

10-6-2009

Fazzio v. Mason Order Dckt. 36068

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In the Supreme Court of the State of Idaho

FRANK J. FAZZIO, JR., and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC,) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD
Plaintiffs-Respondents,)
) Supreme Court Docket No. 36068-2009
v.) Ada County Docket No. 2008-1215
)
EDWARD J. MASON, an individual,)
)
Defendant-Appellant.)

A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondents on March 2, 2010. Therefore, good cause appearing,

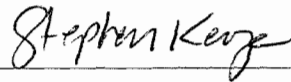
IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Motion for Entry of Judgment, file-stamped April 3, 2009;
2. Affidavit of Frank J. Fazzio, Jr. in Support of Motion for Entry of Judgment and in Opposition of Request for Certification of Interlocutory Appeal, file-stamped April 3, 2009;
3. Objection to Request for Certification for Interlocutory Appeal, file-stamped April 3, 2009;
4. Memorandum in Support of Objection to Request for Certification for Interlocutory Appeal, file-stamped April 3, 2009;
5. Motion for Reconsideration and Memorandum in Support, file-stamped April 7, 2009;
6. Response to Motion for Reconsideration and Memorandum in Support, file-stamped April 15, 2009;
7. Supplemental Memorandum Regarding Enforcement of Judgment of Specific Performance, file-stamped April 27, 2009;
8. Defendant's Requested Conditions for Entry of the Judgment, Objection to Entry of the Judgment and Request for Hearing, file-stamped April 27, 2009;
9. Memorandum Clarifying Proposed Judgment as to Kuna LID and Objection to Request for Hearing, file-stamped May 5, 2009;

10. Memorandum Re: Motion to Reconsider and Entry of Judgment, file-stamped May 28, 2009;
11. Judgment, file-stamped May 28, 2009; and
12. Memorandum in Response to Defendant's Second Objection and Motion to Disallow Plaintiffs' Memorandum of Costs and Fees and Amended Memorandum of Costs and Fees, file-stamped August 5, 2009.

DATED this 4th day of March 2010.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

COPY

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE No.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

NO. _____ FILED _____
AJM. PM
APR 03 2009
J. DAVID SHAFER, Clerk
By KATHY J. BISH
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Case No. CV OC 0801215

Plaintiffs,)

**MOTION FOR ENTRY
OF JUDGMENT**

vs.)

EDWARD J. MASON, an individual,)

Defendant.)

COMES NOW, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho Livestock Company, LLC, by and through their attorney of record, Derek A. Pica, and pursuant to the Memorandum Decision and Order filed by the Court on December 30, 2008, moves this Court for entry of a Judgment in conformance with the Memorandum Decision and Order as Defendant has failed to specifically perform the contracts to purchase Plaintiffs' real property as Ordered. A true and correct copy of the proposed Judgment is attached hereto as Exhibit "A."

This Motion is supported by the Memorandum and Affidavit filed concurrently

herewith and the record on file herein.

Oral argument is hereby requested.

DATED this 3rd day of April, 2009.



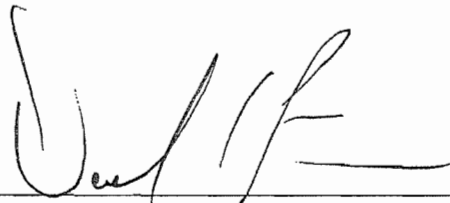
Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3rd day of April, 2009, I caused a true and correct copy of the foregoing MOTION FOR ENTRY OF JUDGMENT to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR NO. 3559

ATTORNEY FOR Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Case No. CV OC 0801215

Plaintiffs,)

JUDGMENT

vs.)

EDWARD J. MASON, an individual,)

Defendant.)

On December 30, 2008, the above-entitled Court filed its Memorandum Decision and Order in the above-entitled action ordering Defendant to specifically perform the contracts he entered into to purchase Plaintiffs' real property within thirty (30) days of December 30, 2008. Defendant, having failed to specifically perform the contracts as ordered, and for good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That judgment is entered against Defendant, Edward J. Mason in favor of Plaintiffs, Frank J. Fazio, Jr. and Cindy Ann Fazio, in the amount of \$1,530,000.00 plus contractual interest thereon in the amount of \$393,859.71 through April 20, 2009 for a total Judgment in favor of Plaintiffs, Frank J. Fazio, Jr. and Cindy Ann Fazio in the amount of \$1,923,859.70 plus interest thereon at the statutory rate of 7.625% per annum. Upon satisfaction of the Judgment, Plaintiffs, Frank J. Fazio, Jr. and Cindy Ann Fazio shall convey the real property that is the subject matter of the Agreement to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration they entered into with Defendant on September 12, 2007, so long as Plaintiffs have not foreclosed on their vendor's lien against said real property.

2. That judgment is entered against Defendant, Edward J. Mason in favor of Plaintiff, Idaho Livestock Company, LLC, in the amount of \$2,000,000.00 plus interest thereon in the amount of \$514,848.68 through April 20, 2009 for a total Judgment in favor of Plaintiff, Idaho Livestock Company, LLC in the amount of \$2,514,848.68 plus interest thereon at the statutory rate of 7.625% per annum. Upon satisfaction of the Judgment, Plaintiff, Idaho Livestock Company, LLC shall convey the real property that is the subject matter of the Agreement to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration they entered into with Defendant on September 12, 2007, so long as Plaintiff, Idaho Livestock Company, LLC has not foreclosed on its vendor's lien against said real property.

3. That Judgment is entered in favor of both Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID that Defendant encumbered against

Plaintiffs' real property when due, plus statutory interest thereon from the due date until paid. The Court shall reserve jurisdiction over the amount of the City of Kuna Sewer LID should a dispute arise as to the amount thereof and the payment due date.

DATED this _____ day of April, 2009.

DISTRICT JUDGE

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE No.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)
Plaintiffs,)
vs.)
EDWARD J. MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

**AFFIDAVIT OF FRANK J.
FAZZIO, JR. IN SUPPORT OF
MOTION FOR ENTRY OF
JUDGMENT AND IN
OPPOSITION OF REQUEST
FOR CERTIFICATION OF
INTERLOCUTORY APPEAL**

STATE OF IDAHO)
) ss.
County of Ada)

FRANK J. FAZZIO, JR., being first duly sworn on oath, deposes and says:

1. That Affiant is a Plaintiff in the above entitled action and has personal

**AFFIDAVIT OF FRANK J. FAZZIO, JR. IN SUPPORT OF MOTION FOR ENTRY OF
JUDGMENT AND IN OPPOSITION OF REQUEST FOR CERTIFICATION OF
INTERLOCUTORY APPEAL – Page 1**

EXHIBIT

"B"

NO _____
A.M. _____ P.M. _____

APR 03 2009

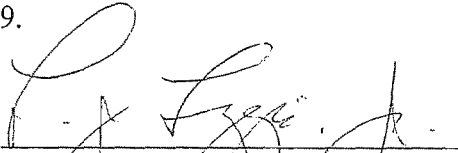
J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL,
DEPUTY

knowledge of all facts set forth herein.

2. That attached hereto as Exhibit "A" is a true and correct copy of a letter from Defendant that was hand delivered to Affiant's home on February 25, 2009.


3. That as of the date of this Affidavit, despite a court order requiring Defendant to close on the purchase of Plaintiffs' real property, Defendant has failed to close.

DATED this 18th day of April, 2009.

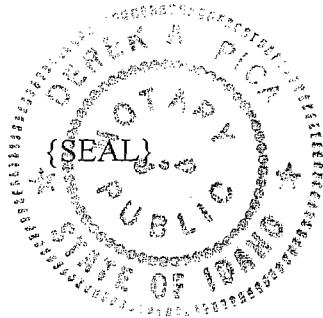


Frank J. Fazio, Jr.

SUBSCRIBED AND SWORN to before me this 18th day of April, 2009.



NOTARY PUBLIC FOR IDAHO
Residing at: Laurel
My Commission Expires: 2011



CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3rd day of April, 2009, I caused a true and correct copy of the foregoing AFFIDAVIT OF FRANK J. FAZZIO, JR. IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT AND IN OPPOSITION OF REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

February 25, 2009

Delivered by hand

Dr. and Mrs. Fazzio:

Something has been nagging at me:

I am not trying to get out of buying your property. It's not a case of won't, it's a case of can't.

Initially I believed we didn't have a contract and you would keep the \$68,000.

I signed a new contract with you and set about getting approvals and funds in order to close. I obtained the approvals, spending \$96,008 in the process. The financial world has been in disarray since and I have been unable to close.

I have used every scrap of my resources to survive individually and as a company. I provided you complete financial information. When you look at it, look at both the asset side and the liability side. I will provide the most recent information as soon as 2008 year-end is completed.

I am trying to hang on, recover, and close on your property. I am a man of my word. I don't need the courts to force me.

I feel responsible to pay the City of Kuna for the LID. I feel responsible for the delay in your personal plans. I want to close, but an economic environment outside of my control has made it impossible so far. The circumstances surrounding me may force me to declare bankruptcy. If I am not required to declare bankruptcy, I will close on your property when I am able to do so.

Ted Mason



EXHIBIT A

COPY

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ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR NO. 3559

ATTORNEY FOR Plaintiffs

NO. _____
FILED
A.M. _____ P.M. _____

APR 03 2009

J. DAVID NAVARRO, Clerk
By KATHY J. BIEHL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Plaintiffs,)

vs.)

EDWARD J. MASON, an individual,)

Defendant.)

Case No. CV OC 0801215

**OBJECTION TO REQUEST
FOR CERTIFICATION FOR
INTERLOCUTORY APPEAL**

COMES NOW, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho Livestock Company, LLC, by and through their attorney of record, Derek A. Pica, and pursuant to Rule 12 of the Idaho Appellate Rules, objects to Defendant's Request for Certification for Interlocutory Appeal on the following grounds:

1. The district court's decision granting summary judgment does not involve a ... "controlling question of law as to which there is a substantial difference of opinion." I.A.R. 12 and Budell v. Todd, 105 Idaho 2, 665 P.2d 701 (1983).

2. An interlocutory appeal will substantially prejudice the Plaintiffs as the

status of the real property they own will be clouded until such time as a final judgment is entered.

3. The granting of an interlocutory appeal could lead to a second appeal once a final judgment is filed.


4. The entry of a final judgment in this action will not delay Defendant's ability to appeal as a final judgment can be entered by the district court immediately.

Plaintiffs further object to Defendant's request that their Request for Certification for Interlocutory Appeal be determined without oral argument as this request is contrary to I.A.R. 12(b) except that any hearing is to be expedited as the district court must issue a decision within twenty-one (21) days of the Request for Certification for Interlocutory Appeal.

This Objection to Request for Certification for Interlocutory Appeal is supported by the Memorandum and Affidavit filed concurrently herewith and by the record on file herein.

Oral argument is hereby requested.

DATED this 3rd day of April, 2009




Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3rd day of April, 2009, I caused a true and correct copy of the foregoing OBJECTION TO REQUEST FOR CERTIFICATION FOR INTERLOCUTORY APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
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Overnight Mail



Derek A. Pica

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DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

FILED
APR 03 2009
J. DAVID NAVARRO, Clerk
By KATHY J. DIEHL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)
Plaintiffs,)
vs.)
EDWARD J. MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

**MEMORANDUM IN SUPPORT
OF OBJECTION TO REQUEST
FOR CERTIFICATION FOR
INTERLOCUTORY APPEAL**

COMES NOW, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho Livestock Company, LLC, by and through their attorney of record, Derek A. Pica, and file with the Court their Memorandum in Support of Objection to Request for Certification for Interlocutory Appeal.

STATEMENT OF FACTS

On December 30, 2008, the district court filed its Memorandum Decision and Order granting Plaintiffs' Motion for Summary Judgment and ordered Defendant, Edward J. Mason, hereinafter "Mason," to specifically perform on the contracts he had entered

EXHIBIT "D"

into with Plaintiffs, Frank J. Fazio, Jr. and Cindy Ann Fazio, and Idaho Livestock Company, LLC, hereinafter collectively “Fazio” to purchase their real property within thirty (30) days of the Memorandum Decision and Order, or a judgment for the purchase price would be entered. As of the date of this Memorandum, Mason has failed to comply with the court order and close on his purchase of Fazio’s real property.

In ruling that the contracts Mason entered into with Fazio be enforced by specific performance, the district court found as follows:

The Court finds that there is good reason to enforce the contract by specific performance, rather than the legal remedy of contract damages ordinarily available. Not only is the real property itself inherently unique, the real property was significantly and materially altered by Mason in anticipation of the sale by causing it to be annexed into the City of Kuna. Furthermore, the contract was for a cash sale, as in *Perron*. The Court cannot find that the present case presents a situation where performance is so unlikely and impossible that it would render the order futile. Rather, the Court, in its discretion, finds that the appropriate remedy is to order specific performance, and if performance is not completed, judgment can be entered for the purchase price. (Emphasis added).

(Memorandum Decision and Order dated December 30, 2008, p. 6).

ARGUMENT

I.

MASON FAILS TO ESTABLISH THAT THE DISTRICT COURT’S MEMORANDUM DECISION AND ORDER INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION SO AS TO JUSTIFY AN INTERLOCUTORY APPEAL.

Rule 12(a) of the Idaho Appellate Rules provides:

Rule 12. Appeal by permission.

(a) **Criteria for permission to appeal.** Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these

rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation. (Emphasis added).

I.A.R. 12(a). In Budell v. Todd, 105 Idaho 2, 665 P.2d 701 (1983), the Idaho Supreme Court ruled that the court intends I.A.R. 12 to create an appeal ... “in the exceptional case” holding:

It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court’s decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11. For these reasons, the Court has, over the six year experience of the use of Rule 12, accepted only a limited number of the applications for appeal by certification.

105 Idaho at 4. In this action, there is not a substantial legal issue ... “of great public interest” or a legal question ... “of first impression.” 105 Idaho at 4. In fact, the only issue is whether the district court properly exercised its discretion. In P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust, 144 Idaho 233, 159 P.3d 870 (2007), the Idaho Supreme Court held:

Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. Fullerton v. Griswold, 142 Idaho 820, 823, 136 P.3d 291, 294 (2006). The inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement due to the perceived uniqueness of land. *Id.* The decision to grant specific performance is a matter within the district court’s discretion. *Id.* When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate. *Id.*

(Emphasis added).

