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American Pension Services v. Cornerstone Home Builders Clerk's Record v. 3 Dckt. 34697

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volume 3 of 3

SUPREME COURT

OF THE

STATE OF IDAHO

COPY

AMERICAN PENSION SERVICES

Plaintiff and

Respondents
vs.

CORNER STONE HOME BUILDERS

Defendant and

Appellants

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

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Filed this _____ day of _____, 20____

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Supreme Court _____ Court of Appeals _____
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By _____ Deputy

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BONNEVILLE COUNTY

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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

Case No. CV-06-140

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.)
_____)

**PLAINTIFFS' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

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.

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Following the submission of the evidence, the Court took the matter under advisement, ordering the parties to submit post-trial briefing. In accordance therewith, Plaintiffs offer the following:

PROPOSED FINDINGS OF FACT

1. APS is a Utah corporation in business as a contract administrator for third party retirement plans. In 2001, APS, through its President, Curtis DeYoung, approached P&B Enterprises Inc. and informed its CEO, Martin Pool of a real property development project located in Idaho that APS was involved in. Mr. DeYoung inquired as to whether or not P&B would be interested in being involved in the project. P&B looked into the project and turned down the offer at that time.

2. Later, in 2003, APS, once again through Mr. DeYoung, approached P&B and informed it that APS was involved in the Idaho project previously discussed. Mr. DeYoung advised that the Idaho project developer was trying to get out and that the project was going into foreclosure. Mr. DeYoung inquired whether P&B would be interested in picking up the project if APS provided funding the down payment to facilitate the purchase of the real property that was in foreclosure.

3. P&B agreed to look into the project and Brad Kendrick, the Chief Operations Officer of P&B was assigned to investigate the matter due to his previous experience with real property development. The prospective development project was in or near Idaho Falls, Idaho. Mr. Pool and Mr. Kendrick thought Scott Tallman might be a good fit to assist with the project since Mr. Tallman was a home builder, had built Mr. Pool's home and was from the Idaho Falls area.

4. Mr. Pool, Mr. Kendrick and Jonathan Reyes, another individual associated with P&B, had a meeting with Mr. DeYoung in the P&B office regarding how the potential purchase could take place. These individuals all agreed that if the purchase could be made for the right price, APS would provide the down payment of approximately twenty percent (20 %) for the purchase of the real

property and be paid back at 10% interest and APS would receive a promissory note and deed of trust securing its loan. Additionally, it was agreed that APS would have the option to lend on the project and APS would also receive \$750.00 per lot sold in the development project. Mr. Kendrick, Mr. Pool and Mr. Reyes agreed that if the purchase took place, they would form a new corporation to put this new, potential project into.

5. Shortly thereafter, Mr. Tallman came to the P&B office in Utah and it was agreed upon by Mr. Kendrick, Mr. Pool, Mr. Tallman and Mr. Reyes, that they would form a new business entity if they could purchase the Idaho project. Mr. Kendrick and Mr. Pool both told Mr. Tallman about the agreement made with APS if the land could be purchased. Mr. Tallman never objected.

6. The business entity ultimately formed by Mr. Kendrick, Mr. Pool, Mr. Tallman and Mr. Reyes was called Cornerstone Homebuilders, LLC. Mr. Kendrick was designated to be the Member-Manager. The Articles of Organization for Cornerstone Homebuilders, LLC, which were filed in the state of Utah in October 2003 are found in Exhibit 1 and such Articles memorialize Mr. Kendrick as the member-manager.

7. Thereafter, APS, by and through Mr. DeYoung, and soon to be Cornerstone, through its soon to be members and manager, Mr. Tallman and Mr. Kendrick, flew to Spokane, Washington to meet with Metropolitan Mortgage & Securities Co., Inc., and Old West Annuity & Life Insurance Company, the sellers of the Idaho development project, with the purpose of attempting to finalize the purchase of the Idaho real property.

8. In Spokane, soon to be Cornerstone was able to reach an agreement on the purchase of the Idaho real property development project with Metropolitan Mortgage & Securities Co., Inc., and Old West Annuity & Life Insurance Company for the purchase price of approximately 1.1

million dollars. The title of the real property was to be put and was put into both P&B's name and Scott Tallman's business name, S.R. Tallman Construction, Inc., due to Cornerstone not yet being formalized. In January, 2004 title to the Idaho real property was put into Cornerstone's name. Exhibit 14 demonstrates the Warranty Deeds given from sellers to P&B and S.R. Tallman and from P&B and S.R. Tallman to Cornerstone.

9. As part of the agreement between soon to be Cornerstone and the property sellers, the property sellers agreed to provide soon to be Cornerstone with 10 lots free and clear. Additionally, sellers agreed to provide construction financing for construction of the improvements in the development project in the amount of \$230,000.00. Exhibits 27 and 29 demonstrate this \$230,000.00 obligation. It is also important and critical that the testimony given by Mr. Pool, Mr. Kendrick and Mr. Tallman is that these documents for development financing were all signed *after* the Spokane trip and the parties had returned home. These are all documents relating to financing the development of the project by the property seller, after the agreement to purchase had been made. If APS had promised to provide complete financing of the development project, it doesn't make sense that Cornerstone was contracting to obtain additional sources of financing for the development of the real property. The plan to finance the project was to roll the profits from the 10 free and clear lots into further development within the project, along with the \$230,000.00 coming from the sellers, all in order to perpetuate a constant stream of financing for the development of the project. The profits from the development would be reinvested into the development to fund its growth.

10. None of the members of Cornerstone knew of the Idaho development project until APS brought it to their attention. During Cornerstone's preliminary calculations, they projected to realize a profit in the Idaho development project in an amount over two(2) million dollars.

11. While Mr. Kendrick, Mr. Tallman and Mr. DeYoung were in Spokane negotiating the purchase price, Mr. Kendrick and Mr. Tallman were working various calculations, including how the project would be financed. Exhibit 2 memorializes Mr. Tallman's calculations and demonstrates how Met Life (seller) was going to provide financing and how a release on 10 lots was to be provided to facilitate the financing of the project as well. Exhibit 2 also is illustrative as it memorializes the \$750.00 per lot obligation in the upper right hand corner of the exhibit where it reads "750.00 Curtis." The testimony given was that note was placed there as part of determining the cost to develop the lots and what their potential retail may be.

12. While the parties were in Spokane, Washington, negotiating the purchase of the subject property, there was a break where Mr. DeYoung, Mr. Tallman and Mr. Kendrick were discussing life in general which eventually led into a discussion about retirement accounts. At the end of the conversation Mr. DeYoung mentioned he wanted his \$750.00 equity position to be in writing. Mr. Kendrick was intrigued by the conversation and took notes, memorializing the topic of discussion and Mr. DeYoung's request. Exhibit 3 memorializes the notes from this conversation.

13. When the agreement between soon to be Cornerstone and the sellers out of Spokane was finalized, the agreement reached between APS and soon to be Cornerstone that APS was to provide the down payment of approximately 20% for the purchase of the development property, to be paid back at 10% interest and to be secured by a promissory note and deed of trust and APS to be paid \$750.00 per lot sold in the development project as well as APS having the option to lend on the project as well, was ratified and confirmed to APS through Mr. Kendrick, soon to be Cornerstone's managing member and soon to be member, Mr. Pool. Mr. Tallman had no further

substantive conversations with Mr. DeYoung after the Spokane triip. Mr. DeYoung had his conversations regarding this project with Mr. Pool and Mr. Kendrick.

14. On September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of \$226,218.70, which was used to purchase the property. APS was not provided a Promissory Note or Deed of Trust at this time.

15. Following the September 30, 2003 payment made by APS, APS exercised its option to lend on the project by lending additional sums. After each additional loan, APS still did not receive a promissory note or deed of trust from Cornerstone.

16. The combined amount of money lent by APS to Cornerstone, through February 2004 was in the approximate sum of a half of a million dollars. Exhibit 7 is a document created by Mr. Kendrick as managing member of Cornerstone, memorializing Cornerstone's calculations of sums received from APS through February 2004.

17. The reason APS was not provided a Promissory Note and Deed of Trust reflecting the agreement between the parties was because at the time of the initial purchase of the real property, Cornerstone had yet to be formalized. Once Cornerstone was formalized, the members of Cornerstone just didn't get around to following through with their end of the bargain and providing APS the documents as previously agreed. Testimony also revealed that the sellers of the development project backed out of their obligation to provide funding for the project. The members of Cornerstone feared that if a promissory note and deed of trust were given to APS, APS's first lien position could detrimentally affect Cornerstone's ability to secure other financing for the project. Cornerstone members elected to stall in getting APS its security in order to get the financing in the project secured.

18. Mr. DeYoung contacted members of Cornerstone several times after APS's initial loan and continued thereafter after the subsequent loans to Cornerstone, inquiring as to the status of the promissory note and deed of trust.

19. In March 2004, APS refused to lend any additional funds to Cornerstone as a result of having lent approximately one-half million dollars to Cornerstone and having no security in place for said funds.

20. When APS stopped lending money to Cornerstone Mr. Tallman told Mr. Kendrick that Cornerstone would not be paying APS the \$750.00 per lot because, from his perspective, the \$750.00 per lot was only to be provided upon complete funding of the entire development project by APS. As testified to by Mr. DeYoung, Mr. Pool and Mr. Kendrick, Cornerstone's managing member, this contingency expressed by Mr. Tallman at this time was never part of the agreement between APS and Cornerstone. In Mr. Tallman's own testimony, he stated he has no evidence whatsoever of this contingency ever being a part of the agreement.

21. In March 2004, Mr. Pool and Mr. Reyes disassociated themselves from Cornerstone. At that time only Mr. Kendrick and Mr. Tallman remained as members of Cornerstone.

22. In June, 2004, on behalf of Cornerstone, Mr. Kendrick sent a Promissory Note to APS for \$250,000.00, interest free, signed by himself and Mr. Tallman, see Exhibit 4. This is the first Note Cornerstone sent to APS and it was never recorded. Testimony given was that the Cornerstone members knew this document was inaccurate, would more than likely not be accepted by APS, and was merely drafted to stall and buy time to secure other financing.

23. Accompanying the June, 2004 Note was a letter identified as Exhibit N, written by Mr. Kendrick to APS. Testimony from Mr. Kendrick was that he drafted the letter, knowing the

amount of money claimed owing to APS was wrong. Mr. Kendrick also testified that the purpose of the closing paragraph was to invite APS to continue to exercise its option to lend on the project. This paragraph also memorialized Cornerstone's knowledge that APS got its money from APS "clients."

24. Following APS's receipt of this Note, Mr. DeYoung informed Mr. Kendrick this Note was in error and was not acceptable as it did not reflect the agreement between APS and Cornerstone. See Exhibit Q.

25. In September 2005, now approximately two years after the original sums had been lent, Mr. Kendrick, on behalf of Cornerstone, sent APS another promissory note and a deed of trust which reflected an unpaid principal amount of \$150,000.00 at 10% interest. See Exhibits 5 and 6. These documents were never recorded. Both Mr. Kendrick and Mr. Tallman testified that neither of these documents sent to APS were accurate as well. Following APS's receipt of this Note and Deed of Trust, Mr. DeYoung informed Mr. Kendrick this Note was also in error and was not acceptable as well as it did not reflect the agreement between APS and Cornerstone.

26. In April 2005 Mr. Kendrick wrote a Financial Reconciliation to APS and signed it as Cornerstone's managing member. Exhibit 7. This document itemized monies lent by APS to Cornerstone and amounts paid back. Additionally, the Reconciliation also addressed the principal and interest balance then asserted by Cornerstone believed to be due and owing, as well as the existence of the per lot agreement. Specifically, in the last paragraph on page 2 of Exhibit 7, Mr. Kendrick wrote,

Regarding the equity interest in the project to APS - I have searched my notes, and literally every file I have, but have found nothing. However, I specifically recall that we all discussed and agreed to an equity participation of either \$550 or \$725 per home to APS. I am therefore proposing a payment of \$625 per home which would

equate to \$175,000 to you as an equity participant on the Single Family Homes and roughly \$20,000 on the Multi-Family Units, for a total of \$195,000. However, the last thing I want to do is short change you. Therefore if you remember the number to be different, then let me know.

27. Mr. Kendrick testified that he wrote that paragraph, knowing its content to be inaccurate, as he was "negotiating" between himself and Mr. Tallman and APS. Mr. Kendrick testified that Mr. Tallman was still refusing to pay APS the \$750.00 per lot fee and he was trying to reach a number that everyone could agree on.

28. APS agreed to compromise the per lot amount to \$650.00 per lot, but Cornerstone was to pay APS the amounts due within three weeks of the agreement. Mr. Kendrick memorialized this \$650.00 agreement in a Cornerstone meeting agenda identified as Exhibit 9. Mr. Tallman still refused to pay this obligation to APS and Cornerstone never did pay it.

29. In March 2005 Mr. Kendrick had prepared another agenda for a Cornerstone business meeting, identified as Exhibit 8. Paragraph 5 of the agenda starts with "Curtis." "Curtis" is the first name of Mr. DeYoung from APS. This agenda memorializes Cornerstone's obligation to APS regarding the per lot payment which remained due and owing, in addition to the outstanding principal and interest. Specifically, regarding Curtis (APS), paragraph (c.) reads, "We committed to him. [sic] i. What if we didn't take his money, we would still have to honor our commitment - he is the reason we have this great opportunity." Mr. Kendrick testified that this document was given to Mr. Tallman and Mr. Tallman still refused to acknowledge the debt owed to APS.

30. In Mr. Kendrick's testimony, he also testified as to Exhibit 10, which is a copy of the construction costs break down for lot #29 in the Cornerstone project. This document was given to Mr. Kendrick by Mr. Tallman on March 9, 2004 or sometime thereafter. Item number 1600, too, memorializes the \$750.00 equity payment that was agreed upon by Cornerstone with APS.

31. In January 2006 Cornerstone was sued by APS for the outstanding principal and interest. Once Cornerstone resolved this portion of the obligation with APS, the parties agreed on the record on January 24, 2006, before this Court, that there still remained issues to be resolved between APS and Cornerstone and that the then current agreement was not to be construed as final resolution of all issues between the parties. A true and correct copy of that record is attached to the Third Affidavit of Stephen J. Muhonen, submitted in support of APS's first Motion for Summary Judgment.

32. In approximately April 2006 Mr. Kendrick disassociated himself from Cornerstone. Following Mr. Kendrick's disassociation from Cornerstone and following the filing of suit in this matter, Mr. Tallman testified that he dissolved Cornerstone that was originally incorporated in the state of Utah. Mr. Tallman testified that Cornerstone then reformed in Idaho with Mr. Tallman's construction company, S.R. Tallman Construction being the owner and Mr. Tallman is the Managing Member. Exhibit A is the newly created operating agreement for the newly formed LLC as testified to by Mr. Tallman. Exhibit C is the Articles of Organization filed for the new Idaho LLC. Mr. Tallman also testified that when the Utah LLC was dissolved, its only asset, the property development project, was transferred into the new Idaho LLC. Mr. Tallman also testified that none of the Utah LLC obligations were transferred into the new Idaho LLC.

33. Mr. Tallman gave testimony that Mr. Kendrick was the managing member of Cornerstone, but Mr. Tallman actually did all the work. Mr. Tallman also testified that at some point during the Utah Cornerstone, LLC's existence, he and Mr. Kendrick signed some sort of document requiring both of their signatures to bind the corporation. The internal disputes between Mr. Kendrick and Mr. Tallman as to who was the managing member have no bearing as to APS since

Mr. Kendrick testified that he represented to APS that he was the managing member and Mr. Tallman testified that he never told APS that Mr. Kendrick was not the managing member or that Mr. Kendrick did not have authority to bind Cornerstone.

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

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

36. In his testimony, Mr. Tallman, could not offer any evidence whatsoever that supports his contingency position. Mr. Tallman admitted all he had was his own self-serving position. Mr. Tallman also admitted that if the debt had been paid, Mr. Kendrick stood to lose just as much money as he did in paying the debt.

37. Mr. Tallman also admitted that he learned about APS's role in the project through Martin Pool, not from any first hand information or conversations he had with APS directly. Mr. Tallman then testified that the contingency on the per lot issue was created in Spokane, Washington when the property was being purchased. Mr. Tallman offered no evidence or testimony that anyone else involved in this entire matter knew of or even heard of such contingency ever being a part of the agreement between APS and Cornerstone.

38. Mr. Tallman, Mr. Pool and Mr. Kendrick all testified that there are 212 lots in the property development project. APS has not been paid for any of the lots sold, nor does APS have

any security on the lots to be sold. Mr. Tallman testified that currently, approximately 141 lots have been sold to date.

39. Mr. Tallman, the sole remaining member of Cornerstone, testified that Cornerstone estimates to realize a profit of over 2 million dollars in the underlying property development project.

40. Mr. DeYoung testified that funds from five (5) IRA accounts were used as the funds lent to Cornerstone. These five (5) IRA accounts were/are owned by Curtis DeYoung, Dean DeYoung, Harry Segura, Drew Downs and Dale Henderson.

41. Four of the five IRA holders filed affidavits with the Court on July 6, 2007. In these affidavits each IRA holder swore under oath that they had an IRA account with APS in 2003. Each IRA holder also stated that they gave unlimited authority to Curtis DeYoung to direct and exercise their IRA funds as he deemed would be beneficial to them. Each individual also stated they have no further knowledge regarding these proceedings other than Mr. DeYoung directed their IRA's to be invested in the property development project which is the subject matter of this litigation. These affidavits were not tested by Cornerstone, nor have they been refuted.

42. Mr. DeYoung also submitted an affidavit to the Court on July 6, 2007 and testified at trial as well that in 2003 he had his own IRA with APS as well. Mr. DeYoung, in his testimony, stated that the other four IRA holders were his friends and family members. Mr. DeYoung, in his affidavit and testimony, stated he was given written and or verbal authority from the other four IRA holders to direct their funds, without limitation, as he deemed would be beneficial to them. Mr. DeYoung, in his affidavit and testimony, stated he acted upon this authority and did invest his own and the other four IRA holders funds, through APS, in the property development project, which is the subject matter of this litigation.

43. In Mr. DeYoung's testimony at trial, he stated that each of the IRA holders signed *Adoption Agreements* to the APS Master Individual Retirement Trust Account. This testimony was not refuted or contradicted.

44. Mr. DeYoung testified that Exhibit XXX is the current APS Master Individual Retirement Trust Agreement and that the terms contained therein are the same as were in place in 2003. These terms were adopted by each IRA who adopted the *APS Master Individual Retirement Trust Agreement* and whose IRA funds were used in this matter. This testimony was not refuted or contradicted.

45. On page three (3) of Exhibit XXX, under 6.12, Mr. DeYoung testified each IRA had contracted with APS as follows: "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."

46. Mr. DeYoung testified APS acted upon this contractual provision in bringing suit in this matter.

47. On July 20, 2007 each of owners of the five (5) IRA accounts filed another affidavit with this Court, ratifying and confirming the actions of APS in this litigation and authorizing APS to continue pursuing the claims against *Cornerstone*. The signature pages to each of these affidavits were hand filed with the Court on August 1, 2007.

48. On August 1, 2007 this Court joined each of the five (5) IRA members, Curtis DeYoung, Dean DeYoung, Harry Segura, Drew Downs and Dale Henderson, to this case as Plaintiffs, along with APS.

49. Mr. DeYoung testified that APS stands to gain nothing by this litigation. Mr. DeYoung testified that what that means is that if APS is successful in this litigation, APS will distribute the recovery to the five IRA holders pursuant to its contractual obligation it has with them. Thus resulting in a zero recovery for APS.

ARGUMENT AND PROPOSED CONCLUSIONS OF LAW

I. Validity of contract between APS and Cornerstone.

The contract between APS and Cornerstone is lawful and binding upon Cornerstone. In paragraph 13 of Cornerstone's Amended Answer, Cornerstone admits to the agreement made between APS and Cornerstone.

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

(Def.'s Am. Answer to Pl.'s Am. Compl. ¶ 13).

The only part Cornerstone does not admit to is the \$750.00 per lot payment and asserts that the \$750.00 per lot was part of the agreement, but contingent upon APS providing full funding of the development project. An admission made in a pleading is binding on the party making it. Smiley v. Smiley, 46 Idaho 588, 594, 269 P. 589,590 (1928).

Furthermore, the agreement between APS and *soon to be* Cornerstone, too, is lawful and binding upon Cornerstone. "Generally, if promoters of a corporation in contemplation of its organization enter into a contract for and on behalf of the corporation which was intended for its benefit and the contract is adopted, accepted, confirmed and ratified by the corporation when

organized, such corporation is then liable, both in law and in equity, to perform the obligations imposed thereby." Albano v. Motor Ctr., 75 Idaho 348, 352, 271 P.2d 444, 446 (1954); Hackbarth v. Wilson Lumber Co., 36 Idaho 628, 212 P. 969 (1923); Henry Gold Mining Co. v. Henry, 25 Idaho 333, 137 P. 523 (1913); Mantle v. Jack Waite Mining Co., Ltd., 24 Idaho 613, 135 P. 854, (1913); see also Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 1, sec. 207, p. 681 and sec. 211, pp. 701-2.

In the Henry Gold Mining Co. case, the Idaho Supreme Court adopted the reasoning found in Wall v. Niagara Min. & Smelt Co., 20 Utah 474, 481, 59 P. 399, 400 (1899) that a corporation not yet formed can be bound by contracts entered into by its promoters.

It is contended by counsel for the appellant that a contract made for a corporation, before it has an actual existence, is not enforceable by or against it. This contention is too broad. It indicates that a corporation cannot, even in the exercise of its powers to make contracts, accept and adopt a contract made for it, by the promoters, before its existence as an entity. The legitimate sequence of this would be that a corporation, upon full and complete organization under the statute, might accept and adopt such a contract, receive and retain the benefits thereof and at the same time be absolved from its burdens. We have no sympathy with a doctrine that would lead to such results--that might be employed as an instrument of fraud and injustice to the unwary.

It may be assumed as true that promoters and incorporators have no standing in any relation of agency, since that which has no existence can have no agent, and in the absence of any act authorizing them so to do, can enter into no contract, nor transact any business which shall bind the proposed corporation after it becomes a distinct entity, but notwithstanding this be true, still such promoters and incorporators may, acting in their individual capacities, make contracts in furtherance of the incorporation and for its benefit, and, after the incorporation comes into being as an artificial person under the forms of law, it may, at least under the weight of American authority, accept and adopt such contracts, and thereupon they become its own contracts, and may be enforced by or against it. This the corporation may do, not because of an agency on the part of the incorporators, before the existence of the entity, for there is none, but because of its own inherent powers as a body corporate, to make contracts. Moreover, the adoption of such a contract need not be by express action of the corporation, entered on its minutes, but may be inferred from its own acts and acquiescence, or those of its agents, and there need be no express acceptance or the corporation may be bound by the contracts of its promoters, if made so by its

charter, which it has accepted and to which it was agreed. Unless, however, there be an acceptance and adoption thereof in some such way, the corporation will not, in general be bound by the contracts, of its promoters and incorporators, made for it before its complete organization.

Where a contract is made by and with promoters, which is intended to inure to the benefit of a corporation about to be organized, such contract will be regarded as in the nature of an open offer which the corporation, upon complete organization, may accept and adopt or not as it chooses, but if it does accept and adopt and retain the benefits of it, it cannot reject any liability under it, but in such case will be bound to perform the contract, upon the principle that one who accepts and adopts a contract which another undertook to perform in his name and on his behalf, must take the burden with the benefit.

Id. at 481-2, 59 P. 400-1.

The contract between APS and Cornerstone provided that APS agreed to provide the down payment of approximately twenty percent (20 %) for the purchase of the real property and in return be paid back at 10% interest and receive a promissory note and deed of trust securing its loan and APS having the option to lend on the project and APS to also receive \$750.00 per lot sold in the development project. Mr. Kendrick and Mr. Pool testified that they and Mr. Reyes made this agreement with Mr. DeYoung prior to Mr. Tallman even meeting Mr. DeYoung and that this was the agreement between them if the subject property could be purchased. When they created this agreement, they agreed that if the purchase took place, they would form a new corporation to put the project into as well. The testimony given supports that the property was purchased and was purchased pursuant to the agreement between APS and Cornerstone. Cornerstone became formalized, the agreement was ratified both expressly by Mr. Pool, a member of Cornerstone and Mr. Kendrick, the managing member to APS, and by Cornerstone's acts, acquiescence and performance of accepting funds from APS and ultimately paying APS back those funds.

