold the accounts or to assume the role of bank or trustee. APS is a third part administrator that handles administrative details but does not hold the funds. If it does not hold the funds, it had no contractual relationship with Cornerstone. Mr. DeYoung affirmed this fact at pages 50-51 of his deposition:

> Q. Okay. But, in fact, who made the decisions with regard to the Cornerstone investment?
>
> A. I did.
>
> Q. Individually?
>
> A. Yes.
>
> Q. Okay, Now, what about with regard to bringing this suit. Are you doing that as an agent of these five individuals?
>
> A. No. I'm actually doing it as a corporation.
>
> Q. Okay. And is the corporation doing it as an agent of those five individuals?
>
> A. Yes.
>
> Q. Okay. You're not doing that as a trustee because you are not a trustee, right?
>
> A. That's correct
>
> Q. Okay. Or, as a custodian because you are not a custodian?
>
> A. That's correct.

Q. All right. You've -- I think you indicated in answers to discovery that if you recover money in this lawsuit, that $750-per-lot fee, that that will go to the various IRA accounts --

A. Yes.

Q. Is that correct? Will APS get any of that money?

A. No of the 750, no.

Q. Okay. So APS doesn't claim any right or interest to that money?

A. No.

In its brief APS argues that it is a proper party plaintiff because APS "stands to benefit if this action is successful." However, Mr. DeYoung testimony demonstrates that this assertion is not true.

Part II

Since APS has no interest in any recovery from Cornerstone, it is not a proper party plaintiff. Unlike a trustee a mere agent does not possess real party status. *Hanna Mining Co. v. Minn. Power & Light Co.*, 573 F. Supp. 1395, 1398 (D. Minn. 1983) aff'd 739 F.2d 1368 (8th Cir. 1984). Thus the primary question before this Court is what is the appropriate action to take in light of the fact that APS, at most, can claim it was acting as an agent for the purported IRA holders?

Idaho R. Civ. Pro.17 seeks to avoid dismissals when it was difficult for a plaintiff to determine at the beginning of the suit who is the real party in interest. When it is discovered that the named plaintiff is not the real party in interest, the court is required to allow the plaintiff a reasonable time to cure. The cure can be effected through ratification, joinder, or substitution. Whichever option the court chooses, the rule requires that it "have the same effect as if the action had been commenced in the name of the real party in interest." The end result is what ultimately matters, not which option is chosen.

APS argues for the ratification option. Ratification is effected through a formal notice to the court that that the ratifying party (1) authorizes continuation of the action and (2) agrees to be

bound by its results. See Moore's Federal Practice section 17.12 footnote 6. Joinder or substitution is more common, Moore's Federal Practice section 17.12 n 8.

Notwithstanding APS's expressed preference for ratification, substitution would better serve the end of having the same effect as if the suit had been commenced with the proper party plaintiffs. Since APS clearly has no claim to the alleged $750 fee, leaving APS as a party plaintiff would only tend to confuse who has the rights. There is also the practical question of separate counsel being needed for the various named parties. This is particularly true as to APS and the four non-IRA account owners. Given that the complaint and amended complaint consistently allege that APS is seeking recovery based upon a direct contractual relationship with Cornerstone, without reference to or an assertion of claims for the individual account holders, a clear conflict of interest now exists based upon the pleadings.

The essence of Rule 17 is to make the real parties in interest effective parties that will be bound by the results. The position of the account holders may have preclusive effect on any subsequent claim those account holders may choose to make against APS. Certainly the statements made in this litigation by those account holders will affect their rights against APS. Because of the consequences of this litigation on the rights of the account holders, it is important they know they are the proper parties and that their rights are being affected. It is also important that they have separate counsel since there is a significant conflict of interest between APS and the account owners.

The danger arising from the account holders not being parties and not having separate counsel is readily apparent. The account owners have filed two affidavits. In the first affidavit they have stated that they have an IRA account and that they have given Curtis DeYoung authority to invest those funds. Those affidavits were no doubt given at the request of DeYoung or his counsel. When the affidavits were requested and given, DeYoung knew that four of the five accounts were not IRA accounts and that no account holder had signed any document giving him authority to invest. Furthermore, investment authority belongs to a trustee and Curtis DeYoung knew he was neither a trustee nor a custodian. The first affidavits also state that the owners granted DeYoung authority to invest their IRA funds in a property development project. However, Mr. DeYoung, in answer to defendant's interrogatory 16, states that the "[p]laintiff

made no suggestions, recommendations, or other communications about any loans to defendant to any person, entity, plan, trust, or account." Gaffney Affidavit, Ex A. A second set of affidavits was then filed with the court by APS's counsel.

If there is a recovery, it is important that the money go to the owners of the IRA and not to APS. If it went to APS it would reward APS for illegal activity. All negotiations, payments, settlements, if any, must be between Cornerstone and those IRA accounts.

The rights of the five account owners in any recovery, if there is one, are not uniform. Those five account owners appear to have different rights. This is based upon an unclear rationale underlying the $750 per lot fee APS originally laid claim to. It is unclear whether the fee was for reimbursement for land acquisition, land development or simply for putting the investors together. For example, Henderson put up $226,000 for the down payment on the Cornerstone property. That occurred in September of 2003. None of the other account owners participated in funding for the land; however, the $750 fee per lot fee appears to have been calculated in relation to the down payment and the value of the land. See pages of 97-99, Curtis DeYoung deposition. Other accounts disbursed money at Cornerstone at later times to fund development and improvements See pages 97-102 of DeYoung deposition. DeYoung states however that the claimed per lot fee had nothing to do with funding development, but rather related to "bringing the parties together." This was presumably done for Henderson's benefit. See DeYoung deposition pages 101-104. Mr. DeYoung was asked if the fee sharing among the five accounts would recognize any difference in the timing of when the money was put in or the reasons for which the money was disbursed. He said no. DeYoung deposition p. 105-6. However, we do not know what positions the real parties in interest may take nor has there been any consideration of what would be fair as to each account owners since there is no agreement as to how the fees are to be disbursed. APS assumes there is no difference in the rights or interests of the account owners now that it claims that it was simply "passing through" these fees. Only a party with no financial interest in the outcome would make such an assumption.

Cornerstone has been seeking to depose the five IRA owners. It has been told it must go to Utah to do that. If they were parties, they would have to come to Idaho and would have to answer questions about their claims. To date, that has not happened. Cornerstone has had to pay

Utah attorneys to obtain subpoenas to serve on the real parties in interest. It should not have to incur that expense. If they assume their rightful position as proper party plaintiffs, the true facts and true claims will come out with much less expense to all parties.

The best way to make sure that rights of all involved are protected is to have the proper parties assume their role as named plaintiffs and to have them represented by counsel separate and independent of APS. Substitution would seem to do that best, but in either event the effect of ratification or substitution must be the same.

Part III.

APS assumes that dismissal of this action is in appropriate. Rule 17(a) certainly favors non-dismissal; however, that is not an absolute rule and dismissal may still be appropriate is this case.

When APS filed the amended complaint, it knew it was not a trustee or custodian of the claimed funds. APS knew it was not entitled to any money from Cornerstone. Nonetheless the amended complaint alleges that APS provided funding to Cornerstone and that APS was entitled to the $750/lot fee because of its "knowledge, experience and relationship with individuals in the finance industry." APS filed its amended complaint in bad faith with full knowledge that it was not entitled to recover the $750 / lot fee and transparently changed its claims once Cornerstone pointed out to the court the illegality of the alleged agreement.

The following sets forth a good summary of the applicable law:

> The last sentence of Rule 17(a) provides that "no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." FED. R. CIV. P. 17(a). According to the Advisory Committee's Notes, this provision was added "simply in the interests of justice" and "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." FED. R. CIV. P. 17(a) Advisory Committee Notes, 1966 Amendment.

. . . .