144 Idaho at 237. In Johannsen v. Utterbeck, 146 Idaho 423, 196 P.3d 341 (2008), the

Idaho Supreme Court held:

A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason. *In re Jane Doe, I*, 145 Idaho 650, 651, 182 P.3d 707, 708 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

196 P.3d at 347. In this action, the district court clearly recognized the issue of whether to grant specific performance was one of discretion. As such, the first prong of the test was met.

The second prong of the test as to whether the district court acted within its discretion is whether the district court acted within the boundaries of its discretion and applied the appropriate legal standards. Clearly the district court met this standard. In its Memorandum Decision and Order the district court cited Perron v. Hale, 108 Idaho 578, 701 P.2d 198 (1985) which held:

The overwhelming weight of authority states that specific performance is as freely available to vendors as it is to purchasers. *E.g., Tombari v. Griep*, 55 Wash.2d 771, 350 P.2d 452, 454-55 (1960) (string cite of treatises and cases); 71 Am.Jur.2d Specific Performance, § 112 (1973); Cribbet, Principles of the Law of Property, p. 144 (2d ed. 1975).

108 Idaho at 582. The district court also analyzed the legal principal of impossibility. Mason argued that equity dictated that enforcement by specific performance should not be granted where such an order would be futile. Mason cites Paloukos v. Intermountain Chevrolet Co., 99 Idaho 74, 588 P.2d 939 (1978); Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); and Childs v. Reed, 34 Idaho 450, 202 P.2d 685 (1921) in support

of his argument that the district court should not have ordered specific performance because Mason was unable to perform. (This is an impossibility defense which Mason specifically waived and then went forward and argued in the district court. Mason substituted the word “futile” for impossible in his argument). The three (3) Idaho cases cited by Mason fail to raise any legal issues that are of great public interest or legal questions of first impression. In fact, all three (3) cases are factually driven and only one (1) involves the sale of real property.

In Paloukos v. Intermountain Chevrolet Company, 99 Idaho 740, 588 P.2d 939 (1978), the issue revolved around the purchase and sale of a pickup truck. In Paloukos, the Idaho Supreme Court upheld on appeal the district court’s denial of specific performance under the Uniform Commercial Code holding:

The final issue presented is whether the district court properly dismissed that portion of Paloukos’ complaint which sought specific performance of the alleged contract. Under the UCC specific performance is available to a purchaser where “the goods are unique or in other proper circumstances.” I.C. s 28-2-716(1).

* * *

In his pleadings Paloukos alleged no facts suggesting anything unique about the pickup involved. The market value of such a vehicle is readily ascertainable and Paloukos’ pleadings indicate no reason why damages would not be adequate relief. Moreover, the sole remaining defendant in this case, Intermountain, is a dealer, not a manufacturer, of automobiles. Paloukos does not allege that Intermountain is in possession of a conforming pickup which it could sell him. Indeed, the record suggests quite the contrary. It is well established that the courts will not order the impossible, such as ordering the seller under a sales contract to sell to the buyer that which the seller does not have. See Moody v. Crane, 34 Idaho 103, 199 P. 652 (1921); 5A A. Corbin, Contracts s 1170 (1964); 2 Restatement of Contracts s 368, illus. 1 (1932). We therefore affirm the district court’s dismissal of that portion of Paloukos’ complaint seeking specific performance. (Emphasis added).

99 Idaho at 745-746. Clearly this holding is based in part on the defense of impossibility. (In Paloukos, the court did not discuss objective impossibility v. subjective impossibility, e.g. State of Idaho v. Chacon, 146 Idaho 520, 198 P.3d 749 (App. 2008)). In Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951), the issue involved the enforcement of an oral lease of real property with yearly rent based upon a customary crop rental for the life of the lessee. The lease agreement did not set forth a yearly lease rate. 71 Idaho at 124. The Idaho Supreme Court reversed the district court holding:

An agreement, which leaves any of the material terms or conditions for future determination, cannot be enforced. (Cites omitted).

* * *

Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible. These parties have had many disagreements as to what the rent should be and since 1946 have been entirely unable to reach any agreement at all. Under such circumstances, to enforce the decree entered, the court must, necessarily, either retain jurisdiction for the purpose of determining the reasonable rental each year during the life of the plaintiff, or the parties would be required to have the rental determined by jury each year, so long as they remain unable to agree. Such a result is abhorrent to equity. 49 Am.Jur., Specific Performance, secs. 70 and 72. It would impose upon the plaintiff a contract which she refuses to enter into voluntarily. Machold v. Farnan, 14 Idaho 258, 94 P. 170. Further as to this aspect of the case, the contract lacks the necessary mutuality of remedy. It is apparent that the part that remains executory on the part of the defendants, that is, the occupation of the premises, and the diligent, faithful, husbandlike farming thereof by the defendants in the years to come, cannot be enforced. (Emphasis added).

71 Idaho at 125. The “practicability” and feasibility in Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951) revolved around the fact that the alleged lease contract left material terms for future determination and therefore, could not be enforced. In Childs v. Reed, 34 Idaho 450, 202 P. 685 (1921), the Idaho Supreme Court reversed the district

court and held specific performance was not available where husband contracted to sell real property that was community, but his wife refused to join the husband in the conveyance. 202 P. at 687. It was impossible for the husband to convey the real property without his wife's execution of the deed pursuant to Idaho statutes.

The three (3) cases cited by Mason revolve around the doctrine of impossibility. The district court in this action, in analyzing the facts and applying the appropriate legal standards, ruled as follows:

The Court cannot find that the present case presents a situation where performance is so unlikely and impossible that it would render the order futile.

(Memorandum Decision and Order dated December 30, 2008, p. 6). There is nothing of great public interest or a legal question of first impression in regard to the law applied by the district court, nor is there a difference of opinion as to the interpretation of that law in the state of Idaho.

The third prong is whether the district court reached its decision by exercise of reason. In this action, the district court clearly determined the remedy of specific performance was appropriate through an exercise of reason when applying the facts to the law. The following facts were undisputed by Mason:

- A. Mason entered into Purchase and Sale Agreements with Fazzio to purchase certain real property in Kuna, Idaho with a closing date of February 26, 2007.
- B. While the Purchase and Sale Agreements were pending, Mason caused the real property owned by Fazzio to be annexed into the city of Kuna.

- C. While the Purchase and Sale Agreements were pending, Mason caused the real property owned by Fazzio to be encumbered by the Kuna sewer LID (Local Improvement District) thereby causing an obligation to the city of Kuna in excess of \$400,000.00.
- D. Mason failed to close on the Purchase and Sale Agreements on or before February 26, 2007.
- E. To avoid arbitration, Mason and Fazzio entered into a Settlement Agreement whereby the parties would close on December 21, 2007 and Mason would pay twelve percent on the entire purchase price through the closing date.
- F. Mason and Fazzio agreed that upon either parties' breach of the Settlement Agreement, the remedy would be specific performance.
- G. Neither the original Purchase and Sale Agreements nor the Settlement Agreement was contingent upon Mason obtaining financing for his purchase of Fazzio's real property.
- H. Mason admitted he breached the Settlement Agreements for which he gave no excuse, including declining to plead the doctrine of impossibility as a defense.
- I. Fazzio's real property is inherently unique and Mason offered no evidence to rebut its uniqueness.
- J. There is a presumption as to the inadequacy of remedies at law in an action for breach of a real estate purchase and sale agreement because of

the uniqueness of land that Mason offered no evidence to rebut.

- K. Mason significantly and materially altered the real property which was farmground by causing it to be annexed into the city of Kuna in anticipation of closing.
- L. The Settlement Agreements called for a cash sale at closing making the Settlement Agreements enforceable by entering a Judgment for the purchase price.

Mason clearly breached both the Purchase and Sale Agreements and then the subsequent Settlement Agreements. Now, Mason is requesting the district court to not hold him accountable on the basis he cannot perform. This is not a viable defense because it is subjective as to Mason. This court has already correctly ruled pursuant to established case law that Mason's inability to perform is not a defense. See State of Idaho v. Chacon, 146 Idaho 520, 198 P.3d 749 (App. 2008) and Christy v. Pilkington, 224 Ark. 407, 273 S.W.2d 533 (1954). Mason has violated the order requiring him to specifically perform in thirty (30) days and despite his "unclean hands," comes to the court for the additional relief of being allowed to appeal before judgment is entered. This is but another delay tactic on Mason's part to avoid accountability. In the meantime, Fazzio has been required to endure having his real property "tied up" by Mason well over two (2) years because Mason failed to honor his agreements. If an interlocutory appeal is allowed before judgment is entered, there will be an additional delay of several months, if not a year, before Fazzio will have an enforceable remedy. In the meantime, Fazzio owns real property he cannot sell, etc. because of the agreements Mason breached. Further,

Fazzio has an encumbrance to pay that is substantial to the City of Kuna. The encumbrance was solely caused by Mason. As such, the district court should enter a judgment and then Mason can appeal as a matter of right.

II.

PURSUANT TO THE DISTRICT COURT'S RULING IN THE MEMORANDUM DECISION AND ORDER FILED DECEMBER 30, 2008, JUDGMENT SHOULD BE IMMEDIATELY ENTERED AGAINST MASON FOR THE PURCHASE PRICE.

In the district court's Memorandum Decision and Order filed on December 30, 2008, the district court ruled as follows:

Specific performance on the contracts is to be completed within thirty days of the date of this order; if not so accomplished, a judgment for the purchase price may be entered, upon satisfaction of which the properties must be conveyed to Mason.

IT IS SO ORDERED.

(Memorandum Decision and Order filed December 30, 2008, p. 6).

Mason has failed to close. As such, judgment should immediately be entered for the purchase price. There is nothing to be gained by allowing an interlocutory appeal before judgment is entered as there is no pending trial that could be rendered moot should Mason prevail on appeal. Instead, the district court will be left with an open case file for a substantial period of time solely because judgment has not been entered. An interlocutory appeal will also create the possibility of two (2) appeals. A delay in the entry of judgment will be prejudicial to Fazzio as Fazzio's real property will continue to be held in "limbo." In this entire proceeding, Fazzio has done nothing wrong. It is Mason that has breached agreements and violated a court order. Once judgment is entered, Fazzio can foreclose on his vendor's lien against the real property that is the

subject of the Settlement Agreements and convey clear title to the buyer in foreclosure. Once the property is sold, the amount of damages Fazzio incurred will be fixed (e.g. the remaining portion of the judgment) and Fazzio can execute on the remaining portion of the judgment.

CONCLUSION

Mason's Request for Certification for Interlocutory Appeal should be denied and a judgment should be entered immediately by the district court. It would be clearly inequitable for Mason to continue to encumber Fazzio's real property for an additional period of time while an interlocutory appeal is pending. Judgment should be entered so Fazzio can clear his title.

DATED this 3rd day of April, 2009.



Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 3rd day of April, 2009, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF OBJECTION TO REQUEST FOR CERTIFICATION FOR INTERLOCUTORY APPEAL to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

Please Conform & Return

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 07 2009

J. DAVID NAVARRO, Clerk
By C. WATSON
DEPUTY

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN
FAZZIO, husband and wife, and IDAHO
LIVESTOCK COMPANY, LLC, an Idaho
Limited Liability Company,

Plaintiffs,

vs.

EDWARD J. MASON, an individual,

Defendant.

Case No. CV OC 0801215

MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT

Defendant Edward J. Mason, by and through his counsel of record, Hawley Troxell Ennis & Hawley, LLP submits this Motion for Reconsideration and Memorandum in Support.

I. INTRODUCTION

Mr. Mason has already filed a request that the Court's Order Granting Summary Judgment be certified for interlocutory appeal. The briefing filed in support of that request

MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT -

EXHIBIT "E"

explains the erroneous nature of the Court's order granting Plaintiffs specific performance and explains how the Court's order results in a windfall to Plaintiffs and is inconsistent with Idaho law. That briefing is incorporated herein by reference. An interlocutory appeal would allow the Idaho Supreme Court to correct the Court's order and will likely result in a remand for this Court to determine an appropriate remedy at law. A much more efficient procedure would be for this Court to reconsider the order granting specific performance.

If the Court denies Mr. Mason's request that the order granting summary judgment be certified for interlocutory appeal, Mr. Mason respectfully requests that the Court vacate the order granting specific performance (and ordering specific performance), declare the sales transactions rescinded and determine damages, if any occurred, to be awarded to Plaintiffs.

II. ARGUMENT

As explained in Mr. Mason's briefing in connection with the request for certification for interlocutory appeal, the Court's order granting summary judgment and ordering specific performance is erroneous. It is indisputable that Mr. Mason does not have the approximately \$3.6 Million that would be required to close on the Subject Properties as ordered by the Court. See the Affidavits of Edward J. Mason, filed Affidavit of Edward J. Mason, filed October 7, 2008 and October 10, 2008 (filed under seal). In ordering specific performance, the Court did not follow the well-established rule that a court should not order an equitable remedy, including specific performance, that is not feasible. See, e.g., *Anderson v. Whipple*, 71 Idaho 112, 125, 227 P.2d 351, 359 (1951), overruled on other grounds by *David Steed and Associates, Inc. v. Young*, 115 Idaho 247, 766 P.2d 717 (1988) ("Equity will not enter a decree for specific performance the enforcement of which is not practicable or feasible."); *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 745-46, 588 P.2d 939, 944-45 (1978) (dismissing

claim for specific performance because “[i]t is well established that the courts will not order the impossible”); *Childs v. Reed*, 202 P. 685, 686 (Idaho 1921) (“Where the contract is of such a nature that obedience to the decree cannot be obtained by the ordinary processes of the court, equity will decline to interfere.”).

Rather than apply this equitable rule, the Court applied and rejected the substantive contract defense of impossibility of performance as if the two rules were one and the same. The Court should reconsider this analysis as the two rules are not one and the same. The equitable rule merely precludes an order of equitable relief and leaves the plaintiff with a remedy in law, i.e., damages. The substantive impossibility of performance doctrine is a complete defense to a contract and leaves the plaintiff with no remedy at all, either equitable or at law. *See Landis v. Hodgson*, 109 Idaho 252, 257, 706 P.2d 1363, 1368 (Ct. App. 1985) (explaining that the substantive doctrine of impossibility of performance results in the party asserting the defense being “relieved of his duty to perform”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981)).