The elicited testimony is that the agreement was never changed. APS was never informed of the agreement changing. Mr. Kendrick, the managing member never told APS the agreement had changed. In fact, Mr. Kendrick testified that once the property was purchased and Cornerstone became formalized, the afore-entered into agreement was adopted and the parties were moving forward with its performance. Mr. Pool never told APS the agreement changed.

Mr. Tallman is the only Cornerstone member that asserts the \$750.00 per lot payment was contingent upon APS providing full financing of the development project. Mr. Tallman maintains this position, with his own admission that he has no evidence to support such a position. Mr. Tallman couldn't even testify that anyone else in Cornerstone even knew about his contingency position until he told them about it, some six to seven months after the real property had been purchased. Furthermore, Mr. Tallman himself testified that the alleged contingency agreement was made in Spokane, while soon to be Cornerstone was attempting to purchase the real property. By Mr. Tallman's own admission, after the Spokane trip he signed agreements with the property sellers for the sellers to provide financing of the development project. It goes without saying that it does not make sense that Mr. Tallman would be signing contracts for funding of the development project, after the fact, if he already had an agreement in place with APS to fund the development project. Finally, Mr. Tallman is the sole remaining shareholder of Cornerstone and is the only one who stands to gain by asserting this contingency argument. To permit Cornerstone to retain possession of the property and its proceeds, without paying the agreed price therefor, would be subversive of every principle of justice.

II. CORNERSTONE BREACHED THE CONTRACT AND THE COVENANT OF GOOD FAITH AND FAIR DEALINGS.

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

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

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

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

In compliance with the agreement, on September 30, 2003, APS performed its obligation and provided the agreed upon 20% down payment, in the sum of approximately \$226,000.00, which was used by Cornerstone to purchase the property. APS was not provided a promissory note or deed of trust at this time. This failure by Cornerstone to provide security documents to APS for the sums lent is actually the first breach of the agreement. This breach was by Cornerstone. After providing the down payment as required, APS exercised its option to lend further monies on the project and did so by lending approximately one half of a million dollars through February 2004. In March 2004, after more than five months of not receiving a promissory note and deed of trust securing the almost a half of a million dollars lent by APS' to Cornerstone, APS refused to continue to exercise its option to lend on the project.

It was not until June, 2004, eight months after the original funds were lent, that Cornerstone finally got around to attempting to provide APS with a promissory note, which was inaccurate. The testimony from both Mr. Tallman and Mr. Kendrick was that they both knew the note identified in

Exhibit 4 was inaccurate. Mr. Kendrick testified Mr. DeYoung was pressing him for his security documents and Cornerstone was stalling so as to secure other lending on the project with lenders who would require first position on loans. Mr. Kendrick testified that the property sellers had backed out of their agreement to provide funding for the development project and Cornerstone was trying to secure other financing and APS's security documents would impair that ability to obtain financing since it would place subsequent lenders in a junior position, thus making the ability to obtain financing more difficult.

The evidence and testimony illustrates the existence of the contract and the breach by Cornerstone. The parties' contract is evidenced by the notes, agendas and the April 2005 memorandum, all of which were written and/or signed by Cornerstone. The April 2005 memorandum is particularly insightful since it was drafted by Cornerstone's Managing Member and reads in part, as follows.

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

Ex. 7.

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

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

only member of Cornerstone to allege a contingency existed that required APS to provide complete funding in order to receive \$750 per lot. Mr. Tallman bases his contingency argument on his own self serving testimony that he spoke with Mr. DeYoung of APS while in Spokane, with Mr. Kendrick present, and that APS agreed then that the \$750.00 per lot payment would only be received if APS provided full financing of the entire development project. Mr. Kendrick testified that such conversation never took place and Mr. Pool testified he had never heard of the original agreement changing, for which he, Mr. Kendrick, Mr. Reyes and Mr. DeYoung were a part of. Furthermore, it does not make sense that Mr. Tallman, Mr. Pool and Mr. Kendrick would be signing agreements with the property sellers, post Spokane visit, for funding of the development project by the sellers, if Cornerstone already had an agreement with APS to fund the development of the project.

Another reason Mr. Tallman's contingency argument is flawed is because Mr. Tallman's position is an internal issue of Cornerstone that he must resolve within Cornerstone, that has no bearing on the agreement between APS and Cornerstone. Mr. Tallman testified he never told APS that Mr. Kendrick was not the managing member and did not have authority to bind Cornerstone. Mr. DeYoung testified he was told all along that Mr. Kendrick was to become and was the managing member of Cornerstone. Mr. Kendrick testified that he told APS that he was Cornerstone's managing member. Mr. Tallman is not a party in this action. Cornerstone is the Defendant and it is Cornerstone that entered into the agreement with APS.

The evidence unequivocally establishes that the agreement of \$750 per lot was made between APS and Cornerstone. None of the members of Cornerstone knew of the Idaho development project until APS brought it to their attention, hence the \$750 payment per lot. During Cornerstone's preliminary calculations, they projected to realize a profit in the Idaho development project in an

amount over two(2) million dollars. That profit estimation is now a realization according to Mr. Tallman's own testimony.

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

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

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

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

Mr. DeYoung, the agent for APS, negotiated and finalized this agreement through Cornerstone's agents Mr. Pool and Mr. Reyes, members of Cornerstone and Brad Kendrick, the

Member Manager of Cornerstone.¹ APS was told that Mr. Kendrick was Cornerstone's manager, and for this reason directed the majority of its discussions surrounding the agreement and the development project with Mr. Pool and Mr. Kendrick. As the Member-Manager, Mr. Kendrick had full, apparent authority to bind Cornerstone with the agreement it made with APS. Furthermore, as discussed above, it was Cornerstone's Member Manager that drafted the April 7, 2005 memorandum identified as Exhibit 7 that memorialized the agreement between the parties. Mr. Tallman testified he never told APS that Mr. Kendrick was not the managing member.

Mr. Tallman, is the only member of Cornerstone to ever allege a contingency existed that required APS to provide complete funding in order to receive \$750 per lot. Mr. Tallman testified he had only spoken briefly with Mr. DeYoung prior to going to Spokane and briefly thereafter. The only evidence Mr. Tallman can present to sustain his contingency argument is his own self-serving claim of having a conversation in Spokane with Mr. DeYoung and Mr. Kendrick wherein Mr. DeYoung allegedly promised to fund the entire development project in order to receive the \$750.00 per lot payment. As the exhibits demonstrate, there is a lot of evidence evidencing the \$750.00 per lot agreement, especially Exhibit 7, but none evidencing any sort of contingency as propounded by Mr. Tallman.

Mr. Kendrick and Mr. Pool each testified that once the property was purchased and

¹ Should Cornerstone argue that since Cornerstone was formalized in Utah, Utah law should be relied upon regarding members and managers and their ability to bind the corporation, such argument should not be considered pursuant to I.R.C.P. 44(d). Rule 44(d) expressly provides, "The court shall take judicial notice as provided by law. . . . If either party to an action intends to request the court to take judicial notice of the statutes or laws of a foreign state, a brief or memorandum citing such foreign law shall be submitted to the court and opposing counsel at least ten (10) days prior to trial or hearing." Cornerstone did not comply with this rule in this case.

Cornerstone became formalized, the agreement they reached with APS was ratified and adopted by Cornerstone. The agreement was entered by individuals with authority and adopted and ratified by the Corporation. Any internal changes or disputes amongst the members of Cornerstone of who can bind the company and what the agreement was is an issue for Cornerstone. APS made the agreement with Mr. Pool, Mr. Reyes and Mr. Kendrick and APS was never told the agreement had changed.

Based upon the foregoing, Mr. Tallman cannot even personally testify as to what the agreement was between APS and Cornerstone nor can he produce any evidence demonstrating that Cornerstone cannot be bound by the agreement entered into with APS. All Mr. Tallman can present is his own self serving testimony which contains nothing more than bald assertions that cannot unwind the agreement between the entities. By his own admission, Mr. Tallman was not present or involved in the formation of the agreement between these two entities. The agreement was made by other members of Cornerstone. The key piece of evidence before the Court is the valid April 7, 2005 memorandum written and signed by Mr. Kendrick, acting as the Managing Member of Cornerstone. The fact that Mr. Tallman does not like the agreement is irrelevant as to whether it is valid and enforceable.

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

For these reasons Cornerstone is in breach of its agreement with APS in regards to the \$750.00 per lot issue as the contingency agreement as asserted by Mr. Tallman, individually, is without merit and lacks any evidentiary support. APS is entitled to judgment on this issue as a matter of law.

III. THE COVENANT OF GOOD FAITH AND FAIR DEALINGS

Cornerstone has breached the agreement between itself and APS and likewise, has breached the covenant of good faith and fair dealings which is implied in every contract. See, Luzar v. Western Surety, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). A violation of the covenant occurs when "either party violates, nullifies or significantly impairs any benefit of the contract." Sorensen v. Comm Tek, Inc., 118 Idaho 664, 669, 799 P.2d 70, 75 (1990). "It is well settled that a contract includes not only that which is stated expressly, but also that which is ... implied from its language." Independence Lead Mines Co. v. Hecla Mining Co., 2006 Ida. LEXIS 54, 9, 137 P.3d 409, 413 (2006) citing Star Phoenix Min. Co. v. Hecla Min. Co., 130 Idaho 223, 231, 939 P.2d 542, 550 (1997) (quoting Commercial Insurance Co. v. Hartwell Excavating Co., 89 Idaho 531, 541, 407 P.2d 312, 317 (1965)). The covenant of good faith and fair dealing may be implied, however, it arises only regarding terms agreed to by the parties, and requires that the parties perform, in good faith, the obligations imposed by their agreement. Independence, 2006 Ida. LEXIS 54 at 9, 137 P.3d at 413 citing Lettunich v. Key Bank Nat. Ass'n, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). "[T]he covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." Independence, 2006 Ida. LEXIS 54 at 10, 137 P.3d at 414 citing Jenkins v. Boise Cascade Corp., 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). "An objective determination can only be made by considering a party's reasonableness in carrying out the contract

provisions.” Independence, 2006 Ida. LEXIS 54 at 10, 137 P.3d at 414.

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

For these reasons APS is entitled to judgment on this issue as a matter of law. APS has performed in good faith the obligations that were imposed upon it pursuant to the agreement; Cornerstone has not. Cornerstone, through its refusal to honor its obligations from the get go and now through its refusal to pay its \$750.00 per lot obligation, has violated and significantly impaired APS’s benefit of the contract.

IV. APS HAS WAIVED ITS CAUSES OF ACTION FOR FRAUD AND UNJUST ENRICHMENT.

During summary judgment proceedings, APS waived its causes of action for fraud and unjust enrichment. APS and the five joined IRA plaintiffs continue to waive such causes of action and are not seeking relief from this Court for these enumerated causes of action.

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

Cornerstone raises several affirmative defenses in its Amended Answer to Plaintiff’s Amended Complaint in an effort to bar recovery by APS. However, none of the affirmative defenses

raised by Cornerstone are in fact applicable to this case. These affirmative defenses include: (A) Failure to state a claim pursuant to I.R.C.P. 12(b)(6) (see First Affirmative Defense); (B) Statute of Frauds in that this transaction involves real estate, and such transaction was never reduced to writing (see Second Affirmative Defense); (C) Accord and Satisfaction; Any debt owed to Plaintiff by Defendant has been paid in full (see Third and Fourth Affirmative Defenses); (D) Detrimental Reliance (see Fifth Affirmative Defense); (E) Failure to Confer a Benefit (see Sixth Affirmative Defense); (F) Inconsistent or alternative causes of action plead in Plaintiff's Amended Complaint (see Seventh Affirmative Defense); (G) Defendant reserves the right to allege additional defenses and/or counterclaims after completion of discovery (none have been raised); (H) Plaintiff is not the real party in interest and therefore is barred from asserting all claims alleged in its Amended Complaint; (I) Plaintiff lacks standing to prosecute its Amended Complaint; (J) Plaintiff's claim is barred by illegality.

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

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

answer or amended answer to APS' amended complaint. For this reason, Cornerstone has failed to properly plead its I.R.C.P. 12(b)(6) claim and has therefore waived this defense.

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

As this Court is well aware, this case has gone through two sets of cross motions for summary judgment. Cornerstone has repeatedly attempted to have this case dismissed, to no avail. This Court has ruled there are genuine issues of material fact and this case has since gone to trial. APS has demonstrated through testimony and evidence that more than enough evidence exists to sustain its causes of action against Cornerstone and APS is entitled to its relief sought.

B. Defense of Statute of Frauds

In its amended answer, Cornerstone pled the affirmative defense of the Statute of Frauds stating, "[T]his transaction involves real estate, and such transaction was never reduced to writing." (Def.'s Am. Answer to Pl.'s Am. Compl., ¶V.) The Statute of Frauds as it relates to real estate is the only portion of the Statute of Frauds pled as an affirmative defense in Cornerstone's Answer. Id. "In pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of frauds

... and any other matter constituting an avoidance or affirmative defense.” IDAHO R. CIV. P. 8(c).
“The statute of frauds defense is an affirmative defense *which must be specifically raised* by the pleadings.” Paloukos v. Intermountain Chevrolet Co., 99 Idaho 740, 744, 588 P.2d 939,943 (1978)(emphasis added).

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

Assuming arguendo that Cornerstone has not waived its right to utilize these other sections of the Statute of Frauds, as explained herein below, the Statute of Frauds is not applicable in this case. Even if it were, the writings that exist and which are part of the record before the Court and the performance by both parties to the agreement, fully satisfy any Statute of Frauds requirements.

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

Idaho Code 9-505(4) pertains to “An agreement . . . for the *sale*, of real property, or of an interest therein. . . .” IDAHO CODE § 9-505(4) (Michie 2004). Neither APS nor Cornerstone is selling any real property. No facts alleged and no evidence produced by either party evidences any “sale” of real property. This case relates to monies lent by APS to Cornerstone so that Cornerstone could buy real property from a third party. As the testimony of Mr. DeYoung, Mr. Pool and Mr. Kendrick revealed, the agreement in issue pertains to security for monies lent by APS to Cornerstone

and payment of the \$750 per lot to APS, which was a condition of payment by Cornerstone to APS. Idaho Code 9-505(4) simply does not apply because neither of the parties were selling real property or selling an interest in real property to the other party.

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

Cornerstone's agent, Mr. Kendrick drafted multiple memorandums, agendas and notes memorializing the agreement of payment of \$750 per lot by Cornerstone to APS. Exhibits 3, 7, 8,9 and N. Mr. Tallman, too, drafted documents memorializing the agreement. Exhibits 2 and 10. The April 2005 memorandum identified as Exhibit 7, which is signed by Mr. Kendrick is particularly insightful since it was drafted by Cornerstone's Member Manager and reads in part, as follows:

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

(Ex. 7)

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

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

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

Id.

The foregoing case law demonstrates, once again, that the Statute of Frauds relates to the conveyance of real property, which is not the issue in this case. However, as admitted by Cornerstone, APS performed its obligation and provided the agreed upon down payment, in the sum of \$226,218.70, which was used to purchase the property. The April 7, 2005 memorandum from Cornerstone evidences the complete agreement between APS and Cornerstone. The memorandum evidences monies received from APS, monies paid by Cornerstone to APS, a balance, interest incurred and the payment due per lot. This writing is complete, definite and certain in all its material

terms. The only ambiguity was the amount of the per lot payment, not whether there was a per lot payment to be made at all. Furthermore, this writing was created after APS stopped exercising its option to lend on the project due to not receiving a promissory note and deed of trust. No where in the document does it say anything about a contingency for APS to receive its per lot payment. As a matter of fundamental contractual and agency law, the agreement between APS and Cornerstone is lawful and binding.

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

In addition to the satisfaction of any Statute of Frauds requirements, the facts do not support the application of other sections of the Statute of Frauds raised by Cornerstone. In essence, Cornerstone argues that because the principal amount loaned by APS to Cornerstone was greater than \$50,000, then for the loan from APS to Cornerstone to be valid, it had to be in writing. Idaho Code 9-505(5) is a mechanism of redress for lenders who are accused of making oral commitments to lend money, then fail to deliver the funds. "The apparent purpose of the statute is to protect banks and other businesses from claims that they made an oral commitment to lend money or to grant credit and breached such commitment by failing to deliver the funds. Once the loan funds have been delivered to the borrower, so there is no longer an executory promise to make a loan, the statute, by its plain language, has no further application." Rule Sales & Serv. v. United States Bank Nat'l. Ass'n., 133 Idaho 669, 673, 991 P.2d 857, 861 (Idaho Ct. App. 1999).

Idaho Code § 9-505(5) does not apply in this situation because Cornerstone is not seeking to force APS to further lend funds. To the contrary, Cornerstone is attempting to get out of its repayment obligations by incorrectly relying on a statute that was designed to protect lenders from unenforceable oral commitments to make loans. Cornerstone attempts to convince the Court that

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this statute applies when Cornerstone has failed to allege a single fact or introduce a single item of evidence in support of the statute. The only conceivable situation where Idaho Code § 9-505(5) would apply to this case would be if Cornerstone was attempting to force APS to loan further funds (i.e. more money to complete the development). In that case, APS could validly assert Idaho Code § 9-505(5) as a defense and prevent Cornerstone from obtaining an order requiring APS to make a loan of further funds. This section of the Statute of Frauds does not apply.

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

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

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

IDAHO CODE § 9-508 (Michie 2004).

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

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

Cornerstone admits and does not dispute that the real property purchased in this matter was purchased from a third party and not APS. APS was not the seller or the owner of the real estate purchased by Cornerstone. Because APS was never the seller or owner of the real estate involved in this case, I.C. 9-508 is simply not applicable.

For the foregoing reasons, the Statute of Frauds defense raised by Cornerstone cannot be sustained. Under the terms of the contract between APS and Cornerstone, APS is entitled to receive the sum of \$750.00 per lot once the lot is sold. This is purely contractual in nature. The parties never intended to *transfer* any property in a way that would bring the statute of frauds into play as to the payment of the \$750.00 per lot agreement. Furthermore, the writings that exist and the performance by APS and Cornerstone fully satisfy any and all other Statute of Frauds requirements.

C. Defense of Accord and Satisfaction Does Not Apply.

Cornerstone's affirmative defense of accord and satisfaction is not applicable and does not bar recovery by APS. The elements of an accord and satisfaction are: (1) a bona fide dispute as to the amount owed; (2) that the debtor tendered an amount to the creditor with the intent that such payment would be in *total satisfaction of the debt owed to the creditor*; and (3) that *the creditor agreed to accept payment in full satisfaction of the debt*, or that both the debtor and the creditor understood that the acceptance of the check was in full payment of all sums owed by the debtor. Beard v. George, 135 Idaho 685, 689 23 P.3d 147, 151 (2001) (italics added). Additionally, because accord and satisfaction is an affirmative defense, the burden is upon the Cornerstone to prove all the elements of an accord and satisfaction. See, Id. citing, Clay v. Rossi, 62 Idaho 140, 108 P.2d 506 (1940).

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

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

Mr. Muhonen: (Counsel for APS) Thank you, Your Honor. In consideration of American Pension Services, Inc., not pursuing preliminary injunction or writ of attachment, American Pension Services, Inc., has agreed to release the TRO that is currently in place as well as the lis pendens that is also in place in consideration of receiving today a wire transfer from Cornerstone in the amount of \$187,591.35. By no means is this to be construed as full and final resolution of this matter, and this sum relates only to the lifting of the TRO and the release of the lis pendens as well.

The Court: All right. Mr. Decker (counsel for Cornerstone's Managing Member, Brad Kendrick), do you stipulate to that?

Mr. Decker: Yes, Your honor, with the clarification that the \$187,591.35 has been arrived at by the parties as an amount that is – that is owed that is not in dispute. So it's not merely consideration for the release of the TRO, but it is not our understanding that it is a full and final settlement of all the claims.

The Court: It may be partial payment of some remaining claims?

Mr. Decker: Yes, Your Honor.

The Court: Is that all?

Mr. Muhonen: That's correct, Your Honor.

The Court: All right. Ms. Shaul.

Ms. Shaul: (Counsel for Mr. Tallman) Thank you, your Honor. I concur with what Counsel has represented, both Counsel have represented, and I believe that Mr. Decker has clarified appropriately that this is an amount that is not

contested by any of the parties at this point as due and owing; and therefore, that's why it's being tendered today.

The Court: All right. So with that proviso you're stipulating to it?

Ms. Shaul: We are, Your Honor.

Hr'g on Mot. to Extend Prelim. Inj., Writ of Attach. and T.R.O., Jan. 24, 2006.

Because the burden is on Cornerstone to prove all the elements of accord and satisfaction, Cornerstone cannot sustain its accord and satisfaction defense with nothing more than a bald assertion. The evidence outlined above and on the Court record evidences that the accord and satisfaction cannot be met. For these reasons, in addition to those listed above, Cornerstone cannot sustain its accord and satisfaction defense.

D. Defense of Detrimental Reliance.

As with all previous discussed affirmative defenses, Cornerstone's affirmative defense of detrimental reliance cannot bar recovery by APS. The elements required to sustain a defense of equitable estoppel are: (1) a false representation or concealment of a material fact be made; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment be made with intent that it be relied upon; and (4) that the misrepresentation resulted in detrimental reliance on the part of the party asserting estoppel. Schoonover v. Bonner County, 113 Idaho 916, 919, 750 P.2d 95, 98 (1988). "To establish detrimental reliance, a party must show that she reasonably and justifiably relied on a specific promise of the offending party *and suffered substantial and foreseeable economic loss when relying on the promise.*" Podolan v. Legal Aid Services, Inc., 1223 Idaho 937, 943, 854 P.2d 280, 286 (Ct. App. 1993)(emphasis added).

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

Cornerstone has not produced one single piece of evidence demonstrating it "suffered substantial and foreseeable economic loss when relying on the promise." First, as demonstrated by the evidence, there was no promise by APS to provide complete funding of the entire development project. Second, Cornerstone admits that when it initially calculated its projected profit in the development project, it estimated it would realize a profit over two (2) million dollars. Cornerstone is realizing that projected profit.

The loss contemplated to sustain a detrimental reliance defense is not present in this case. Cornerstone has not presented one piece of evidence to sustain its burden and substantiating that it suffered substantial and foreseeable economic loss. The burden is on Cornerstone to prove all the elements of detrimental reliance or equitable estoppel. The evidence outlined above and in trial evidences that there was an open, known and agreed upon agreement between APS and Cornerstone. Cornerstone cannot satisfy even one element of equitable estoppel. For this reason, in addition to

those areas listed above, Cornerstone cannot sustain its detrimental reliance defense.

E. Defense of Failure to Confer a Benefit.

Cornerstone's affirmative defense that APS failed to confer a benefit is not supported by the record and cannot bar recovery by APS. This section is incorporated into section II. Breach of Contract set forth more fully above. Simply put, APS brought Cornerstone a project that Cornerstone is realizing a benefit of more than two (2) million dollars.

F. Defense of Pleading in the Alternative.

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

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

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

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

G. Other Additional Defenses or Counterclaims.

As its eighth affirmative defense, Cornerstone reserved the right to allege defenses and/or counterclaims after completion of discovery. Discovery is complete, trial is over and Cornerstone did not raise any further defenses or counterclaims.

H. Defense of Real Party in Interest and Standing

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, 127 P.3d 156, 161 (2005).

Fundamental, established case law also allows a party to prosecute a case in their own name even though the contract entered into was for the benefit of a third party. This is particularly true in the context of an agent filing suit on behalf of an undisclosed principal.² “[I]t [is] a well-established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, *either the agent or the principal may sue on it* ; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party.” New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. 344, 380-381 (1848)(emphasis added).

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal."

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the States, but by this court.

²Pursuant to this Court's request, Plaintiffs are providing the Court with case law supporting the legality of an agent filing suit on behalf of an undisclosed principal. The testimony elicited at trial by Mr. Kendrick demonstrated Cornerstone's knowledge that funds other than APS's own were being lent by APS to Cornerstone. This testimony was confirmed through Exhibit N wherein Mr. Kendrick testified he drafted this document. In the last paragraph he wrote to APS, "Please let me know if you would like to meet or if you or your clients have any interest in the spec homes."

Ford v. Williams, 62 U.S. 287, 289-90 (U.S. 1858).

“The fact that appellee was an undisclosed principal in this contract does not prevent it from bringing this suit, for it is settled law that an agent may act for an undisclosed principal and that the principal may sue third parties on contracts entered into for its benefit by the agent.” Southern Industries, Inc. v. United States, 326 F.2d 221, 223-24 (9th Cir. 1964).