In accordance with the Advisory Committee's note, most courts have interpreted the last sentence of Rule 17(a) as being applicable only when the plaintiff brought the action in her

own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult. *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (district court retains discretion to dismiss action where there was no reasonable basis for naming incorrect party); *Feist*, 100 F. Supp. 2d at 276 ("Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. In order to substitute the trustee as the real party in [**16] interest, Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable mistake."); *Lans v. Gateway 2000, Inc.*, 84 F. Supp. 2d 112, 120 (D.D.C. 1999) ("it is appropriate to liberally grant leave to substitute a real party in interest when there has been an honest mistake in choosing the nominal plaintiff, meaning that determination of the proper party was somehow difficult at the time of the filing of the suit, or that the mistake is otherwise understandable."), *aff'd*, 252 F.3d 1320 (Fed. Cir. 2001); *South African Marine Corp. v. United States*, 10 C.I.T. 415, 640 F. Supp. 247, 254-55 (Ct. Int'l Trade 1986) (Rule 17(a) "should be used to prevent forfeiture and injustice where the determination as to who may sue is difficult").

Wieburg v. GTE Southwest Inc., 272 F.3d, 308-309 (5th Cir. 2001).

In this case APS clearly knew or should have known when it filed the complaint that it was not entitled to the $750 per lot fee. It clearly knew or should have known that the allegations of its amended complaint were false. It brought the suit without ever talking to the IRA owners about it.

There is no statute of limitations issue; therefore, the rights of the five accounts owners would not be prejudiced by a dismissal of this suit. Because of the apparent bad faith by APS in filing the amended complaint in its own name when it knew it had no rights against Cornerstone, and the absence of prejudice to the five account owners makes dismissal an appropriate course for the court to take.

DATED this 27th day of July, 2007.

Michael D. Gaffney, ISB No. 3558
Of Beard St. Clair Gaffney P.A.

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on July 27, 2007, I served a true and correct copy of the DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☐ Hand-delivered ☒ Facsimile

Michael D. Gaffney, ISB No. 3558
Of BEARD ST. CLAIR GAFFNEY P.A.
Attorney for Error! Reference source not found.

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
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 **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S SECOND 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 Second 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. In attempt to rid itself of its contractual obligation to APS, Cornerstone has engaged itself into a collateral attack upon APS, attempting to discredit the

administration and internal operations of APS to flush out an illegality argument. Such attack appears to be made to support the averment by Cornerstone that to allow enforcement of the contract between APS and Cornerstone would then be sanctioning APS to violate ERISA and IRA regulations.

For the following reasons and those outlined in APS's Second Motion for Summary Judgment, with its supporting memorandum, and APS's Response Memorandum to Cornerstone's Second Memorandum in support of its Second Motion for Summary Judgment, each of Cornerstone's new defenses fails. APS is entitled to this Court's Order that APS is the proper party and that the contract between APS and Cornerstone is legal and binding.

ARGUMENT

I. Cornerstone's Collateral Attack On APS Cannot Be Lawfully Made.

Cornerstone attempts to call into question the internal operations, administration and conduct of APS to avoid its contractual obligation to APS. In Cornerstone's briefing, it goes to great lengths to attempt to demonstrate to the Court that the way APS conducts its business is in violation of various federal regulations. The resultant assertion made by Cornerstone is that if this Court upholds the contract between the parties, then APS's "illegal" conduct is being sanctioned. APS's operations are legal and nonetheless, have no bearing on the legality of the contract between the parties.

(The following was previously provided to this Court in response to Cornerstone's Motion to Compel and is re-inserted here to assist the Court from having to peruse the voluminous filings to locate.) The United States Supreme Court has dealt with this illegality defense in a case similar to the defense as presented by Cornerstone, though not for quite some time. In D.R. Wilder Manuf. Co. v. Corn Prod. Refining Co., 236 U.S. 165 (1915), the defendant was trying to escape its contract

with Plaintiff company, alleging that the contract between the two was illegal because the Plaintiff organized itself in violation of the Sherman anti-trust act. Id. at 170. In upholding the contract between the parties, the Court wrote:

> Having dealt with the Refining Company as an existing concern possessing the capacity to sell, speaking generally the assertion that it had no legal existence because it was an unlawful combination in violation of the Anti-Trust Act was irrelevant to the question of the liability of the Manufacturing Company to pay for the goods since such defense was a mere collateral attack on the organization of the corporation which could not be lawfully made. Besides, considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties, -- the receipt of the goods on the one hand and the payment of the price on the other. *And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result -- doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence....*

D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 171-172 (U.S. 1915)(emphasis added).

Like the manufacturing company in D.R. Wilder Mfg. Co., that was liable under its contract with the Refining Company despite the assertion that the Refining Company had no legal existence, Cornerstone is liable for the $750.00 per lot fee regardless of whether APS allegedly violated ERISA or IRA laws.

The D.R. Wilder Mfg. Co. Court, in reaching the above decision, relied heavily upon Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902). In Connolly, the defendant was attempting to escape its contractual obligations of paying for pipe sold to it by plaintiff, by asserting that plaintiff was a trust or combination of persons and corporations organized for the express purpose

of unlawfully carrying out restrictions in trade. Id. at 541. In holding the contract was enforceable between the parties, the Court stated that even if the combination was illegal, the illegality did not eliminate the defendant's obligation to pay for the pipe. Id. at 545. "[T]he buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe." Id.

In support of its position the Supreme Court then cited a string of cases supporting its position. In National Distilling Co. v. Cream City Importing Co., 86 Wisconsin 352 (1893), defendants attempted to escape their contractual obligations due to plaintiff allegedly being involved in illegal conduct or conduct opposed to public policy. Id. at 355. The Court held that even if all of the illegal acts were true, "there is no, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff was tainted with any illegality, or was contrary to public policy." Id. "The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy." Id.

The Connolly Court then explained, as is applicable in this case, that the cause of action by plaintiff was to enforce defendant's contractual obligation to pay for the pipe. Connolly, 184 U.S. at 549. The action was not one to enforce or involved the enforcement of the alleged arrangement or combination between the plaintiff and other corporations in relation to the sale of Akron pipe. Id. "The purchases by the defendants had no necessary or direct connection with the alleged illegal

combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the later became an illegal combination." Id.

The foregoing cases and analysis are entirely applicable in this action. In no situation can it be argued that APS's internal operations and administration had anything to do with the contract entered into by Cornerstone with APS. Cornerstone readily admits that it entered into contract with APS. It is that contract that is the issue of this case. Cornerstone's allegations of illegality by APS have no connection or affect on the $750.00 per lot contract between APS and Cornerstone.

II. APS's Conduct In This Action Is Legal.

Cornerstone's opposition to APS' Second Motion for Summary Judgment attempts to identify the existence of an "illegality" relative to the relationships between APS and the IRAs. This effort fails. First, the agreements and understandings between APS and its clients as the administrator for IRAs is not at issue in this litigation. APS is not seeking to enforce the agreements between itself and the IRAs, thus those relationships are not relevant. Second, the failure to obtain a tax benefit does not rise to the level of engaging in an act which is prohibited by statute and thus arguably "illegal." Third, Cornerstone fails to identify any illegality.

1. ERISA Has No Relationship To This Case And There Are No ERISA Violations

In its response brief, Cornerstone continues to discuss the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). ERISA is not at issue in this case. IRAs are at issue in this case. *See generally* (Aff. of Curtis DeYoung, Aff. of Dean DeYoung, Aff. of Drew Downs, Aff. of Dale Henderson, Aff. of Harry Segura, Aff. Of Michael D. Gaffney ¶2, Ex. A). IRAs are governed by Internal Revenue Code Section 408, *et seq.* and the regulations promulgated thereunder, *i.e.*, 26 CFR 1.408, *et seq.* ERISA, and particularly the ERISA provision cited by Cornerstone in its

briefings, applies *only* to "employee benefit plans" as that term is defined in Section 3(3) of ERISA. *See* ERISA Section 4. An "employee benefit plan" in most cases requires sponsorship, which is not present here.