This is a case in which a remedy at law is appropriate, likely measured by the difference between the contract price and the value of the Subject Properties at the time of the breach. In fact, Plaintiffs recognized as much in their Motion For Leave To Amend Complaint, filed October 31, 2008. Up until that time, Plaintiffs had requested only an award of specific performance. In their Motion For Leave To Amend Complaint the Plaintiffs requested, in the alternative, an award of damages.

An award of damages at law is the only appropriate remedy in this case. The Court's order proves this point:

Specific performance on the contracts is to be completed within thirty days of the date of this order; if not so accomplished, a

judgment for the purchase price may be entered, upon satisfaction of which the properties must be conveyed to Mason.

See Memorandum Decision and Order, p. 6.

The remedy ordered by the Court is clearly inappropriate as it will result in a windfall to Plaintiffs. Under the Court's order, a judgment will be entered for the entire purchase price if Mason does not close on the Subject Property within 30 days. Given that Mason does not have \$3.6 Million, the Court's order is effectively a \$3.6 Million judgment. What will happen next is that Fazzio will attempt to collect on the judgment by liquidating Mason's assets. Plaintiffs, however, will not get much. As explained in Mason's supplemental affidavit filed October 10, 2008, the vast majority of Mason's assets are in the form of real property, which serves as the collateral on bank loans. It will be extremely difficult to sell those properties under the current real estate market conditions. More importantly, due to the bursting of the housing bubble, Mason already owes the banks more than the value of the properties. Thus, liquidating those assets will not produce any money to satisfy the judgment.

Even if Plaintiffs seize every asset Mr. Mason owns, they will not be able to collect on the entire judgment. However, they would be able to collect some amount of money – perhaps a few hundred thousand dollars. If they do so, Plaintiffs will end up with a windfall. Plaintiffs will be able to collect some part of the judgment – and in the meantime bankrupt Mason and take the jobs away from Mason's remaining employees and contractors. **Plaintiffs will get whatever they can collect from Mason, and they will also get to keep the Subject Property.** This windfall is what makes the Court's order so clearly wrong. It would be one thing if Plaintiffs were awarded damages in the form of a money judgment for the difference between the purchase price and the value of the Subject Property. But Plaintiffs here effectively get both a money judgment and they get to keep the property.

MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT -

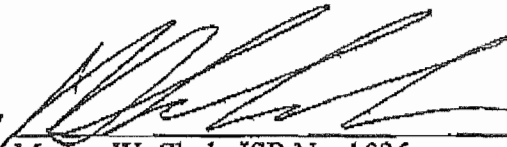
Indeed, in a recent telephone conference, Plaintiffs' counsel explained exactly what Plaintiffs intend to do to collect what they can from the judgment and still keep the Subject Properties. During that conversation, Plaintiffs' counsel stated that Plaintiffs intend to take the following actions: Plaintiffs intend to obtain entry of a Judgment in this matter and proceed to levy execution upon the assets of the Defendant. Plaintiffs will treat the title to the real estate, which is the subject of the sales that are the subject matter of this action, as equitably owned by Defendant under the Doctrine of Equitable Conversion. Plaintiffs intend to levy execution upon the real properties and cause them to be sold at a Sheriff's Sale. It is Plaintiffs' intent to bid in a portion of their judgments upon the real properties to recover complete title to the properties. When that is accomplished, Plaintiffs will then own both the real properties and the balance of their Judgment. *See* Affidavit of Merlyn Clark, filed concurrently herewith.

III. CONCLUSION

If the Court does not certify its order granting summary judgment for interlocutory appeal, Mr. Mason respectfully requests that the Court reconsider the order. The order does not follow the well-established rule that a court should not award an equitable remedy like specific performance where such an order would be futile, as is clearly the case here. More importantly, the order grants Plaintiffs a windfall in that, as a practical matter, it allows them to keep the Subject Properties and have an approximately \$3.6 Million judgment against Mr. Mason. The order granting summary judgment should be vacated. The Court should declare the sales transactions rescinded and determine damages, if any occurred, to be awarded to Plaintiffs.

DATED THIS 7th day of April, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 
Meryn W. Clark, ISB No. 1026
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2009, I caused to be served a true copy of the foregoing MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT by the method indicated below, and addressed to each of the following:

Derek A. Pica, PLLC
ATTORNEY AT LAW
199 N. Capitol Blvd., Ste. 302
Boise, ID 83702
[Attorney for Plaintiffs]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy - (208) 336-4980



Merlyn W. Clark

COPY

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 15 2009

J. DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR NO. 3559

ATTORNEY FOR Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)
Plaintiffs,)
vs.)
EDWARD J. MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

RESPONSE TO MOTION FOR
RECONSIDERATION AND
MEMORANDUM IN SUPPORT

COMES NOW, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho
Livestock Company, LLC, by and through their attorney of record, Derek A. Pica, and file
with the Court their Response to Motion for Reconsideration and Memorandum in
Support.

STATEMENTS OF FACTS

The facts in this action have been previously set forth and need not be re-stated

EXHIBIT "F"

herein.

ARGUMENT

I.

DEFENDANT, EDWARD J. MASON, PRESENTS NO NEW FACTS UPON WHICH TO SUPPORT A MOTION FOR RECONSIDERATION

Defendant, Edward J. Mason, hereinafter “Mason,” presents no new facts upon which to support his Motion for Reconsideration. While Mason does not set forth the statutory basis or Rule of Civil Procedure upon which he bases his Motion for Reconsideration, it is assumed he is proceeding under I.R.C.P. 11(a)(2)(B). In Jordan v. Beeks, 135 Idaho 586, 21 P.3d 908 (2001), the Idaho Supreme Court held:

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *Watson v. Navistar Int’l Transp. Corp.*, 121 Idaho 643, 827 P.2d 656 (1992); *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 979 P.2d 107 (1999). After a thorough review of the record, we conclude that the district court was provided with no new facts to create an issue for trial, and thus there was no basis upon which to reconsider its summary judgment order.

135 Idaho at 914. In fact, Mason does not dispute any of the facts upon which the district court based its Memorandum Decision and Order filed December 30, 2008 granting Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio, and Idaho Livestock Company, LLC’s Motion for Summary Judgment. Those significant facts include but are not limited to the following:

- A. Mason entered into Purchase and Sale Agreements with Fazzio to purchase certain real property in Kuna, Idaho with a closing date of February 26, 2007.
- B. While the Purchase and Sale Agreements were pending, Mason caused the

- real property owned by Fazzio to be annexed into the city of Kuna.
- C. While the Purchase and Sale Agreements were pending, Mason caused the real property owned by Fazzio to be encumbered by the Kuna sewer LID (Local Improvement District) thereby causing an obligation to the city of Kuna in excess of \$400,000.00.
 - D. Mason failed to close on the Purchase and Sale Agreements on or before February 26, 2007.
 - E. To avoid arbitration, Mason and Fazzio entered into a Settlement Agreement whereby the parties would close on December 21, 2007 and Mason would pay twelve percent on the entire purchase price through the closing date.
 - F. Mason and Fazzio agreed that upon either parties' breach of the Settlement Agreement, the remedy would be specific performance.
 - G. Neither the original Purchase and Sale Agreements nor the Settlement Agreement was contingent upon Mason obtaining financing for his purchase of Fazzio's real property.
 - H. Mason admitted he breached the Settlement Agreements for which he gave no excuse, including declining to plead the doctrine of impossibility as a defense.
 - I. Fazzio's real property is inherently unique and Mason offered no evidence to rebut its uniqueness.
 - J. There is a presumption as to the inadequacy of remedies at law in an

action for breach of a real estate purchase and sale agreement because of the uniqueness of land that Mason offered no evidence to rebut.

K. Mason significantly and materially altered the real property which was farmground by causing it to be annexed into the city of Kuna in anticipation of closing.

L. The Settlement Agreements called for a cash sale at closing making the Settlement Agreements enforceable by entering a Judgment for the purchase price.

All of the above facts overwhelmingly support a judgment for specific performance in the state of Idaho. Instead, Mason chooses in his Motion for Reconsideration to argue that it is not equitable for the Court to enter a judgment for specific performance because such a judgment would result in a windfall for Fazzio as Fazzio could keep his real property by foreclosing on the same and then collect the balance of the judgment as well. What Mason ignores is the following:

A. If Fazzio were to foreclose on his vendor's lien to his real property, he is buying real property that was substantially changed in its character by Mason. Fazzio may not choose to foreclose as he does not want to own real property that is now annexed into the city of Kuna as a result of Mason's actions. Mason argues it would be equitable if Fazzio were required to keep his real property and collect damages as a result of Mason's breach of contract. HOW IS FORCING FAZZIO TO KEEP REAL PROPERTY THAT WAS MATERIALLY ALTERED BY

MASON EQUITABLE?

- B. If Fazzio were to foreclose on his vendor's lien against his real property and choose to purchase the same, he would be purchasing the real property subject to the \$425,000.00 LID encumbrance that Mason caused to encumber on Fazzio's real property. This would result in a windfall to Mason as he would no longer be liable for the Kuna LID encumbrance.
- C. MASON CONTRACTUALLY AGREED TO A REMEDY OF SPECIFIC PERFORMANCE IN THE SETTLEMENT AGREEMENTS THEREBY MAKING THE REMEDY OF SPECIFIC PERFORMANCE A LEGAL RIGHT. (See Memorandum in Response to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed August 4, 2008, pp. 3 – 4).
- D. If Fazzio foreclosed on his vendor's lien it would establish the true market value of the real property as it has been altered by the annexation and encumbered by the Kuna LID, all of which was caused by Mason. The remaining portion of the judgment not satisfied by the foreclosure would be Fazzio's true damages.

These are but some of the reasons that the entry of a judgment for specific performance is far more equitable given Mason's actions than a remedy of damages. A remedy of damages does not make Fazzio whole as it would ignore the reality that Mason materially altered the real property owned by Fazzio. Forcing Fazzio to keep the real property as materially altered by Mason is clearly inequitable.

II.

MASON'S ARGUMENT THAT THE DISTRICT COURT ERRED AS A MATTER OF LAW HAS NO MERIT

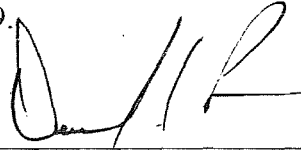
Mason continues to argue the district court erred by not considering three (3) cases he cited in his Opposition to Plaintiff's Motion for Summary Judgment. Mason ignores the fact that the district court specifically addressed his argument in its Memorandum Decision filed on December 30, 2008, pp. 4 – 5. Mason instead chooses to ignore the district court's well reasoned decision in which the district court cited Christy v. Pilkington, 224 Ark. 407, 273 S.W.2d 533 (1954), a case directly on point, and Perron v. Hale, 108 Idaho 478, 701 P.2d 198 (1985). Finally, Mason fails to address State of Idaho v. Chacon, 146 Idaho 520, 198 P.3d 749 (App. 2008) which was also specifically cited by the district court in its Memorandum Decision.

CONCLUSION

Mason's Motion for Reconsideration must be denied and judgment entered. Mason breached the Purchase and Sale Agreements he entered into with Fazzio by failing to close on February 26, 2007. Mason then breached the settlement agreements he entered into with Fazzio in order to avoid arbitration proceedings by failing to close in December, 2007. Mason then violated the district court's Memorandum Decision and Order filed December 30, 2008 by failing to close on his purchase by January 29, 2009. It is only equitable if a judgment for specific performance is entered against Mason. In fact, even Mason agrees that it is equitable that he close on his purchase of Fazzio's real property. See, Affidavit of Frank J. Fazzio, Jr. filed April 3, 2009, Exhibit "A."

Finally, it should be noted again that Mason contractually agreed to the remedy of specific performance should either party breach the settlement agreements.

DATED this 15th day of April, 2009.



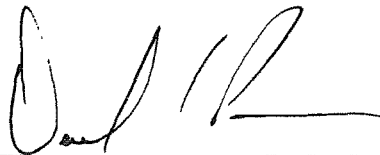
Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 15th day of April, 2009, I caused a true and correct copy of the foregoing RESPONSE TO MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

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FACSIMILE No.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

NO. _____
A.M. _____ P.M. _____

APR 27 2009

J. DAVID NAVARRO, Clerk
By A. LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Plaintiffs,)

vs.)

EDWARD J. MASON, an individual,)

Defendant.)

Case No. CV OC 0801215

**SUPPLEMENTAL MEMORANDUM
REGARDING ENFORCEMENT
OF JUDGMENT OF
SPECIFIC PERFORMANCE**

COMES NOW, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho Livestock Company, LLC, hereinafter collectively "Fazzio," by and through their attorney of record, Derek A. Pica, and file with the Court their Supplemental Memorandum Regarding Enforcement of Judgment for Specific Performance.

STATEMENT OF FACTS

On Wednesday, April 15, 2009, the above-entitled matter came before the Court

for hearing on Defendant, Edward J. Mason's, hereinafter "Mason," Motion for Reconsideration and Request for Certification for Interlocutory Appeal; and on Fazzio's Motion for Entry of Judgment. The Court denied Mason's Request for Certification for Interlocutory Appeal. The Court also denied Mason's Motion for Reconsideration except as to concerns regarding a judgment for specific performance potentially giving Fazzio both the real property and a monetary judgment and request that both parties suggest appropriate safeguards to prevent such a scenario and briefing on that issue.

Given the Court's concerns, it is important to note that Fazzio tendered the deeds to the subject real property to the title company that was going to close the transaction on February 26, 2007. (See Affidavit of Frank J. Fazzio, Jr. dated November 6, 2008).

POINTS AND AUTHORITIES

I.

THE CONCERNS RAISED BY MASON IN HIS MOTION TO RECONSIDER HAVE BEEN RESOLVED IN APPELLATE DECISIONS IN OTHER JURISDICTIONS

Mason raises the issue that it would be unfair that Fazzio both end up with the real property by purchasing that real property at a sheriff's sale and also have a monetary judgment. In Renard v. Allen, 237 Or. 406, 391 P.2d 777 (1964), the Oregon Supreme Court resolved this very issue holding:

Many other jurisdictions have approved of the coupling of a decree of specific performance with a provision for a sale if the money decree is not paid. Typical of these cases is the decision in Morgan v. Lewis, 203 Ala. 47, 82 So. 7 (1919):

* * *

That the remedy by specific performance is available to a vendor of

land; that the nature of the subject-matter of the contract, real estate, invests the vendor with the right to elect either to sue at law for damages for the vendee's breach of the contract or to invoke equity to compel specific performance of the contract of purchase by the vendee; and that appropriate decree may enter requiring specific performance on the part of the vendee, by a fixed time, after the vendor has deposited in the court, for the vendee, a conveyance to him of a good title to the land; failing acceptance of the deed and payment of the purchase price and interest by the vendee, it may thereupon be contingently decreed that the land be sold to satisfy the vendor's demand, and that execution against the vendee issue to enforce the payment of the unpaid balance of the purchase price and interest that the net proceeds of the sale fail to satisfy. * * * (82 So. at 7)

The last portion of the above quotation in effect provides that if the net proceeds of the sale are not sufficient to satisfy the money decree, the balance still owing remains a personal decree against the purchaser which can be enforced as any other money decree of judgment. (Emphasis added).