Case law from the Federal Courts for the District of Idaho is also insightful. In Farmers Underwriters Asso. v. Wanner, 30 F. Supp. 358, 359-60 (D. Idaho 1938) the Court relied upon Federal Rule of Civil Procedure 17 and Idaho Code 5-301 and 5-303 which have since been repealed and are now identified as I.R.C.P. 17. In Farmers Underwriters Asso. the Court held that an attorney-in-fact for an inter-insurance exchange was a person with whom or in whose name a contract was made and that such person or entity, pursuant to Rule 17, is the real party in interest.

The principal question urged by the defendant that plaintiff is not the real party in interest and has no capacity to sue, as the Farmers Automobile Interinsurance Exchange issued the policy and therefore there is a non-joinder of parties plaintiff, call for the consideration of equity rule 37, 28 U.S.C.A. following section 723, and rule 17 of the rules of civil procedure, 28 U.S.C.A. following section 723c, and the statute of the State when the pleaded facts are applied. Equity rule 37 provides:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, 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 expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

"Anyone claiming an interest in the litigation may at any time be permitted to assert

his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

And rule 17 of the rules of civil procedure provides:

"(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, 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 his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

"(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

Section 5-301, I C A, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by this code."

And Section 5-303, I C A, provides: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust within the meaning of this section."

These rules and the provisions of the State Statutes seem to be clear as they require that every action shall be prosecuted in the name of the real party in interest, but when a trustee of an express trust; a party with whom or in whose name a contract has been made for the benefit of another may sue in his own name without joining with him the party for whose benefit the action is brought, and therefore the rules apply as the action is in reality one in equity. Western Casualty & Surety Co. v. Beverforden, 8 Cir., 93 F.2d 166.

Under these rules the Farmers Underwriters Association is in fact a real party in interest and is properly classified as a "trustee of an express trust" as well as the "party with whom or in whose name a contract has been made for the benefit of another." And under either of these designations is entitled to maintain the suit. They

have application to an attorney-in-fact dealing with reciprocal insurance. United States Shipping Board Emergency Fleet Corp. v. Sherman & Ellis, 208 Ala. 83, 93 So. 834.

The attorney-in-fact is engaged in that insurance business and it also becomes liable as an insurer. The type of contract of insurance here is termed reciprocal or "interinsurance" and is authorized by the Statute of the State, sections 40-2201 to 40-2206, I C A, inclusive. So when we consider the rules of the Court referred to, the Farmers Automobile Interinsurance Exchange is not an indispensable party but is a proper party, if made so.

Farmers Underwriters Asso. v. Wanner, 30 F. Supp. 358, 359-360 (D. Idaho 1938).

The Idaho Supreme Court, too, has followed many of the cases from the United States Supreme Court and the Ninth Circuit Court of Appeals, cited above.

The testimony mentioned while conflicting in certain respects is substantial and supports the trial court's finding that O. T. Jones acted as agent on behalf of both himself and respondents when he applied for the fire insurance, in culmination of their understanding and agreement to insure their combined interests in the stored potatoes. Sumner v. Flowers, 130 Cal.App.2d 672, 279 P.2d 772 (1955), quoting from Ford v. Williams, 21 How. 287, 289, 16 L. Ed. 36, 38, stated the rule announced by the United States Supreme Court as follows: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein, and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction.' This declares the universal law." See also Wood Building Corporation v. Griffiths, 164 Cal.App.2d 559, 330 P.2d 847; Miller v. Ziedrich, 199 Or. 505, 263 P.2d 611; Baker Oil Tools v. Chism, 70 Wyo. 461, 251 P.2d 569; 3 C.J.S. Agency § 276; 2 Am.Jur., Agency, §§ 392 et seq.

Coburn v. Fireman's Fund Ins. Co., 86 Idaho 415, 425, 387 P.2d 598, 605 (1963)(superseded on other grounds by Keller Loenz Co. v. Insurance Assocs. Corp., 98 Idaho 678, 570 P.2d 1366 (1977)).

"It is not essential, in order to enable a third person to recover on a contract made for his benefit, that he knew of the contract at the time it was made. Our statute, sec. 5-301, I.C.A., seems to recognize

the general rule, that a third person may enforce a contract made for his benefit.” Jones v. Adams, 67 Idaho 402, 408, 182 P.2d 963, 967 (1947).

Applying the foregoing to this case, the law holds that APS had every right to file suit in this matter, has standing, and is also the proper party. Cornerstone readily admits it entered into the contract in issue with APS. Throughout the course of these proceedings, Cornerstone has been 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. As established in Mr. DeYoung’s testimony, as well as the affidavits submitted by the five (5) joined Individual Retirement Accounts (IRAs) holders who also ratified this action, 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. The unrefuted testimony is four of these five individuals authorized Mr. DeYoung (the fifth IRA holder) to invest their IRA funds as he deemed would be beneficial to them. Mr. DeYoung testified he did exercise the authority given to him by these four IRA holders by directing APS to invest these four IRA holders funds, as well as his own personal IRA funds, into the property development project, which is the subject matter of this litigation, which APS subsequently did.

As testified by Mr. DeYoung, each of the five IRA holders signed an Adoption Agreement to the A.P.S. Master Individual Retirement Trust Account. In Exhibit XXX, 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, on page three of the Trust Agreement, in section 6.12, 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.” APS’s filing of suit in this matter was done so in compliance of this contractual obligation and APS was thus made the attorney-in-fact for each of the IRA holders in this action.

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, 710 P.2d 647 (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, 710 P.2d at 649. 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, 710 P.2d at 653. 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, 710 P.2d at 653-54.

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.

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 as their attorney-in-fact. Additionally, the affidavits of each IRA holder submitted previously to the Court and which stand as unrefuted, also demonstrate the five IRAs ratification of APS’s prosecution of this matter. As such, APS is the proper party in this case.

Furthermore, as this Court is well aware, Drew Downs, Dale Henderson, Dean DeYoung, Harry Segura and Curtis DeYoung were joined to this litigation by the Court’s order on August 1, 2007 and are now parties. Rule 19(a)(1) of the Idaho Rules of Civil Procedure pertains to persons to be joined and specifically states in part, “If the person has not been so joined, the court shall order that the person be made a party.” ID. R. CIV. P. 19(a)(1). Rule 21 of the Idaho Rules of Civil Procedure, which pertains to joinder as well, states, “Parties may be dropped or added by order of the court on motion of any party *or of its own initiative* at any stage of the action and on such terms as are just.” ID. R. CIV. P. 21 (emphasis added).

In Dell Holmes v. Henderson Oil Company, 102 Idaho 214, 628 P.2d 1048 (1981) Defendant had moved to dismiss Plaintiff’s complaint, alleging that the Plaintiff had failed to join an indispensable party. Plaintiff moved to substitute in another party as plaintiff and the District Court denied Plaintiff’s request and subsequently dismissed Plaintiff’s claims. Id. at 215, 628 P.2d at

1049. On appeal, the Idaho Supreme Court stated that the trial court should not have dismissed the claims and that the other party should have been brought into the action “so that the entire conflict could have been resolved without resort to the bringing of further actions.” *Id.*

In reaching this conclusion, the Court relied upon Rules 19(a)(1) and 21 and stated:

I.R.C.P. 19(a)(1), which was apparently designed to serve the function of now repealed I.C. §5-324, provides for joinder of persons subject to service of process if necessary to complete relief to those who are already parties, and, as did the former statute, provides that *the court itself* may so order. I.R.C.P. 21, captioned “Misjoinder and nonjoinder of parties,” provides that misjoinder, and inferentially nonjoinder, “is not ground for dismissal of an action. It further provides that “[parties] may be dropped or added by order of the court on motion of any party or *of its own initiative* at any stage of the action and on such terms as are just.”

Id. at 216, 628 P.2d at 1049 (emphasis added).

In this case, the foregoing is exactly what this Court did during the August 1, 2007 proceedings. APS presented argument that the now joined parties had ratified the current cause of action by APS and that APS was the proper party, with standing, before the Court. Defendant argued that the case should be dismissed as APS was not the proper party and that the non-joined parties should have to file new causes of action. The Court expressed some concern about curtailing subsequent litigation from the now joined parties and killing off more trees in the process and thus ordered, on its own initiative, that Drew Downs, Dale Henderson, Dean DeYoung, Harry Segura and Curtis DeYoung are joined as Plaintiffs to this case. Because of the Court’s ruling, APS was not bound to join the new parties since the Court did it on its own initiative.

The joined parties have the same interests in a recovery in this matter as does APS. See I.R.C.P. 17 (a) (“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.”). If there is a successful recovery by APS, distribution of the recovery is between APS and the newly joined parties and has absolutely

PLAINTIFFS’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW - Page 47

no bearing on Defendant.

It is APS's position that the reason the new parties were joined by the Court was to curtail potential subsequent litigation by the then non-parties and to secure a just, speedy and inexpensive determination to this litigation. Relating back to the Idaho Supreme Court's decision in *Holmes*, reversing the District Court's dismissal, the Court wrote:

Other provisions in our own rule of civil procedure suggest that I.R.C.P. 17(a), 19(a)(1), and 21 should be read not only just to allow, but to require, the granting of the Dell Holmes motion. I.R.C.P. 1(a) directs that "[these] rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." We noted in *Sines v. Blaser*, 98 Idaho 435, 566 P.2d 758 (1977), that I.R.C.P. 1 was designed to further "our general policy of providing [litigants their] day in court . . . , 98 Idaho at 437, 566 P.2d at 760, and that the rule "is a constant reminder that the rules are to be liberally construed, and a just result is always the ultimate goal to be accomplished." 98 Idaho at 439, 566 P.2d at 762. Denying Dell Holmes' motion to substitute party plaintiff hardly served to perpetuate the policy of securing a just, speedy and inexpensive determination.

Holmes, 102 Idaho at 216, 628 P.2d at 1049.

In APS's opinion, the policy as outlined above was exercised by this Court in securing for Defendant a just, speedy and inexpensive determination and curtailing potential, subsequent litigation. That is what the Court was trying to accomplish in joining the new individual Plaintiffs.

Cornerstone has asserted that APS does not have standing in this case since if money is owed, it is owed to pension plan participants and not APS. As outlined above through the cited rules and case law, this argument is without merit and fails for several reasons. First, Cornerstone, unequivocally admits there is a contract between APS and Cornerstone. The only issue, from Cornerstone's perspective, is not whether there was a \$750 per lot agreement (Cornerstone readily admits that it made the \$750 agreement with APS), but whether payment of \$750 per lot to APS by Cornerstone was contingent upon APS providing full funding for the entire development project.

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

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

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

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

For these reasons and those as outlined above, APS has standing, APS lawfully brought suit in this matter, APS is the real party in interest, and the ratification and joinder of the five IRA holders prevents Cornerstone from exposure to subsequent litigation in this matter.

VI. DAMAGES

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

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

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

In the present case there are 212 lots for which APS is entitled to be paid \$750 for each lot, for a total of \$159,000.00. Cornerstone admits through the testimony of Scott Tallman that 141 lots have already been sold. APS is entitled to a damages award of either a lump sum payment of \$159,000.00 from Cornerstone, or a payment in the amount of 141 lots multiplied by \$750.00, for a sum of \$105,750.00 plus security documents ensuring payment to APS for the remaining 71 lots to be sold in the development.

VII. ATTORNEY FEES AND COSTS

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

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

Idaho Code § 12-120(3).

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

Furthermore, on June 6, 2007 this Court held a pre-trial conference due to the parties request to move the trial date. This conference was held on the record and was held shortly after the parties had argued their first motions for summary judgment. On the record, the Court verbally stated there existed genuine issues of material fact and that summary judgment was being denied. The Court also stated, though, that based upon its review of the case, unless some new evidence was presented at trial, it was inclined to rule that the contingency as asserted by Cornerstone DID NOT in fact exist. As was briefed during summary judgment, Mr. Tallman testified in deposition that he had no evidence to support his contingency claim that only he has asserted and that the other members of Cornerstone all testified they had never heard of. At trial, Mr. Tallman testified he still had no evidence other than his own self serving assertion. No further evidence was produced at trial by Cornerstone that it hadn't already produced during summary judgment proceedings.

Cornerstone, even with this guidance from the Court, still pushed this matter to trial, knowing that it had nothing further to provide to this Court. APS is entitled to its award of attorney fees and costs.

CONCLUSION

Based upon the foregoing, Plaintiff are entitled to judgment requiring Cornerstone to pay Plaintiffs a lump sum payment of \$159,000.00 or \$105,750.00 for the 141 lots already sold and provide security documents entitling Plaintiffs to be paid \$750.00 for each of the remaining 71 lots to be sold in the development project.

DATED this 13 day of September, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: *S. Muhonen*
STEPHEN J. MUHONEN
Attorney for Plaintiff

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 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

BONNEVILLE COUNTY
IDAHO

7 SEP 28 09:44

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

<p>AMERICAN PENSION SERVICES, INC., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, E. DALE HENDERSON,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CORNERSTONE HOME BUILDERS, LLC,</p> <p>Defendant.</p>	<p>Case No. CV-06-140</p> <p>ORDER</p>
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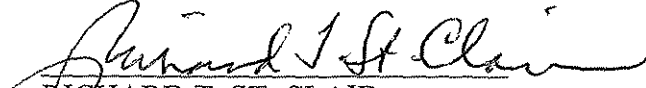
A court trial was held on August 28-30, 2007. After the close of evidence the plaintiffs moved orally pursuant to I.R.C.P. 15(b) to amend their complaint to conform to the evidence presented at trial to add a claim for fraudulent conveyance. No proposed amended complaint was submitted. On September 7, 2007, Cornerstone filed a brief in opposition to the motion to amend, however in its brief Cornerstone stated that it would stipulate to joining the new Idaho limited liability company as a defendant and subject to any judgment rendered against the original Cornerstone defendant. On September 13, 2007, the plaintiffs filed a reply brief.

The Court having concluded that the plaintiffs introduced evidence that in 2006 while this action was pending the owner of Cornerstone formed a new Idaho limited

liability company with the same name and shortly thereafter transferred all of the assets of Cornerstone to it without paying any consideration so as to render Cornerstone insolvent and without assuming any liability that might result from this action; and having concluded that counsel for the new limited liability company has consented for it to be joined as a defendant, and the Court being fully advised in the premises, and good cause appearing;

IT IS HEREBY ORDERED that the plaintiffs' motion to amend is GRANTED, and the plaintiffs may file an amended complaint setting forth a cause of action under I. C. 55-913(1)(b)(2), 55-916(c) and 55-917(2) against the new Cornerstone limited liability company as a successor entity.

Dated this 28 day of September, 2007.


RICHARD T. ST. CLAIR
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on the 28 day of September, 2007, I served a true and correct copy of the forgoing Order upon the following by U. S. mail postage prepaid, or by hand delivery, or by depositing at recipients' courthouse box:

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Budge & Bailey, CHTD
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Attorneys for Defendant

RONALD LONGMORE
Clerk of the District Court
Bonnevill County, Idaho

By MS
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

7 SEP 28 12:12

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

<p>AMERICAN PENSION SERVICES, INC., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGUARA, DEAN G. DEYOUNG, E. DALE HENDERSON,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>CORNERSTONE HOME BUILDERS, LLC,</p> <p>Defendant.</p>	<p>Case No. CV-06-140</p> <p>FINDINGS OF FACT AND CONCLUSIONS OF LAW</p>
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I. PROCEDURAL BACKGROUND

On January 10, 2006, American Pension Services, Inc. ("APS") filed a complaint against Cornerstone Home Builders, LLC ("Cornerstone"). APS filed an amended complaint on October 5, 2006. The amended complaint alleges the following causes of action against Cornerstone: (1) breach of express contract; (2) breach of implied in fact contract; (3) fraud; (4) unjust enrichment and breach of the covenant of good faith and fair dealing. On October 24, 2006, Cornerstone filed an answer to APS's amended complaint.

The Court entered an order denying cross-motions for summary judgment on June 6, 2007. On August 10, 2007, the Court entered an order regarding the parties' second motions for

summary judgment. The August 10th order dismissed APS's defense of illegality and joined the following individuals as plaintiffs: Drew Downs ("Downs"), Dale Henderson ("Henderson"), Dean DeYoung, Harry Segura ("Segura") and Curtis L. DeYoung ("DeYoung") (collectively with APS "Plaintiffs").

A court trial was held on August 28-30, 2007. Plaintiffs' exhibits 2-6, 8-9, and 23-25 were admitted by stipulation of the parties. Plaintiffs' exhibits 1, 7, 10, 14, 27 and 29 were admitted at trial. The Plaintiffs called Martin Pool ("Pool"), Brad Kendrick ("Kendrick"), and DeYoung as witnesses.

The following Defendant's exhibits were admitted by stipulation: A-V, X-VV, LLL-OOO, and EEEE-GGGG. Defendants' exhibits XXX & YYY were admitted at trial. APS called the following individuals as witnesses: DeYoung, Pool, Wendy Nelson ("Nelson"), Mary TeNgaio and Scott Tallman ("Tallman").

The Plaintiffs' exhibits are described as: (1) the Articles of Organization of Cornerstone Home Builders, LLC dated October 14, 2003; (2) a document entitled "Cornerstone Development Idaho Falls, Idaho" containing handwritten notes from Tallman written while on a trip to Spokane, Washington; (3) an untitled and undated document containing handwritten notes from Kendrick taken while on a trip to Spokane, Washington; (4) a note for \$250,000.00 dated June 4, 2004 signed by Kendrick and Tallman; (5) a note for \$150,000.00 dated September 7, 2005 signed by Kendrick and Tallman; (6) a Deed of Trust dated September 7, 2005 signed by Kendrick and Tallman; (7) a document entitled "APS Financial Reconciliation" dated April 7, 2005 signed by Kendrick; (8) an untitled document dated March 9, 2005 containing typewritten and handwritten notes regarding Cornerstone's finances; (9) an undated and unsigned document entitled "Issues"; (10) a spreadsheet containing financial information regarding Lot # 29 in the

Cornerstone subdivision; (11) four copies of a Corporation Warranty Deed, one copy for each of the four phases of the Cornerstone project, dated September 29, 2003 signed by Greg Strate; (12) four copies of a Deed of Trust, Assignment of Rents and Security Agreement dated September 25, 2003 signed by Pool and Tallman; (13) four copies of a Hazardous Waste Warranty and Indemnification Agreement dated September 26, 2003 signed by Pool and Tallman; (14) a Deed of Reconveyance time-stamped March 20, 2006 signed by Ed Watson of Amerititle; (15) three copies of a Substitution of Trustee and Full Reconveyance dated October 11, 2005 signed by Truitte Todd and Paul V. Carlin III; (16) an Option Agreement signed by Pool, Tallman and Turner; (17) a plat map dated September 26, 2003; (18) an Application for Certificate of Authority dated March 5, 2005 signed by Kendrick; (19) an Application for Registration of Foreign Limited Liability Company signed by Kendrick time-stamped June 27, 2005; (20) Articles of Amendment to Articles of Organization signed by Kendrick, Tallman, Jonathan Reyes ("Reyes") and Pool time stamped March 23, 2004; (21) a letter dated September 12, 2003 from Andy Belew to Kendrick to Tallman; and (22) a Purchase and Sale Agreement for Phase II dated September 26, 2003 signed by Pool, Tallman and Turner.

Many of the Defendant's exhibits correspond with the exhibits presented by the Plaintiffs, including the exhibits described in the foregoing paragraph as numbers: (2)-(7), (9-11), (15-16); (19)-(20), (22) and (22). The remaining Defendant's exhibits are described as: (1) the Operating Agreement of Cornerstone Home Builders, LLC; (2) a plat map depicting the Cornerstone subdivision; (3) the Idaho Articles of Organization for Cornerstone time-stamped July 12, 2006 signed by Tallman; (4) an unsigned handwritten note on paper with Bonneville Land & Title Co. letterhead with the dates "9-9", "9/26" and "9/27"; (5) a letter dated August 30, 2005 from Nelson to DeYoung with Amerititle letterhead; (6) an undated and unsigned

Disclosure Statement with APS letterhead; (7) a fax cover sheet on Amerititle letterhead from Nelson to Kendrick dated August 30, 2005; (8) a document entitled "Cornerstone Transactions for American Pension (1001)" dated October 10, 2005; (9) a letter from Kendrick to DeYoung dated June 4, 2004; (10) a letter on from Kendrick to Tallman dated June 7, 2004; (11) a fax with APS letterhead and a time stamp of June 14, 2004 addressed to Kendrick and Tallman; (12) a letter from Kendrick to DeYoung dated August 10, 2004; (13) a letter from Kendrick to DeYoung dated December 14, 2004; (14) a fax from DeYoung to Kendrick time stamped April 1, 2005; (15) A letter from Kendrick to DeYoung/APS dated July 28, 2005; (15) a fax dated February 26, 2004 with DeYoung's signature requesting the Bank of Utah to wire funds to Tallman Construction dated February 26, 2004; (16) a fax on APS letterhead from a person named "Chris" regarding wiring instructions dated March 16, 2005; (17) an unsigned document dated May 22, 2007; (18) a fax from Becky Holzemer to Penny Shaul dated January 24, 2005; (19) a document entitled "****REPRINT****"; (20) Outgoing Wire Transfers from Cornerstone to APS signed by Tallman or Sheri Tallman dated August 2, 2004, January 21, 2005, March 16, 2005, April 1, 2005, April 20, 2005; May 6, 2005 and December 14, 2005; (21) the first page of a Trust Deed dated April 1, 2004; (22) the first page of a trust deed dated March 19, 2004; (23) the first page of a Receiver's Limited Warranty Deed; (24) a Trust Deed signed by Kendrick and Tallman dated October 25, 2005; (25) Plaintiff's Responses to Defendant's Discovery Requests; (26) an undated and unsigned Trust Agreement on APS letterhead entitled "APS Master Individual Retirement Trust Agreement"; and (27) an undated and unsigned Disclosure Statement on APS letterhead.

After the close of evidence the Plaintiffs moved pursuant to I.R.C.P. 15(b) to amend their complaint to conform to the evidence presented at trial to add a claim for fraudulent conveyance.

On September 7, 2007, Cornerstone filed a brief in opposition to the motion to amend. On September 13, 2007, the Plaintiffs filed a reply brief. On September 28, 2007, the Court granted the Plaintiffs' motion.

On September 13, 2007, both sides filed post-trial briefs and proposed findings of fact and conclusions of law.

Based on the evidence admitted at trial, including the Court's evaluation of the credibility of the witnesses, pursuant to I.R.C.P. 52(a), the Court makes the following findings of fact and conclusions of law from a preponderance of the evidence.

II. FINDINGS OF FACT

1. APS is a Utah Corporation with its principal place of business located in Sandy, Utah. DeYoung is the sole shareholder and president of APS.
2. APS engages in third party administration of employee retirement accounts and self-directed Individual Retirement Accounts ("IRAs").
3. Cornerstone was a Utah limited liability company formed in Utah on October 24, 2003. Its original members included Jonathan Reyes, Scott Tallman, Martin Pool and Brad Kendrick. As of July, 2006, Tallman was the sole remaining member of Cornerstone.
4. Cornerstone Home Builders, LLC ("Cornerstone II") was formed as an Idaho limited liability company on July 12, 2006, by S.R. Tallman Construction Inc. ("Tallman Construction"), an Idaho corporation owned by Tallman. After July, 2006, Cornerstone transferred all its real property to Cornerstone II without paying any consideration so as to render Cornerstone insolvent, and without assuming any liability for the claims in this action.
5. From late 2003 to early 2006 Cornerstone, and after July, 2006 Cornerstone II, constructed homes in an area located in Ammon, Idaho known as the Cornerstone Subdivision.

6. In 2001, DeYoung approached Pool about investing in a housing construction project located in Ammon that was experiencing financial difficulties. Pool, through his company P&B Enterprises, Inc., ("P&B") considered investing in the project, but determined that the market conditions were not right at that time.

7. In 2003, Tallman, as president of Tallman Construction, served as the general contractor for a few houses for P&B. Tallman and Pool developed a good professional relationship through their business dealings between their respective companies.

8. Later in 2003, DeYoung again contacted Pool about developing the Ammon project. Pool believed the market conditions might be favorable for the project at that time and began considering the project.

9. Pool knew that Tallman was originally from the Idaho Falls area and told DeYoung that Tallman might be a good person to bring on to the project.