Cornerstone engages in a misguided discussion regarding the relationship between ERISA and the Internal Revenue Code. Cornerstone completely misunderstands and misrepresents the structure and relationship between the Internal Revenue Code and ERISA. ERISA is a law that was passed in 1974 and has since been amended many times. ERISA is codified in Title 29 of the U.S. Code. For example, ERISA Section 4 is codified at 29 U.S.C. Section 1003. The Internal Revenue Code is codified in Title 26 of the U.S. Code. Title II of ERISA amends portions of the Internal Revenue Code. However, this does not make ERISA broadly applicable to all issues addressed in the Internal Revenue Code. As an example of the absurdity that would result -- ERISA does not apply to require that IRAs furnish summary plan descriptions or file annual Forms 5500 under ERISA Sections 101 and 104.[1]

In its briefing, Cornerstone cites 29 CFR 2550.404(c), a regulation promulgated under a provision contained in Title I of ERISA. Cornerstone vaguely and inaccurately asserts a violation of this ERISA regulation. The regulation and the corresponding statute (ERISA Section 404(c) (29 U.S.C. 1104(c))) provide a safe harbor that *allows* (not mandates) *employee benefit plan* fiduciaries to avoid liability for *investment losses* resulting from a participant's exercise of control over his or her own account.[2] This *optional* safe harbor is often used by ERISA defined contribution plans so

[1] Assuming an ERISA plan failed to file a Form 5500 for a year (or filed it late), such would not result in the plan's inability to recover plan assets and gains relative to investments with third parties.

[2] ERISA Section 404(c) is under Title I of ERISA. ERISA Section 404 is under Part 4 of Title I of ERISA. Part 4 is titled "Fiduciary Responsibility." ERISA Section 401(a)(1) states "[t]his *part* shall apply to any *employee benefit plan* described in Section 4(a). . . ." (emphasis added). It is clear that ERISA Section 404(c) and the associated regulations

that employers do not incur liability for investment losses resulting from a participant's own investment decisions; however, the safe harbor has no relationship to this case by analogy or otherwise. First and foremost, there is no employee benefit plan at issue here – just IRAs – and thus 29 CFR 2550.404c does not apply in any fashion. Second, APS is not seeking the protections of the safe harbor provided under ERISA Section 404(c). Third, no claims are being made against APS by employee benefit plan participants. Fourth, the instant case does not involve any claim of investment losses by any employee benefit plan participants against employee benefit plan fiduciaries.

ERISA and the cited regulation do not apply to this matter because there are no employee benefit plans involved in this case. Furthermore, the cited regulation only mandates actions necessary to take advantage of a safe harbor that is not at issue here. That is, even if the regulation had some relationship to this case, which it absolutely does not, this regulation only serves to provide optional protection to employee benefit plan fiduciaries --- it would be impossible for an employer to "violate" such a provision and give rise to an illegality. There is no requirement that participant directed plans utilize the protections afforded by ERISA Section 404(c).

Accordingly, ERISA does not apply and there was no violation of any ERISA provision.

2. <u>There Are No Illegalities Associated With The IRAs</u>

Cornerstone's briefing uses the term illegality, but does not link any particular facts to any particular violation of law that would allow it to be relieved of its obligations that are at issue in this case. The following will discuss the asserted irregularities relative to the Code. However, assuming noncompliance with the Internal Revenue Code (which may result in adverse tax consequences),

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do not apply.

there is still no support to Cornerstone's argument that there is an "illegality" which would allow Cornerstone to avoid its $750.00 per lot contractual obligation to APS.

a. IRA Assets May Be Invested

Cornerstone states that "[g]enerally the IRA account must be held by a bank." *See* (Def's. Br. Supplementing. Second Mot. Summ. J. and Opp'n Pl's. Second Mot. For Summ. J. at 11). It appears Cornerstone may be asserting that it is illegal to invest IRA assets. It is common knowledge that IRA assets are invested. IRAs can invest in anything, however, there are certain tax consequences for investing in collectibles and life insurance contracts. *See* Code Sections 408(a)(3) and 408(m). Even if such investments were made, it is completely without basis to characterize such investments as an "illegality" that would allow the entity or person with whom the IRA made such an investment to breach the agreement – however, this is Cornerstone's theory (for which it does not cite any precedent).

For example, if an IRA invested $100,000 in a painting, which is a collectible, with the $100,000 to be repaid to the IRA along with a share of the profits associated with the subsequent sale of the painting to a third party, the investment would not be void simply due to the potential adverse tax consequences that might apply to the IRA for investing in a collectible. Cornerstone is arguing that it is relieved from its contractual obligations because of some vaguely asserted irregularities with the maintenance of the IRAs. Taking the example a step further based on Cornerstone's logic, the $100,000 would not have to be returned to the investor because the agreement is not enforceable due to the so-called illegality.

b. APS Is An IRA Administrator

Cornerstone notes that the master trust agreement utilizes the word "trustee" in a single instance in relation to APS. (Def's. Br. Supplementing. Second Mot. Summ. J. and Opp'n Pl's. Second Mot. For Summ. J. at 13). The assertion of APS acting as a trustee is factually incorrect; additionally, the mechanics regarding the establishment and the maintenance of the IRAs is not relevant to this case.

Cornerstone recognizes and argues throughout its briefings that APS is not and cannot be an IRA trustee. More importantly, APS is clearly identified throughout the APS Master Individual Retirement Trust Agreement as the Administrator. (Aff. Michael D. Gaffney ¶ 2, APS Master Individual Retirement Trust Agreement, opening ¶) First Utah Bank is clearly identified throughout that agreement as the Custodian (in contrast to Cornerstone's statement on page 5 of its brief that "a bank was not acting as a trustee or custodian of the funds after they were loaned to Cornerstone"). Id. The fact that APS is the Administrator for the IRAs and not the trustee is not in dispute and does not give rise to any illegality.

c. There Are Written Instruments Governing the IRAs

Cornerstone appears to assert there is an illegality because there are no written IRA agreements. (Def's. Br. Supplementing. Second Mot. Summ. J. and Opp'n Pl's. Second Mot. For Summ. J. at 13). This contention, too, is factually incorrect.

Each of the IRA holders executed adoption agreements. (Aff. Michael D. Gaffney ¶ 2). The adoption agreements in part establish IRAs in the form of the APS Master Individual Retirement Trust Account ("Trust") and incorporate the terms of the Trust. These adoption agreements were provided in response to Defendant's Second Set of Discovery. The APS Master Individual

Retirement Trust Agreement is the most recent version of the master trust agreement. It was submitted to the Internal Revenue Service for review and approval, as are most IRA documents as they are revised from time to time. (Aff. Michael D. Gaffney ¶ 2, Ex. A, pg. 21, lines 4-14, Ex.1) *See* Internal Revenue Service Revenue Procedure 87-50. The trustee or custodian has changed over time. (Aff. Michael D. Gaffney ¶ 2, Ex. A, pg. 37-38). The update to the master prototype document does not result in the absence of a written instrument or any illegality.

d. There Are No Identifiable Prohibited Transactions

APS establishes in its moving papers that there are no prohibited transactions. Cornerstone does not appear to dispute this assertion. This issue is only addressed here in an abundance of caution. In its argument under the heading "Cornerstone is entitled to assert its illegality defense as it relates to standing," Cornerstone cites two Code sections that describe prohibited transactions (29 U.S.C. Sections 4975(c)(1)(E) and (F)). *See* (Def's. Br. Supplementing. Second Mot. Summ. J. and Opp'n Pl's. Second Mot. For Summ. J. at 9). Cornerstone appears to cite these sections only for the proposition that APS is not the real party in interest because *if* APS benefitted in connection with the transactions and thus was a party seeking to recover the $750 per lot on its own behalf that it perhaps engaged in a prohibited transaction. In this regard, Cornerstone states "[t]he illegality defense is being asserted in this instance as an additional reason for APS not being allowed to claim it is a proper party plaintiff. If it is a proper party plaintiff it must have an interest in the $750/lot fee." *See* Defendant's Brief Supplementing its Second Motion for Summary Judgment and in Opposition to Plaintiff's Second Motion for Summary Judgment, page 10.

APS is seeking to recover the $750 per lot as the administrator for the IRAs. Thus, there is no prohibited transaction. This is detailed in APS' briefing on its Second Motion for Summary Judgment and is not refuted by any facts or law in Cornerstone's opposition.

CONCLUSION

Cornerstone's arguments that APS violated ERISA or the Internal Revenue Code do not affect Cornerstone's $750.00 per lot contractual obligation. APS respectfully seeks this Court's Order that the contract between APS and Cornerstone is legal and binding.