391 P.2d at 779-780. The Oregon Supreme Court went on to hold:

Other decisions approving a provision in the decree providing for a sale in the event the money decree was not paid are as follows: National Bank of Kentucky v. Louisville Trust Co., 67 F.2d 97 (6th Cir. 1933); Andrews v. Sullivan, 7 Ill. 327, 334 (1845); Maya Corporation v. Smith, 240 Ala. 371, 199 So. 549, 554 (1941); Standard Lumber Co. v. Florida Industrial Co., 106 Fla. 884, 141 So. 729, cert. den. 289 U.S. 723, 53 S.Ct. 522, 77 L.Ed. 1474 (1932); Robinson v. Appleton, 124 Ill 276, 15 N.E. 761, 762 (1888); Attebery v. Blair, 244 Ill. 363, 91 N.E. 475, 479 (1910); Bockelman v. Spires, 110 Neb. 234, 193 N.W. 334 (1923); Burnap v. Sidberry, 108 N.C. 307, 12 S.E. 1002, 1003 (1891); Tombari v. Griep, 55 Wash.2d 771, 350 P.2d 452 (1960); Big Bay Realty Co. v. Rosenberg, 218 Wis. 318, 259 N.W. 735 (1935).

In Walsh, Equity (1930), 428, § 91, it is stated:

* * * Where, however, the purchaser is unable to pay for the property, so that the decree for specific performance cannot actually be carried out, it is usual to provide, in that event, that the property be sold and the proceeds be applied to the payment of the purchase price, and for a judgment against the purchaser for a deficiency, exactly as in the case of foreclosure by sale of a mortgage. * * *

On initial reaction a decree of specific performance seems inconsistent

with a further provision in the decree for a sale. In a suit for specific performance the vendor plaintiff must tender a deed of the property into court. If the purchaser-defendant complies with the decree and pays the balance owing, the deed is delivered to the purchaser. The vendor is divested of any interest in the land, including his former lien or right to enforce his claim against the purchaser's equitable estate. On the other hand, in foreclosure, the vendor enforces his lien by having the court of equity proceed against the equitable estate that the purchaser has in the property because of the contract of sale. *Grider v. Tumbow*, 162 Or. 622, 641, 94 P.2d 285 (1939).

However, on further reflection, the awarding of both a decree for specific performance, i.e., a money judgment, and providing for a sale, with the proceeds to be applied on the unpaid judgment, is not incompatible. Fry, *Specific Performance* (6th ed. 1921), 549 § 1175, states: 'Still another form of relief open in many cases to a vendor after a judgment for specific performance, is the enforcement of his lien for unpaid purchase-money, with interest, and his costs of the action.' It is clear from other parts of the text that the lien the author has in mind is the equitable lien created by the contract of sale.

This reasoning, in effect, results in the unpaid vendor being granted alternative remedies. He can secure a decree for the balance of the unpaid purchase price, and tender a deed. If the purchaser pays the balance, the deed is delivered to the purchaser. If the purchase price is not paid, the vendor may have his alternative remedy, he may have his lien foreclosed, the property sold, and the proceeds applied upon his judgment for the purchase price.

There is nothing inconsistent in this procedure. If a specific performance decree is complied with by the purchaser-defendant, the vendor gives up his lien and puts complete title, both legal and equitable, in the purchaser. However, until the purchaser pays the unpaid balance, legal title remains in the vendor and there is no reason why he should not retain his lien although he has a judgment for the balance of the purchase price. The vendor's lien is to secure the purchase price, and the price is not paid merely because a judgment is entered for the balance. This is the reasoning stated in *Harris v. Halverson*, 192 Wis. 71, 211 N.W. 295, 297 (1926), as follows:

* * * When an action for specific performance is brought, the plaintiff is required to tender a deed to become effective upon the compliance by the vendee with the terms of the contract. In other words, the action being an equitable one, he cannot both retain the title to the property absolutely and

at the same time recover the full amount of the purchase price. However, until the payment of the purchase price is made, he retains the legal title and holds the same subject to the payment, as security for any unpaid amount. * * *

‘In an action brought by a vendor for specific performance of a land contract, the circuit court is authorized to order the land described in the contract sold, and to direct that the proceeds be applied to the payment of the amount due thereon. By tendering the deed to the vendee, or by depositing the same with the court, the vendor in legal effect expresses his intention to part with the title to the vendee, upon performance by the latter of the terms of the contract, and, on the failure of the vendee to perform, the property may be ordered sold by the court. The vendor cannot both retain title and accept the proceeds of the sale. * * *

There is nothing inequitable, i.e., ‘unfair,’ about such procedure. By entering a decree for specific performance the court has transferred an obligation assumed by contract into a judgment. If the purchaser does not pay this obligation, it is reasonable that the property should be sold; the lien on the property was created to insure payment if the purchaser did not pay this obligation.

391 P.2d 780-782.

In Glacier Campground v. Wild Rivers, Inc., 184 Mont. 543, 597 P.2d 689 (1979), the Montana Supreme Court held:

As we have explained above, and as the Oregon court intimates, **Renard v. Allen, 237 Or. At 412, 391 P.2d at 780**, land sale contracts, or contracts for deed as they are commonly called in this state, and not mortgage transactions differ from one another. Therefore, “(t)he statutory prohibition against deficiency judgments in mortgage foreclosures is not a prohibition against awarding specific performance by granting a money decree and further providing that in the event the decree is not paid the property shall be sold and the proceeds applied in satisfaction of the money decree.” **Renard v. Allen, 237 Or. At 413, 391 P.2d at 780**, and cases subsequently cited.

We concur in the declaration of the Oregon court, to wit:
“There is nothing inequitable, i.e., ‘unfair,’ about such procedure. By entering a decree for specific performance the court has transferred an obligation assumed by contract into a judgment. If the purchaser does not pay this obligation, it is reasonable that the property should be sold;

...” **Renard v. Allen, 237 Or. At 416, 391 P.2d at 782.**

It is not unfair or inequitable because specific performance of such a contract is granted in favor of the seller as freely as in favor of the purchaser, although the relief actually obtained is only a recovery of the money. *Tombari v. Griep* (1960), 55 Wash.2d 771, 775-77, 350 P.2d 452, 455-56, and the numerous authorities subsequently cited.

597 P.2d at 698. In *Aveco Properties, Inc. v. E. J. Nicholson*, 229 Mont. 417, 747 P.2d 1358 (1987), the Montana Supreme Court, citing *Glacier Campground v. Wild Rivers, Inc.*, 184 Mont. 543, 597 P.2d 689 (1979), upheld a district court’s judgment that granted specific performance to a seller’s successor in part as follows:

On May 23, 1986, the District Court issued a final judgment granting Aveco specific performance of the contract for deed and judgment as follows:

1. Granted Aveco judgment for principal, interest, attorney fees, costs advanced and late charges.
2. Granted the appellant Nicholson until June 9, 1986 to pay that judgment including all accrued costs and fees incurred by the respondent.
3. Provided for the docketing of the judgment with authority for the respondent to file his transcript of judgment in any jurisdiction.
4. Provided that if the buyer did not satisfy the judgment then the respondent could sell “any interest held by the Defendant in the real property” at a sheriff’s sale with delivery of the deed after the period of redemption pursuant to Title 25, Ch. 13, MCA.
5. Provided that any deficiency from the sale will continue as a judgment to the extent of the deficiency after the sale.
6. Provided the appellant a statutory right of redemption pursuant to Title 25, Ch. 13, MCA and provided that any purchaser would be entitled to immediate possession after the sale and for delivery of the deed from the sheriff to purchaser after the period of redemption.

747 P.2d at 1360. The judgment entered by the Montana district court is consistent with Fazio’s request for judgment and conforms to well established case law in other jurisdictions. Fazio’s counsel has been unable to find any case law in the state of Idaho specific to the subject of the terms of a judgment for specific performance.

II.

IDAHO STATUTES AND CASE LAW PROVIDE SAFEGUARDS FOR
THE FORECLOSURE OF A VENDOR'S LIEN

Idaho Code § 45-801 provides:

45-801. Vendor's lien. – One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

Fazzio has a vendor's lien pursuant to statute. In Quintana v. Anthony, 109 Idaho 977, 712 P.2d 678 (1985), the Idaho Court of Appeals held:

Title 45 of the Idaho Code also recognizes a vendor's lien. "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." I.C. § 45-801. A vendor's lien, like a mortgage, is a security device. But unlike a mortgage, which arises from agreement of the parties, a vendor's lien arises by operation of law, unless waived. It is a codified creature of equity. *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.15 (1973) (hereafter cited as DOBBS). Accordingly, the vendor's lien is "not a specific and absolute charge on the realty but a mere equitable right to resort to it [i.e., the property] on failure of payment by the vendee." *Estates of Somers v. Clearwater Power Co.*, 107 Idaho 29, 30, 684 P.2d 1006, 1007 (1984), quoting from *Mills v. Mills*, 147 Cal.App.2d 107, 305 P.2d 61, 68 (1956) (bracketed language added in *Somers*).

In light of this distinction, we think it would be unwise to lay down a rigid general rule that a vendor's lien must in all respects be treated as a mortgage. A court in equity may determine the scope of the lien and how it will be enforced in each case. This is especially true where, as in Idaho, the statute recognizing a vendor's lien makes no explicit provision for its enforcement. *See generally* 51 AM.JUR.2d *Liens* § 65 (1970). Nevertheless, the legislative policies underlying our mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien. In *Wells v. Francis*, 7 Colo. 396, 4 P. 49 (1884), the Colorado Supreme Court held that a suit on a vendor's lien is analogous to an action seeking foreclosure of a mortgage. Indeed, our Supreme Court, in *Farnsworth v. Pepper*, 27 Idaho 154, 160, 148 P. 48, 51 (1915), has held that the statute now codified as I.C. § 6-101 may be

applied to liens other than mortgages.

109 Idaho at 980. The Idaho Court of Appeals went on to hold:

Idaho Code § 6-101 was supplemented by I.C. § 6-108, the deficiency limitation statute, during the Great Depression. The statutory scheme responded to a haunting spectre of mortgage debtors defaulting on loans, losing their property in distress sales and encountering massive deficiencies. These statutes have protected debtors by sheltering unmortgaged property from potential execution until mortgaged property has been sold in a judicially supervised foreclosure. The statutes also have established a right to redeem the property sold and, as noted earlier, they have restricted the amounts of deficiency judgments after foreclosure sales. In our view, parallel protections are appropriate, and may be provided in equity, where sellers of real property assert the existence of vendors' liens.

109 Idaho at 980. Idaho Code § 6-108 provides:

6-108. Deficiency judgments – Amount restricted. – No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

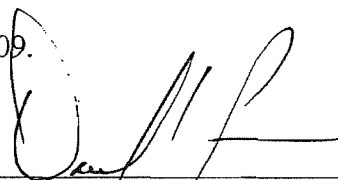
The above statutes and case law let forth the methods for foreclosing on a vendor's lien and the statutory protection for Mason. In addition, Mason would have redemptive rights pursuant to Idaho Code § 11-402 which would protect him from Fazzio entering a credit bid at a sheriff's sale for an amount less than fair market value because Fazzio would not risk Mason redeeming the real property at a price less than fair market value. Mason has already been given thirty (30) days by the Court to close on his purchase of Fazzio's real property. He failed to do so. therefore, Judgment should be entered for the contract purchase price plus interest, attorney fees and costs. The deed to the real property has been tendered. The Court should provide in the Judgment that

Fazzio shall foreclose on his vendor's lien and the real property sold at Sheriff's sale. This will accomplish two (2) benefits. First, it will establish the amount of the deficiency owed by Mason on the Judgment. Second, it will resolve the issue as to the encumbrance caused by the Kuna LID as the purchaser at foreclosure will purchase the property subject to the Kuna LID. Once the foreclosure has taken place and the amount of the deficiency determined, there will be no need for further action by the Court except as may be necessary for execution on the deficiency judgment.

CONCLUSION

Statutes and case law set forth the procedures to be followed for the entry of a judgment for specific performance and enforcement of said judgment. Any protections necessary to safeguard Mason's interests are set forth in the foreclosure statutes. As such, it is not necessary for the Court to create additional protections.

DATED this 27TH day of April, 2009.



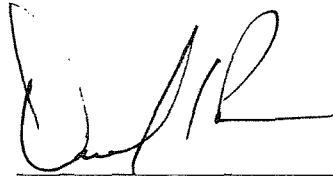
Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 27th day of April, 2009, I caused a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM REGARDING ENFORCEMENT OF JUDGMENT OF SPECIFIC PERFORMANCE to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

NO. 723 P. 13
Unison filed

43464-1

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 27 2009

J. DAVID NAVARRO, Clerk
By A. LYKE
DEPUTY

PLEASE CONFORM
AND RETURN

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an Idaho)
Limited Liability Company,)
Plaintiffs,)
vs.)
EDWARD J. MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

DEFENDANT'S REQUESTED
CONDITIONS FOR ENTRY OF THE
JUDGMENT, OBJECTION TO ENTRY
OF THE JUDGMENT AND REQUEST
FOR HEARING

Defendant Edward J. Mason, by and through his counsel of record, Hawley Troxell Ennis & Hawley, LLP submits this Defendant's Requested Conditions for Entry of the Judgment, Objection to Entry of the Judgment and Request for Hearing.

DEFENDANT'S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT,
OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING - I -

EXHIBIT "H"

I. INTRODUCTION

Pending before the court is Plaintiffs' Motion for Entry of Judgment, which purportedly is "in conformance with the Memorandum Decision and Order" filed by the Court on December 30, 2008. Mr. Mason objects to the form of the proposed judgment that was submitted to the court because it does not conform to the Memorandum Decision and Order. Plaintiffs have added a provision in the submitted form of judgment that judgment would be entered in favor of both Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID, which was not pled, nor litigated, nor included in the Memorandum Decision and Order.