10. Sometime around August 2003, Tallman decided to stop by Pool's office to say hello to Pool. Pool introduced DeYoung to Tallman, and told DeYoung that Tallman was the person he had been talking about regarding the Cornerstone project located in Ammon. DeYoung told Tallman that he would arrange for Tallman to talk to some people regarding the project.

11. Later that afternoon, representatives from Old West Annuity and Life Insurance ("Old West") in Spokane, Washington called Tallman. Old West had acquired the Ammon property and was attempting to sell it to a developer.

12. Within a few days of Old West contacting Tallman, Tallman arranged a meeting in Spokane with Old West representatives. Tallman, Kendrick and DeYoung flew to Spokane to negotiate a price for the parcel of land known as Cornerstone.

13. Tallman and Kendrick, as two of the four intended members of Defendant Cornerstone, which had not yet been legally formed, negotiated a purchase and sale agreement between P&B and Tallman Construction as purchasers, and Old West, as seller, for the Cornerstone Subdivision, in the approximate amount of one million two hundred thousand dollars, (\$1,200,000.00). The real property was to be deeded to P&B and Tallman Construction, due to Cornerstone not yet being formalized.

14. As part of the agreement between soon to be Cornerstone and the property sellers, the property sellers agreed to provide soon to be Cornerstone with 10 lots free and clear. Additionally, sellers agreed to provide construction financing for construction of the improvements in the development project in the amount of \$230,000.00. Exhibits 27 and 29 demonstrate this \$230,000.00 obligation. The testimony given by Pool, Kendrick and Tallman establishes that these documents for development financing were all signed *after* the Spokane trip and the parties had returned home. These are all documents relating to financing the development of the project by the property seller, after the agreement to purchase had been made. The plan to finance the project was to roll the profits from the 10 free and clear lots into further development within the project, along with the \$230,000.00 coming from the sellers, all in order to perpetuate a constant stream of financing for the development of the project. The profits from the development would be reinvested into the development to fund its growth.

15. While Kendrick, Tallman and DeYoung were in Spokane negotiating the purchase price, Kendrick and Tallman were working various calculations, including how the project would be financed. Exhibit 2 evidences Tallman's calculations and demonstrates how Met Life (seller) was going to provide financing and how a release on 10 lots was to be provided to facilitate the financing of the project as well. Exhibit 2 also is illustrative as it evidences the

\$750.00 per lot obligation in the upper right hand corner of the exhibit where it reads "750.00 Curtis." The testimony given was that note was placed there as part of determining the cost to develop the lots and what their potential selling prices may be.

16. While the parties were in Spokane, Washington, negotiating the purchase of the subject property, there was a break where DeYoung, Tallman and Kendrick discussed the fact that DeYoung wanted his \$750.00 equity position to be in writing. Kendrick took notes admitted as Exhibit 3, evidencing the discussion and DeYoung's request.

17. When the agreement between soon to be Cornerstone and the Spokane sellers was finalized, an oral agreement was also reached between DeYoung and soon to be Cornerstone that DeYoung was to provide the down payment of approximately 20% for the purchase of the development property, to be paid back at 10% interest and to be secured by a promissory note and deed of trust and be paid \$750.00 per lot at the closing of each lot sold in the development project as well as DeYoung having the option to lend more money at 10% interest to construct the project. Both agreements were ratified and confirmed by Kendrick, soon to be Cornerstone's managing member and soon to be member, Pool. Tallman had no further substantive conversations with DeYoung after the Spokane trip. DeYoung had further conversations regarding the agreements with Pool and Kendrick.

18. On September 30, 2003, DeYoung provided the agreed upon 20% down payment, in the sum of \$226,218.70, which was used to purchase the property. DeYoung obtained the money from the IRA accounts of plaintiffs Downs, C. DeYoung, Sequera, D. DeYoung and Henderson. Cornerstone did not provide a Promissory Note or Deed of Trust to secure the loan at this time.

19. The balance of the purchase price of the Subdivision, owed to Old West, in

excess of \$1,000,000.00 was paid for directly from Cornerstone from its own funds.

20. On January 22, 2004, P&B and Tallman Construction executed a Corporation Warranty Deed transferring the Subdivision to Cornerstone.

21. Following the September 30, 2003 loan, DeYoung wired additional sums to Cornerstone, also taken from the IRA accounts of plaintiffs Downs, C. DeYoung, Sequera, D. DeYoung and Henderson.. After each additional loan, Cornerstone did not provide promissory notes or deeds of trust to secure the additional loans.

22. The combined amount of money lent by APS to Cornerstone, through February 2004 was in the approximate sum of a half of a million dollars. Exhibit 7 is a document created by Kendrick as managing member of Cornerstone, memorializing Cornerstone's calculations of sums received from APS through February 2004.

23. In March 2004, APS refused to lend any additional funds to Cornerstone as a result of having lent approximately one-half million dollars to Cornerstone and having no security in place for said funds.

24. Tallman was forced to obtain alternate financing, which he did, through his contact, Howard Kent. Kent began providing financing to APS in March, 2004.

25. When APS stopped lending money to Cornerstone, Tallman told Kendrick that Cornerstone would not be paying APS the \$750.00 per lot because, from his perspective, the \$750.00 per lot was only to be provided upon complete funding of the entire development project by APS. As testified to by DeYoung, Pool and Kendrick, this contingency expressed by Tallman at this time was never part of the agreement between APS and Cornerstone's promoters in the Spokane meeting.

26. In March 2004, Pool and Reyes disassociated themselves from Cornerstone, and only Kendrick and Tallman remained as members of Cornerstone.

27. In June, 2004, on behalf of Cornerstone, Kendrick sent a Promissory Note to APS for \$250,000.00, interest free, signed by himself and Tallman, see Exhibit 4. This is the first Note Cornerstone sent to APS and it was never recorded. Testimony given was that the Cornerstone members knew this document was inaccurate, would more than likely not be accepted by APS, and was merely drafted to stall and buy time to secure other financing.

28. Accompanying the June, 2004 Note was a letter identified as Exhibit N, written by Kendrick to APS. Testimony from Kendrick was that he drafted the letter, knowing the amount of money claimed owing to APS was wrong. Kendrick also testified that the purpose of the closing paragraph was to invite APS to continue to exercise its option to lend on the project. This paragraph also evidences Cornerstone's knowledge that APS got its money from APS "clients." Those "clients" were plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson.

29. Following receipt of this Note, DeYoung informed Kendrick this Note was in error and was not acceptable as it did not reflect the agreement between APS and Cornerstone. See Exhibit Q.

30. In September 2005, now approximately two years after the original sums had been lent, Kendrick, on behalf of Cornerstone, sent APS another promissory note and a deed of trust which reflected an unpaid principal amount of \$150,000.00 at 10% interest. See Exhibits 5 and 6. These documents were never recorded. Both Kendrick and Tallman testified that neither of these documents sent to APS were accurate as well. Following receipt of this Note and Deed

of Trust, DeYoung informed Kendrick this Note was also in error and was not acceptable as well as it did not reflect the agreement between APS and Cornerstone.

31. In April 2005 Kendrick wrote a Financial Reconciliation to APS and signed it as Cornerstone's managing member. Exhibit 7. This document itemized monies lent by APS to Cornerstone and amounts paid back. Additionally, the Reconciliation also addressed the principal and interest balance then asserted by Cornerstone believed to be due and owing, as well as the existence of the per lot agreement. Specifically, in the last paragraph on page 2 of Exhibit 7, Kendrick wrote,

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

32. Kendrick testified that he wrote that paragraph, knowing its content to be inaccurate, as he was "negotiating" between himself and Tallman and APS. Kendrick testified that Tallman was still refusing to pay APS the \$750.00 per lot fee and he was trying to reach a number that everyone could agree on.

33. APS agreed to compromise the per lot amount to \$650.00 per lot, but Cornerstone was to pay APS the amounts due within three weeks of the agreement. Kendrick identified this \$650.00 agreement in a written Cornerstone meeting agenda identified as Exhibit 9. Tallman still refused to pay this obligation to APS and Cornerstone never did pay it.

34. In March 2005 Kendrick prepared another written agenda for a Cornerstone business meeting, identified as Exhibit 8. This writing evidences Cornerstone's obligation regarding the per lot payment which remained due and owing, in addition to the outstanding

principal and interest. Specifically, regarding Curtis DeYoung paragraph (c.) reads, "We committed to him. [sic] i. What if we didn't take his money, we would still have to honor our commitment - he is the reason we have this great opportunity." Kendrick testified that this document was given to Tallman and Tallman still refused to acknowledge the debt owed to APS.

35. In Kendrick's testimony, he also testified as to Exhibit 10, which is a copy of the construction costs break down for lot #29 in the Cornerstone project. This document was given to Kendrick by Tallman on March 9, 2004 or sometime thereafter. Item number 1600, also evidences in writing the \$750.00 equity payment that was agreed upon by Cornerstone with APS.

36. In January 2006 Cornerstone was sued by APS for the outstanding principal and interest. Once Cornerstone resolved this portion of the obligation with APS, the parties agreed on the record on January 24, 2006, before this Court, that there still remained issues to be resolved between APS and Cornerstone and that the then current agreement was not to be construed as final resolution of all issues between the parties.

37. In approximately April 2006 Kendrick disassociated himself from Cornerstone. Following Kendrick's disassociation from Cornerstone and following the filing of suit in this matter, Tallman testified that he dissolved Cornerstone that was originally incorporated in the state of Utah. Tallman testified that Cornerstone then reformed in Idaho with Tallman's construction company, S.R. Tallman Construction being the owner and Tallman is the Managing Member. Exhibit A is the newly created operating agreement for the newly formed LLC identified in these Findings as Cornerstone II. Exhibit C is the Articles of Organization filed for Cornerstone II. Tallman also testified that when the Utah Cornerstone was dissolved, its only asset, the property development project, was transferred into Cornerstone II. Tallman also testified that none of the Utah LLC obligations were assumed by Cornerstone II.

38. Since the parties resolved the underlying principal and interest issues, Plaintiff amended its Complaint, claiming recovery of the \$750.00 per lot.

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

40. Tallman, Pool and Kendrick each testified that there are 212 lots in the property development project. Cornerstone and Cornerstone II have not paid any of the plaintiffs \$750 for any lot sold in the Subdivision. Tallman testified that currently, approximately 141 lots have been sold to date.

41. DeYoung testified that funds from five (5) IRA accounts were used as the funds lent to Cornerstone. These five (5) IRA accounts are owned by Curtis DeYoung, Dean DeYoung, Segura, Downs and Henderson.

42. On July 20, 2007, each owner of the five (5) IRA accounts filed affidavits with this Court, ratifying and confirming the actions of APS in this litigation and authorizing APS to continue pursuing the claims against Cornerstone. The signature pages to each of these affidavits were hand-filed with the Court on August 1, 2007.

43. On August 1, 2007, this Court joined each of the five (5) IRA members, Downs, C. DeYoung, Sequra, D. DeYoung and Henderson as plaintiffs.

44. Cornerstone made several payments to APS to repay the loans with 10% interest, and those claims are settled. APS was the agent of plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson, and they are bound by the settlement and payment as such loans.

45. APS itself is not the true source of the funds loaned to Cornerstone. APS has no expectation or contractual right to receive any payment from Cornerstone.

46. Curtis DeYoung or APS was acting as an agent with authority to invest IRA funds owned by Downs, C. DeYoung, Segura, D. DeYoung and Henderson when the oral agreements were made with Cornerstone's promoters in 2003 and when the loans were made in 2003 through 2004. The \$750 per lot consideration was part of the oral agreements made for plaintiffs Downs, C. DeYoung, Segura, D. DeYoung and Henderson.

47. Henderson's IRS account was the source of \$226,218.70, loaned to Cornerstone on September 30, 2003.

48. Downs' IRA account was the source of \$49,476.30, loaned to Cornerstone on November 5, 2003.

49. Curtis DeYoung's IRA account was the source of \$36,406.91, loaned to Cornerstone on November 5, 2003.

50. On January 13, 2004, Cornerstone received a wire in the amount of \$78,280.20. Segura's IRA account was the source of \$2,000.00 of the total amount. The balance, \$76,280.20, came from Dean DeYoung's IRA account.

51. Segura's IRA account was the source of \$97,569.33, loaned to Cornerstone on February 24, 2004.

52. APS claimed the accounts of the five individuals were Individual Retirement Accounts (IRAs); however, no documentation establishing those accounts as IRAs was produced as of the time the loans were made.

53. Henderson, Downs, Dean DeYoung, and Segura had no knowledge of the loans made to Cornerstone. The foregoing individuals did not know of the substance of any agreement for funds loaned and terms of repayment between APS and Cornerstone.

54. Henderson, Downs, Segura and Dean DeYoung orally delegated all decisions to Curtis DeYoung.

55. APS itself did not make any decisions regarding investment of funds or lending of funds to Cornerstone, relating to the accounts of Henderson, Downs, Segura, and both Dean DeYoung and DeYoung himself.

56. DeYoung, in his individual capacity, made investment decisions for all five account holders.

57. DeYoung admitted that he is not a trustee and he is acting as a non-licensed financial advisor who is making investment decisions as a friend and/or familial advisor. APS initially claimed it was entitled to the per lot fee. After discovery, it claimed the per lot fee was due to the five individuals.

58. This matter is a commercial transaction.

III. CONCLUSIONS OF LAW

1. As additional consideration for loans from DeYoung's clients Downs, C. DeYoung, Sequra, D. DeYoung and Henderson, on behalf of soon to be formed Cornerstone, Pool, Kendrick, Reyes and Tallman orally contracted with DeYoung to pay \$750.00.00 per lot from the closing of each lot sold from the Cornerstone Subdivision, and to secure such obligation with a deed of trust against Cornerstone's property.

2. After its formation, by accepting the loans and the real property in the Subdivision, by sending letters proposing promissory notes and deeds of trust, and by repaying the loans, Cornerstone ratified the contract of its promoters. A corporation is liable for its promoters contracts entered into for such corporation and ratified by such corporation. *Albano v. Motor Ctr.*, 75 Idaho 348, 271 P.2d 444 (1954). By analogy a limited liability

company is liable for contracts entered into by its members on its behalf before formation when such contracts are ratified by the members after formation.

3. Cornerstone's several written letters, internal agendas and notes of members are written evidence of the \$750 per lot obligation of Cornerstone to the plaintiffs sufficient to comply with I. C. 9-505(4). Further the complete performance by plaintiffs, and substantial partial performance by Cornerstone is sufficient to take the oral contract out of the statute of frauds in I. C. 9-505(4). See *Bear Island Water Ass'n., Inc. v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994); *Watson v. Watson*, 144 Idaho 214, 159 P.3d 851 (2007).

4. Since the loans were repaid, and this case does not involve an action to make a loan, I. C. 9-505(5) does not apply. See *Rule Sales & Serv. V. United States Bank Nat'l Ass'n.*, 133 Idaho 669, 991 P.2d 857 (Ct. App. 1999).

5. The written acknowledgements of Cornerstone in letters, notes of members and agendas are sufficient to comply with I. C. 9-508 if it applies to the oral contract of Cornerstone and DeYoung's clients.

6. No accord and satisfaction occurred as to the plaintiffs' claims in the amended complaint for the \$750 per lot fees to be paid from closings of lot sales in the Cornerstone Subdivision.

7. DeYoung acted for five undisclosed principals, himself, Dean DeYoung, Henderson, Downs and Segura. An undisclosed principal can enforce contracts made by it for its agent. *Southern Industries, Inc. v. United States*, 326 F.2d 221 (9th Cir. 1964).

8. Cornerstone breached the 2003 oral contract by not paying DeYoung's

clients \$750.00 for each lot in the Cornerstone Subdivision at the closing of such lots. Cornerstone and Cornerstone II sold 141 lots. Plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson were collectively damaged in the amount of \$105,750.00, and are entitled to a judgment for such amount against Cornerstone and Cornerstone II. APS is not entitled to damages.

9. Plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson are entitled to a judgment specifically enforcing Cornerstone's obligation to provide a deed of trust on remaining lots to secure its performance of paying \$750 per lot at the future closings of remaining lots in the subdivision, because the plaintiffs would be irreparable harmed if the remaining lots were transferred to bona fide purchasers without knowledge of the liabilities or if Cornerstone or Cornerstone II were to encumber such property.

9. The contract between the parties was a commercial transaction, and the plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson are entitled to a reasonable attorney fee pursuant to I. C. 12-120(3). A reasonable attorney fees will be determined in accordance with Rule 54, I.R.C.P.

Based on the foregoing Findings of Fact and Conclusions of Law, the plaintiffs Downs, C. DeYoung, Sequra, D. DeYoung and Henderson may submit a proposed Judgment.

Dated this 28th day of September, 2007.


RICHARD T. ST. CLAIR
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on the 21 day of September, 2007, I served a true and correct copy of the Findings of Fact and Conclusions of Law upon the following by U. S. mail postage prepaid, or by hand delivery, or by depositing at recipient's courthouse box:

Stephen J. Muhonen
Racine, Olson, Nye,
Budge & Bailey, CHTD
P.O. Box 1391
Pocatello, ID 83204-1391
Attorneys for Plaintiffs

Penny North Shaul
P.O. Box 277
477 Pleasant Country Lane
Rigby, Idaho 83442

Michael Gaffney
Beard, St. Clair Gaffney P.A.
2105 Coronado Street
Idaho Falls, Idaho 83404-7495
Attorneys for Defendant

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

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

BONNEVILLE COUNTY
 IDAHO

7 OCT -6 2011

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 SEGURA; DEAN G. DEYOUNG;))
 E. DALE HENDERSON,)

Case No. CV-06-140

Plaintiffs,)

SECOND AMENDED COMPLAINT

vs.)

CORNERSTONE HOME BUILDERS,)
 LLC, a Utah Limited Liability Company;)
 CORNERSTONE HOME BUILDERS,)
 a Idaho Limited Liability Company,)

Defendants.)

COMES NOW the above named Plaintiffs, AMERICAN PENSION SERVICES, INC.,
 DREW DOWNS; CURTIS L. DEYOUNG; HARRY SEGURA; DEAN G. DEYOUNG and E.
 DALE HENDERSON, and for their second amended cause of action against the above-named
 Defendants CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company and
 CORNERSTONE HOME BUILDERS, a Idaho Limited Liability Company, states and alleges as
 follows:

PARTIES

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

2. Plaintiffs DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGURA, DEAN G. DEYOUNG and E. DALE HENDERSON are all individuals who ratified this action on July 20, 2007 and were joined as Plaintiffs by the Court on August 1, 2007.

3. Plaintiffs AMERICAN PENSION SERVICES, INC., DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGURA, DEAN G. DEYOUNG and E. DALE HENDERSON are collectively referred to herein as "Plaintiff."

4. Defendant, CORNERSTONE HOME BUILDERS, LLC., is/was at all times relevant hereto a Utah limited liability company, formed in Utah on October 24, 2003 and conducting business in the state of Idaho. It is currently unclear what the exact operating status of this corporation currently is.

5. Defendant, CORNERSTONE HOME BUILDERS, LLC., is an Idaho limited liability company that was formed on July 12, 2006 and is conducting business in the state of Idaho. Defendants CORNERSTONE HOME BUILDERS, LLC., a Utah limited liability company and CORNERSTONE HOME BUILDERS, LLC., a Idaho limited liability company are collectively referred to herein as "Cornerstone."

FACTS AND BACKGROUND

6. On September 29, 2003, Old West Annuity & Life Insurance Company, as Grantor, executed a Corporation Warranty Deed transferring certain real property located in Bonneville County, Idaho to P&B Enterprises, Inc., a Utah Corporation (hereinafter referred to as "P & B") and S.R. Tallman Construction, Inc. a Utah corporation (hereinafter referred to as "Tallman") as

Grantees. The Corporation Warranty Deed was recorded on September 30, 2003 as Bonneville County Recorder's Instrument No. 1130070. A true and correct copy of said deed is attached hereto as **Exhibit A** and incorporated by reference as if set forth fully herein.

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

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

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

10. When the project went into foreclosure, Plaintiff, utilizing his experience, contacts and knowledge in the finance industry, arranged a meeting with the project lender, Met Life of Spokane Washington, himself and Cornerstone to determine what could be done to save the subdivision project.

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

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

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

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

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

16. 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.

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

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

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

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

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

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

23. After the filing of suit in this matter, Scott Tallman, the sole remaining member of Cornerstone, dissolved the Cornerstone Utah limited liability corporation and formed Cornerstone as an Idaho limited liability company.

24. When Cornerstone (Idaho) was formed, Cornerstone (Idaho) did not adopt or transfer any of the liabilities of Cornerstone (Utah) into Cornerstone (Idaho).

25. When Cornerstone (Idaho) was formed, the development property which is the subject matter of this suit was transferred from Cornerstone (Utah) to Cornerstone (Idaho), rendering Cornerstone (Utah) insolvent.

FIRST CAUSE OF ACTION
[Breach of Express Contract]

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

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

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

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

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

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

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

32. Plaintiff realleges the allegations contained in Paragraphs 1-31 above, and incorporates the same herein by reference as if set forth fully.

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

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

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

36. Plaintiff provided the money as requested.

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

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

THIRD CAUSE OF ACTION
[Fraud]

39. Plaintiff realleges the allegations in Paragraphs 1- 38 above and incorporates the same herein by reference as if set forth fully.

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

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

42. Plaintiff did not know the representation was false and that Cornerstone did not intend to provide a promissory note and deed of trust, nor did Cornerstone intend on paying Plaintiff the \$750.00 per lot. Plaintiff had a right to rely on and did rely on the truth of Cornerstone's representations.

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

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

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

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

FOURTH CAUSE OF ACTION
[Unjust Enrichment]

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

48. Plaintiff, utilizing his experience, knowledge and contacts in the finance industry, introduced Cornerstone to the underlying construction and subdivision project, as well as provided capital to Cornerstone. In exchange, Plaintiff anticipated receiving a promissory note and deed of trust securing the sums lent through the real property described herein, with such repayment terms to include, but not limited to, the repayment of the sums lent, including interest and \$750.00 per lot as outlined above.

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

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

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

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

52. Plaintiff realleges the allegations in Paragraphs 1-51 above and incorporates the same herein by reference as if set forth fully.

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

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

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

SIXTH CAUSE OF ACTION
[Fraudulent Conveyance]

56. Plaintiff realleges the allegations in Paragraphs 1-55 above and incorporates the same herein by reference as if set forth fully.

57. After the filing of suit in this matter, Scott Tallman, the sole remaining member of Cornerstone, dissolved the Cornerstone Utah limited liability corporation and formed Cornerstone as an Idaho limited liability company.

58. When Cornerstone (Idaho) was formed, Cornerstone (Idaho) did not adopt or transfer any of the liabilities of Cornerstone (Utah) into Cornerstone (Idaho).

59. When Cornerstone (Idaho) was formed, the development property which is the subject matter of this suit was transferred from Cornerstone (Utah) to Cornerstone (Idaho), rendering Cornerstone (Utah) insolvent.

60. The foregoing actions by Cornerstone satisfy all the elements necessary to evidence and maintain a claim or cause of action for fraudulent conveyance as provided in I.C. 55-913.

61. As a result of Cornerstone's actions, Plaintiff has been harmed as the main asset of Cornerstone (Utah) has been transferred to Cornerstone (Idaho), rendering Cornerstone (Utah) insolvent.

62. Plaintiff is entitled to this Court's judgment, awarding Plaintiff relief as provided in I.C. 55-916 and I.C. 55-917.

ATTORNEY S' FEES

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

DEMAND FOR JURY TRIAL

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

PRAYER FOR RELIEF

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

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

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

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

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

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

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

G. That Plaintiff receive this Court's judgment, awarding Plaintiff relief as provided in I.C. 55-916 and I.C. 55-917.

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

DATED this 3 day of October, 2007.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By 
STEPHEN J. MUHONEN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

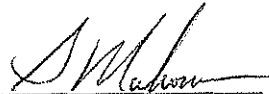
I HEREBY CERTIFY that on the 3 day of October, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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 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



STEPHEN J. MUHONEN

2007 10:25 FAX 2085291300
01/19/2005 11:12 87 7 4
JAN. 19. 2005 10:56.

BONN CTY COURTS
REIN

013/024

PAGE 03

MERITITLE J. F.