DATED this 27 day of July, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
For STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of July, 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
[X] Facsimile — *745-8160*
[ ] Email

Winston V. Beard
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

[ ] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile — *529-9732*
[ ] Email

FOR STEPHEN J. MUHONEN

Idaho for the County of Bonneville, and hereby ratify and confirm the actions of APS in said litigation and authorize APS to continue to pursue the claims against Cornerstone Home Builders, LLC.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 24 day of July, 2007.

Dale Henderson
DALE HENDERSON

SUBSCRIBED AND SWORN TO before me this 24th day of July, 2007.

(SEAL)

KARIANN WILLIAMS NOTARY PUBLIC STATE OF IDAHO

Kariann Williams
NOTARY PUBLIC FOR ~~UTAH~~ Idaho
Residing at: Island Park, ID
My Commission Expires: 07/11/08

— 114 —

Idaho for the County of Bonneville, and hereby ratify and confirm the actions of APS in said litigation and authorize APS to continue to pursue the claims against Cornerstone Home Builders, LLC.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 25 day of July, 2007.

DEAN DEYOUNG

SUBSCRIBED AND SWORN TO before me this 25 day of July, 2007.

R R Park Justice of the Peace for
~~NOTARY PUBLIC~~ FOR New Zealand
Residing at: Hamilton
My Commission Expires: ——

(SEAL)

14 Ho-B

Idaho for the County of Bonneville, and hereby ratify and confirm the actions of APS in said litigation and authorize APS to continue to pursue the claims against Cornerstone Home Builders, LLC.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 31 day of July, 2007.

HARRY SEGURA

SUBSCRIBED AND SWORN TO before me this 31 day of July, 2007.

NOTARY PUBLIC FOR UTAH
Residing at: Salt Lake
My Commission Expires: 6-30-2009

(SEAL)

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

65-46-C

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 1st day of August, 2007, cross-motions for summary judgment 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 and Mr. Jeffery Mandell appeared on behalf of the Plaintiff.

Mr. Winston Beard and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Talman appeared as a representative of Cornerstone.

Mr. Muhonen presented Plaintiff's motion for summary judgment. Mr. Mandell presented further argument on behalf of Plaintiff's motion for summary judgment. Mr. Beard presented Defendant's motion for summary judgment. Mr. Mandell presented rebuttal argument. Mr. Muhonen presented additional rebuttal argument.

The Court granted Plaintiff's second motion for summary judgment against Cornerstone's illegality. Mr. Muhonen will prepare a proposed order for the Court's signature.

The Court denied Defendant's motion for summary judgment in part as to lack of standing on the part of APS and granted the motion in part as to requiring Harry Segura, Dean DeYoung, Dale Henderson, Curtis DeYoung, and Drew Downs to be joined as plaintiffs. Mr. Beard will prepare a proposed order for the Court's signature.

Court was thus adjourned.

RICHARD T. ST. CLAIR
DISTRICT JUDGE

H:cv06140.31mosj
080107AM3StClair

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of August, 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
(Pl - American Pension Services, Inc.)

Jeffery M. Mandell
PO Box 853
Boise, ID 83701
(Pl - APS)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

Winston V. Beard
2105 Coronado St.
Idaho Falls, ID 83404
(Defendant)

54 Hair

7TH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

7 AUG 10 A9:17

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

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By

Both parties filed their second motions for summary judgment and oral argument was held August 1, 2007. Pursuant to the reasons stated in open court and on the record, the Court

orders as follows:

1. Cornerstone Home Builders, LLC's defense of illegality is dismissed;
2. The following individuals shall be joined as Plaintiffs by American Pension Services, Inc.:
    a. Drew Downs
    b. Dale Henderson
    c. Dean DeYoung
    d. Harry Segura
    e. Curtis L. DeYoung

APPROVED AS TO FORM:

Stephen Muhonen
Attorney for Plaintiff

APPROVED AS TO FORM:

Winston V. Beard
Attorney for Defendant

DATED this 10 day of August, 2007.

Honorable Richard T. St. Clair

orders as follows:

1. Cornerstone Home Builders, LLC's defense of illegality is dismissed;
2. The following individuals shall be joined as Plaintiffs by American Pension Services, Inc.:
   a. Drew Downs
   b. Dale Henderson
   c. Dean DeYoung
   d. Harry Segura
   e. Curtis L. DeYoung

APPROVED AS TO FORM:

S. Muhonen

Stephen Muhonen
Attorney for Plaintiff

APPROVED AS TO FORM:

Winston V. Beard

Winston V. Beard
Attorney for Defendant

DATED this ___ day of August, 2007.

Honorable Richard T. St. Clair

CLERK'S CERTIFICATE OF SERVICE

I certify that on August 10, 2007, I served a true and correct copy of the ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☑ U.S. Mail ☐ Hand-delivered ☐ Facsimile

Michael D. Gaffney
Beard St. Clair Gaffney
2105 Coronado Street
Idaho Falls, ID 83404
FAX: (208) 529-9732

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Clerk of the Court

By: _____
Deputy Clerk

Beard St. Clair Gaffney

Attorneys

Attorneys admitted in
Idaho Oregon Washington Wyoming

Shaunie Bell
Legal Assistant
2105 Coronado Street ▪ Idaho Falls, ID 83404
Telephone (208) 523-5171
Direct Line (208) 557-5298 ▪ Fax (208) 529-9732
Email shaunie@beardstclair.com

VIA HAND DELIVERY

August 6, 2007

Civil Court Clerk
Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402

Re: American Pension Services v. Cornerstone Home Builders, CV-06-140

Dear Clerk:

Enclosed please find

1- 4 copies of the proposed Order Regarding Motions for Summary Judgment;
2- Postage paid return envelopes for the parties.

Please present this proposed Order to the Judge for his signature, conform the signed Orders and return them to the parties in the enclosed envelopes. If you have any questions, please do not hesitate to contact me.

Sincerely,

Shaunie Bell
Legal Assistant

Enclosures as stated
Cc: Stephen J. Muhonen w/ enclosures
Penny North Shaul w/ enclosures

T&T REPORTING
Certified Court Reporting
P.O. Box 51020
Idaho Falls, Idaho 83405-1020

July 18, 2007

Winston V. Beard, Esq.
BEARD ST. CLAIR GAFFNEY MCNAMARA
2105 Coronado Street
Idaho Falls, Idaho 83404-749

Re: State of Idaho, County of Bonneville
AMERICAN PENSION SERVICES vs. CORNERSTONE HOME
Case No. CV-06-140
Deposition(s) of: Curtis L. DeYoung
Taken: July 13, 2007

Dear Mr. Beard:

Pursuant to Rule 30 (f) (1), I have enclosed the original and your certified copy of the transcript for the deposition taken in the above captioned matter. The E-Transcript has been electronically sent.

Mr. Green has been sent a certified copy of the transcript along with the Verification sheet to obtain the witness' signature for the deposition taken in the above captioned matter. The E-Transcript has been electronically sent.

If you have any questions, please contact our office.

Sincerely,

John Terrill

Enclosures

cc – Daniel C. Green, Esq.
Clerk of the Court
File

Offices at: 525 Park Avenue • Suite 1E • Idaho Falls, ID 83405-1020
PHONE 208.529.5491 • 800.529.5491 • FAX 208.529.5496

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, ISB No. 138
Michael Gaffney ISB No. 3558
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732
Email: winston@beardstclair.com

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 NOTICE OF OFFER OF JUDGMENT I.R.C.P. 68

COMES NOW, Defendant, by and through the undersigned, and OFFERS JUDGMENT TO BE TAKEN AGAINST IT, pursuant to I.R.C.P. 68. This Notice is only provided to the court with the original offer provided to counsel for the plaintiff.

ORIGINAL

DATED this 10th day of August, 2007.