Mr. Mason filed a motion that the Court's Order Granting Summary Judgment be certified for interlocutory appeal and the court denied this motion. Mr. Mason also filed a motion that the court reconsider the Memorandum Decision and Order and the court denied this motion. However, the court informed the parties that in the exercise of its equitable powers, the court would consider adding conditions to the judgment to provide protections from injustice to the parties. The court did not indicate what protections would be added, but rather invited the parties to submit suggested conditions. By submitting a request for conditions as invited by the court, Mr. Mason does not intend to waive his objections or his right to appeal from the Order Granting Summary Judgment, the decision denying his motion for certification of an interlocutory appeal or the decision denying his motion for reconsideration.

Defendant requests that the court hold a hearing on the requested conditions and objection to entry of the judgment.

II. OBJECTION TO PROPOSED FORM OF JUDGMENT

Defendant continues to object to Plaintiffs' Motion for Entry of Judgment. Defendant also objects to Plaintiffs' request for a judgment in the amount of the City of Kuna Sewer LID. Plaintiffs' Application for Entry of Arbitration Award, or in the Alternative, Complaint for Breach of Contract fails to allege any claim for a judgment in favor of Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID. In fact, the Plaintiffs' Application fails to make any reference to the City of Kuna Sewer LID. The claim for a judgment in favor of Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID has not been litigated in this action. Moreover, the court's Memorandum Decision and Order, entered herein on December 30, 2008, contains no provision for an award to Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID. Yet, Plaintiffs have included language in their proposed judgment that would grant them a judgment "in favor of both Plaintiffs and against Defendant in the amount of the City of Kuna Sewer LID."

There is no legal basis for entry of such judgment in this proceeding. The Memorandum Decision and Order was issued when the Court granted Plaintiffs' motion for summary judgment under Rule 56(c), I.R.C.P. The Court cannot address this claim regarding the City of Kuna Sewer LID because it was not raised in the pleadings and thus is not subject to being addressed under I.R.C.P. 56(c). *See, e.g., Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 75 P.3d 733 (2003), cert. denied, 540 U.S. 1184, 124 S. Ct. 1426, 158 L. Ed. 2d 88 (2004)(trial court properly refused to address an employee's claim regarding the employee's at-will status because the claim was not raised in the pleadings and thus was not subject to being addressed under Idaho R. Civil P. 56(c)).

DEFENDANT'S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT,
OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING - 3 -

III. REQUESTED CONDITIONS

In their Response to Motion for Reconsideration and Memorandum in Support, Plaintiffs assert they have a vendor's lien in their real property that is the subject of this action. E.g., "If Fazio were to foreclose on his vendor's lien to his real property . . ." Plaintiffs' Response, p. 4. Given the fact that Plaintiffs have vendor's liens in their property and, in effect, are foreclosing on their liens, the legislative policies underlying the mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing the vendor's liens. Protections paralleling those given mortgagors are appropriate, and may be provided in equity, where sellers of real property assert the existence of vendor's liens. *Quintana v. Anthony*, 109 Idaho 977, 712 P.2d 678 (Ct. App. 1985).

In *Quintana*, vendors brought suit to collect payments due to them and asserted a vendor's lien upon the ranch. The trial court entered judgment pursuant to a stipulation against the purchaser for various sums due. Vendors deferred a foreclosure sale of the ranch and started executing on their judgment against other assets of the purchaser. The purchaser objected but the trial court refused to stay the execution sales. However, the Court of Appeals determined that the purchaser was entitled to relief from any injustice shown to result from deferring a foreclosure sale of the ranch while other property was sold at execution. Specifically, the Court held that the vendor's lien must be foreclosed, as provided in a judgment, before the vendors could employ other remedies against the defaulting purchaser.

In the case at bar, this is the same kind of situation that Defendant Mason seeks to avoid. Plaintiffs have made it painfully clear that it is Plaintiffs' intent to have the sheriff sell the

property so Plaintiffs can credit bid a small portion of their judgment, acquire title to the property and proceed with the remainder of their judgment to levy on other assets of Defendant Mason. In effect, the Plaintiffs plan to have their property and their judgment too. This is the kind of injustice the *Quintanna* Court sought to remedy.

In *Quintanna*, the Court observed that Idaho Code § 6-101 authorizes a single form of action to collect a debt secured by a mortgage. The mortgage must be foreclosed. A deficiency judgment may be obtained if the foreclosure sale does not satisfy the debt; but the deficiency is limited to the difference between the fair market value of the real property and the amount of the unpaid debt. I. C. § 6-108. See *Eastern Idaho Production Credit Association v. Placerton, Inc.*, 100 Idaho 863, 606 P.2d 967 (1980). The creditor may not simply sue on the debt and collect by execution on the judgment. The Court stated:

Title 45 of the Idaho Code also recognizes a vendor's lien. "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." I.C. § 45-801. A vendor's lien, like a mortgage, is a security device. But unlike a mortgage, which arises from agreement of the parties, a vendor's lien arises by operation of law, unless waived. It is a codified creature of equity. (Citation omitted.)

Accordingly, the vendor's lien is "not a specific and absolute charge on the realty but a mere equitable right to resort to it [i.e., the property] on failure of payment by the vendee." (Citation omitted.)

In light of this distinction, we think it would be unwise to lay down a rigid general rule that a vendor's lien must in all respects be treated as a mortgage. A court in equity may determine the scope of the lien and how it will be enforced in each case. This is especially true where, as in Idaho the statute recognizing a vendor's lien makes no explicit provision for its enforcement. (Citation omitted.) Nevertheless, the legislative policies underlying our mortgage foreclosure statutes should guide the court's exercise of its equitable powers when enforcing a vendor's lien. In *Wells v. Francis*, 7 Colo. 396, 4. p. 49 (1884), the Colorado Supreme

DEFENDANT'S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT,
OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING - 5 -

Court held that a suit on a vendors lien is analogous to an action seeking foreclosure of a mortgage. Indeed, our Supreme Court, in *Farnsworth v. Pepper*, 27 Idaho 154, 160, 148 P.48, 51 (1915), has held that the statute now codified as I.C. § 6-101 may be applied to liens other than mortgages. See also *Jaussaud v. Samuels*, 58 Idaho 191, 205, 71 P.2d 426, 433 (1937)(characterizing I.C. §6-101 as applicable to “foreclosure of mortgages and liens”).

109 Idaho at 980, 712 P.2d at 681. (Bold emphasis added.) The Court went on to explain that Idaho Code § 6-101 was supplemented by I.C. § 6-108, the deficiency limitation statute, during the Great Depression in response to a “haunting spectre of mortgage debtors defaulting on loans, losing their property in distress sales and encountering massive deficiencies. ...” The Court stated, “In our view, parallel protections are appropriate, and may be provided in equity, where sellers of real property assert the existence of vendors’ liens.” *Id.*

Plaintiffs in this action have asserted vendor’s liens in the subject properties. Defendant Mason is requesting this court to impose conditions parallel to those provided in the mortgage foreclosure statutes of Idaho in the judgment that is entered in favor of Plaintiffs and against Defendant Mason, including:

- a) Direct the sale of the encumbered property and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the Plaintiffs, as provided in I.C. § 6-101.
- b) Order that the sale of the real estate under the judgment of foreclosure is subject to redemption as in the case of sales under execution, as provided in I.C. § 6-101.

DEFENDANT’S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT,
OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING - 6 -

c) And if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the Defendant, provided that the amount of any deficiency not be greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgage property, to be determined by the court in the decree upon the taking of evidence of such value, as provided in I.C. § 6-108.

d) If there be surplus money remaining after payment of the judgment, cause the same to be paid to Defendant, as provided in I.C. § 6-102.

IV. CONCLUSION

By imposing these conditions, all parties are protected from an injustice that would otherwise result.

V. REQUEST FOR HEARING

Defendant requests that the court hold a hearing on the requested conditions and the objection to entry of the judgment.

DATED THIS 27th day of April, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Meryn W. Clark, ISB No. 1026
Attorneys for Defendant

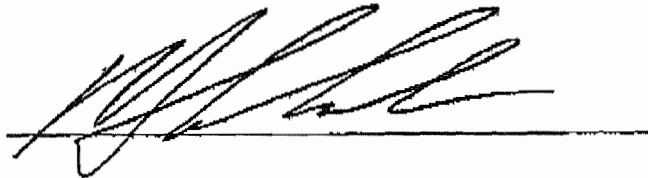
DEFENDANT'S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT,
OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING - 7 -

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2009, I caused to be served a true copy of the foregoing DEFENDANT'S REQUESTED CONDITIONS FOR ENTRY OF THE JUDGMENT, OBJECTION TO ENTRY OF THE JUDGMENT AND REQUEST FOR HEARING by the method indicated below, and addressed to each of the following:

Derek A. Pica, PLLC
ATTORNEY AT LAW
199 N. Capitol Blvd., Ste. 302
Boise, ID 83702
[Attorney for Plaintiffs]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy - (208) 336-4980



Merlyn W. Clark

MAY 05 2009

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE No.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

COPY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)
Plaintiffs,)
vs.)
EDWARD J. MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

**MEMORANDUM CLARIFYING
PROPOSED JUDGMENT AS TO
KUNA LID AND OBJECTION TO
REQUEST FOR HEARING**

COMES NOW, the above-named Plaintiffs, Frank Fazzio, Jr. and Cindy Ann Fazzio, husband and wife, and Idaho Livestock Company, LLC, hereinafter collectively "Fazzio," and respectfully file with the Court their Memorandum Clarifying Proposed Judgment as to Kuna LID and Objection to Request for Hearing.

INTRODUCTION

On April 27, 2009, Defendant, Edward J. Mason, hereinafter "Mason," filed with the Court Defendant's Requested Conditions for Entry of the Judgment, Objection to

EXHIBIT I

Entry of the Judgment, and Request for Hearing, hereinafter "Requested Conditions." In his Requested Conditions, Mason states that Fazzio is not entitled to a Judgment in regard to the Kuna LID as Fazzio did not plead or request relief as to the Kuna LID. Mason further requests a hearing on his requested conditions and objection to entry of judgment.

ARGUMENT

I.

FAZZIO DID PLEAD FOR RELIEF IN REGARD TO THE KUNA LID

In the Application for Entry of Arbitration Award, Or in the Alternative, Complaint for Breach of Contract filed January 22, 2008, Fazzio plead in part:

III.

That pursuant to the terms of the Agreements entered into by Plaintiffs and Defendant, Edward J. Mason, Plaintiffs are entitled to the remedy of specific performance enforcing the terms of the Agreements as a result of Defendant, Edward J. Mason, breaching the Agreements by failing to close his purchase of the real property that is the subject matter of the Agreements. (Emphasis added).

Application for Entry of Arbitration Award, Or in the Alternative, Complaint for Breach of Contract filed January 22, 2008, p. 6. Paragraph 4 of the Agreements entered into between Fazzio and Mason provides:

4. LOCAL IMPROVEMENT DISTRICT: Mason shall be responsible for and pay any assessments that become due and owing to the city of Kuna prior to closing as a result of Mason causing the Subject Property to be subject to the local improvement district, hereinafter "L.I.D." in May of 2006.

Agreements to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So as to Avoid Arbitration, p. 3. Clearly Fazzio plead that Mason be required to specifically perform all provisions of the Agreements, including paying the

Kuna LID. Obviously, if Mason completes the purchase of Fazzio's real property, the issue relating to the Kuna LID is moot if the purchase takes place prior to any assessments coming due. Further, if the property is sold at a foreclosure sale prior to the assessments coming due, the LID issue will also be moot. However, until Mason completes his purchase, or the property is sold, Mason should be required to specifically perform and judgment should be entered regarding the Kuna LID assessment.

II.

FAZZIO OBJECTS TO ANY FURTHER HEARINGS AS TO THE
ENTRY OF JUDGMENT

Mason requests yet another hearing in regard to his objection to entry of judgment. This is nothing more than a further delay tactic on the part of Mason. Mason's counsel made it perfectly clear at the hearing on April 15, 2009 that Mason was seeking to avoid having a judgment entered so as to avoid the cost of a supersedeous bond to prevent execution on the judgment while he appealed. He has already managed to delay entry of a judgment by filing an illegitimate appeal, which was ultimately dismissed.

This Court stated at the hearing on April 15, 2009 that it intended to enter a judgment for the purchase price plus interest. The Court wanted guidance in regard to Mason's concerns that Fazzio could ultimately end up with a judgment for the purchase price and the real property as well. Both parties have provided very similar briefing on this issue. As such, there is nothing further that can be accomplished at a hearing other than further delay and additional costs. A hearing may be appropriate as to the Court's proposed judgment, but until a proposed judgment is issued by the Court, no hearing is necessary.

CONCLUSION

Fazzio requests that the Court enter judgment as stated at the April 15, 2009 hearing, with Fazzio being given the opportunity to accept the judgment or proceed on damages.

DATED this 4th day of May, 2009.



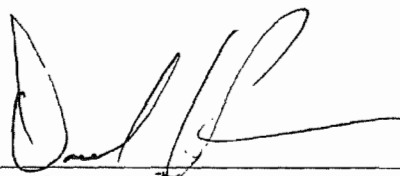
Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 4th day of May, 2009, I caused a true and correct copy of the foregoing MEMORANDUM CLARIFYING PROPOSED JUDGMENT AS TO KUNA LID AND OBJECTION TO REQUEST FOR HEARING to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

MAY 28 2009

J. DAVID NAVARRO, Clerk
By JENNIFER KENNEDY
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN
FAZZIO, husband and wife, and IDAHO
LIVESTOCK COMPANY, LLC, an
Idaho Limited Liability Company,

Plaintiffs,

vs.

EDWARD J. MASON, an individual,

Defendant.

Case No. CV-OC-0801215

MEMORANDUM RE: MOTION
TO RECONSIDER AND ENTRY
OF JUDGMENT

After this matter was argued on the pending motions, the Court offered the parties the opportunity to suggest limitations to be placed upon any judgment entered pursuant to the previous summary judgment motion. The parties have submitted supplemental memoranda and the matter was taken under advisement as of May 5, 2009. Included in the memoranda was a request by the defendant for a hearing prior to entry of judgment.

The Court denies the request for hearing and directs the entry of judgment without further hearing in this matter. The Court determines that further argument will not materially aid the Court in its decision.