NO. 3183

P. 2

BONNEVILLE COUNTY RECORDER
1130070 SEP 30 03 PM 4 46

1130070

BLT 7-100634

CORPORATION WARRANTY DEED

OLD WEST ANNUITY & LIFE INSURANCE COMPANY, a Corporation under the laws of the State of Arizona, having been duly authorized by its Board of Directors, as **GRANTOR**,
for good and valuable considerations, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto **P & B ENTERPRISES, INC.**, a Utah corporation, and **S. R. TALLMAN CONSTRUCTION, INC.**, a Utah corporation, as **GRANTEE**
whose address is 565 East 8300 South - Suite 22, South Ogden, Utah 84405 and Grantee's successors and assigns, all of the following described real property, to-wit:

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

SUBJECT TO the 2003 and subsequent years general taxes and assessments, all existing patent reservations, easements, right of ways, protective and restrictive covenants, zoning ordinances and applicable building codes, laws and regulations.

TOGETHER WITH any and all improvements, water and ditch rights, easements, improvements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and any reversion, remainder, rents, issues, and profits thereof.

Grantor, for itself and its successors and assigns, does hereby warrant and agree to forever defend the Grantee, and Grantee's successors and assigns, in the quiet and peaceful possession of said premises against the lawful claims of any and all persons.

In construing this Deed and where the context so requires, the singular includes the plural, and the masculine and neuter.

Dated 9-29-03

OLD WEST ANNUITY AND LIFE INSURANCE COMPANY

By: [Signature]

By: _____

STATE OF WASHINGTON)
COUNTY OF SPOKANE)

On 9-29-03, before me, the undersigned, personally appeared

GREG STRATE

known or identified to me to be the Vice President of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

[Signature]

Notary Public for the State of
Commission Expiration Date _____

INSTRUMENT NO.	<u>1130070</u>
DATE	<u>9-29-03</u>
INST CODE	<u>235</u>
IMAGED PGS	<u>3</u>
FEE	<u>65</u>
STATE OF IDAHO COUNTY OF BONNEVILLE) ss I hereby certify that the within instrument was recorded. Ronald Longmire, County Registrar	
By	<u>[Signature]</u> Deputy
Requested	<u>Blt</u>

NOTARY PUBLIC STATE OF WASHINGTON MURIEL R. MCBRIDE My Appointment Expires June 18, 2007

EXHIBIT A

2007 10:26 FAX 2085291300
01/19/2005 11:12 881
JAN. 19. 2005 10:58AM

BONN CTY COURTS
REIN

014/024

PAGE 04

WITITILE I. F.

NO. 3183

P. 3

EXHIBIT "A"
(Phase II)

Lots 1 through 23, Block 1; Lots 1 through 21, Block 2; Lots 8 and 9, Block 3; Lots 8 and 9, Block 4; Lots 7 and 8, Block 10; and Lots 1 through 4, Block 3, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

- a. The North 30.0 feet of Lot 8, said Block 16, being more particularly described as follows: Beginning at the Northwest Corner of Lot 8; running thence S8°42'56"E along the West line of Lot 8, 33.0 feet thence S9°57'04"E 91.52 feet to the East line of Lot 8; thence N0°42'56"W along the East line of Lot 8, 30.0 feet to the Northeast Corner thereof; thence S89°57'04"W along the North line of Lot 8, 91.52 feet to the point of beginning.*

02/28/2007 10:26 FAX 2085291200
01/19/2005 11:12 3094

BONN CTY COURTS
REIN

015/024
PAGE 05

- JAN. 19. 2005 10:00AM JERITITLE I.F.

NO. 3183 P. 4

BONNEVILLE COUNTY RECORDER
1146311 MAR1904 AM1033

CORPORATION WARRANTY DEED

P & B ENTERPRISES, INC., a Utah corporation, and **S. R. TALLMAN CONSTRUCTION, INC.**, a Utah corporation, as **GRANTOR**,
for good and valuable considerations, the receipt of which is hereby acknowledged, have hereby given, bargained, sold and conveyed with
CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company, as **GRANTEE**,
whose address is 155 East 1500 South - Hwy 3, Suite 8, Ogden, Utah 84203 and Grantee's successors and assigns, all of the following described
real property, to-wit:

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

TOGETHER WITH any and all improvements, water and ditch rights, easements, interests, hereditaments and appurtenances thereto's belonging
or in anywise appertaining, and any retention, reservation, right, claim, and profit thereon.
Grantee, for itself and its successors and assigns, does hereby warrant and cove to forever defend the Grantor, and Grantee's successors and
assigns, in the quiet and peaceful possession of said premises against the lawful claims of any and all persons.
In witnessing this Deed and where the context so requires, the singular includes the plural, and the masculine the feminine and neuter.

Date: 1/19/05

P & B Enterprises, Inc.

S. R. TALLMAN, INC.

By:

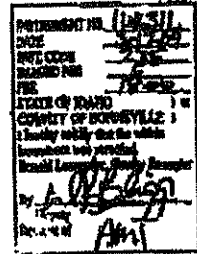
By:

STATE OF UTAH)
COUNTY OF WILSON)

On 1/19/05, before me, the undersigned, personally appeared
Martha Peol

known or identified to me to be the President of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Notary Public for the State of UTAH
Commission Expires on Date 5-28-07



STATE OF UTAH)
COUNTY OF WILSON)

On 1-22-04, before me, the undersigned, personally appeared
SCOTT A. TALLMAN

known or identified to me to be the President of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Notary Public for the State of UTAH
Commission Expires on Date 5-28-07



EXHIBIT B

JAN. 19. 2005 10:59AM MERITITLE I. F.

NO. 3183 P. 5

EXHIBIT "A"

TRACT I:

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

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

- a. The West 17.0 feet of Lot 10, said Block 12, being more particularly described as follows: Beginning at the Southwest Corner of said Lot 10; running thence N89°57'04"E along the South line of Lot 10, 17.0 feet; thence N8°02'56"W 100.00 feet to the North line of Lot 10; thence S89°57'04"W along the North line of Lot 10, 17.0 feet to the Northwest Corner thereof; thence S8°02'56"E along the West line of Lot 10, 100.00 feet to the point of beginning.

AND: Lot 12, Lots 15 through 18, and Lots 20 through 22, Block 7 and Lots 1 through 5, Lots 7 through 10 and Lot 12, Block 8, Lincoln Park Subdivision, Division No. 4, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

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

AND: Lots 8 through 9, and Lots 12 through 16, Block 6, Lincoln Park Subdivision, Division No. 5, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

TRACT II:

Lots 1 through 20, Block 1; Lots 1 through 21, Block 2; Lots 6 and 9, Block 9; Lots 2 and 3, Block 8; Lots 7 and 8, Block 10; and Lots 1 through 4, Block 3, Cornerstone Community, Division No. 3, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

- a. The North 30.0 feet of Lot 8, said Block 10, being more particularly described as follows: Beginning at the Northwest Corner of Lot 8; running thence S8°02'56"E along the West line of Lot 8, 30.0 feet; thence S9°57'04"E 91.52 feet to the East line of Lot 8; thence N0°02'56"W along the East line of Lot 8, 30.0 feet to the Northeast Corner thereof; thence S89°57'04"W along the North line of Lot 8, 91.52 feet to the point of beginning.

TRACT III:

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

ALSO:

Beginning at the Southeast Corner of Lot 1, Block 9 of Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence N89°02'56"W 236.31 feet

Continued next page

to the Southwest Corner of Lot 5, Block 3 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S04°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, in the County of Bonneville, State of Idaho; thence Southerly along the East line of a utility easement as described in Instrument No. 1075440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 478.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 in the County of Bonneville, State of Idaho, and the point of beginning.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

Beginning at the Northwest Corner of Lot 1, Block 4, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; running thence S87°19'04"E 240.28 feet along the North line of said Lincoln Park Subdivision, Division 1, to the Northeast Corner of Lot 3, Block 4 of said Lincoln Park Subdivision; thence N8°02'56"W 80.00; thence N87°19'04"W 240.28 feet; thence S8°02'56"E 80.00 feet to the point of beginning.

TRACT IV:

Beginning at a point that is S87°10'42"E 990.00 feet along the Section line from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho, running thence S87°10'42"E 825.00 feet to an existing fence line; thence S8°04'33"E along said fence 2640.00 feet to the South line of the Northwest Quarter of said Section 14; thence N87°19'04"W 825.00 feet along said South line; thence North 2640.00 feet to the point of beginning.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTIES:

- a. Beginning at the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence N88°02'56"W 236.31 feet to the Southwest Corner of Lot 5, Block 5 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S88°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence Southerly along the East line of a utility easement as described in Instrument No. 1075440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 478.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 to the County of Bonneville, State of Idaho, and the point of beginning.
- b. Beginning at a point that is S87°10'42"E 1464.56 feet along the Section line from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S87°10'42"E 350.40 feet along said Section line to an existing fence line extended; thence S8°04'33"E 777.08 feet along said fence line; thence N89°55'27"W 358.00 feet; thence N0°04'33"E 793.79 feet to the point of beginning.

- c. Beginning at a point that is S87°10'42"E 1464.96 feet along the Section line and S8°04'33"W 793.78 feet from the Northwest Corner of Section 14, Township 2 North, Range 28 East of the Boise Meridian, Bonneville County, Idaho; running thence S14°27'48"W 36.16 feet; thence S89°55'27"E 398.97 feet to an existing fence; thence N0°04'33"E 33.86 feet along said fence; thence N89°55'27"W 350.00 feet to the point of beginning.
- d. That portion of the following described property lying within the boundaries of the above legal description: Lincoln Park Subdivision, Division No. 1, 3, 4, and 5 and Lincoln Park Subdivision, Division No. 2, First Amended, in the County of Bonneville, State of Idaho, according to the recorded plat thereof.
- e. That portion of the following described property lying within the boundaries of the above legal description: Cornerstone Community, Division No. 1, in the County of Bonneville, State of Idaho, according to the recorded plat thereof.
- f. That portion of the above described property lying North of Cornerstone Community, Division No. 1, and West of Lincoln Park Subdivision, Division No. 4, in the County of Bonneville, State of Idaho, according to the recorded plat thereof.

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

Lot 29, Block 3, Cornerstone Community, Division No. 1, in the County of Bonneville, State of Idaho, according to the recorded plat thereof.

AND ALSO the West 5 feet of Lot 28, said Block 1, being more particularly described as follows: Beginning at the Southwest corner of said Lot 28; and running thence N89°52'36"W along the West line of Lot 28, 100.0 feet to the Northwest corner thereof; thence N89°57'04"E along the North line of Lot 28, 5.0 feet; thence S8°02'56"E 100.0 feet to the South line of Lot 28; thence S89°57'04"W along said South line, 5.0 feet to the Point of Beginning.

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

The East 55.0 feet of Lot 28, and the West 5.0 feet of Lot 27, Block 1, Cornerstone Community, Division No. 1, in the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southeast corner of said Lot 28; and running thence N89°57'04"E along the South line of Lot 27, 5.0 feet; thence N0°02'56"W 100.0 feet to the North line of Lot 27; thence S89°57'04"W along the North line of Lot 27 extended, 60 feet to a point on the North line of said Lot 28; thence S8°02'56"E 100.0 feet to the South line of Lot 28; thence N89°57'04"E along said South line 55.0 feet to the Southeast corner of Lot 28, said point being the Point of Beginning.

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

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

Continued on next page

02/28/2007 10:32 FAX 2085291300
01/19/2005 11:12 70094

BONN CITY COURTS
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PAGE 10

JAN. 19. 2005 11:11 AM

MERITITLE I. E.

NO. 3183 P. 9

East (measured along the South line of Lot 22) from the Southwest Corner of said Lot 22; thence $N0^{\circ}02'53''W$ 105 feet to the point of beginning.

Lot 21: the West 5 feet of the South 25.05 feet of Lot 22 and the West 5 feet of Lot 21, Block 1:

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

AND ALSO the West 5 feet of Lot 22 and the West 5 feet of the South 25.05 feet of Lot 22, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at the Southwest corner of Lot 22; and running thence $N89^{\circ}57'04''E$ along the South line of Lot 22, 5.0 feet; thence $N8^{\circ}02'56''W$ 105.0 feet; thence $S89^{\circ}57'04''W$ 5 feet to the Northeast corner of Lot 21; thence $S9^{\circ}02'56''E$ 105.00 along the East line of Lot 21, to the point of beginning.

va/Carroll/02/04

CornerStone Home Builders, LLC

Ogden, UT - Idaho Falls, ID

VIA FACSIMILE: 801.571.4226

Total Pages: 16

To: Curtis DeYoung
 From: Brad Kendrick
 Date: January 18, 2005
 Subject: APS / Cornerstone Subdivision Financial Reconciliation

Curtis,

Enclosed, please find the accounting for the Corner Stone Subdivision based on a compilation of your records and ours. Please take a minute and look this over to make sure that we have covered everything and to ensure that you agree with the numbers.

Let's discuss when you have time.

Brad

EXHIBIT C

FROM : AMERICAN PENSIQ. SERVICE

PHONE NO. : 801 571 2712

Jan. 19 2006 01:39PM P3

Received: 4/ 7/05 11:54AM;

801 475 0398 -> American Pen. on Service; Page 2

Apr 07 05 11:25a

Corner Stone Group

801-475-0398

p.2

Corner Stone Homebuilders, LLC

APS Financial Reconciliation

April 7, 2005

Monies Received by Corner Stone from APS

<u>DATE</u>	<u>AMOUNT</u>
9.30.03	\$ 226,218.70
11.05.03	\$ 49,476.30
12.05.03	\$ 75,128.33
1.13.04	\$ 76,280.28
1.13.04	\$ 17,951.91
2.26.04	\$ 108,318.61
2.26.04	\$ 10,749.28
Total	\$ 564,123.41

Monies Paid to APS from Corner Stone

<u>DATE</u>	<u>AMOUNT</u>
4.26.04	\$ 26,400.46
5.15.04	\$ 97,066.14
8.03.04	\$ 48,000.00
10.18.04	\$ 37,602.39
1.25.05	\$ 25,000.00
3.16.05	\$ 15,000.00
4.01.05	\$ 15,000.00
Total	\$ 264,068.99
5-2-05	\$ 5,000.00
5-12-05	\$ 5,000.00
12-20-05	\$ 100,000.00

Balance Owing:

\$564,123.41 (less) \$264,068.99 = \$300,054.42

1-20-05 \$262,094.58

Therefore the Note amount and recorded Lien position should be \$ 300,054.42

FROM : AMERICAN PENSION SERVICE INC

PHONE NO. : 801 571 2712

Jan. 19 2006 01:40PM P4

Received: 4/ 7/05 11:54AM;

801 475 0398 -> American Pension Service: Page 3

Apr 07 05 11:25a

Corner Stone Group

801-475-0398

p.3

Page Two:
Corner Stone / APS Reconciliation

Interest Payment Calculations:

2003 - (\$ 275,695.00)

October: (\$226,218.70) = \$1,885.16

November: (\$49,476.30) \$343.59 + \$1,855.16 = \$2,198.75

December: (\$275,695) = \$2,297.46

Total Interest owed for 2003- \$ 6,381.37

2004 - (\$ 300,054.42)

Total Interest owed for 2004 - \$ 30,005.44

2005 - (\$300,054.42)

January: \$ 2,500.45

February: \$ 2,500.45

March: \$ 2,500.45

April: \$ 2,500.45

Total owed (to date) for 2005 - \$10,001.80

Grand Total: Outstanding Principal & Interest	\$346,443.03
(As of end of April 2005)	

Regarding the NOTE amount - Based on the above numbers, the note amount should be \$ 300,054.42. I would now like to get the Note and Deed of Trust recorded, in APS's name, if we all agree on this amount.

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

FROM : AMERICAN PENSION

PHONE NO. : 801 571 2712

Jan. 19 2006 01:40PM P5

Received: 4/ 7/08 11:54AM;

801 475 0398 -> American Pension Service; Page 4

Apr 07 05 11:25a

Corner Stone Group

801-475-0398

p. 4

Page Three:
Corner Stone / APS Reconciliation

Immediate Funding Needs -


1. **Spec Homes** – The 26 spec homes that we currently have under construction have all sold and we have an additional 26 lots in Phase II for spec homes that we need to begin construction on. (see enclosed cost break downs) Addendum "A"

2. **Four Plexes** - The area formerly known as "Tornado Alley" or "Dysfunctional Double Wide Row" is now clear of all but three double wides and we are ready to begin construction on the eight (8) four-plexes that we have designed for that section of the development. I have enclosed a cost breakdown and basic plan overview for your review.

I will give you a call later today to make sure you received all the pages in this facsimile and to answer any questions you may have. The project continues to amaze us as to how quickly it is moving along and how well the homes are selling.

We truly appreciate your support and help on this project.

Regards,



Brad Kendrick
Managing Member,
Corner Stone Homebuilders, LLC

C: 801.390.1751
F: 801.475.0398

BBK/bms

- Enclosures: (1) Single Family Home Cost Break Downs
 (2) Multi Family Cost Break Downs
 (3) Multi Family Plan Overview

7

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

BONNEVILLE COUNTY
IDAHO

7 OCT 12 09:13

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 SEGURA; DEAN G. DEYOUNG;
E. DALE HENDERSON,

Case No. CV-06-140

JUDGMENT

Plaintiffs,

vs.

CORNERSTONE HOME BUILDERS,
LLC, a Utah Limited Liability Company;
CORNERSTONE HOME BUILDERS, a
Idaho Limited Liability Company,

Defendants.

This matter came on for trial on the 28th, 29th and 30th of August, 2007. After the close of evidence, Plaintiffs moved orally pursuant to I.R.C.P. 15(b) to amend their complaint to conform to the evidence presented at trial to add a claim for fraudulent conveyance. The Court then ordered the parties to submit proposed findings of facts and conclusions of law, which were done so on September 13, 2007.

Based upon the evidence admitted at trial, including the Court's evaluation of the credibility of the witnesses, pursuant to I.R.C.P. 52(a) and those reasons as outlined in this Court's Findings

of Fact and Conclusions of Law dated September 28, 2007 and this Court's Order dated September 28, 2007, the Court hereby orders that Plaintiffs DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGURA, DEAN G. DEYOUNG AND E. DALE HENDERSON ("Plaintiffs") are entitled to Judgment against said Defendants. Plaintiff AMERICAN PENSION SERVICES, INC. is not entitled to a recovery in this matter.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforementioned Plaintiffs have and recover from Defendants, CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company and CORNERSTONE HOME BUILDERS, LLC, a Idaho Limited Liability Company ("Defendants") as follows:


1. ONE HUNDRED FIVE THOUSAND, SEVEN HUNDRED FIFTY DOLLARS (\$105,750.00) lawful money of the United States of America, which represents the sale of 141 lots at \$750.00 per lot previously sold by Defendants , and;
2. Defendants shall immediately provide a deed of trust to Plaintiffs on the remaining seventy-one (71) lots in the subdivision to secure Defendant's performance of paying \$750.00 per lot on a total of 212 lots, at the future closings of said seventy-one (71) lots in the subdivision, and;
3. Cornerstone Home Builders, LLC, an Idaho Limited Liability Company is joined as a Defendant with Cornerstone Home Builders, LLC, a Utah Limited Liability Company, to this Judgment, and;
4. Pursuant to I.C. 55-916(c) and I.C. 55-917(2), Plaintiffs are awarded an injunction against Defendants preventing Defendants from further disposition, sale or transfer of the real property as further identified in **Exhibit A**, attached hereto, excluding the lots sold as of the date of entry of this judgment, until such time that Defendants have ~~provided and~~ ^{satisfied or} recorded a deed of trust

in Plaintiff's favor, securing the amount necessary to satisfy this judgment, including post-judgment interest, and pre and post judgment reasonable attorney's fees and costs, and; ^(RTS) or posted a supersedeas bond for appeal;

5. Plaintiffs shall be entitled to reasonable attorney fees and costs to be determined in accordance with I.R.C.P. 54, and;

6. Said total Judgment shall accrue interest at the statutory rate from the date of Judgment until satisfied. Further, that Plaintiffs have execution hereon and recover costs incurred for said execution.

DATED this 10 day of October, 2007.


RICHARD T. ST. CLAIR
Seventh District Judge

CLERK'S CERTIFICATE OF SERVICE

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

Stephen J. Muhonen
RACINE OLSON NYE
BUDGE & BAILEY CHARTERED
P. O. Box 1391
Pocatello, Idaho 83204-1391

- U. S. Mail
- Postage Prepaid
- Hand Delivery
- Overnight Mail
- Facsimile — 232-6109
- 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
Michael 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



CLERK

EXHIBIT "A"

TRACT I:

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

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

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

AND: Lot 12, Lots 15 through 18, and Lots 20 through 22, Block 7 and Lots 1 through 5, Lots 7 through 10 and Lot 12, Block 8, Lincoln Park Subdivision, Division No. 4, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

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

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

TRACT II:

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

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

- a. The North 30.0 feet of Lot 8, said Block 10, being more particularly described as follows: Beginning at the Northwest Corner of Lot 8; running thence S0°02'56"E along the West line of Lot 8, 30.0 feet; thence 89°57'04"E 91.52 feet to the East line of Lot 8; thence N0°02'56"W along the East line of Lot 8, 30.0 feet to the Northeast Corner thereof; thence S89°57'04"W along the North line of Lot 8, 91.52 feet to the point of beginning.

TRACT III:

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

ALSO:

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

to the Southwest Corner of Lot 5, Block 3 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S00°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence Southerly along the East line of a utilities easement as described in Instrument No. 1075440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 470.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 to the County of Bonneville, State of Idaho, and the point of beginning.

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTY:

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

TRACT IV:

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

EXCEPTING THEREFROM ALL OF THE FOLLOWING DESCRIBED PROPERTIES:

- a. Beginning at the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence N00°02'56"W 236.31 feet to the Southwest Corner of Lot 5, Block 3 of said Cornerstone Community, Division 1; thence N89°57'04"E 115.00 feet to the Southeast Corner of said Lot 5; thence S00°02'56"E 17.00 feet; thence N89°57'04"E 426.54 feet, more or less, to the East line of Stevens Drive as shown on Cornerstone Community, Division 1, to the County of Bonneville, State of Idaho; thence Southerly along the East line of a utilities easement as described in Instrument No. 1075440 records of Bonneville County, to the Northwest Corner of Lot 1, Block 5, Lincoln Park Subdivision, Division Number 1, to the County of Bonneville, State of Idaho; thence N87°19'04"W 470.50 feet, more or less, along the North line of Lincoln Park Subdivision, Division Number 1 to the Southeast Corner of Lot 1, Block 3 of Cornerstone Community, Division 1 to the County of Bonneville, State of Idaho, and the point of beginning.
- b. Beginning at a point that is S87°10'42"E 1464.56 feet along the Section line from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S87°10'42"E 350.40 feet along said Section line to an existing fence line extended; thence S0°04'33"E 777.00 feet along said fence line; thence N89°55'27"W 350.00 feet; thence N0°04'33"E 793.79 feet to the point of beginning.

- c. Beginning at a point that is S87°10'42"E 1464.56 feet along the Section line and S0°04'33"W 793.78 feet from the Northwest Corner of Section 14, Township 2 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S14°27'08"W 36.16 feet; thence S89°55'27"E 358.97 feet to an existing fence; thence N0°04'33"E 35.00 feet along said fence; thence N89°55'27"W 350.00 feet to the point of beginning.
- d. That portion of the following described property lying within the boundaries of the above legal description: Lincoln Park Subdivision, Division Nos. 1, 3, 4, and 5 and Lincoln Park Subdivision, Division No. 5, First Amended, to the County of Bonneville, State of Idaho, according to the recorded plats thereof.
- e. That portion of the following described property lying within the boundaries of the above legal description: Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.
- f. That portion of the above described property lying North of Cornerstone Community, Division No. 1, and West of Lincoln Park Subdivision, Division No. 4, to the County of Bonneville, State of Idaho, according to the recorded plat thereof.

TRACT IV:

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

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

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

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

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

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

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

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

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

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

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

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

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

A portion of Lots 23 & 24, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at a point that is N89°57'04"E 5.0 feet from the Southeast corner of Lot 25; and running thence N89°57'04"E, parallel to the South line of Lot 24, 97.31 feet to the East line of Lot 23; thence N0°02'58"W 80.0 feet along the East line of Lots 23 and 24; thence N45°02'56"W 28.28 feet; thence S89°57'04"W 77.31 feet, to a point that is 5 feet East (measured along the North line of Lot 24) from the Northwest Corner of said Lot 24; thence S0°02'58"E 100 feet to the point of beginning.