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August, 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

Stephen J. Muhonen, Esq.
RACINE OLSON NYE BUDGE
& BAILEY, CHTD.
P.O. Box 1391
Pocatello, ID 83204

Winston V. Beard, Esq.
Michael Gaffney, Esq.
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495

BONNEVILLE COUNTY

7 [illegible] 21 P[illegible]:32

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

Jeffery Mandell (ISB No. 5807)
The ERISA Law Group, P.A.
P. O. Box 853
Boise, Idaho 83701
Telephone: (208) 342-5522
Fax: (208) 342-7672
Attorneys for Plaintiffs

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., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, and E. DALE HENDERSON, Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **NOTICE OF APPEARANCE**

COMES NOW, Stephen J. Muhonen of the firm Racine, Olson, Nye, Budge & Bailey, Chartered, pursuant to the Court's oral ruling on August 1, 2007 as well as its order dated August 10, 2007, and hereby enters an appearance on behalf of the Plaintiff Drew Downs in the above matter. Pursuant to Rule 17(a) of the Idaho Rules of Civil Procedure, Plaintiff Drew Downs hereby

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ratifies and adopts by reference the commencement of the action by American Pension Services, Inc. and all pleadings, motions, and filings by American Pension Services, Inc., including without limitation witness and exhibit lists.

DATED this 21 day of August, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: [signature] For
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffery Mandell The ERISA Law Group, P.A. P. O. Box 853 Boise, Idaho 83701	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *(208) 342-7672* [ ] Email
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* [ ] Email
Winston V. Beard BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *529-9732* [ ] Email

For
STEPHEN J. MUHONEN

BONNEVILLE COUNTY

7 21 P2:33

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

Jeffery Mandell (ISB No. 5807)
The ERISA Law Group, P.A.
P. O. Box 853
Boise, Idaho 83701
Telephone: (208) 342-5522
Fax: (208) 342-7672
Attorneys for Plaintiffs

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., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, and E. DALE HENDERSON, Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **NOTICE OF APPEARANCE**

COMES NOW, Stephen J. Muhonen of the firm Racine, Olson, Nye, Budge & Bailey, Chartered, pursuant to the Court's oral ruling on August 1, 2007 as well as its order dated August 10, 2007, and hereby enters an appearance on behalf of the Plaintiff Harry Segura in the above matter. Pursuant to Rule 17(a) of the Idaho Rules of Civil Procedure, Plaintiff Harry Segura hereby

74- 7

ratifies and adopts by reference the commencement of the action by American Pension Services, Inc. and all pleadings, motions, and filings by American Pension Services, Inc., including without limitation witness and exhibit lists.

DATED this 21st day of August, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: For
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffery Mandell The ERISA Law Group, P.A. P. O. Box 853 Boise, Idaho 83701	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *(208) 342-7672* [ ] Email
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* [ ] Email
Winston V. Beard BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *529-9732* [ ] Email

For
STEPHEN J. MUHONEN

BONNEVILLE COUNTY

7 [illegible] 21 P2:33

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

Jeffery Mandell (ISB No. 5807)
The ERISA Law Group, P.A.
P. O. Box 853
Boise, Idaho 83701
Telephone: (208) 342-5522
Fax: (208) 342-7672
Attorneys for Plaintiffs

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., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, and E. DALE HENDERSON, Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **NOTICE OF APPEARANCE**

COMES NOW, Stephen J. Muhonen of the firm Racine, Olson, Nye, Budge & Bailey, Chartered, pursuant to the Court's oral ruling on August 1, 2007 as well as its order dated August 10, 2007, and hereby enters an appearance on behalf of the Plaintiff Dean G. DeYoung in the above matter. Pursuant to Rule 17(a) of the Idaho Rules of Civil Procedure, Plaintiff Dean G. DeYoung

74- 10

hereby ratifies and adopts by reference the commencement of the action by American Pension Services, Inc. and all pleadings, motions, and filings by American Pension Services, Inc., including without limitation witness and exhibit lists.

DATED this 21 day of August, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: [signature] For
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffery Mandell The ERISA Law Group, P.A. P. O. Box 853 Boise, Idaho 83701	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *(208) 342-7672* [ ] Email
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* [ ] Email
Winston V. Beard BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *529-9732* [ ] Email

For
STEPHEN J. MUHONEN

74-12

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

Jeffery Mandell (ISB No. 5807)
The ERISA Law Group, P.A.
P. O. Box 853
Boise, Idaho 83701
Telephone: (208) 342-5522
Fax: (208) 342-7672
Attorneys for Plaintiffs

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., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, and E. DALE HENDERSON, Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **NOTICE OF APPEARANCE**

COMES NOW, Stephen J. Muhonen of the firm Racine, Olson, Nye, Budge & Bailey, Chartered, pursuant to the Court's oral ruling on August 1, 2007 as well as its order dated August 10, 2007, and hereby enters an appearance on behalf of the Plaintiff E. Dale Henderson in the above matter. Pursuant to Rule 17(a) of the Idaho Rules of Civil Procedure, Plaintiff E. Dale Henderson

hereby ratifies and adopts by reference the commencement of the action by American Pension Services, Inc. and all pleadings, motions, and filings by American Pension Services, Inc., including without limitation witness and exhibit lists.

DATED this 21 day of August, 2007.

RACINE, OLSON, NYE, BUDGE & BAILEY, CHARTERED

By: For
STEPHEN J. MOHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffery Mandell The ERISA Law Group, P.A. P. O. Box 853 Boise, Idaho 83701	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *(208) 342-7672* [ ] Email
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* [ ] Email
Winston V. Beard BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *529-9732* [ ] Email

For
STEPHEN J. MUHONEN

BONNEVILLE COUNTY

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

Jeffery Mandell (ISB No. 5807)
The ERISA Law Group, P.A.
P. O. Box 853
Boise, Idaho 83701
Telephone: (208) 342-5522
Fax: (208) 342-7672
Attorneys for Plaintiffs

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., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, and E. DALE HENDERSON, Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC. Defendant.	Case No. CV-06-140 **NOTICE OF APPEARANCE**

COMES NOW, Stephen J. Muhonen of the firm Racine, Olson, Nye, Budge & Bailey, Chartered, pursuant to the Court's oral ruling on August 1, 2007 as well as its order dated August 10, 2007, and hereby enters an appearance on behalf of the Plaintiff Curtis L. DeYoung in the above matter. Pursuant to Rule 17(a) of the Idaho Rules of Civil Procedure, Plaintiff Curtis L. DeYoung

74-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of August, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Jeffery Mandell The ERISA Law Group, P.A. P. O. Box 853 Boise, Idaho 83701	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *(208) 342-7672* [ ] Email
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* [ ] Email
Winston V. Beard BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[ ] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile — *529-9732* [ ] Email

[signature] For
STEPHEN J. MUHONEN

74-17

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 TO STRIKE NOTICES OF APPEARANCE

Defendant, through counsel, respectfully moves this Court for an order striking the Notices of Appearance filed by the individual plaintiffs in the above entitled matter. The basis

74-18

for this motion is set forth in the memorandum filed contemporaneously herewith.

Oral argument is requested.

DATED this 24th day of August, 2007.

Winston Beard
Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY PA
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho and on August 24, 2007, I served a true and correct copy of the DEFENDANT'S MOTION TO STRIKE NOTICES OF APPEARANCE on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☑ Hand-delivered ☐ ~~Facsimile~~

Winston Beard
Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY PA
Attorneys for Defendant

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
Lance J. Schuster, Esq., ISB No. 5404
BEARD ST. CLAIR GAFFNEY P.A.
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 MEMORANDUM IN SUPPORT OF MOTION TO STRIKE NOTICES OF APPEARANCE

Defendant, through counsel, submits the following memorandum in support of its motion to strike notices of appearance.

PROCEDURAL BACKGROUND

1. At the August 1, 2007 summary judgment hearing the Court found that Drew Downs, Dale Henderson, Dean DeYoung, Harry Segura, and Curtis DeYoung were necessary parties (collectively individual plaintiffs).

2. On August 10, 2007, the Court entered an order requiring the plaintiff, American Pension Services, Inc. (APS), to join the individual plaintiffs as parties.