Having considered the files and records in this matter, including the previous decision entered on summary judgment by Judge Sticklen, the comments and briefs of counsel, the Court has determined the following:

**MEMORANDUM RE: MOTION TO RECONSIDER
AND ENTRY OF JUDGMENT - PAGE 1**

EXHIBIT

"J"

1. This action is an action in equity for a specific performance. The remedy of specific performance was granted, with an alternative remedy for entry of a summary judgment.

2. It would be inherently inequitable for a money judgment to be entered for the full balance due on the purchase price without recognizing the value of the real property that is the subject of the dispute between the parties. The Court has therefore determined that, while a judgment for the full purchase price is appropriate, it is also appropriate to give the judgment debtor the benefit of the value of the real property that is the subject of this dispute. For that reason, the Court accepts the invitation of both parties and will enter a judgment providing for vendors liens to secure the judgments entered in favor of plaintiffs. The Court further intends to authorize sale of the real property under execution to enforce the judgments. Such sale is to be conducted in accordance with the procedures on execution sale in mortgage foreclosures. In this fashion the plaintiffs will receive the benefit of the value of the property, as well as the benefit of their contract. The defendant will be protected from an unreasonably low sales price at execution by the anti-deficiency statutes together with the right of redemption.

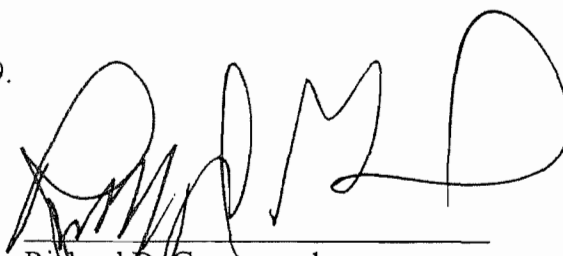
The plaintiff has asked that the amount due on the Local Improvement District (LID) be included in the judgment. The Court declines to do so. However, the Court finds that it is necessary to account for the LID in fashioning and remedying this case. For that reason the Judgment and Decree of the Court will provide that the vendor's liens are subject to the LID. In this fashion, should the property be sold to enforce the vendor's lien, plaintiffs will not have the value of their bargain reduced by the amount of the LID. It would be inherently inequitable to require the defendant to pay the LID on the property as part of a money judgment. It is also

inequitable to require plaintiffs to bear the burden of the LID when defendant agreed to be responsible for the same. Because record title to the property currently remains in the plaintiffs, they are presumably being billed for the LID. For that reason the Judgment and Decree will provide for recovery of any actual LID payments made by defendants at anytime prior to sale of the property and satisfaction of the vendor's lien or defendant otherwise satisfying the judgments.

The Court will enter a separate judgment.

IT IS SO ORDERED.

Dated this 28 day of May 2009.

A handwritten signature in black ink, appearing to read 'R. Greenwood', written over a horizontal line.

Richard D. Greenwood
District Judge

CERTIFICATE OF MAILING

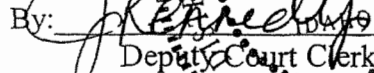
I hereby certify that on this 28 day of May 2009, I mailed a true and correct copy of

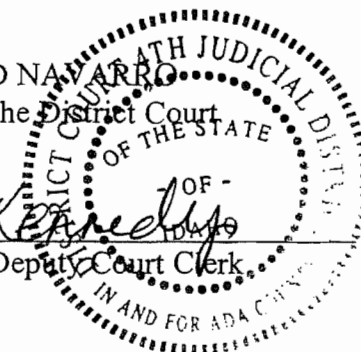
the within instrument to:

DEREK A PICA
ATTORNEY AT LAW
199 N CAPITOL BLVD STE 302
BOISE IDAHO 83702

MERLYN W CLARK
D JOHN ASHBY
HAWLEY TROXELL ENNIS
& HAWLEY LLP
POST OFFICE BOX 1617
BOISE IDAHO 83701-1617

J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Court Clerk



MEMORANDUM RE: MOTION TO RECONSIDER
AND ENTRY OF JUDGMENT - PAGE 4

MAY 28 2009

J. DAVID NAVARRO, Clerk
By **JENNIFER KENNEDY**
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN
FAZZIO, husband and wife, and IDAHO
LIVESTOCK COMPANY, LLC, an
Idaho Limited Liability Company,

Plaintiffs,

vs.

EDWARD J. MASON, an individual,

Defendant.

Case No. CV-OC-0801215

JUDGMENT

On December 30, 2008, the Court entered a Memorandum Decision and Order in the above action granting plaintiffs specific performance of plaintiffs' contract with defendant requiring defendant to complete the purchase of plaintiffs' real property and otherwise specifically perform the contract between the parties. Defendant was given thirty days from December 30, 2008 to perform. Defendant having failed to pay the balance due under the terms of the parties' contract, consistent with the Court's Memorandum Decision and Order of December 30, 2008, it is

HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment is hereby entered against Defendant Edward J. Mason in favor of Plaintiffs Frank J. Fazzio, Jr. and Cindy Ann Fazzio in the principal amount of \$1,530,000.00, plus interest thereon calculated at the rate of 12% per annum, in the amount of \$412,471.08.

2. Judgment is hereby entered against Defendant Edward J. Mason in favor of Plaintiff Idaho Livestock Company, LLC, in the principal amount of \$2,000,000.00, together with interest thereon calculated at the rate of 12% per annum in the amount of \$539,177.66.

3. To secure the Judgment entered herein, plaintiffs shall each be granted a vendor's lien as set forth below:

a. Frank J. Fazzio, Jr. and Cindy Ann Fazzio are hereby declared to have a valid, subsisting vendor's lien against real property that is the subject of the contract with defendant, more particularly described as follows: The Northwest Quarter of the Northwest Quarter of Section 14, township 2 North, Range 1 West, Boise Meridian, Ada County Idaho, as shown on Record of Survey No. 2531, filed as instrument 9367500, in the records of the office of the Ada County Recorder.

b. Plaintiff Idaho Livestock Company, LLC is hereby declared to have a valid, subsisting lien upon the real property which is the subject of the contract with defendant, which real property is more particularly described as follow:

PARCEL I:

Lot 2, block 1 according to the official plat thereof filed in Book 70 of plats at pg. 7150, records of the Ada County Recorder.

PARCEL II:

South ½ of Northwest ¼, Section 14, Township 2 North, Range 1 West, Boise Meridian, Ada County, Idaho.

4. The vendor's liens herein declared are subordinate and inferior to all assessments due, and to become due, owing to the City of Kuna by virtue of the Local Improvement District established by the City of Kuna in May 2006.

5. Upon satisfaction of the Judgments entered herein, in full, defendant shall be entitled to transfer of title to the real property above described as provided in the contract between the parties, so long as the property has not been sold in satisfaction of the vendor's lien herein declared. Subject, however, to the requirement that defendant shall reimburse plaintiffs any sums actually paid by plaintiffs representing charges and assessments of the Local Improvement District created by the City of Kuna in May 2006.

6. The vendor's lien herein declared may be enforced through sale of the real property in the same manner and subject to the same restrictions as the execution sale of property subject to a decree of foreclosure as set forth in Chapter 1 of Title 6, Idaho Code.

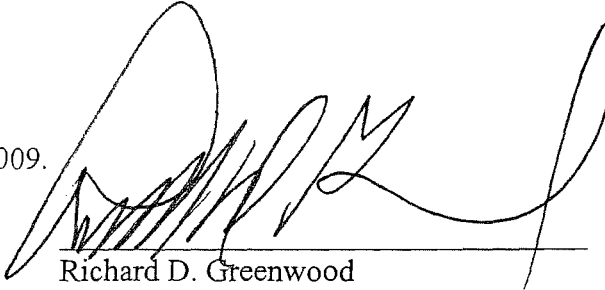
7. As part of any execution sale the foreclosing judgment creditor herein shall be entitled to recover all sums actually paid to the City of Kuna as assessments and charges for the Local Improvement District which have been actually paid by the judgment creditor prior to sale. Such sum shall be collected from the proceeds of sale and repayed to the judgment creditor prior to the application of the proceeds of sale to the judgment granted above.

8. The Judgments herein granted shall bear interest at statutory rate of 7.625% per annum from the date of Judgment until paid.

9. This Court shall retain jurisdiction to enforce this decree and resolve any disputes arising from this decree.

IT IS SO ORDERED.

Dated this 28 day of May 2009.



Richard D. Greenwood
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 28 day of May 2009, I mailed a true and correct copy of

the within instrument to:

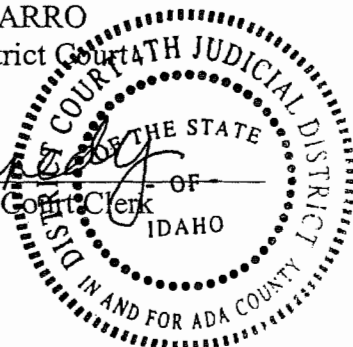
DEREK A PICA
ATTORNEY AT LAW
199 N CAPITOL BLVD STE 302
BOISE IDAHO 83702

MERLYN W CLARK
D JOHN ASHBY
HAWLEY TROXELL ENNIS
& HAWLEY LLP
POST OFFICE BOX 1617
BOISE IDAHO 83701-1617

J. DAVID NAVARRO
Clerk of the District Court

By: 

Deputy Court Clerk



COPY

NO. _____ FILED _____
A.M. _____ P.M. _____

AUG 05 2009

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR No. 3559

ATTORNEY FOR Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Case No. CV OC 0801215

Plaintiffs,)

**MEMORANDUM IN RESPONSE
TO DEFENDANT'S SECOND
OBJECTION AND MOTION TO
DISALLOW PLAINTIFFS'**

vs.)

**MEMORANDUM OF COSTS AND
FEES AND AMENDED
MEMORANDUM OF COSTS
AND FEES**

EDWARD J. MASON, an individual,)

Defendant.)

Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio and Idaho Livestock
Company, LLC, respectfully file with the Court their Memorandum in Response to
Defendant's Second Objection and Motion to Disallow Plaintiffs' Memorandum of Costs
and Fees and Amended Memorandum of Costs and Fees.

STATEMENT OF FACTS

1. On January 22, 2008, Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio
and Idaho Livestock Company, LLC, hereinafter collectively "Fazzio," filed their

MEMORANDUM IN RESPONSE TO DEFENDANT'S SECOND OBJECTION AND MOTION TO
DISALLOW PLAINTIFFS' MEMORANDUM OF COSTS AND FEES AND AMENDED
MEMORANDUM OF COSTS AND FEES – Page 1

EXHIBIT h

Application for Entry of Arbitration Award, Or in the Alternative, Complaint for Breach of Contract.

2. On February 19, 2008, Fazio served on Defendant's counsel Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant.
3. On March 24, 2008, Defendant, Edward J. Mason, hereinafter "Mason," served on Fazio's counsel Defendant's Answers to Plaintiff's First Set of Interrogatories and Responses to Request for Production of Documents to Defendant which stated that the majority of the discovery requested would be produced pursuant to an appropriate protective order. (Affidavit in Support of Motion to Compel filed April 7, 2008).
4. On April 7, 2008, Fazio filed a Motion to Compel Mason's responses to discovery.
5. On or about May 1, 2008, Mason filed his Motion for Protective Order.
6. On June 6, 2008, the Court filed its Order on Motion to Compel and Motion for Protective Order.
7. On August 4, 2008, Fazio filed a Motion for Summary Judgment along with a supporting Memorandum and Affidavit.
8. On October 7, 2008, Mason filed his Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.
9. On October 21, 2008, a hearing was held on Fazio's Motion for Summary Judgment, at which time the Court requested supplemental briefing on certain issues.
10. On November 4, 2009, both Fazio and Mason filed their supplemental briefing.

11. On December 30, 2008, the Court filed its Memorandum Decision and Order granting Fazzio summary judgment as to Fazzio's breach of contract claim and granted Fazzio specific performance by giving Mason thirty (30) days to perform on the contracts he had entered into with Fazzio or the Court would enter judgment for the purchase price.

12. On January 13, 2009, Fazzio filed a Memorandum of Costs seeking costs and attorney's fees in the amount of \$31,228.00.

13. On January 20, 2009, Mason, despite the fact that the district court had not entered a final judgment, filed a Notice of Appeal to the Supreme Court.

14. On January 26, 2009, Mason filed Defendant's Objection and Motion to Disallow Plaintiffs' Memorandum of Costs and Fees.

15. On February 11, 2009, Fazzio filed a Motion to Dismiss and Supporting Memorandum to the Supreme Court arguing that Mason's appeal should be dismissed as the district court's Memorandum Decision and Order filed December 30, 2008 is not an appealable decision.

16. On February 23, 2009, Mason filed his Opposition to Motion to Dismiss.

17. On February 24, 2009, Fazzio filed his Response to Opposition to Motion to Dismiss.

18. On March 23, 2009, the Supreme Court filed its Order Conditionally Dismissing Appeal. (See Appendix 1).

19. On March 27, 2009, Mason filed a Request for Certification for Interlocutory Appeal.

20. On April 3, 2009, Fazzio filed a Motion for Entry of Judgment and an Objection to Request for Certification for Interlocutory Appeal.

21. On April 7, 2009 Mason filed a Motion for Reconsideration and Memorandum in Support.

22. On May 28, 2009, after receiving Supplemental Memorandums from both parties, the district court filed its Judgment granting Fazzio a Judgment against Mason for the full purchase price of the contracts and a vendor's lien against the subject real property.

23. On June 4, 2009, Fazzio filed an Amended Memorandum of Costs.

24. On June 17, 2009, Mason filed Defendant's Second Objection and Motion to Disallow Plaintiff's Memorandum of Costs and Fees and Amended Memorandum of Costs and Fees.

25. Paragraph 14 of the Agreement to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement dated April 12, 2006 So As to Avoid Arbitration entered into by Fazzio and Mason states:

14. ATTORNEY FEES AND COSTS TO ENFORCE THIS SETTLEMENT AGREEMENT: Should either party be required to bring an action or apply to the district court to obtain a judgment to enforce this Settlement Agreement, that party shall be entitled to reasonable attorney fees and costs associated with that action or application.

ARGUMENT

I.

MASON'S ARGUMENT THAT ATTORNEY'S FEES MUST BE DENIED AS A RESULT OF FAZZIO'S FAILURE TO PROVIDE SUFFICIENT INFORMATION IS MISPLACED.