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

A portion of Lots 22 & 23, Block 1, Cornerstone Community, Division No. 1, to the County of Bonneville, State of Idaho, according to the recorded plat thereof, and being more particularly described as follows: Beginning at a point that is N89°57'04"E 5.0 from the Southeast corner of Lot 25; and running thence N89°57'04"E, parallel to the South line of Lot 24, 97.31 feet to the East line of Lot 23; thence S0°02'58"E along the East line of Lots 23 and 22, 85 feet; thence S44°37'04"W 28.28 feet; thence S89°57'04"W 77.31 feet, to a point that is 5 feet

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

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

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

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

EXCLUDING THE LOTS SOLD AS OF THE DATE OF ENTRY OF JUDGMENT

BONNEVILLE COUNTY

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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.; DREW DOWNS; CURTIS
DEYOUNG; HARRY SEGURA;
DEAN DEYOUNG; and
E. DALE HENDERSON,

Plaintiffs,

vs.

CORNERSTONE HOME BUILDERS,
LLC.,

Defendant.

Case No. CV-06-140

OBJECTION TO
PROPOSED JUDGMENT

OBJECTION TO
PROPOSED JUDGMENT

COMES NOW, Defendant, by and through the undersigned, and hereby objects to Plaintiffs' proposed Judgment submitted to the Court for signature on October 3, 2007, on the basis that Plaintiffs' proposed Judgment, as currently drafted, fails to conform to the Court's Findings of Fact and Conclusions of Law entered on September 28, 2007. Plaintiffs' proposed Judgment is inappropriate as follows:

1. In Paragraph 2 of their proposed Judgment, Plaintiffs propose the following: "Defendants shall immediately provide a deed of trust to Plaintiffs on the remaining seventy-one (71) lots in the subdivision to secure Defendants' performance of paying \$750.00 per lot on a total of 212 lots, at the future closings of said seventy-one (71) lots in the subdivision". The Court's Conclusion of Law, Paragraph 8, indicates Plaintiffs are "entitled to a judgment" in the amount of \$105,750.000 (\$750.00 per lot x 141 lots already sold within Cornerstone Community Subdivision). The Court's Conclusion of Law, Paragraph 9, indicates Plaintiffs are entitled to "a deed of trust on remaining lots to secure its performance of paying \$750.00 per lot at the future closings of remaining lots in the subdivision". This Court did *not* authorize or order a Deed of Trust in favor of Plaintiffs securing the \$105,750.00, plus payment on future sales, on the remaining 71 lots. As such, Plaintiffs' proposed Judgment fails to reflect the Court's ruling. Furthermore, the proposed Judgment fails to provide a date certain regarding when the obligation to provide a deed of trust is to occur, and which entity is to prepare such document.

2. In Paragraph 4 of their proposed Judgment, Plaintiffs propose the following: "Pursuant to I.C. §55-916(c) and I.C. §55-917(2), Plaintiffs are awarded an injunction against Defendants preventing Defendants from further disposition, sale or transfer of the real

OBJECTION TO
PROPOSED JUDGMENT

property as further identified in Exhibit A, attached hereto, excluding the lots sold as of the date of entry of this judgment, until such time as Defendants have provided and recorded a deed of trust in Plaintiff's favor, securing the amount necessary to satisfy this judgment, including post-judgment interest, and pre and post judgment reasonable attorney's fees and costs". This Court has not made a finding that Defendant engaged in a fraudulent conveyance. Further, this Court has not reached a legal conclusion that Plaintiffs are entitled to an injunction pursuant to I.C. §55-916(c) and I.C. §55-917(2). As such, inclusion of injunctive relief in Plaintiffs' proposed Judgment is inappropriate and not supported by this Court's written decision dated September 28, 2007. It follows that pre- and post-judgment attorney's fees and costs relating to the same are not appropriate as well.

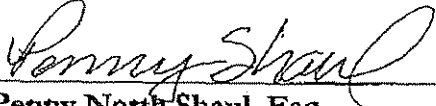
3. The Plaintiffs' proposed Judgment as written fails to designate and apportion the amount of money damages owed to each separate Plaintiff, as required under IRCP 58(a), and as construed by Idaho case law. The fact that each individual plaintiff is not awarded a sum certain is going to lead to both procedural and substantive problems for the Defendant. For example, it is impossible at this point to determine who the prevailing party is under IRCP 68. An offer of judgment was filed on August 10, 2007, by the Defendant, and there is no designation as to separate plaintiffs' proportionate shares of the money judgment. It is therefore impossible for the Court and the parties to determine the actual sum owed to each separate plaintiff. Essentially, what this proposed Judgment does is exposes Defendant to potential conflicting claims for money damages by each of the plaintiffs, which further exposes the Defendant to litigation, including a possible interpleader action since is no evidence of any binding agreement between the plaintiffs

OBJECTION TO
PROPOSED JUDGMENT

regarding each plaintiff's proportionate share of the money judgment.

Oral argument is requested.

DATED this 4th day of October, 2007.



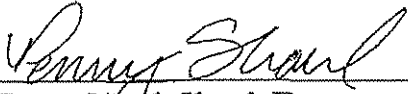
Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

OBJECTION TO
PROPOSED JUDGMENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission


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OBJECTION TO
PROPOSED JUDGMENT

BONNEVILLE COUNTY

7 OCT 16 10 55

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Telephone: (208) 523-5171
Facsimile: (208) 529-9732

Attorney for Defendant

**DISTRICT COURT SEVENTH JUDICIAL DISTRICT
BONNEVILLE COUNTY IDAHO**

AMERICAN PENSION SERVICE, INC.,

Plaintiff,

vs.

CORNERSTONE HOME BUILDERS,
LLC

Defendant.

Case No.: CV-06-140

DEFENDANT'S ANSWER TO SECOND
AMENDED COMPLAINT

Comes now the Defendant, Cornerstone Home Builders, LLC, a Utah limited liability company, and Cornerstone Home Builders, an Idaho limited liability company, and answers the Plaintiff's Second Amended Complaint as follows:

1. Any paragraph of the Second Amended Complaint not expressly admitted is hereby denied.

2. The paragraphs 1 through 55 have been answered in the Defendant's Answer to the First Amended Complaint and those admissions, denials or objections are incorporated fully herein, a copy of that Answer is attached and also incorporated fully herein.

3. The answering Defendant hereby denies paragraphs 56, 57, 58, 59, 60, 61 and 62 of the Second Amended Complaint.

AFFIRMATIVE DEFENSES

1. The Plaintiff's claim is barred by the relevant statute of limitations.
2. The Plaintiff's claim is barred by estoppel.
3. The Plaintiff's claim is barred by failure of consideration.
4. The Plaintiff's claim is barred by illegality.
5. The Plaintiff's claim is barred by failure to state a claim.

PRAYER FOR RELIEF

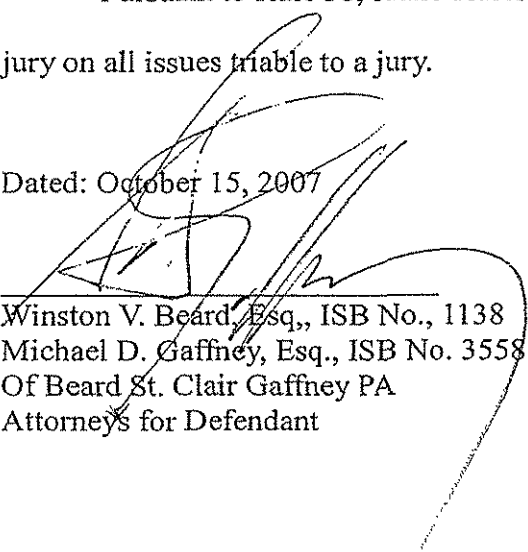
The Defendant prays for judgment and decree of this Court as follows:

1. Dismissing the Plaintiff's Sixth Cause of Action with prejudice;
2. The Defendant's costs and attorney fees associated with defense of this action;
3. For all other relief that the Court deems just and proper under these circumstances.

JURY DEMAND

Pursuant to Rule 38, Idaho Rules of Civil Procedure, Plaintiff demands trial by jury on all issues triable to a jury.

Dated: October 15, 2007



Winston V. Beard, Esq., ISB No., 1138
Michael D. Gaffney, Esq., ISB No. 3558
Of Beard St. Clair Gaffney PA
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify I am a licensed attorney in the state of Idaho and on October 15, 2007, I served a true and correct copy of the DEFENDANT'S ANSWER TO SECOND AMENDED COMPLAINT 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

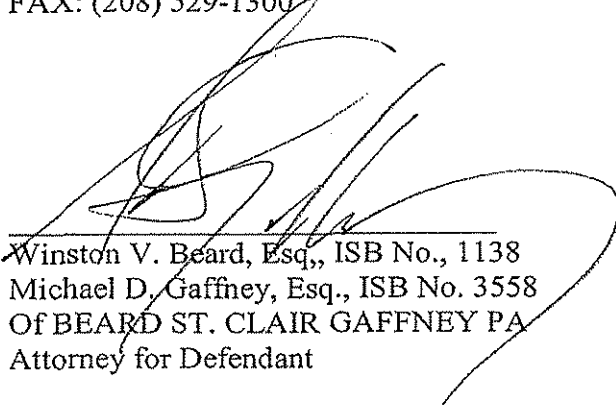
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Penny North Shaul
Dunn Law Office
PO Box 277
Rigby, ID 83442
FAX: (208) 745-8160

U.S. Mail Hand-delivered Facsimile

Bonneville County Courthouse
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Idaho Falls, ID 83402
FAX: (208) 529-1300

U.S. Mail Hand-delivered Facsimile


Winston V. Beard, Esq., ISB No., 1138
Michael D. Gaffney, Esq., ISB No. 3558
OF BEARD ST. CLAIR GAFFNEY PA
Attorney for Defendant

T

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7:07:18 PM 10/18/07

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Attorneys for Defendant

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

AMERICAN PENSION SERVICES,
 INC.,

Plaintiff,

vs.

CORNERSTONE HOME BUILDERS,
 LLC.,

Defendant.

Case No. CV-06-140

MOTION TO DISALLOW COSTS AND
 FEES / OBJECTION TO MEMORANDUM
 OF FEES AND COSTS

The defendant, Cornerstone Home Builders, LLC (Cornerstone), through counsel of record respectfully objects to the Memorandum of Fees and Costs filed by the plaintiff.


Specifically:

1. Cornerstone was the prevailing party on all matters regarding the original parties and therefore objects to the entirety of the fee award on that basis. As the prevailing party as to those parties, the plaintiff is not entitled to an award of fees and costs. In fact, any "new" parties to the lawsuit were not properly brought into the suit. This provides another basis for Cornerstone to object to fees incurred after the "addition" of those parties. Since Cornerstone prevailed in part in its defense as to the original parties, the parties respectively prevailed in part and there is no prevailing party in the action. Thus, the plaintiffs are not entitled to fees in this matter.

2. The judgment specifically states that "Plaintiff AMERICAN PENSION SERVICES, INC. is not entitled to a recovery in this matter." Thus, APS is not entitled to have any of its attorney fees paid because it was not a prevailing party. The majority of the fees listed in the Memorandum of Costs was for APS and were not incurred for the individual plaintiffs. Thus, the vast majority of the fees should not be awarded.

3. Cornerstone also objects to the award of fees in the amount requested because the costs and fees were excessive given the subject matter and nature of the lawsuit.

DATED: October 18, 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 October 18, 2007, I served a true and correct copy of the MOTION TO DISALLOW COSTS AND FEES / OBJECTION TO MEMORANDUM OF FEES AND COSTS on the following by the method of delivery designated below:

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

7 OCT 22 09:24

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Attorneys for Defendant

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

AMERICAN PENSION SERVICES,)
INC.; DREW DOWNS; CURTIS)
DEYOUNG; HARRY SEGURA;)
DEAN DEYOUNG; and)
E. DALE HENDERSON,)

Plaintiffs,)

vs.)

CORNERSTONE HOME BUILDERS,)
LLC.,)

Defendant.)

Case No. CV-06-140

MOTION FOR AWARD OF
ATTORNEYS' FEES AND COSTS
AGAINST PLAINTIFF AMERICAN
PENSION SERVICES, INC.

COMES NOW, Defendant, by and through the undersigned, and hereby moves this

MOTION FOR AWARD OF
ATTORNEYS FEES AND COSTS

140-4

ORIGINAL

Court for entry of an order awarding attorney's fees and costs to Defendant as the prevailing party against Plaintiff American Pension Services, Inc. This motion is brought based upon the following:

1. Plaintiff American Pension Services, Inc., (APS) filed the original complaint in this matter on January 10, 2006, alleging that it was entitled to recovery of certain sums based on funds loaned to Defendant.

2. Plaintiff APS filed an Amended Complaint on October 4, 2006, claiming that it was entitled to \$750.00 per closing on sale of lots within Cornerstone Community Subdivision. It did not indicate there were any other individuals or entities with any claim to said funds in its Amended Complaint, or in any of its discovery responses, which were provided to Defendant by Plaintiff APS on December 15 and 18, 2006.

3. Defendant filed its Answer to Amended Complaint on October 24, 2006, alleging that Plaintiff APS had failed to state a claim upon which relief could be granted, among other defenses.

4. On April 6, 2007, Defendant served its Second Discovery on Plaintiff APS, seeking to determine the source of funds loaned to Defendant. On April 30, 2007, Plaintiff APS objected to providing this information to Defendant.

5. On May 11, 2007, the Court compelled Plaintiff APS to answer Defendant's Second Discovery. On May 31, 2007, Plaintiff APS finally disclosed the source of funds loaned to Defendant.

6. On May 22, 2007, the Court heard oral argument on cross motions for summary judgment. Defendant argued, among other issues, that Plaintiff APS had failed to

MOTION FOR AWARD OF
ATTORNEYS FEES AND COSTS

state a claim upon which relief could be granted. On June 6, 2007, the Court denied the cross motions for summary judgment.

6. On August 1, 2007, in response to second cross-motions for summary judgment and argument by Plaintiff APS and Defendant, this Court found that five individuals needed to be joined to the lawsuit: E. Dale Henderson; Harry Segura; Drew Downs; Dean DeYoung; and Curtis DeYoung.

7. On August 10, 2007, the Court signed an order stating the above-named individuals "shall be joined as Plaintiffs by American Pension Services, Inc".

8. On August 10, 2007, Defendant filed a Notice of Offer of Judgment with the Court, and sent a written Offer of Judgment to Plaintiff APS, offering \$25,000.00.

9. On August 21, 2007, Stephen J. Muhonen, Esq., of Racine, Olsen, Nye, Budge, & Bailey, filed five Notices of Appearance on behalf of Plaintiffs Henderson, Downs, Segura, and both DeYoungs, respectively.

10. Trial in this matter began on August 28, 2007. At that time, Defendant objected because the five individuals named above had not been properly joined in the matter, and had failed to file a second amended complaint in this matter setting forth their causes of action, or claims. Notwithstanding that four of the five individuals named above were not present at trial, and that said individuals failed to set forth their own claims, the Court allowed the trial to go forward on August 28, 2007.

11. On September 28, 2007, the Court issued its Findings of Fact and Conclusions of Law. The Court specifically found and concluded that APS "has no expectation or contractual right to receive any payment from Cornerstone" and "APS is not entitled to

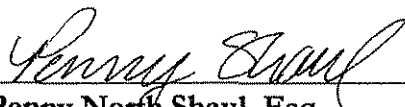
MOTION FOR AWARD OF
ATTORNEYS FEES AND COSTS

damages". *Findings of Fact, Paragraph 45; Conclusions of Law, Paragraph 8.* In its Judgment entered on October 12, 2007, the Court stated: "Plaintiff AMERICAN PENSION SERVICES, INC. is not entitled to recovery in this matter. *Judgment, pg. 2.*

APS claimed it was owed the funds in dispute throughout these proceedings, including throughout trial. It refused to disclose the true source of funds until ordered by the Court to do so in May, 2007. In fact, the individuals who were the true source of funds did not even join this case until August 21, 2007.

Up until August 21, 2007, APS was the only plaintiff present in this case, and incurred attorneys' fees and costs in its pursuit of claims against Cornerstone. It is clear from the record that APS is not the prevailing party as to Cornerstone, in that the Court indicated it had no right or expectation to receive payments from Cornerstone, and it had not been damaged. The Court found that this case involved a commercial transaction. Cornerstone lodged a notice of offer of judgment, made to APS on August 10, 2007. APS did not prevail against Cornerstone in excess of the offer of judgment. Pursuant to Idaho Code §12-120(3), and IRCP 68, Defendant is entitled to reasonable attorneys' fees and costs, as determined in accord with IRCP 54, against APS.

DATED this 22nd day of October, 2007.



Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

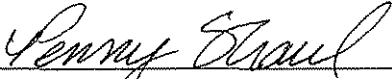
MOTION FOR AWARD OF
ATTORNEYS FEES AND COSTS

140-7

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of October, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
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RACINE OLSON NYE BUDGE
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Winston V. Beard, Esq.
Michael Gaffney, Esq.
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MOTION FOR AWARD OF
ATTORNEYS' FEES AND COSTS

140-8

OCT/15/2007/MON 04:00 PM DUNN LAW OFFICES

FAX No. 2087458160

P.001

COPY

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2006 OCT 24 PM 1:53

DISTRICT COURT
MAGISTRATE DIVISION
BONNEVILLE COUNTY
IDAHO

Attorneys for Defendant

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

AMERICAN PENSION SERVICES,)
INC.,)
)
Plaintiff,)
)
vs.)
)
CORNERSTONE HOME BUILDERS,)
LLC.,)
)
Defendant.)

Case No. CV-06-140

DEFENDANT'S ANSWER TO
PLAINTIFF'S AMENDED
COMPLAINT

Fee Category: I.1.b
Fee: \$14.00

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

I

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

OCT/15/2007/MON 04:00 PM DUNN LAW OFFICES

FAX No. 2087458160

P. 002

II

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

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

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

Page 2

OCT/15/2007/MON 04:00 PM DUNN LAW OFFICES

FAX No. 2087458160

P. 003

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

14. Deny.

15. Deny. Any monies lent by Plaintiff to Defendant have been fully repaid with interest accrued at the rate agreed upon.

16. Deny. No such sums are due and owing to Plaintiff.

17. Defendant always acknowledged that sums were due for monies lent by Plaintiff to Defendant, and did, in fact, pay such sums once Plaintiff cooperated with Defendant to determine the fixed sum due and owing. Therefore, Defendant denies Paragraph 17 as alleged by Plaintiff.

18. Deny. Plaintiff was provided with several drafts of promissory notes and/or deeds of trust, up until the underlying principal and interest owed by Defendant to Plaintiff was paid in full.

19. Defendant admits it has refused to pay Plaintiff \$750.00 per lot for each lot sold or to be sold in the construction and subdivision project, because no such sums are due and owing to Plaintiff. Defendant denies the balance of Paragraph 19.

20. Defendant realleges its answers to Paragraphs 1 through 19 of Plaintiff's Amended Complaint.

21. Defendant admits it agreed to enter into a promissory note which contained a

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

Page 3

OCT/15/2007/MON 04:00 PM DUNN LAW OFFICES

FAX No. 2087458160

P. 004

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

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

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

24. Deny.

25. Deny

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

27. Deny.

28. Deny.

29. Deny.

30. Deny.

31. Deny

32. Deny.

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

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

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FAX No. 2087458160

P. 005

Amended Complaint.

34. Deny.

35. Deny.

36. Deny.

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

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

39. Deny.

40. Deny.

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

42. Deny.

43. Deny.

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

45. Deny.

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

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FAX No. 2087458160

P. 006

Amended Complaint.

47. Deny.

48. Deny.

49. Deny.

III. ATTORNEYS' FEES

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

IV. FIRST AFFIRMATIVE DEFENSE

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

V. SECOND AFFIRMATIVE DEFENSE

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

VI. THIRD AFFIRMATIVE DEFENSE

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

VII. FOURTH AFFIRMATIVE DEFENSE

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

VIII. FIFTH AFFIRMATIVE DEFENSE

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

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

Page 6

OCT/15/2007/MON 04:01 PM DUNN LAW OFFICES

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P. 007

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

IX. SIXTH AFFIRMATIVE DEFENSE

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

X. SEVENTH AFFIRMATIVE DEFENSE

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

XI. EIGHTH AFFIRMATIVE DEFENSE

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

REQUEST FOR ATTORNEY FEES

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

WHEREFORE, Defendant prays for relief as follows:


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

OCT/15/2007/MON 04:01 PM DUNN LAW OFFICES

FAX No. 2087458160

P. 008

DATED this 27th day of October, 2006.



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

OCT/15/2007/MON 04:01 PM DUNN LAW OFFICES

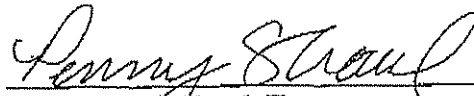
FAX No. 2087458160

P. 009

CERTIFICATE OF SERVICE

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

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission


 Penny North Shaul, Esq.
 DUNN & CLARK

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

7 OCT 17 18:56

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., No. 4993
Amy Sheets, Esq., ISB No. 5899
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.; DREW DOWNS; CURTIS)
DEYOUNG; HARRY SEGURA;)
DEAN DEYOUNG; and)
E. DALE HENDERSON,)

Plaintiffs,)

vs.)

CORNERSTONE HOME BUILDERS,)
LLC., a Utah Limited Liability Company;)
CORNERSTONE HOME BUILDERS,)
an Idaho Limited Liability Company,)

Defendants.)

Case No. CV-06-140

NOTICE OF APPEAL

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, AMERICAN PENSIONS SERVICES, INC.,; DREW DOWNS; CURTIS L. DEYOUNG; HARRY SEGURA; DEAN G. DEYOUNG; AND E. DALE HENDERSON; AND THE PARTIES' ATTORNEYS OF RECORD, DANIEL C. GREEN, ESQ. AND STEPHEN J. MUHONEN, ESQ., PO BOX 1391, POCATELLO, IDAHO 83204-1391; AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, CORNERSTONE HOMEBUILDERS, LLC of Utah and CORNERSTONE HOME BUILDERS, LLC, of Idaho, appeal against the above named respondents to the Idaho Supreme Court from the final Judgment, entered in the above entitled action on the 12th day of October, 2007, the Honorable Richard T. St. Clair presiding.

2. The appellants have a right to appeal to the Idaho Supreme Court, and the judgment described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1) I.A.R.

3. The issues on appeal are as follows:

a. Did the District Court abuse its discretion on June 6, 2007, by denying Defendant's Motion for Summary Judgment, filed on April 19, 2007?

b. Did the District Court abuse its discretion on August 28, 2007, by denying Defendant's Motion to Strike Notices of Appearance, filed on August 24, 2007?

c. Did the District Court err by refusing to require Plaintiffs Downs, Segura, Henderson, D. DeYoung and C. DeYoung to be served, appear and submit a Second Amended Complaint setting forth their alleged cause of action against Defendant

NOTICE OF APPEAL

prior to trial?

d. Did the District Court err by finding that Curtis DeYoung was acting as an agent with authority to invest IRA funds owned by Downs, Segura, Henderson, and D. DeYoung, when the same was not supported by admissible, competent evidence presented at trial?

e. Did the District Court err by finding that Henderson, Downs, Segura and D. DeYoung orally delegated all decisions to Curtis DeYoung, when the same was not supported by admissible, competent evidence presented at trial?

f. Did the District Court err by issuing inconsistent findings that APS was an agent of the individual plaintiffs, but did not make any decisions regarding investment of funds or lending of funds for the individual plaintiffs, where the District Court also found that Curtis DeYoung, in his individual capacity, made investment decisions for all the Plaintiffs (excluding APS)?

g. Did the District Court err by finding that the material elements of binding contract between Plaintiffs and Defendants were proved by Plaintiffs?

h. Did the District Court err by relying upon inadmissible affidavits which were not presented and admitted at trial?

i. Did the District Court err by failing to specify in its judgment the apportioned respective claims of the plaintiffs against Defendant, thereby denying Defendants the ability to determine if it prevailed against any of the respective Plaintiffs?

j. Did the District Court err by entering a judgment against Defendants which contained relief on behalf of Plaintiffs not specified or authorized by the District Court's Conclusions of Law, and not supported by the evidence?

NOTICE OF APPEAL

k. Are Defendants entitled to an award of attorneys' fees and costs as the prevailing party against Plaintiff APS pursuant to IRCP 54 and 68 and I.C. §12-120(3)?

4. No order has been entered sealing all or any portion of the record.

5. A reporter's transcript is requested. The appellants request the preparation of the following portions of the reporter's transcript: all hearings and proceedings from May 22, 2007; June 6, 2007; August 1, 2007, and including the trial held on August 28, 29 and 30, 2007.