3. APS has failed to add the individual plaintiffs as parties.

4. On August 21, 2007, counsel for APS filed notices of appearance on behalf of all the individual plaintiffs.

5. The individual plaintiffs have not filed any type of complaint or claim.

ARGUMENT

The notices of appearance of the individual plaintiffs should be stricken. Since the individual plaintiffs have not been joined by APS, this action warrants dismissal. APS has indicated that it only filed this lawsuit as an agent and that it has no interest in the outcome. DeYoung Dep. pp. 49, 64. "An agent does not acquire real party status and may not bring suit on behalf of another." 4-17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL ¶ 17.10(3)(f) (3d ed. 2007). The complaint as presently constituted fails to state a claim because it only seeks relief on behalf of APS. Because of this problem, the Court ordered APS to add the individual plaintiffs as parties.

To date APS has failed to add the individual plaintiffs as parties. Instead counsel for APS has filed notices of appearance on behalf of all of the individual plaintiffs. This action by APS is problematic for several reasons. A notice of appearance is a document that is filed by a

defendant not a plaintiff. Written notice of appearance is a statement in writing by a defendant or his attorney whereby plaintiff is informed that defendant has appeared, generally or specially, in the case and has submitted himself to jurisdiction of the court. *Domer v. Stone*, 27 Idaho 279, 149 P. 505 (1915). The function of a notice of appearance is for a defendant to put a plaintiff on notice that he or she is appearing in order to prevent a default judgment being entered. Thus, the notices of appearances filed by counsel for APS are procedurally improper and should be stricken.

Even if filing a notice of appearance is procedurally proper for a plaintiff, it does not constitute a pleading and does not state a claim. "Notice of appearance does not constitute pleading." 10-55 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL ¶ 55.10(2)(c) (3d ed. 2007). The individual plaintiffs' failure to enter pleadings in this case is fatal to their claims. Counsel for APS attempted to incorporate pleadings filed by APS into the notices of appearance filed on behalf of the individual plaintiffs. Since a notice of appearance is not a pleading, such an attempt must fail. The individual plaintiffs must file a complaint or some other type of claim. Thus, the notices of appearance should be stricken.

Cornerstone does not know what claims are being asserted by the individual plaintiffs because no claims have been asserted. Even if the individual plaintiffs were able to incorporate APS's pleadings through a notice of appearance, the action should be dismissed. The existing complaint only seeks relief for APS. No claims are brought on behalf of the individual plaintiffs. There is no indication in the complaint that the individual plaintiffs are even involved. Since APS has acknowledged it has no interest in this lawsuit, a claim must be made by the individual plaintiffs. Such a claim has not been asserted. Thus, the notices of appearance should be

stricken and this case warrants dismissal.

CONCLUSION

Based on the foregoing, the defendant respectfully requests that the notices of appearance filed by counsel for APS on behalf of the individual plaintiffs be stricken and that this matter be dismissed.

DATED this 24th day of August, 2007.

Winston Beard
Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY PA
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho and on August 24, 2007, I served a true and correct copy of the DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE NOTICES OF APPEARANCE on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☑ Hand-delivered ☐ Facsimile

Winston Beard
Michael D. Gaffney
Of BEARD ST. CLAIR GAFFNEY PA
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(s), vs. CORNERSTONE HOME BUILDERS, LLC, Defendant(s).	MINUTE ENTRY CASE NO. CV-06-140

On the 28th day of August, 2007, a court 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 and Mr. Lane Erickson appeared on behalf of the Plaintiff. Mr. Curtis DeYoung was present at counsel table as a representative of APS.

Mr. Michael Gaffney and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was present at counsel table as a representative of Cornerstone.

The Court granted the motion to shorten time.

Mr. Gaffney presented Defendant's motion to dismiss and motion to strike notices of appearances. Mr. Muhonen argued in opposition to the motions. Mr. Gaffney presented rebuttal argument. Further discussion was heard.

The Court denied the motion to strike appearances and denied the motion to dismiss.

Mr. Muhonen presented Plaintiffs' motion to quash subpoena of Mark Poole. Mr. Gaffney presented argument in opposition to the motion. The Court will take the motion under advisement and see if Mr. Poole can be worked into the trial schedule.

Mr. Gaffney orally moved to sequester witnesses. There was no opposition from the Plaintiffs. The Court granted the motion.

Trial recessed for morning break.

Trial continued at 11:40 a.m. with all parties present.

Mr. Muhonen presented Plaintiffs' opening statement.

Mr. Gaffney reserved Defendant's opening statement.

Mr. Martin Pool was called to the stand and placed under oath by the clerk. Mr. Muhonen inquired on direct examination.

Trial recessed for lunch break.

On the 28th day of August, 2007, court trial reconvened 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 and Mr. Lane Erickson appeared on behalf of the Plaintiff. Mr. Curtis DeYoung was present at counsel table as a representative of APS.

Mr. Michael Gaffney and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was present at counsel table as a representative of Cornerstone.

Mr. Martin Pool retook the witness stand. He was still under oath. Mr. Muhonen continued direct examination of Mr. Pool. Plaintiff's Exhibit 14 was marked and presented to the witness. Exhibit 14 was offered and admitted without objection.

Plaintiff's Exhibit 1 was marked, offered and admitted without objection.

Plaintiff's Exhibits 2, 3, 4, 5, 6, 8, 9, 23, 24 and 25 were admitted by stipulation. Exhibits 1 and 14 were already admitted.

Defendant's Exhibits A, B, C, D(1), E, F, G, H, I, J, K(14), L, M, N, O, P, Q, R, S, T, U, V, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, QQ(14), PP(14), RR(14), SS(14), TT(14), UU(14), VV(14), LLL, MMM, NNN, OOO, EEEE, FFFF, GGGG, IIII, JJJJ were admitted by stipulation.

Mr. Pool was excused from the witness stand.

Mr. Curtis DeYoung was called as a witness and placed under oath. Mr. Muhonen inquired of Mr. DeYoung on direct examination. Plaintiff's Exhibit 7 was marked and presented to the witness. Plaintiff's Exhibit 7 was offered and admitted without objection. Mr. DeYoung was excused.

Trial recessed for afternoon break.

Trial resumed at 4:00 p.m. with all parties present.

Mr. Brad Kendrick was called as a witness and placed under oath. Mr. Muhonen inquired on direct examination. Plaintiff's Exhibit 28 was marked and presented to the witness. Exhibit 28 was offered, objection raised, objection sustained and denied admission. Mr. Muhonen offered to modify the document, offered it for admission. Mr. Gaffney objected; the Court sustained the objection and denied admission.

Trial recessed for the evening. Trial will continue at 9:00 a.m. on Wednesday, August 29, 2007.

On the 29th day of August, 2007, a court trial continued at

9:00 a.m. 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 and Mr. Lane Erickson appeared on behalf of the Plaintiff. Mr. Curtis DeYoung was present at counsel table as a representative of APS.

Mr. Michael Gaffney and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was present at counsel table as a representative of Cornerstone.

Mr. Brad Kendrick retook the witness stand. Mr. Kendrick was still under oath. Mr. Muhonen continued direct examination of the witness. Plaintiff's Exhibit 30 was marked and presented to the witness. Mr. Muhonen moved to admit Exhibit 30. Mr. Gaffney objected. The Court sustained the objection. Plaintiff's Exhibit 27 was marked and presented to the witness. Exhibit 27 was offered, objection raised, the Court overruled the objection and admitted the document. Plaintiff's Exhibit 10 was marked, offered, objection raised, objection overruled and Exhibit 10 was admitted.

Mr. Gaffney cross-examined Mr. Kendrick. The Deposition of Brad Kendrick published and presented to the witness.

Trial recessed for the mid-morning break.

Trial resumed at 10:55 a.m. with all parties present. Mr. Gaffney continued cross-examination of Mr. Brad Kendrick.

Trial recessed for the morning. Trial will continue at 1:00 p.m.

On the 29th day of August, 2007, a court trial continued at

1:10 p.m. 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 and Mr. Lane Erickson appeared on behalf of the Plaintiff. Mr. Curtis DeYoung was present at counsel table as a representative of APS.

Mr. Michael Gaffney and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was present at counsel table as a representative of Cornerstone.