I.R.C.P. 54(e)(3) provides:

Rule 54(e)(3). Amount of attorney fees.

In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

Mason is taking the position that because Fazzio has not provided information relating to all of the factors set forth in I.R.C.P. 54(e)(3), Fazzio's attorney's fees claim should be denied. What Mason fails to recognize is the fact that the factors set forth in I.R.C.P. 54(e)(3) go solely to the amount of attorney's fees awarded, not to whether the Court should grant attorney's fees. Second, I.R.C.P. 54(3)(6) provides that the Court may

conduct an evidentiary hearing to determine the amount of attorney's fees to be awarded. In an effort to avoid an evidentiary hearing, Fazzio's counsel has submitted a Supplemental Affidavit to Determine Amount of Attorney's Fees.

II.

THE TIME AND LABOR REQUESTED BY PLAINTIFFS IS NOT UNREASONABLE

Mason argues the time and labor spent by Fazzio's counsel was unreasonable and therefore, certain fees should be disallowed. First among Mason's objections is the fact that attorney's fees are being requested for a Motion to Compel brought by Fazzio. Mason's position is that the Motion to Compel was premature. The Court records show that Mason did not file a Motion For a Protective Order until several weeks after Fazzio filed their Motion to Compel. Mason also complains that Fazzio objected to the request for protective order. The Court records show that the protection order that was entered is far different than the protective order requested by Mason. All attorney fees incurred by Fazzio in regarding to the Motion to Compel and the protective order were reasonable and necessary.

Mason also objects to time entries for the dates of 1/03/08 and 1/04/08 relating to the drafting of proposed agreements to avoid the necessity of litigation. Given the outcome of the litigation, Mason would have been well advised to accept Fazzio's proposed settlement. Clearly, Fazzio's efforts to avoid litigation relate to the lawsuit. Had Mason complied with the contracts he entered into, such efforts on Fazzio's part would not have been necessary.

Mason also objects to the attorney's fees relating to Fazzio's objection to the

appeal that was filed by Mason over which the Supreme Court had no jurisdiction as Mason was attempting to appeal an interlocutory order. The attorney's fees incurred by Fazzio are certainly covered by the attorney's fees provision in the Agreements to Resolve Dispute Arising Out of Real Estate Purchase and Sale Agreement Dated April 12, 2006 So As to Avoid Arbitration.

Further, the district court has continuing jurisdiction over all matters, including attorney's fees. In Camp v. Jiminez, 107 Idaho 878, 693 P.2d 1080 (App. 1984), the Idaho Court of Appeals held:

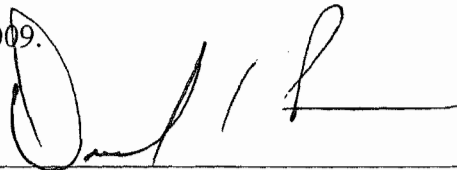
An appeal taken from a nonappealable order does not divest the lower court of continuing jurisdiction in the case. *See Marks v. Vehlow*, 105 Idaho 560, 567, 671 P.2d 473, 480 (1983).

107 Idaho at 880. The district court clearly has jurisdiction over all attorney's fees issues until such time as a final judgment was filed.

CONCLUSION

Fazzio is entitled to an award of attorney's fees in the amount of \$51,367.50 and costs in the amount of \$88.00.

DATED this 4th day of August, 2009.



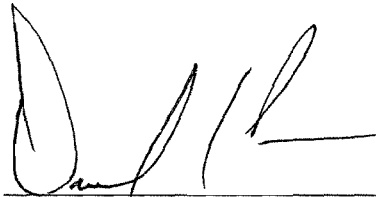
Derek A. Pica
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 4th day of August, 2009, I caused a true and correct copy of the foregoing MEMORANDUM IN RESPONSE TO DEFENDANT'S SECOND OBJECTION AND MOTION TO DISALLOW PLAINTIFFS' MEMORANDUM OF COSTS AND FEES AND AMENDED MEMORANDUM OF COSTS AND FEES to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

APPENDIX 1

In the Supreme Court of the State of Idaho

FRANK J. FAZZIO, JR., and CINDY ANN
FAZZIO, husband and wife, and IDAHO
LIVESTOCK COMPANY, LLC,

Plaintiffs-Respondents,

v.

EDWARD J. MASON, an individual,

Defendant-Appellant.

ORDER CONDITIONALLY
DISMISSING APPEAL

Supreme Court Docket No. 36068-2009
Ada County District Court No. 2008-1215

Ref. No. 098-80

A MOTION TO DISMISS, an AFFIDAVIT OF DEREK PICA IN SUPPORT OF MOTION TO DISMISS with attachment and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS with attachment were filed by counsel for Respondents on February 12, 2009, requesting this Court for an Order dismissing the above entitled appeal on the grounds that the Memorandum Decision and Order that Respondent is appealing from is an interlocutory order and is not an appealable order, pursuant to Rule 11(a)(1) of the Idaho Appellate Rules. Thereafter, an OPPOSITION TO MOTION TO DISMISS was filed by counsel for Appellant on February 23, 2009. Subsequently, a RESPONSE TO OPPOSITION TO MOTION TO DISMISS was filed by counsel for Respondents on February 24, 2009. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that the above entitled appeal be, and hereby is, CONDITIONALLY DISMISSED unless a SEPARATE JUDGMENT IS FILED PURSUANT TO I.C.R. 58(a) OR A PERMISSIVE APPEAL IS PROCURED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER.

IT FURTHER IS ORDERED that proceedings in this appeal be, and hereby are, SUSPENDED until further Order of this Court.

DATED this 23 day of March 2009.

By Order of the Supreme Court

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Kathryn A. Sticklen

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason

| | <u>Amount</u> |
|----------------------------|---------------|
| Previous balance | \$2,828.95 |
| 9/2/08 Payment - thank you | (\$2,828.95) |
| Balance due | <u>\$0.00</u> |

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH SEPTEMBER 23, 2008
PAYMENTS RECEIVED THROUGH SEPTEMBER 23, 2008

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason
Invoice #21196

Professional services

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|---------------|
| 9/25/08 Review settlement E-mail from client and analyze; review Summary Judgment issues as pertains to settlement | 0.60 | 135.00 |
| 10/8/08 Review Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and analyze; review Affidavit of Edward J. Mason in Opposition to Plaintiff's Motion for Summary Judgment and analyze; review supplemental discovery responses | 4.40 | 990.00 |
| 10/10/08 Research specific performance issues; draft letter to client | 1.60 | 360.00 |
| 10/13/08 Research equity issues; review cases cited by defendant; draft Memorandum in Response to Defendant's Memorandum in Opposition to Motion for Summary Judgment | 9.50 | 2,137.50 |
| 10/14/08 Draft Affidavit; research arbitration issue; complete draft of Response Memorandum | 3.60 | 810.00 |

| | <u>Hours</u> | <u>Amount</u> |
|--|--------------|--------------------------|
| 10/15/08 Review defendant's 2007 income tax returns; draft Second Affidavit; draft letter to client | 1.60 | 360.00 |
| 10/20/08 Prepare for hearing | 1.30 | 292.50 |
| 10/21/08 Continue preparation for Summary Judgment Hearing; attend Summary Judgment Hearing; conference with client | 4.00 | 900.00 |
| 10/22/08 Draft Motion to Amend Complaint; draft Amended Application and Complaint; draft Motion to Extend Time; research impossibility of performance issues | 5.70 | 1,282.50 |
| 10/23/08 Research specific performance issues at Law Library | 2.00 | 450.00 |
| For professional services rendered | 34.30 | \$7,717.50 |
| Additional charges: | | |
| 10/22/08 Postage | | 4.42 |
| Copies | | 75.60 |
| Total costs | | <u>\$80.02</u> |
| Total amount of this bill | | <u>\$7,797.52</u> |
| Balance due | | <u><u>\$7,797.52</u></u> |

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH OCTOBER 23, 2008
 PAYMENTS RECEIVED THROUGH OCTOBER 23, 2008

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason
Invoice #21261

Professional services

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|---------------|
| 10/24/08 Continue research on specific performance and damage issues | 3.20 | 720.00 |
| 10/29/08 Research specific performance enforcement issues | 3.00 | 675.00 |
| 10/30/08 Research specific performance issues; continue draft of Supplemental Memorandum; research damages issue; complete research on impossibility of performance issue | 4.80 | 1,080.00 |
| 10/31/08 Research damages issue in specific performance case; complete draft of Supplemental Memorandum; draft Affidavit | 3.60 | 810.00 |
| 11/3/08 Conduct additional research on enforcement of judgment for specific performance; draft Revised Memorandum | 4.70 | 1,057.50 |

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|---------------|
| 11/4/08 Complete draft of Revised Memorandum; review Defendant's Supplemental Memorandum and analyze; research cases cited by Defendant; draft letter to client | 3.50 | 787.50 |
| 11/5/08 Continue research of specific performance issues raised in Defendant's Brief; draft Affidavit of client | 2.70 | 607.50 |
| 11/6/08 Telephone conference with Larry Braga regarding tax issue; research issue regarding use of judgment as credit; draft letter to client | 2.60 | 585.00 |
| 11/7/08 Continue researching specific performance enforcement issues | 0.80 | 180.00 |
| 11/10/08 Draft Notice of Hearing; review Court dates to determine discovery schedule | 0.30 | 67.50 |
| | <hr/> | <hr/> |
| For professional services rendered | 29.20 | \$6,570.00 |
| Additional charges: | | |
| 11/24/08 Postage | | 7.91 |
| Copies | | 16.95 |
| | | <hr/> |
| Total costs | | \$24.86 |
| | | <hr/> |
| Total amount of this bill | | \$6,594.86 |
| Previous balance | | \$7,797.52 |
| 11/3/08 Payment - thank you | | (\$7,797.52) |
| | | <hr/> |
| Balance due | | \$6,594.86 |
| | | <hr/> <hr/> |

Frank Fazzio/Idaho Livestock

Page 3

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH NOVEMBER 24, 2008
PAYMENTS RECEIVED THROUGH NOVEMBER 25, 2008

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT
PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY
UNPAID BALANCE.

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason

| | <u>Amount</u> |
|------------------------------|---------------|
| Previous balance | \$6,594.86 |
| 12/22/08 Payment - thank you | (\$6,594.86) |
| Balance due | <u>\$0.00</u> |

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH DECEMBER 26, 2008
PAYMENTS RECEIVED THROUGH DECEMBER 26, 2008

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason
Invoice #21401

Professional services

| | <u>Hours</u> | <u>Amount</u> | |
|---|--------------|------------------|---|
| 1/2/09 Review Memorandum Decision and Order and analyze; draft letter to client | 1.40 | 315.00 | |
| 1/6/09 Review contracts; calculate attorney fees; draft Memorandum of Cost and Affidavit of Attorney Fees; calculate interest due and owing | 1.70 | 382.50 | |
| 1/8/09 Finalize Memorandum of Costs; draft Affidavit of Attorney Fees | 1.00 | 225.00 | |
| 1/13/09 Review Notice; draft letter to client | 0.20 | 45.00 | ✓ |
| 1/21/09 Review Notice of Appeal and analyze; research enforcement and bond issues; research finality issue; draft Motion to Dismiss; draft Request for Additional Documents; draft letter to client | 3.20 | 720.00 | ✓ |
| For professional services rendered | <hr/> 7.50 | <hr/> \$1,687.50 | |

Additional charges:

| | <u>Amount</u> |
|---------------------------|--------------------------|
| 1/21/09 Postage | 5.97 |
| Copies | 14.10 |
| Total costs | <u>\$20.07</u> |
| Total amount of this bill | <u>\$1,707.57</u> |
| Balance due | <u><u>\$1,707.57</u></u> |

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH JANUARY 22, 2009
PAYMENTS RECEIVED THROUGH JANUARY 22, 2009

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT
PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY
UNPAID BALANCE.

DEREK A. PICA
Attorney at Law
199 N. Capitol, Suite 302
Boise ID 83702
336-4144

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna ID 83634

In Reference To: Fazzio/Idaho Livestock v. Mason
Invoice #21472

Professional services

| | <u>Hours</u> | <u>Amount</u> | |
|---|--------------|---------------|---|
| 1/29/09 Review Objection to Motion to Dismiss; research jurisdiction of lower court of an improper appeal; research specific performance orders as to finality | 1.70 | 382.50 | ✓ |
| 2/9/09 Research interlocutory judgment issues; draft Motion to Dismiss in Supreme Court; begin draft of supporting Memorandum | 2.50 | 562.50 | ✓ |
| 2/10/09 Continue draft of Memorandum in Support of Motion to Dismiss; research specific performance judgment issues | 3.70 | 832.50 | ✓ |
| 2/11/09 Complete draft of Motion to Dismiss and Memorandum in Support of Motion to Dismiss; draft Affidavit in Support of Motion to Dismiss; draft letter to client; analyze objection to costs and fees | 4.30 | 967.50 | ✓ |

| | <u>Hours</u> | <u>Amount</u> |
|---|--------------|--------------------------|
| 2/23/09 Review opposition to Motion to Dismiss and analyze; research case law cited by appellant and analyze; telephone conference with Stephan Kenyon at Supreme Court; research jurisdictional issues | 2.40 | 540.00 ✓ |
| For professional services rendered | 14.60 | \$3,285.00 |
| Additional charges: | | |
| 2/20/09 Postage | | 3.19 |
| Copies | | 31.20 |
| Total costs | | <u>\$34.39</u> |
| Total amount of this bill | | <u>\$3,319.39</u> |
| Previous balance | | \$1,707.57 |
| 2/2/09 Payment - thank you | | (\$1,707.57) |
| Balance due | | <u><u>\$3,319.39</u></u> |

VISA and MASTERCARD accepted

FOR PROFESSIONAL SERVICES RENDERED THROUGH FEBRUARY 23, 2009
 PAYMENTS RECEIVED THROUGH FEBRUARY 23, 2009

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. ANY BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA, PLLC
Attorney at Law
199 N. Capitol, Suite 302
Boise, ID 83702

Invoice submitted to:
Frank Fazio/Idaho Livestock
2802 Ten Mile Rd
Kuna, ID 83634