6. The appellants request that the following documents be included in the clerk's record in addition to those automatically included under Rule 28, I.R.A:

a. The minute entry denying cross motions for Summary Judgment, dated June 6, 2007;

b. The Order Regarding Motions for Summary Judgment dated August 10, 2007;

c. The Deposition of Curtis L. DeYoung dated March 5, 2007.

7. The undersigned certifies:

a. That a copy of the notice of appeal has been served on the reporter;

b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript;

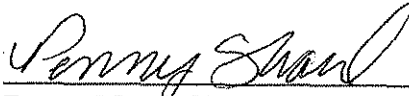
c. That the estimated fee for preparation of the clerk's record has been paid;

d. That appellate filing fee has been paid; and

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

NOTICE OF APPEAL

DATED this 17th day of October, 2007.



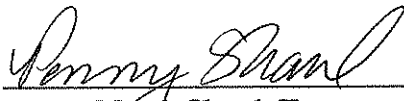
Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC

NOTICE OF APPEAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of October, 2007, a true and correct copy of the foregoing was delivered to the following persons(s) by:

- Hand Delivery
 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

Jack L. Fuller
Court Reporter to Judge Richard T. St. Clair
605 N. Capital Avenue
Idaho Falls, Idaho 83402

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

NOTICE OF APPEAL

Date: 10/19/2007

Seventh Judicial District Court - Bonneville County

NO. 0045197

Time: 10:51 AM

Receipt

Received of: Dunn Law Offices

\$ 100.00

P.O. Box 277

Rigby, ID 83442

One Hundred and 00/100 Dollars

Case: CV-2006-0000140

Defendant: American Pension Services, Inc., etal. vs. Cornerstone Home Builders, LLC

Cash bond:

100.00

Check: 5869

Payment Method: Cashiers Check

Amount Tendered: 100.00

Ronald Longmore, Clerk Of The District Court

By: 

Deputy Clerk

Clerk: HAGERTY

155

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)
 DEYOUNG; HARRY SEGURA;)
 DEAN DEYOUNG; and)
 E. DALE HENDERSON,)
)
 Plaintiff/Respondants,)
)
 vs.)
)
 CORNERSTONE HOME BUILDERS,)
 LLC., a Utah Limited Liability Company;)
 CORNERSTONE HOME BUILDERS,)
 an Idaho Limited Liability Company,)
)
 Defendants/Appellants.)

**CLERK'S CERTIFICATE
OF APPEAL**

Case No. CV-2006-140

Docket No.

Appeal from: Seventh Judicial District, Bonneville County

Honorable Richard T. St. Clair, District Judge, presiding.

Case number from Court: CV-2006-140

Order or Judgment appealed from: Judgment, entered October 12, 2007.

Attorney for Appellant: Penny North Shaul, Esq.

Attorney for Respondent: Stephen J. Muhonen, Esq.

Appealed by: Defendants

Appealed against: Plaintiffs

Notice of Appeal Filed: October 17, 2007.

Appellate Fee Paid: Yes

Was District Court Reporter's Transcript requested? Yes

If so, name of reporter: Jack Fuller

Dated: October 19, 2007

RONALD LONGMORE
Clerk of the District Court

By: *Penny North Shaul*
Deputy Clerk

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),)	
)	MINUTE ENTRY
vs.)	
)	CASE NO. CV-06-140
CORNERSTONE HOME BUILDERS, LLC,)	
)	
Defendant(s).)	
<hr/>		

On the 31st day of October, 2007, Defendant's objection to judgment, motion to amend attorney fees and motion to stay execution of judgment came before the Joel E. Tingey, District Judge, in open court at Idaho Falls, Idaho.

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

Mr. Stephen Muhonen appeared on behalf of the Plaintiff.

Ms. Penny North Shaul and Mr. Rob Dunn appeared on behalf of the Defendant.

Ms. Shaul advised that Defendant's objection to judgment is not moot.

Ms. Shaul presented Defendant's motion to amend attorney fees and motion to disallow Plaintiff's costs. Mr. Dunn presented additional argument in support of the motions. Defendant's Exhibit A - Offer of Judgment was marked and presented to the Court. Mr. Muhonen presented argument in opposition to the motion and in support of Plaintiff's costs. Ms. Shaul presented rebuttal argument. Mr. Dunn joined in

Defendant's rebuttal argument.

The Court will take the matter under advisement and issue an opinion as soon as possible.

Ms. Shaul presented Defendant motion to stay execution of judgment. Defendant's Exhibit B - letter of credit - was marked and presented to the Court. Mr. Muhonen argued in objection to the motion. Ms. Shaul presented rebuttal argument. Mr. Muhonen presented further argument.

The Court will grant a stay of execution of judgment providing the Defendant's post a supersedeas bond on the cash judgment. When a lot is sold, \$750.00 should be posted in an interest bearing account. Plaintiff should be notified of each and every sale plus an accounting of what has occurred between the Court's judgment and now. Ms. Shaul will prepare a proposed order for the Court's signature.

Court was thus adjourned.


JOEL E. TINGEY
DISTRICT JUDGE

H:cv06140.44mo

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of Oct 2007, that
I mailed or hand delivered a true and correct copy of the
foregoing document to the following:

RONALD LONGMORE

BY ms
DEPUTY CLERK

Daniel C. Green
Stephen J. Muhonen
PO Box 1391
Pocatello, ID 83204-1391
(Pl - American Pension Services, Inc.)

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

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

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

7 NOV -1 A9:51

AMERICAN PENSION SERVICES, INC.,
DREW DOWNS; CURTIS L. DEYOUNG,
HARRY SEGURA, DEAN G. DEYOUNG, E.
DALE HENDERSON,

Plaintiffs,

vs.

CORNERSTONE HOME BUILDERS, LLC,
a Utah Limited Liability Company;
CORNERSTONE HOME BUILDERS, an
Idaho Limited Liability Company,

Defendants.

CASE NO. CV-06-140

**MEMORANDUM DECISION AND
ORDER ON COSTS AND ATTORNEY
FEES**

PROCEEDINGS AND BACKGROUND

Following the court trial in this matter, the Court issued Findings of Fact and Conclusions of Law on September 28, 2007. A Judgment was subsequently entered on October 12, 2007. That Judgment included a ruling that "Plaintiffs shall be entitled to reasonable attorney fees and costs to be determined . . .". Defendants filed a Notice of Appeal on October 17, 2007. This matter has now come before the Court upon the Parties' cross motions for costs and attorney fees under I.C. §12-120. Each Party also opposes the other's motion for costs and fees. Pursuant to Rule 13(b)(9), the District Court retains authority to rule on the pending motions notwithstanding the Notice of Appeal.

MEMORANDUM DECISION AND ORDER - 1

ANALYSIS

Following trial, the Court concluded that the individual Plaintiffs were entitled to recover from Defendants. As the record reflects, this matter was initially prosecuted by American Pension Services, Inc. (APS) and the individual Plaintiffs were only joined as plaintiffs shortly before trial. The Court's prior analysis as to an agency relationship between APS and the individuals, actions on behalf of an undisclosed principal, and the joinder of real parties in interest need not be restated here. In ruling that the individual Plaintiffs were entitled to recover, the Court further expressly ruled that APS was not entitled to recover.

The foregoing gives rise to two arguments asserted by Defendants: (1) that Defendants are the prevailing party against APS and (2) that any award of costs and attorney fees to the individual Plaintiffs is limited to those costs and attorney fees incurred after the individuals were joined in the action. Plaintiffs argue that at all times APS was acting as an agent and on behalf of the individuals and that all costs and attorney fees incurred were on behalf of the individuals, who ultimately prevailed.

Under Rule 54(d)(1)(B), I.R.C.P., the Court is to consider the "final judgment or result of the action in relation to the relief sought by the respective parties" in determining who is a prevailing party. In considering the issues and the ultimate outcome, the Court can not find that Defendants were a prevailing party. While APS was not entitled to a recovery, such a finding does not reflect that APS failed in its claims, arguments and prosecution of the case. On the contrary, the prosecution of the action by APS must be considered successful. The express finding that APS is not entitled to recover is logical inasmuch as the relief ordered by the Court is directed to

the individual Plaintiffs. The Court finds that the Plaintiffs, collectively, are the prevailing parties in this matter.

Similarly, the Court is unwilling to segregate Plaintiffs' claim for costs and attorney fees based upon when the individuals were joined as Plaintiffs. At all times, the Plaintiffs had a unity of interest in the matter regardless of who was actually named as Plaintiff. Again, the matter was prosecuted by APS on behalf of the individuals. Furthermore, it is only logical to conclude that the individuals, as the real parties in interest, ultimately bore the expenses of litigation from the outset. The foregoing also is mandated by Rule 17(a), I.R.C.P., which addresses the consequences of joining real parties in interest. The Rule provides that when there is such a joinder, ". . . such . . . joinder . . . shall have the same effect as if the action had been commenced in the name of the real party in interest."

Defendants argue that a prior offer of judgment submitted to APS under Rule 68, I.R.C.P. makes them a prevailing party. The Court disagrees. Again, when considering the case as a whole, the Court finds that Defendants did not prevail. While the offer of judgment may have entitled Defendants to an award of costs against APS for costs incurred subsequent to the date of the offer, the record does not reflect any such costs.

PLAINTIFFS' ATTORNEY FEES AND COSTS

The Court has reviewed the record and Plaintiffs' Memorandum of Fees and Costs and the Affidavit filed in support. The Court has further considered the factors set out in Rule 54(e)(3), I.R.C.P., including but not limited to the time required, the novelty and difficulty of the case, prevailing rates for attorney fees, the amount in dispute, and duplication of effort. It is further the Court's opinion that issues and

MEMORANDUM DECISION AND ORDER - 3

proceedings relating to the source of funds provide by APS in the subject venture and the identity of real parties in interest were largely precipitated by Plaintiffs and the decision to pursue the matter through APS, thereby warranting a discount in the claimed attorney fees. In consideration of the foregoing, the Court finds that Plaintiffs are entitled to an award of attorney fees in the amount of \$82,400.

Plaintiffs also seek an award of costs. While Defendants objected to Plaintiffs motion and memorandum of costs and fees, with regard to the amount claimed the objection was limited to the argument that "costs and fees claimed were excessive given the subject matter and nature of the lawsuit". Defendants' Motion to Disallow Costs and Fees/Objection to Memorandum of Fees and Costs, p. 2.

The Court finds that Plaintiffs are entitled to costs as a matter of right (Rule 54(d)(1)(C)) in the amount of \$2,101.74. As to Plaintiffs claim for discretionary costs under Rule 54(d)(1)(D), the Court finds that such costs were not exceptional costs which in the interest of justice should be awarded against the Defendants.

CONCLUSION AND ORDER

Based on the record and the foregoing analysis, Defendants' Motion for Costs and Attorney Fees is denied. Defendants' Motion to Disallow Costs and Fees/Objection to Memorandum of Fees and Costs is denied in part and granted in part as to the amount of costs and fees claimed.

Plaintiffs' motion for costs and attorney fees is granted and Plaintiffs shall be awarded costs in the amount of \$2,101.74 and attorney fees in the amount of \$82,400.

DATED this 7 day of November, 2007.

MEMORANDUM DECISION AND ORDER - 4


Joel E. Tingey
DISTRICT JUDGE

CERTIFICATE OF SERVICE

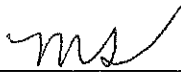
I hereby certify that on this 1 day of November, 2007, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Daniel C. Green
Stephen J. Muhonen
RACINE OLSEN NYE
P.O. Box 1391
Pocatello, ID 83204-1391

Penelope North Shaul
DUNN LAW OFFICES
P.O. Box 277
Rigby, Idaho 83442

Winston V. Beard
Michael Gaffney
BEARD ST. CLAIR GAFFNEY
2105 Coronado Street
Idaho Falls, ID 83404

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

7 NOV -1 A9:51

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 SEGURA, DEAN G. DEYOUNG, E.
DALE HENDERSON,

Plaintiffs,

vs.

CORNERSTONE HOME BUILDERS, LLC,
a Utah Limited Liability Company;
CORNERSTONE HOME BUILDERS, an
Idaho Limited Liability Company,

Defendants.

CASE NO. CV-06-140

**JUDGMENT OF COSTS AND
ATTORNEY FEES**

THIS MATTER having come before the Court upon Plaintiffs' motion for costs and attorney fees, and the Court having entered its Memorandum Decision on said motion, and good cause appearing therefore;

IT IS HEREBY ORDER AND ADJUDGED that Plaintiffs Drew Downs, Curtis L. Deyoung, Harry Segura, Dean G. Deyoung, and E. Dale Henderson, collectively, shall have judgment against Defendants for costs in the amount of \$2,101.74 and attorney fees in the amount of \$82,400, for a total judgment of \$84,501.74, with interest accruing thereon at the legal rate.

JUDGMENT OF COSTS AND ATTORNEY FEES - 1

DATED this 1 day of November, 2007.



Joel E. Tingey
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of November, 2007, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Daniel C. Green
Stephen J. Muhonen
RACINE OLSEN NYE
P.O. Box 1391
Pocatello, ID 83204-1391

Penelope North Shaul
DUNN LAW OFFICES
P.O. Box 277
Rigby, Idaho 83442

Winston V. Beard
Michael Gaffney
BEARD ST. CLAIR GAFFNEY
2105 Coronado Street
Idaho Falls, ID 83404

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

BONNEVILLE COUNTY
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

7 NOV 14 10:00

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

AMERICAN PENSION SERVICES,)
INC., DREW DOWNS,)
CURTIS L. DEYOUNG, HARRY)
SEGURA, DEAN G. DEYOUNG,)
and E. DALE HENDERSON,)

Case No. CV-06-140

**ORDER FOR WRIT OF EXECUTION
AND GARNISHMENT**

Plaintiffs,)

vs.)

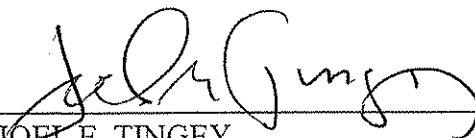
CORNERSTONE HOME BUILDERS,)
LLC, a Utah Limited Liability Company;)
CORNERSTONE HOME BUILDERS, a)
Idaho Limited Liability Company,)

Defendants.)

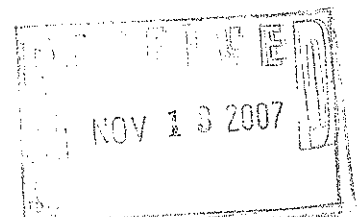
The Court having reviewed the Motion for Writ of Execution and Garnishment dated November 2, 2007, and the Judgments on file herein entered on October 10, 2007, and November 1, 2007, and good cause appearing therefor;

IT IS HEREBY ORDERED that a Writ of Execution and Garnishment be granted for the collection of Defendant CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company's; CORNERSTONE HOME BUILDERS, a Idaho Limited Liability Company's personal and real property listed on said Writ of Execution and Garnishment until the "Judgments" in the combined sum of \$190,251.74 are satisfied.

DATED this 14 day of November, 2007.



JOEL E. TINGEY
Seventh District Judge



CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true, correct and **conformed** copy of the foregoing document to be served by U.S. first-class mail, postage prepaid, upon the following unless a different method of service is indicated:

Stephen J. Muhonen
RACINE, OLSON, NY, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391/Center Plaza
Pocatello, Idaho 83204-6109

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Mail
- Facsimile

DATED this 14 day of November, 2007.



Deputy Clerk

200706950

WARREN

Daniel C. Green (ISB No. 3213)
Stephen J. Muhonen (ISB No. 6689)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109
Attorneys for Plaintiffs

BONNEVILLE COUNTY
ID. CO. DEC -3 P12:24
7 NOV 14 A10:00

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)
SEGURA, DEAN G. DEYOUNG,)
and E. DALE HENDERSON,)

Case No. CV-06-140

**WRIT OF EXECUTION
AND GARNISHMENT**

Plaintiffs,)

vs.)

CORNERSTONE HOME BUILDERS,)
LLC, a Utah Limited Liability Company;)
CORNERSTONE HOME BUILDERS, a)
Idaho Limited Liability Company,)

Defendants.)

THE PEOPLE OF THE STATE OF IDAHO SEND GREETINGS TO:

THE SHERIFFS OF BONNEVILLE COUNTY, STATE OF IDAHO

WHEREAS, the Plaintiffs DREW DOWNS, CURTIS L. DEYOUNG, HARRY SEGURA, DEAN G. DEYOUNG, and E. DALE HENDERSON (hereafter "Plaintiffs"), recovered "Judgment" entered by Judge Richard T. St. Clair in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville on October 10, 2007, bearing Case No. CV-06-140, ("Judgment") against Defendants CORNERSTONE HOME BUILDERS, LLC, a

Utah Limited Liability Company; CORNERSTONE HOME BUILDERS, a Idaho Limited Liability Company, (hereafter "Judgment Debtors").

WHEREAS, the said "Judgment" was for the sum of \$105,750.00 lawful money of the United States of America, which amount shall accrue interest and costs until said Judgment and all approved post-judgment interest, fees and costs are paid. Additionally, Plaintiffs seek payment in full of a subsequent Judgment entered on November 1, 2007, against Defendants by Judge Joel E. Tingey awarding Plaintiffs \$84,501.74 for their pre-judgment attorney fees and costs relating to the aforementioned Judgment entered by Judge St. Clair. The combined total of these two Judgments is \$190,251.74.

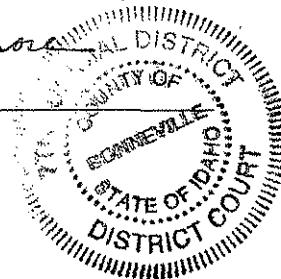
NOW YOU, the said Sheriff of Bonneville County, State of Idaho, are hereby required to satisfy said Judgment with interest, at the statutory rate from the date hereof, plus all accrued costs, attorney's fees and sheriff's fees, out of the personal property of the Judgment Debtors, which includes but is not limited to:

1. All United States currency within its possession in any bank accounts or in its business located in Bonneville County, Idaho;
2. All vehicles owned by Defendants;
3. All machinery and equipment owned by Defendants; and/or
4. Other personal property owned by Defendants.

If sufficient personal property of said Judgment Debtors cannot be found, then out of the real property in your County belonging to said Judgment Debtors on the day when said Judgment was docketed in Bonneville County, Idaho, or at any time thereafter, (from October 10, 2007, and November 1, 2007, forward) and make return of this Writ within sixty (60) days after receipt hereof, with what you have endorsed herein.

ATTEST MY HAND AND SEAL OF THIS COURT THIS 13 day of November, 2007.

Ronald Longmore
Deputy Clerk
Deputy Clerk



**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)
 DEYOUNG; HARRY SEGURA;)
 DEAN DEYOUNG; and)
 E. DALE HENDERSON,)
)
 Plaintiff/Respondants,)
)
 vs.)
)
 CORNERSTONE HOME BUILDERS,)
 LLC., a Utah Limited Liability Company;)
 CORNERSTONE HOME BUILDERS,)
 an Idaho Limited Liability Company,)
)
 Defendants/Appellants.)
 _____)

**CLERK'S CERTIFICATION
OF EXHIBITS**

Case No. CV-2006-140

Docket No. 34697

STATE OF IDAHO)
)
 County of Bonneville)

I, Ronald Longmore, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, do hereby certify that the foregoing Exhibits were marked for identification and offered in evidence, admitted, and used and considered by the Court in its determination:

Trial (August 28, 2007) exhibits and published depositions, see attached "exhibit list".

Deposition of Curtis L. DeYoung dated March 5, 2007.

And I further certify that all of said Exhibits are on file in my office and are part of this record on Appeal in this cause, and are hereby transmitted to the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the District Court

this 20th day of November, 2007.

RONALD LONGMORE
Clerk of the District Court

By *Jerry Shuck*
Deputy Clerk

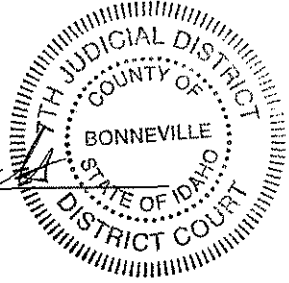


EXHIBIT LIST

CASE NAME: APS v. Cornerstone

JUDGE: Richard T. St. Clair

CASE NUMBER: CV-06-140

DATE: August 28, 2007

TYPE OF PROCEEDING: COURT TRIAL

WITNESS	DESCRIPTION	NUMBER	MARKED	OFFERED	OBJECTED	ADMITTED
	Corp Warr Deeds	14	X	X	None	Yes
	Art of Organiz	1	X	X	None	Yes
	Cornerstone Dev	2			Stip	Yes
	Handwritten notes by Kendrick	3			Stip	Yes
	Note 6/04/04	4			Stip	Yes
	Note 9/07/05	5			Stip	Yes
	Deed of Trust 9/7/05	6			Stip	Yes
	Cornerstone 3/09/05 minutes	8			Stip	Yes
	Issues document	9			Stip	Yes
	App Cert Author	23			Stip	Yes
	App Reg Foreign Lmt Liability co	24			Stip	Yes
	Articles of Amdmt to Articles of Org	25			Stip	Yes
	Oper Agrmt of Cornerstone	A			Stip	Yes
	Plat Map Mobile Home Estates	B			Stip	Yes
	Articles of Organ Lmt Liability Cornerstone	C			Stip	Yes
	Articles of Organ Cornerstone	D			Stip	Yes
	Art of Amdmt to Art of Organ Cornerstone	E			Stip	Yes
	Art of Amdmt to Art of Organiz	F			Stip	Yes
	App Regist Foreign LLC	G			Stip	Yes
	Bonn L&T Co memo note	H			Stip	Yes
	Amerititle ltr to DeYoung 8/30/05	I			Stip	Yes
	Note 9/07/05	J			Stip	Yes

EXHIBIT LIST

CASE NAME: APS v. Cornerstone

JUDGE: Richard T. St. Clair

CASE NUMBER: CV-06-140

DATE: August 28, 2007

TYPE OF PROCEEDING: COURT TRIAL

WITNESS	DESCRIPTION	NUMBER	MARKED	OFFERED	OBJEC TED	ADMITTED
	Deed of Trust 9/07/05	K(14)			Stip	Yes
	Amerititle 8/30/05	L			Stip	Yes
	Cornerstone trans for APS	M			Stip	Yes
	Cornerstone memo to DeYoung 6/5/04	N			Stip	Yes
	Note 6/04/04	O			Stip	Yes
	CHB memo Tallman 6/07/04	P			Stip	Yes
	APS fax 6/10/07	Q			Stip	Yes
	CHB ltr 8/10/07	R			Stip	Yes
	CHB memo 12/14/04	S			Stip	Yes
	APS 3/24/05	T			Stip	Yes
	CHB memo/fax 7/28/05	U			Stip	Yes
	Note dated 2005	V			Stip	Yes
	APS fax 2/26/04	X			Stip	Yes
	APS fax 3/16/05	Y			Stip	Yes
	Key Bank trans	Z			Stip	Yes
	Citizens CB ltr 1/24/05	AA			Stip	Yes
	APS fax 3/16/05	BB			Stip	Yes
	APS fax 2/26/04	CC			Stip	Yes
	Trans APS to Tallman	DD			Stip	Yes
	Wire trans 8/2/04	EE			Stip	Yes
	Wire tran 1/21/05	FF			Stip	Yes
	Wire tran 3/16/05	GG			Stip	Yes

EXHIBIT LIST

CASE NAME: APS v. Cornerstone

JUDGE: Richard T. St. Clair

CASE NUMBER: CV-06-140

DATE: August 28, 2007

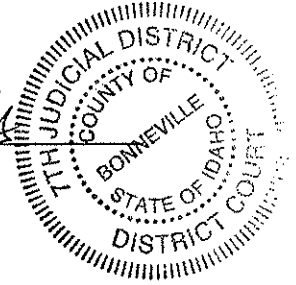
TYPE OF PROCEEDING: Court Trial

WITNESS	DESCRIPTION	NUMBER	MARKED	OFFERED	OBJECTED	ADMITTED
	Wire tran 4/1/05	HH			Stip	Yes
	Wire tran 4/20/05	II			Stip	Yes
	Wire tran 5/06/05	JJ			Stip	Yes
	Wire tran 12/14/05	KK			Stip	Yes
	Trust Deed 4/01/04	LL			Stip	Yes
	Trust Deed 3/19/04	MM			Stip	Yes
	Rcvr Ltd Warr Deed	NN			Stip	Yes
	Trust Deed 10/25/05	OO			Stip	Yes
	Option Agrmt 9/26/03	QQ(14)			Stip	Yes
	Corp Warr Deed 1/22/04	PP(14)			Stip	Yes
	Corp Warr Deed 9/29/03 I	RR(14)			Stip	Yes
	Corp Warr Deed 9/29/03 II	SS(14)			Stip	Yes
	Corp Warr Deed 9/29/03 III	TT(14)			Stip	Yes
	Sub Trustee & Full Reconvey	UU(14)			Stip	Yes
	Corp Warr Deed 9/29/03 IV	VV(14)			Stip	Yes
	Citizens CB 1/24/05	LLL			Stip	Yes
	Deed of Trust 9/07/05	MMM			Stip	Yes
	APS wire 2/26/04	NNN			Stip	Yes
	Wire tran 8/02/04	OOO			Stip	Yes
	Tallman loan orig 11/03/03	EEEE			Stip	Yes
	Notes auth Kendrick	FFFF			Stip	Yes
	Pls Resp Def Disc	GGGG			Stip	Yes

RONALD LONGMORE

Clerk of the District Court

By: *Jenny Shultz*
Deputy Clerk



**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)
 DEYOUNG; HARRY SEGURA;)
 DEAN DEYOUNG; and)
 E. DALE HENDERSON,)
)
 Plaintiff/Respondants,)
)
 vs.)
)
 CORNERSTONE HOME BUILDERS,)
 LLC., a Utah Limited Liability Company;)
 CORNERSTONE HOME BUILDERS,)
 an Idaho Limited Liability Company,)
)
 Defendants/Appellants.)