Mr. Brad Kendrick retook the witness stand. Mr. Kendrick was still under oath. Mr. Gaffney continued cross-examination of the witness. Mr. Muhonen inquired on redirect examination. Mr. Kendrick was excused from the witness stand.

Plaintiff rested.

Ms. Penny Shaul presented an opening statement on behalf of the Defendant.

Mr. Curtis DeYoung was recalled to the witness stand.

Mr. Muhonen renewed Plaintiff's motion to quash the subpoena of Martin Pool. Mr. Gaffney stated that he will call Martin Pool at this time.

Mr. Martin Pool was recalled as a witness. Mr. Pool was still under oath. Mr. Gaffney inquired of Mr. Pool on direct examination. The deposition of Martin Pool was published and presented to the witness. Mr. Pool was excused from the witness stand and released from his subpoena.

Mr. Curtis DeYoung was again called to the witness stand; he was still under oath. Mr. Gaffney inquired on direct examination. Defendant's Exhibit YYY was marked and presented to

the witness. Defendant's Exhibit YYY was offered, objection raised, objection overruled and admitted into evidence. Defendant's Exhibit XXX was marked, offered, objection raised, objection sustained and denied admission. Mr. Gaffney addressed the objection. The Court denied admission of XXX. Mr. Gaff inquired further of Mr. DeYoung and then reoffered Exhibit XXX. Mr. Muhonen objected. The Court overruled the objection and admitted Exhibit XXX.

Trial recessed for a mid-afternoon break.

Trial continued at 2:35 p.m. with all parties present.

Mr. Michael Gaffney continued direct examination of Mr. Curtis DeYoung. The deposition (2 volumes) of Curtis DeYoung was published. Defendant's Exhibits AAA, BBB, CCC, DDD and EEE were marked and presented to the witness. Mr. Muhonen cross-examined. Mr. Gaffney inquired on redirect examination. The witness was excused.

Ms. Wendy Nelson was called to the stand and placed under oath. Ms. Shaul inquired of Ms. Nelson on direct examination. Ms. Nelson was excused.

Mrs. Mary TeNgaio was called to the stand and placed under oath. Ms. Shaul inquired on direct examination. Ms. TeNgaio was excused.

Trial was recessed for an afternoon break.

Trial resumed at 4:15 p.m. with all parties present.

Mr. Scott Tallman was called to the stand and placed under oath. Ms. Shaul inquired of Mr. Tallman.

Trial recessed for the evening. Trial will continue at 9:00 a.m. on Thursday, August 30, 2007.

On the 30th day of August, 2007, court trial continued at 9:15 a.m. 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 and Mr. Lane Erickson appeared on behalf of the Plaintiff. Mr. Curtis DeYoung was present at counsel table as a representative of APS.

Mr. Michael Gaffney and Mrs. Penny North Shaul appeared on behalf of the Defendant. Mr. Scott Tallman was present at counsel table as a representative of Cornerstone.

Mr. Scott Tallman retook the witness stand subject to direct examination by Ms. Shaul. Mr. Muhonen cross-examined Mr. Tallman. Plaintiff's Exhibit 29 was marked, offered and admitted into evidence. Ms. Shaul inquired on redirect examination. Mr. Tallman was excused from the witness stand.

Defendant rested.

There were no rebuttal witnesses.

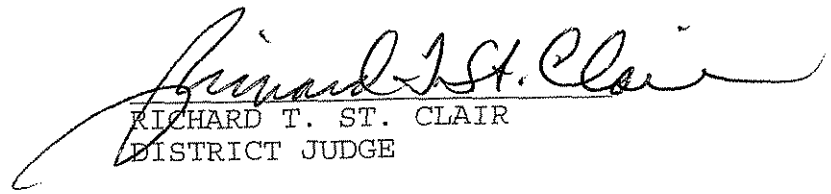
Trial recessed for morning break.

Trial resumed with all parties present.

Mr. Muhonen presented an oral motion under Rule 15(b) to amend the complaint to conform to the evidence presented at trial and add a claim for fraudulent conveyance. Mr. Gaffney requested an opportunity to brief the motion. Mr. Muhonen did not oppose briefing the matter.

The Court will allow Mr. Gaffney seven days to file briefing in opposition. Mr. Muhonen will have seven days to reply. The parties will then have fourteen days to submit any additional trial briefing and findings of fact and conclusions of law.

Court was thus adjourned.



RICHARD T. ST. CLAIR
DISTRICT JUDGE

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CERTIFICATE OF MAILING

I hereby certify that on the 31 day of August, 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
Lane Erickson
PO Box 1391
Pocatello, ID 83204-1391
(Pl - American Pension Services, Inc.)

Penny North Shaul
PO Box 277
Rigby, ID 83442
(Defendant)

Winston Beard
Michael Gaffney
2105 Coronado Street
Idaho Falls, ID 83404

DUNN LAW OFFICES, PLLC
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., ISB No. 4993
David L. Brown, Esq., ISB No. 7430
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

Winston V. Beard, Esq., ISB No. 1138
Michael Gaffney, Esq., ISB No. 3558
BEARD ST. CLAIR GAFFNEY PA
2105 Coronado Street
Idaho Falls, ID 83404-7495
Telephone: (208) 523-5171
Facsimile: (208) 529-9732

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 MEMORANDUM RE: ORAL MOTION TO AMEND PURSUANT TO RULE 15(b)

The defendant, Cornerstone Home Builders, LLC (Cornerstone), through counsel of record, Beard St. Clair Gaffney PA, respectfully submit the following memorandum regarding the plaintiff's oral motion to amend pursuant to Rule 15(b) of the Idaho Rules of Civil Procedure.

INTRODUCTION

The plaintiff, American Pension Services, Inc. (APS), made an oral motion at trial pursuant to Rule 15(b) of the Idaho Rules of Civil Procedure. Rule 15(b) states in part:

> When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as f they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

IDAHO R. CIV. P. 15(b) (2007). APS seeks to conform the pleadings to the testimony elicited at trial and suggests that this testimony gives rise to a claim for fraudulent conveyance. However, APS motion truly has no basis in substantive law and is a hyper-technical interpretation of the law and pleadings.

ARGUMENT

Cornerstone did not engage in a fraudulent conveyance at any material time. APS' motion should be denied for several reasons.

First, Cornerstone formed the Idaho LLC for convenience and based upon the recommendation of counsel. The Idaho entity was not formed with an intent to defraud or hinder any present or future creditors. The actions undertaken by Cornerstone were legally equivalent to a domestication of a foreign entity. When a foreign entity is domesticated in a state, nothing changes except for the law that governs the internal functions of the entity. Though Cornerstone did not follow the formal domestication process, the creation of the Idaho LLC is the legally tantamount to having done so and APS' motion should be denied.

Second, Cornerstone is willing to stipulate to adding the Idaho LLC as a defendant in the lawsuit. This would resolve any issues that APS might perceive could arise from the different entities. In this manner, APS would have the chance to acquire relief from any party from whom

relief could potentially be found liable.

Third, the property at issue in this case is real property. Barring a massive acceleration in the tectonic activity in Southeastern Idaho, the real property is not going anywhere. It will continue to reside where presently constituted. Any transaction or conveyance of that property is readily ascertainable and traceable. APS would be able to follow the proceeds of that transaction and would not be defrauded of anything should the district court rule in its favor. As a result, the district court can deny APS' motion without concern.

Fourth, in order to establish that a transfer was fraudulent a party has to show scienter. *See* IDAHO CODE ANN. § 55-913 (2007). APS has not shown, nor can it establish, that there was ever an actual "intent" to defraud any present or potential creditors through this transfer. The intent by the transferring party must be "actual" intent to hinder, delay or defraud creditors. *Id.* None of the evidence brought out at trial suggests that Cornerstone acted with this "actual" intent. Instead, the transfer was done for convenience and was a de facto domestication of the foreign entity. Absent facts that establish a verifiable intent to defraud, hinder, or delay a present or future creditor's interests, such an amendment would be inappropriate.

CONCLUSION

As a result of the foregoing, Cornerstone respectfully requests that the district court deny APS' oral motion to amend.

DATED: September 6, 2007

Michael D. Gaffney
Winston V. Beard
Of Beard St. Clair Gaffney PA
Attorneys for the Defendant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on September 6, 2007, I served a true and correct copy of the DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT on the following by the method of delivery designated below:

Stephen J. Muhonen
Racine Olson Nye Budge & Bailey
PO Box 1391
Pocatello, ID 83204-1391
FAX: (208) 232-6109

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Bonneville County Courthouse
605 N. Capital Avenue
Idaho Falls, ID 83402
FAX: (208) 529-1300

☐ U.S. Mail ☐ Hand-delivered ☑ Facsimile

Michael D. Gaffney, ISB No. 3558
Of BEARD ST. CLAIR GAFFNEY P.A.
Attorney for Defendant

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
Attorney for Plaintiffs

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.;) CURTIS DEYOUNG, an individual; DEAN) DEYOUNG, an individual; DALE) HENDERSON, an individual; HARRY) SEGURA, an individual; DREW DOWNS,) an individual Plaintiffs, vs. CORNERSTONE HOME BUILDERS, LLC., Defendant.	Case No. CV-06-140 **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' RULE 15(b) MOTION**

This matter came on for trial on the 28th, 29th and 30th of August, 2007, before the Honorable Richard T. St. Clair, Seventh Judicial District Judge. Present for the Plaintiffs was Curtis DeYoung, in his capacity as President of American Pension Services, Inc. (APS) and in his individual capacity. Stephen J. Muhonen and Lane V. Erickson were both present as counsel for Plaintiffs. The Defendant Cornerstone Home Builders, LLC (Cornerstone) was present through its member Scott Tallman. Michael D. Gaffney and Penny North Shaul were both present as counsel for Defendant.

Following the submission of the evidence and after both parties had rested their cases, Plaintiffs made the following motion.

Plaintiffs moved the Court, pursuant to I.R.C.P. 15(b) to amend the Amended Complaint to conform to the evidence presented at trial and to allow Plaintiffs to add a claim or cause of action for fraudulent conveyance. During the direct testimony given by Mr. Tallman, on behalf of Cornerstone, Mr. Tallman testified that this lawsuit began in January 2006. Mr. Tallman also testified that Cornerstone was a Utah LLC and that he dissolved the corporation after January 2006. Mr. Tallman also testified that he created a new Cornerstone LLC in Idaho after January 2006. Mr. Tallman then testified that the new LLC did not adopt or transfer any of the liabilities from the Utah LLC into the newly created Idaho LLC. Mr. Tallman testified on cross examination, without objection, that the development property, which is the main asset of the Utah LLC was transferred into the Idaho LLC. Mr. Tallman then finally testified that his own corporation, S.R. Tallman Construction, Inc. is the new Idaho LLC's only member. All of the elements necessary to evidence and maintain a claim or cause of action for fraudulent conveyance have been presented as evidence at the trial of this matter.

ARGUMENT

Plaintiffs I.R.C.P. 15(b) motion was properly raised and should be granted by this Court. Rule 15(b) of the Idaho Rules of Civil Procedure states:

> **Amendments to conform to the evidence.**
>
> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the

> pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

IDAHO R. CIV. P. 15(b).

Case law, too, supports Plaintiffs ability to bring this motion and this Courts granting of said motion. In Stecklein v. Montgomery, 98 Idaho 671, 570 P.2d 1359 (1977), a trial was had wherein a prescriptive easement was not originally pled by defendant in its counterclaim. The Supreme Court held that since evidence concerning the prescriptive easement came into the record without objection, the provisions of Rule 15(b) could be invoked. "When issues not raised by the [pleadings] are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Id. at 674, 570 P.2d at 1362. Lynch v. Cheney, 98 Idaho 238, 561 P.2d 380 (1977) is also insightful and instructive in this Courts granting of Plaintiffs' motion to amend the pleadings. "A motion to amend pleadings to conform to the evidence under Rule 15(b) should be granted 'when issues not raised by the pleadings are tried by express or implied consent of the parties, . . .' When confronted with a Rule 15(b) motion, the trial court must determine whether the issue was in fact tried with the express or implied consent of the parties." Id. at 241, 561 P.2d at 383.

Idaho Code §55-913 specifically pertains to fraudulent transfers and reads:

> **§ 55-913. Transfers fraudulent as to present and future creditors**
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a) of this section, consideration may be given, among other factors, as to whether:

(a) The transfer or obligation was to an insider;

(b) The debtor retained possession or control of the property transferred after the transfer;

(c) The transfer or obligation was disclosed or concealed;

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) The transfer was of substantially all the debtor's assets;

(f) The debtor abscounded [absconded];

(g) The debtor removed or concealed assets;

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

IDAHO CODE § 55-913 (Michie 2007).

In the trial of this matter, Mr. Tallman testified with consent, under direct testimony, answering questions from his attorney, the following: That as the sole remaining member of Cornerstone Home Builders, LLC, after learning of the lawsuit against it, he intentionally dissolved the Utah LLC, that Cornerstone was, when sued. Still in his direct testimony, Mr. Tallman testified that post-suit, he created Cornerstone Home Builders, LLC, in Idaho. See Exhibits A and C. Mr. Tallman testified that the sole member of the new Idaho LLC was S.R. Tallman Construction, Inc., a company he operates as President. Mr. Tallman also testified, without objection, that upon his dissolving the Utah LLC, he transferred the major asset of the LLC, particularly the real property identified in Exhibit 14, into the new Idaho LLC. While still in his direct testimony, and what should be of peculiar interest to this Court, Mr. Tallman testified he voluntarily DID NOT transfer or adopt any of the liabilities of the Utah LLC into the Idaho LLC.

Cornerstone, in its response to Plaintiffs' 15(b) motion, stated that Cornerstone, when becoming an Idaho LLC, was merely trying to become domesticated in Idaho and just didn't follow the domestication process. This argument is without merit and is easily disposed of by analyzing Cornerstone's own Exhibit G (marked as 7) and Plaintiffs' Exhibits 23 and 24, all which were admitted as evidence. Exhibits G, 23 and 24 are Cornerstone's own Applications for Registration of Foreign Limited Liability Company, with the Idaho Secretary of State's stamped receipt on them dated 01/09/2004 and 06/ 27/ 2005, respectively. Cornerstone had already become domesticated.

By comparing the voluntary testimony of Mr. Tallman at trial to the requisite elements of a fraudulent transfer, a fraudulent transfer has occurred. The Plaintiffs are creditors to Cornerstone. Mr. Tallman demonstrated his intent to hinder, delay or defraud Plaintiffs by voluntarily testifying that he purposefully did not adopt or transfer the liabilities of the Utah LLC into the newly, post-suit

created, Idaho LLC; all the while transferring the only major asset of the Utah LLC into the Idaho LLC. The factors to determine actual intent, found in section two (2) of §55-913 are met by Mr. Tallman's own voluntary testimony. The transfer was to an insider (to the newly created LLC, created by Mr. Tallman with his own company being the sole member of the new LLC); Mr. Tallman, through his corporations, retained possession or control of the property transferred after the transfer; the transfer was not known of until Mr. Tallman voluntarily disclosed it, without objection, on cross examination; before the transfer was made, Cornerstone had been sued; the transfer was of substantially all the debtor's assets; Mr. Tallman, the sole remaining member of Cornerstone removed its assets; and the debtor Cornerstone became insolvent shortly after the transfer was made due to the major asset now being removed and then dissolved.

CONCLUSION

For these reasons, Plaintiffs' Rule 15(b) motion should be granted. The fraudulent transfer was not plead in the Amended Complaint, but was voluntarily tried by the parties by Cornerstone's implied consent. Cornerstone, through Mr. Tallman, voluntarily placed the evidence to sustain the cause of action into evidence and on the record. Pursuant to Rule 15(b), this Court should freely allow the amendment to the pleadings since the presentation of the evidence merits such amendment.

DATED this 13 day of September, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of September, 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* [✓] Email
Winston V. Beard Michael D. Gaffney BEARD ST. CLAIR GAFFNEY P.A. 2105 Coronado Street Idaho Falls, Idaho 83404-7495	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile — *529-9732* [✓] Email

S. Muhonen

STEPHEN J. MUHONEN