CERTIFICATE OF SERVICE

Case No. CV-2006-140
 Docket No. 34697

I HEREBY CERTIFY that on the ____ day of November, 2007, I served a copy of the Reporter's Transcript (if requested) and the Clerk's Record in the Appeal to the Supreme Court in the above entitled cause upon the following attorneys:

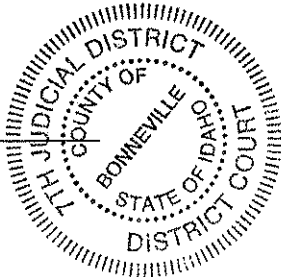
Penny North Shaul, Esq.
 P.O. Box 277
 Rigby, ID 83442-0277

Stephen J. Muhonen
 P.O. Box 1391/Center Plaza
 Pocatello, ID 83204-1391

by depositing a copy of each thereof in the United States mail, postage prepaid, in an envelope addressed to said attorneys at the foregoing address, which is the last address of said attorneys known to me.

RONALD LONGMORE
 Clerk of the District Court

By: *Penny North Shaul*
 Deputy Clerk



7 DEC -3 112:24

Daniel C. Green (ISB-No. 3213)
Stephen J. Muhonen (ISB No. 6689)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109
Attorneys for Plaintiff American Pension Services, Inc.

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

AMERICAN PENSION SERVICES,)
INC., DREW DOWNS,)
CURTIS L. DEYOUNG, HARRY)
SEGURA, DEAN G. DEYOUNG,)
and E. DALE HENDERSON,)

Case No. CV-06-140

NOTICE OF GARNISHMENT

Plaintiffs,)

vs.)

CORNERSTONE HOME BUILDERS,)
LLC, a Utah Limited Liability Company;)
CORNERSTONE HOME BUILDERS, a)
Idaho Limited Liability Company,)

Defendants.)

TO: CITIZENS COMMUNITY BANK
2797 South 25th East
Ammon, Idaho 83406

Pursuant to the Judgments entered by the Bonneville County Court on October 10, 2007, and November 1, 2007, Case No. CV-06-140, the "Motion for Writ of Execution and Garnishment" and "Writ of Execution and Garnishment" and "Order for Writ of Execution and Garnishment" served herewith, the above named Plaintiffs, DREW DOWNS, CURTIS L. DEYOUNG, HARRY

SEGURA, DEAN G. DEYOUNG, and E. DALE HENDERSON, (hereafter "Judgment Creditors") hereby demand that you forthwith pay over to the Bonneville County Sheriff for and in behalf of the Plaintiffs, all monies currently held in any and all bank accounts currently held by CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company; CORNERSTONE HOME BUILDERS, a Idaho Limited Liability Company (hereafter "Judgment Debtors");

Please deliver to the Sheriff of Bonneville County all sums recoverable under the Writ of Execution and Garnishment. Said sums are not to exceed \$190,251.74, which amount was awarded pursuant to said Writ of Execution and Garnishment. Said amount shall continue to accrue interest, costs and fees as provided by law from and after the date of entry of said Judgment.

DATED this 3 day of Dec, 2007.

BONNEVILLE COUNTY SHERIFF'S OFFICE

1530

BYRON R. STAMMEL, SHERIFF

By [Signature]
Deputy Sheriff

2007 DEC 12 PM 10:26
NOTARY PUBLIC
IDAHO

SUBSCRIBED AND SWORN TO before me on this _____ day of _____, 2007.

(SEAL)

NOTARY PUBLIC FOR IDAHO
Residing at: _____
Commission expires: _____

2007069509
CIVIL # _____
DATE _____

7 DEC -3 12:24

Daniel C. Green (ISB No. 3213)
Stephen J. Muhonen (ISB No. 6689)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109
Attorneys for Plaintiff American Pension Services, Inc.

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

AMERICAN PENSION SERVICES,)
INC., DREW DOWNS,)
CURTIS L. DEYOUNG, HARRY)
SEGURA, DEAN G. DEYOUNG,)
and E. DALE HENDERSON,)
)
Plaintiffs,)
)
vs.)
)
CORNERSTONE HOME BUILDERS,)
LLC, a Utah Limited Liability Company;)
CORNERSTONE HOME BUILDERS, a)
Idaho Limited Liability Company,)
)
Defendants.)
_____)

Case No. CV-06-140

**INTERROGATORIES TO GARNISHEE
(Citizens Community Bank)**

I, ENGELA PETERSEN, being first duly sworn upon oath, depose and make answers
to the Interrogatories as follows:

INTERROGATORY NO. 1: At the time of service of this notice, did you or do you, expect
to have in your possession or under your control any property, money, or effects of
CORNERSTONE HOME BUILDERS, LLC, a Utah Limited Liability Company; CORNERSTONE

HOME BUILDERS, a Idaho Limited Liability Company (hereafter "Defendants")? If so, state what property, how much, and of what value, and what money or effects.

ANSWER TO INTERROGATORY NO. 1:

~~NO~~ YES, CHECKING ACCOUNT, \$326.00

INTERROGATORY NO. 2: At the time of the service of this notice, did you owe Defendants any money or do you owe Defendants any money now? If so, state how much, on what account, and when it will become due.

ANSWER TO INTERROGATORY NO. 2:

N/O

INTERROGATORY NO. 3: State the other facts, existing at the time of the service of the garnishment, which might tend to show under which Defendants, might claim a liability on your part to Defendants.

ANSWER TO INTERROGATORY NO. 3:

N/A

INTERROGATORY NO. 4: Please describe in detail specific terms of any written financial documents of which you are aware that refer to Defendants' reason or any purpose. Providing a

complete copy of the document or documents containing the reference to Defendants shall be a sufficient answer to this interrogatory.

ANSWER TO INTERROGATORY NO. 4:

N/A

INTERROGATORY NO. 5: At the time of this notice, did you have in your possession or have the right to possess any documents relating to or descriptive of Defendant's rights to payment or other benefits? If you answer affirmatively, please attach these documents.

ANSWER TO INTERROGATORY NO. 5:

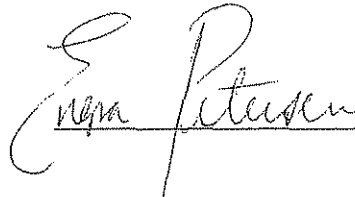
NO

INTERROGATORY NO. 6: Please describe with specificity all reasonable efforts that have been made to respond to these interrogatories, including, without limitation, persons and documents consulted, records and notes or correspondence received.

ANSWER TO INTERROGATORY NO. 6:

N/A

DATED this 3 day of DECEMBER, 2007.

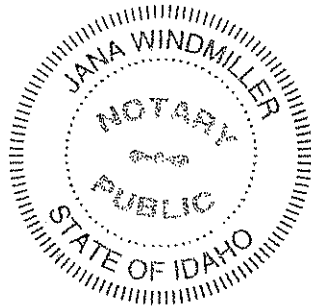


STATE of IDAHO)

County of Bonneville^{SS}

On this 3 day of December, 2007, before me, the undersigned, a Notary Public in and for said State, personally appeared Jana Petersen, known or identified to me to be the Customer Service Sup^{vr} of Citizens Community Bank, the company that executed the instrument or the person who executed the instrument on behalf of said company, and acknowledged to me that such company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Jana Windmiller
Notary Public for Idaho
Residence: Highway
Commission Expires: 8-6-13

DUNN LAW OFFICES, PLLC.
 Robin D. Dunn, Esq., ISB No. 2903
 Penny North Shaul, Esq., No. 4993
 Amy Sheets, Esq., ISB No. 5899
 P.O. Box 277
 477 Pleasant Country Lane
 Rigby, ID 83442
 (208) 745-9202 (t)
 (208) 745-8160 (f)

BONNEVILLE COUNTY
 IDAHO

7 DEC 12 A9:41

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.; DREW DOWNS; CURTIS)
 DEYOUNG; HARRY SEGURA;)
 DEAN DEYOUNG; and)
 E. DALE HENDERSON,)

Plaintiffs,)

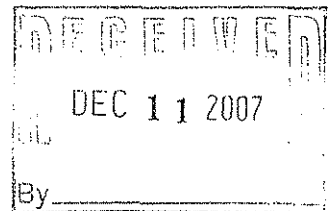
vs.)

CORNERSTONE HOME BUILDERS,)
 LLC.,)

Defendant.)

Case No. CV-06-140

ORDER GRANTING
 MOTION TO STAY
 EXECUTION OF JUDGMENT



This matter having come before the Court on Defendant's Motion to Stay Execution of Judgment; and based upon the file and pleadings herein, as well as IAR 13(b)(15);

IT IS HEREBY ORDERED and this does order that execution upon the JUDGMENT entered by the Court on October 12, 2007 and JUDGMENT OF COSTS AND ATTORNEY FEES entered by the Court on November 1, 2007, in Bonneville County Case No. CV 06-140, is hereby stayed pending resolution of appeal now pending before the Idaho

Supreme Court, Docket No. 34697. Pursuant to IAR 13(b)(15), Defendants have posted a supersedeas bond in the amount of \$258,742.36.00 on the combined amount on said judgments awarded to Plaintiffs.

IT IS FURTHER ORDERED that Defendants must place \$750.00 per closing of sale of the remaining seventy-one (71) lots in Cornerstone Community Subdivision, in an interest bearing trust account through Mountain West Title and Escrow, at 320 Memorial Drive, Idaho Falls, Idaho 83402. Plaintiffs, through their counsel of record, Stephen J. Muhonen, shall be notified of each and every closing of sale, and provided with documentation of each such closing and escrow. Plaintiffs shall also be provided with documentation of escrow of \$750.00 per closing of sale on each and every closing that has occurred, or does occur, on the remaining seventy-one (71) lots in Cornerstone Community Subdivision since August 30, 2007.

DATED this 12 day of December, 2007.


JOEL E. TINGEY
DISTRICT COURT JUDGE

CLERK'S CERTIFICATE OF SERVICE

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

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC
P.O. Box 277
Rigby, ID 83442

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

Clerk

By: 
Deputy

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 4278
RECIPIENT ADDRESS 7458160
DESTINATION ID
ST. TIME 12/12 10:11
TIME USE 00'25
PAGES SENT 3
RESULT OK

DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB No. 2903
Penny North Shaul, Esq., No. 4993
Amy Sheets, Esq., ISB No. 5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

BONNEVILLE COUNTY
IDAHO

7 DEC 12 09:41

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.; DREW DOWNS; CURTIS)
DEYOUNG; HARRY SEGURA;)
DEAN DEYOUNG; and)
E. DALE HENDERSON,)

Plaintiffs,)

vs.)

CORNERSTONE HOME BUILDERS,)
LLC.,)

Defendant.)

Case No. CV-06-140

ORDER GRANTING
MOTION TO STAY
EXECUTION OF JUDGMENT

RECEIVED
DEC 11 2007
By _____

Appeal Bond

Travelers Casualty and Surety Company of America
One Tower Square 3PB, Hartford, CT 06183

American Pension Services, Inc.; Drew Downs; Curtis L. DeYoung; Harry Segura; Dean G. DeYoung; E. Dale Henderson

Plaintiff(s)

-against-

Cornerstone Home Builders, LLC, a Utah Limited Liability Company; Cornerstone Home Builders, an Idaho Limited Liability Company

Defendant(s)

Bond No. 104956347

Index or Cause No. _____

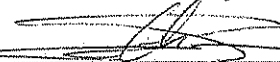
KNOW ALL MEN BY THESE PRESENTS, that we Cornerstone Home Builders LLC a Utah Limited Liability Company; Cornerstone Home Builders, an Idaho Limited Liability Company, as Principal, and Travelers Casualty and Surety Company of America, a corporation organized under the laws of the State of Connecticut and authorized to do business in the State of Idaho, as Surety, are held and firmly bound unto The District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville, as Obligee, in the maximum penal sum of Two Hundred Fifth Seven Thousand Dollars Dollars (\$257,000), lawful money of the United States of America, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has appealed to the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Bonneville from a judgment entered on the 10th day of October, 2007.

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall diligently prosecute its appeal to a decision, and shall promptly perform and satisfy the judgment, then this obligation will be void; otherwise to remain in full, force and effect.

SIGNED, SEALED AND DATED this 11th day of December, 2007.

Cornerstone Home Builders, LLC A Utah Limited Liability Company; Cornerstone Home Builders, LLC an Idaho Limited Liability Company

By: 
Scott Tallman, Owner, Principal

Travelers Casualty and Surety Company of America

By: 
DeRay Perry, Attorney-in-Fact



POWER OF ATTORNEY

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
Seaboard Surety Company
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company
St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company

Attorney-In Fact No. 219299

Certificate No. 002046518

KNOW ALL MEN BY THESE PRESENTS: That Seaboard Surety Company is a corporation duly organized under the laws of the State of New York, that St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company and St. Paul Mercury Insurance Company are corporations duly organized under the laws of the State of Minnesota, that Farmington Casualty Company, Travelers Casualty and Surety Company, and Travelers Casualty and Surety Company of America are corporations duly organized under the laws of the State of Connecticut, that United States Fidelity and Guaranty Company is a corporation duly organized under the laws of the State of Maryland, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Iowa, and that Fidelity and Guaranty Insurance Underwriters, Inc. is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

R. M. Hartwell, Mary Lynn Hartwell, DeRay Perry, Sally Perry, Todd R. Mary, Douglas G. Ball, Colleen B. Rowan, Angela Rae Miller, and Sherl Callen

of the City of Idaho Falls, State of Idaho, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 6th day of November, 2007.

Farmington Casualty Company
Fidelity and Guaranty Insurance Company
Fidelity and Guaranty Insurance Underwriters, Inc.
Seaboard Surety Company
St. Paul Fire and Marine Insurance Company

St. Paul Guardian Insurance Company
St. Paul Mercury Insurance Company
Travelers Casualty and Surety Company
Travelers Casualty and Surety Company of America
United States Fidelity and Guaranty Company



State of Connecticut
City of Hartford ss.

By: [Signature]
George W. Thompson, Senior Vice President

On this the 6th day of November, 2007, before me personally appeared George W. Thompson, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Seaboard Surety Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal. My Commission expires the 30th day of June, 2011.



[Signature]
Marie C. Tetreault, Notary Public

THE HARTWELL CORPORATION

Bonds ■ Benefits ■ Insurance ■ Risk Management

1 Airport Plaza ■ 1084 N. Skyline Drive 83402
 P.O. Box 51019 ■ Idaho Falls, ID 83405-1019
 208-522-5656 ■ Fax 208-524-5721

Cornerstone Home Builders, LLC
 1570 S Midway Ave
 Ammon, ID 83406

INVOICE #		43640	Page 1
ACCOUNT NO.	CSR	DATE	
CORNE-3	LS	12/11/07	
Miscellaneous Bond			
POLICY #			
104956347			
COMPANY			
Travelers Casualty and Surety			
PRODUCER			
Todd Mary			
EFFECTIVE	EXPIRATION	BALANCE DUE ON	
12/11/07	12/11/08	12/11/07	
AMOUNT PAID		AMOUNT DUE	
		\$ 5,140.00	

*** PLEASE RETURN TOP PORTION WITH REMITTANCE ***

Item #	Eff Date	Description	Amount
INVOICE #	43640		
537119	12/11/07	Appeal bond	\$ 5,140.00
Invoice Balance:			\$ 5,140.00

*Paid check # 5072
 Jms
 12/11/07*

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 4387
RECIPIENT ADDRESS 7458160
DESTINATION ID
ST. TIME 12/14 10:55
TIME USE 01'35
PAGES SENT 7
RESULT OK

DUNN LAW OFFICES, PLLC.
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Penny North Shaul, Esq., No. 4993
Amy Sheets, Esq., ISB No. 5899
P.O. Box 277
477 Pleasant Country Lane
Rigby, ID 83442
(208) 745-9202 (t)
(208) 745-8160 (f)

BONNEVILLE COUNTY
IDAHO

7 DEC 12 A9:41

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.; DREW DOWNS; CURTIS)
DEYOUNG; HARRY SEGURA;)
DEAN DEYOUNG; and)
E. DALE HENDERSON,)

Plaintiffs,)

vs.)

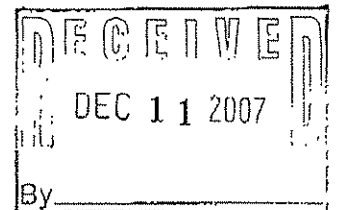
CORNERSTONE HOME BUILDERS,)
LLC.,)

Defendant.)

Case No. CV-06-140

ORDER GRANTING
MOTION TO STAY
EXECUTION OF JUDGMENT

191



DUNN LAW OFFICES, PLLC.
Robin D. Dunn, Esq., ISB No. 2903
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(208) 745-9202 (t)
(208) 745-8160 (f)

7TH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

7 DEC 17 2007

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.; DREW DOWNS; CURTIS)
DEYOUNG; HARRY SEGURA;)
DEAN DEYOUNG; and)
E. DALE HENDERSON,)

Plaintiffs,)

Case No. CV-06-140

ORDER FOR ADDITIONAL
RECORD

vs.)

CORNERSTONE HOME BUILDERS,)
LLC, a Utah Limited Liability Company,)
CORNERSTONE HOME BUILDERS,)
an Idaho Limited Liability Company,)

Defendant.)

Based upon the foregoing stipulation filed by the parties in the above-captioned matter; and good cause appearing therefore;

IT IS HEREBY ORDERED that pursuant to IAR 29(a), inclusion of the following material in the Clerk's Record in addition to that which has already been included, and that which is required shall be included by the Idaho Appellate Rules:

1. Defendant's Motion for Summary Judgment filed April 18, 2007;
2. Affidavit of Penny North Shaul filed April 24, 2007;
3. Affidavit of Scott Tallman filed April 24, 2007;
4. Affidavit of Mary TeNgaio filed April 24, 2007;
5. Defendant's Memorandum in Support of Motion for Summary Judgment filed April 24, 2007;
6. Second Affidavit of Penny North Shaul filed May 8, 2007;
7. Second Affidavit of Scott Tallman filed May 8, 2007;
8. Defendant's Response to Plaintiff's Memorandum in Support of Motion for Summary Judgment;
9. Affidavit of Scott Tallman in Support of Motion to Compel filed May 11, 2007;
10. Affidavit of Penny North Shaul in Support of Defendant's Motion to Compel Discovery Responses filed May 11, 2007;
11. Motion to Compel Response to Defendant's Second Set of Discovery to Plaintiff filed May 11, 2007;
12. Memorandum in Support of Motion to Compel Response to Second Set of Discovery to Plaintiff filed May 11, 2007;
13. Third Affidavit of Scott Tallman filed May 15, 2007;
14. Third Affidavit of Penny North Shaul filed May 15, 2007;
15. Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment filed May 15, 2007;

16. Defendant's Second Motion for Summary Judgment filed June 29, 2007;
17. Affidavit of Michael D. Gaffney filed July 3, 2007;
18. Memorandum in Support of Motion for Leave to Amend filed July 3, 2007;
19. Motion for Leave to Amend Answer filed July 3, 2007;
20. Brief in Support of Defendant's Second Motion for Summary Judgment filed July 6, 2007;
21. Affidavit of Michael D. Gaffney filed July 20, 2007;
22. Defendant's Brief Supplementing its Second Motion for Summary Judgment and in Opposition to Plaintiff's Second Motion for Summary Judgment filed July 20, 2007;
23. Defendant's Reply to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment filed July 27, 2007;
24. Notice of Offer of Judgment filed August 10, 2007;
25. Defendant's Motion to Strike Notices of Appearance filed August 24, 2007;
26. Defendant's Memorandum in Support of Motion to Strike Notices of Appearance filed August 24, 2007;
27. Objection to Proposed Judgment filed October 4, 2007;
28. Motion to Disallow Costs and Fees/Objection to Memorandum of Fees and Costs filed October 18, 2007;
29. Motion for Award of Attorneys' Fees and Costs Against Plaintiff American Pension Services, Inc., filed October 22, 2007;

30. Defendant's Offer of Judgment provided to Court at hearing on October 31, 2007.

31. Plaintiffs' Motion for Summary Judgment dated April 18, 2007, filed April 19, 2007;

32. Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment filed April 24, 2007;

33. Affidavit of Martin Poole filed April 24, 2007;

34. Affidavit of Brad Kendrick filed April 24, 2007;

35. Affidavit of Stephen J. Muhonen filed April 24, 2007;

36. Plaintiffs' Response to Defendant's Motion for Summary Judgment filed May 10, 2007;

37. Second Affidavit of Stephen J. Muhonen filed May 10, 2007;

38. Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment filed May 15, 2007;

39. Third Affidavit of Stephen J. Muhonen filed May 15, 2007;

40. Plaintiffs' Second Motion for Summary Judgment filed June 28, 2007;

41. Memorandum in Support of Plaintiffs' Second Motion for Summary Judgment filed July 6, 2007;

42. Affidavit of Curtis DeYoung filed July 6, 2007;

43. Affidavit of Dale Henderson filed July 6, 2007;

44. Affidavit of Dean DeYoung filed July 6, 2007;

45. Affidavit of Harry Segura filed July 6, 2007;

46. Affidavit of Drew Downs filed July 6, 2007;
47. Plaintiffs' Response to Defendant's Second Motion for Summary Judgment filed July 20, 2007;
48. Second Affidavit of Drew Downs filed July 20, 2007;
49. Second Affidavit of Curtis DeYoung filed July 20, 2007;
50. Second Affidavit of Dale Henderson filed July 20, 2007;
51. Second Affidavit of Dean DeYoung filed July 20, 2007;
52. Second Affidavit of Harry Segura filed July 20, 2007;
53. Plaintiffs' Reply Memorandum in Support of Plaintiffs' Second Motion for Summary Judgment filed July 27, 2007;
54. Signature pages to Second Affidavits of Drew Downs, Curtis DeYoung, Dale Henderson, Dean DeYoung and Harry Segura filed August 1, 2007;
55. Notice of Appearance for Plaintiff Drew Downs filed August 21, 2007;
56. Notice of Appearance for Plaintiff Curtis DeYoung filed August 21, 2007;
57. Notice of Appearance for Plaintiff Harry Segura filed August 21, 2007;
58. Notice of Appearance for Plaintiff Dean DeYoung filed August 21, 2007;
59. Notice of Appearance for Plaintiff E. Dale Henderson filed August 21, 2007;
60. Defendant's Memorandum Re: Oral Motion to Amend Pursuant Rule 15(b) filed September 7, 2007;
61. Plaintiffs' Reply Brief in Support of Plaintiffs' Rule 15(b) Motion filed September 13, 2007;
62. Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed September

13, 2007.

63. That the cover of the clerk's record be conformed to reflect that of the judgments entered in this matter.

DATED: 12-17-07


JOEL E. TINGEY
DISTRICT COURT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 2007, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Penny North Shaul, Esq.
DUNN LAW OFFICES, PLLC
P.O. Box 277
Rigby, ID 83442

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

[Handwritten signature]

Clerk _____
By: *[Signature]* _____
Deputy