March 30, 2009

In Reference To: Fazio/Idaho Livestock v. Mason
Invoice #10014

Professional Services

| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 2/24/2009 Research "finality" issues; continue draft of Reply to Memorandum in Opposition to Motion to Dismiss; draft letter to client | 3.30 225.00/hr | 742.50 ✓ |
| 3/16/2009 Review Clerk's Record on Appeal; draft Request for Addition; draft letter to Merlyn Clark | 1.70 225.00/hr | 382.50 ✓ |
| For professional services rendered | 5.00 | \$1,125.00 |
| Additional Charges : | | |
| 3/23/2009 Postage | | 3.62 |
| Copying cost | | 10.50 |
| Total additional charges | | \$14.12 |
| Total amount of this bill | | \$1,139.12 |
| Accounts receivable transactions | | |
| 3/4/2009 Payment - Thank You | | (\$3,319.39) |
| 3/28/2009 Starting balance | | \$3,319.39 |
| Balance due | | \$1,139.12 |

VISA and MASTERCARD accepted

Professional services rendered through March 23, 2009
Payments received through March 27, 2009

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. BILLS NOT PAID BY THE 10TH SHALL ACCRUE
A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA, PLLC
Attorney at Law
199 N. Capitol, Suite 302
Boise, ID 83702

Invoice submitted to:
Frank Fazio/Idaho Livestock
2802 Ten Mile Rd
Kuna, ID 83634

April 27, 2009

In Reference To: Fazio/Idaho Livestock v. Mason
Invoice #10079

Professional Services

| | <u>Hrs/Rate</u> | <u>Amount</u> | |
|--|-------------------|---------------|---|
| 3/24/2009 Review Order Conditionally Dismissing Appeal and analyze; review I.R.C.P. 58(a); draft letter to client; telephone conference with Richard Webber | 0.80 225.00/hr | 180.00 | ✓ |
| 3/27/2009 Telephone conference with Richard Webber; review request for certification of interlocutory appeal and analyze | 1.40 225.00/hr | 315.00 | ✓ |
| 3/29/2009 Research permissive appeal issues | 1.30 225.00/hr | 292.50 | ✓ |
| 3/30/2009 Draft letter to client; continue research as to requirements for interlocutory appeal | 0.70 225.00/hr | 157.50 | ✓ |
| 3/31/2009 Draft Objection; draft Affidavit of client; begin draft of Memorandum in Support of Objection | 7.50 225.00/hr | 1,687.50 | ✓ |
| 4/1/2009 Continue draft of Memorandum in Support of Objection | 2.80 225.00/hr | 630.00 | ✓ |
| 4/2/2009 Review E-mail from client; revise draft of Objection | 0.80 225.00/hr | 180.00 | ✓ |
| 4/3/2009 Revise draft of Memorandum in Support of Objection; draft Motion for Entry of Judgment; draft Judgment | 2.50 225.00/hr | 562.50 | ✓ |
| 4/6/2009 Telephone conference with Court Clerk; draft Notice of Hearing; draft letter to client; research judgment interest issue | 1.30 225.00/hr | 292.50 | |
| 4/7/2009 Review Motion for Reconsideration and analyze; review supporting Affidavit; research issues raised by Motion; draft Motion to Strike and supporting Affidavit; draft letter to client | 2.30 225.00/hr | 517.50 | |

| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------------------|
| 4/13/2009 Review client's E-mail and analyze; review briefing; research "impossibility" issue raised by Mason; prepare for Hearing | 3.60 225.00/hr | 810.00 |
| 4/14/2009 Continue research of reconsideration issues; draft Memorandum in Opposition to Motion for Reconsideration | 4.40 225.00/hr | 990.00 |
| 4/15/2009 Complete draft of Memorandum; prepare for Hearing; attend Hearing | 4.80 225.00/hr | 1,080.00 |
| 4/16/2009 Review E-mails from client and analyze; research vendor lien issues | 2.80 225.00/hr | 630.00 |
| 4/17/2009 Draft letter to client; draft letter to John Thornton; continue research on foreclosure of Vendor's Lien | 1.70 225.00/hr | 382.50 ✓ |
| 4/20/2009 Finalize letter to Mr. Thornton; telephone conferences with Richard Webber; research foreclosure issues | 2.40 225.00/hr | 540.00 ✓ |
| 4/21/2009 Telephone conference with Richard Webber; telephone conference with John Thornton; prepare documents for Mr. Thornton; work on Judgment issues | 1.40 225.00/hr | 315.00 |
| 4/22/2009 Continue research as to foreclosure and redemption issues | 2.20 225.00/hr | 495.00 |
| 4/23/2009 Continue research as to terms in a judgment for specific performance; begin draft of Supplemental Memorandum; telephone conference with Merlyn Clark | 6.70 225.00/hr | 1,507.50 |
| For professional services rendered | <u>51.40</u> | <u>\$11,565.00</u> |
| Additional Charges : | | |
| 4/23/2009 Postage | | 10.60 |
| Copying cost | | 21.30 |
| Total additional charges | | <u>\$31.90</u> |
| Total amount of this bill | | <u>\$11,596.90</u> |
| Previous balance | | \$1,139.12 |
| Accounts receivable transactions | | |
| 4/6/2009 Payment - Thank You | | <u>(\$1,139.12)</u> |
| Total payments and adjustments | | <u>(\$1,139.12)</u> |
| Balance due | | <u><u>\$11,596.90</u></u> |

VISA and MASTERCARD accepted

Professional services rendered through April 23, 2009
Payments received through April 24, 2009

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.

DEREK A. PICA, PLLC
Attorney at Law
199 N. Capitol, Suite 302
Boise, ID 83702

Invoice submitted to:
Frank Fazzio/Idaho Livestock
2802 Ten Mile Rd
Kuna, ID 83634

May 26, 2009

In Reference To: Fazzio/Idaho Livestock v. Mason
Invoice #10144

Professional Services

| | <u>Hrs/Rate</u> | <u>Amount</u> |
|---|-------------------|-------------------|
| 4/24/2009 Complete draft of Supplemental Memorandum; review tax opinion | 3.70 225.00/hr | 832.50 |
| 4/27/2009 Finalize Memorandum | 0.60 225.00/hr | 135.00 |
| 4/28/2009 Review Defendant's Requested Conditions for Entry of the Judgment, Objection to Entry of the Judgment and Request for Hearing and analyze; draft letter to client | 0.80 225.00/hr | 180.00 |
| 5/1/2009 Review file as to pleadings; draft Memorandum Clarifying Proposed Judgment as to Kuna LID and Objection to Request for Hearing | 2.80 225.00/hr | 630.00 |
| 5/4/2009 Finalize Memorandum | 0.40 225.00/hr | 90.00 |
| For professional services rendered | <u>8.30</u> | <u>\$1,867.50</u> |
| Additional Charges : | | |
| 5/21/2009 Postage | | 3.62 |
| Copying cost | | 7.80 |
| Total additional charges | | <u>\$11.42</u> |
| Total amount of this bill | | <u>\$1,878.92</u> |
| Previous balance | | \$11,596.90 |

| | <u>Amount</u> |
|----------------------------------|-------------------|
| Accounts receivable transactions | |
| 5/6/2009 Payment - Thank You | (\$11,596.90) |
| Total payments and adjustments | (\$11,596.90) |
| Balance due | <u>\$1,878.92</u> |

VISA and MASTERCARD accepted

Professional services rendered through May 21, 2009
Payments received through May 22, 2009

ALL BILLS DUE AND PAYABLE BY THE 10TH OF EACH MONTH. BILLS NOT PAID BY THE 10TH SHALL ACCRUE A 1% PER MONTH INTEREST CHARGE ON ANY UNPAID BALANCE.



PLEASE CONFORM
AND RETURN

JUN 17 2009

J. DAVID NAVARRO, Clerk
By L. AMES
DEPUTY

*file Mason
file ok
43464-1*

Merlyn W. Clark, ISB No. 1026
D. John Ashby, ISB No. 7228
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P O. Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 342-3829
Email: mwc@hteh.com
jash@hteh.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an Idaho)
Limited Liability Company,)
Plaintiffs,)
vs)
EDWARD J MASON, an individual,)
Defendant.)

Case No. CV OC 0801215

DEFENDANT'S SECOND OBJECTION
AND MOTION TO DISALLOW
PLAINTIFFS' MEMORANDUM OF
COSTS AND FEES AND AMENDED
MEMORANDUM OF COSTS AND
FEES

Defendant Edward J Mason, by and through his counsel of record, Hawley Troxell Ennis
& Hawley LLP, submits this Second Memorandum and Motion to Disallow Plaintiffs'
Memorandum of Costs and Fees and Amended Memorandum of Costs and Fees.

DEFENDANT'S SECOND OBJECTION AND MOTION TO DISALLOW
PLAINTIFFS' MEMORANDUM OF COSTS AND FEES AND AMENDED
MEMORANDUM OF COSTS AND FEES - 1

I. INTRODUCTION

On or about January 13, 2009, Plaintiffs filed herein their Memorandum of Costs and Affidavit of Attorney Fees Pursuant to Rule 54(e)(5) of the Idaho Rules of Civil Procedure. On or about January 26, 2009, Defendant filed herein Defendant's Objection and Motion to Disallow Plaintiffs' Memorandum of Costs and Fees. The claim for fees and costs was never heard or decided by the court.

Plaintiffs have now filed an Amended Memorandum of Costs and Amended Affidavit of Attorney Fees Pursuant to Rule 54(e)(5) of the Idaho Rules of Civil Procedure seeking an award of attorney fees and costs that reaches back to the beginning of this action. The claim for an award of attorney fees is defective and cannot be granted.

II. ARGUMENT

A. **Plaintiffs' Request for Attorney Fees Must be Denied For Failure to Provide the Court With Sufficient Information From Which to Determine the Reasonableness of the Amount Claimed.**

As is pointed out in Defendants' first Objection and Motion to Disallow Plaintiffs' Memorandum of Costs and Fees, in determining a reasonable attorney fee award, the Court must consider all of the factors listed in I.R.C.P. 54(e)(3). *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005) ("Lettunich I"); *Heinz v. Heinz*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997). Although, some of the information may come from the Court's own knowledge and experience and some may come from the record in the case, some can only be supplied by the party. *Id.*; *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004) (award of attorney fees vacated where prevailing party did not provide the trial court with sufficient information from which to determine the reasonableness of the amount claimed). The factors to determine the reasonableness of an attorney fee award include: time and labor,

difficulty, skill required, prevailing charges, fixed or contingent fee, time limitations, amount and result, undesirability of the case, relationship with the client, awards in similar cases, costs of automated research and any other factors. *Id.*, citing *I.R.C.P.* 54(e)(3). It is incumbent upon the party seeking the fees to provide the necessary information. *Id.*

Plaintiffs' first Memorandum of Costs and the Affidavit of Attorney Fees submitted in support thereof and Plaintiffs' Amended Memorandum of Costs and Amended Affidavit of Attorney Fees both fail to satisfy Plaintiffs' burden under Rule 54(e)(3). Plaintiffs simply submit their attorney's Affidavits containing their attorney's billing records, which purportedly relate to this action, together with his statements in both Affidavits that he billed Plaintiffs at a fixed hourly rate of \$225.00 and his conclusory statements that "said rates are consistent with the prevailing charges for like work in the State of Idaho by attorneys with comparable experience," and that the time and labor spent by their attorney was necessary for the proper prosecution of Plaintiffs' action. No other information is provided that would allow the court to consider all of the factors the court is required to consider under Rule 54(e)(3).

It is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider the factors as they specifically relate to the prevailing party or parties seeking fees. *Hackett v. Streeter*, 109 Idaho 261, 706 P.2d 1372 (Ct. App. 1985). Plaintiffs have failed to do so. For this reason alone, Plaintiffs' claim for an award of attorney fees must be denied. *Lettunich v. Lettunich*, 141 Idaho 425, 435, 111 P.3d 110, 120 (2005).

B. The Time and Labor Requested by Plaintiffs is Unreasonable.

The time and labor actually expended by an attorney is to be considered under I.R.C.P. 54(e)(3)(A), but it is also to be evaluated under a standard of reasonableness. *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 249, 263, 999 P.2d 914 (Ct. App.

DEFENDANT'S SECOND OBJECTION AND MOTION TO DISALLOW
PLAINTIFFS' MEMORANDUM OF COSTS AND FEES AND AMENDED
MEMORANDUM OF COSTS AND FEES - 3

2000). “A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney.” *Id.* (quoting *Craft Wall of Idaho, Inc. v. Stonebreaker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985)). Thus, a court may disallow fees that were unnecessarily and unreasonably incurred. *Id.*

Plaintiffs have included in the time records submitted in support of their request for fees, time spent by their attorney to pursue a motion to compel Defendant to comply with discovery requests for financial and other personal information of Defendant, when Defendant had previously responded that the information would be produced after the court entered an order to protect such information from public disclosure and misuse by Plaintiffs outside the scope and course of the litigation. The court’s records will also show that Plaintiffs further objected to Defendant’s motion for entry of a protective order to prevent the public disclosure and misuse of such information by Plaintiffs. Plaintiffs’ motion to compel was premature and unnecessary and their objection to the Defendant’s motion for a protective order to allow the discovery to occur was without any basis in fact or law. The protective order was entered and the information was produced as promised. There simply was no need for the motion to compel or the objection to a protective order. Thus, Plaintiffs’ claim for an award of attorney fees for such unnecessary and unreasonable actions should be denied.

The failure of Plaintiffs’ counsel to adequately identify and itemize the tasks performed and the issues or matters relevant to those tasks, and particularly the “block billing” contained in the monthly billing invoices that have been submitted to the court, make it impossible to apportion the time and labor relating to the motion to compel and the objection to the protective order. Thus, Defendant objects to any award of attorney fees for the time and labor shown on the

invoices for the dates, April 3 and 8, May 8, 9, 13, 19 and 21, 2008, all of which appear to relate to the unnecessary motion to compel and the objection to the motion for protective order. The total time for those dates is 9.8 hours and the dollar amount is \$2,205.00 at \$225 per hour.

Additionally, there are entries in the billing invoices for time and labor spent on matters that do not relate to prosecution of the lawsuit. The entries are:

1/3/08 "Review Agreements to resolve dispute; draft Extension Agreements for client and Idaho Livestock 4.50 hours \$1,012.50;"

1/4/08 "Revise drafts of Agreements; draft letter to Merlyn Clark 2.00 hours \$450.00;"

Drafting Extension Agreements was not part of the prosecution of the lawsuit. Additional unrelated entries are:

1/16/08 "Review Agreements relating to ditch issues 0.40 hours \$90.00;"

1/17/08 "Draft letter to Merlyn Clark 0.40 hours \$90.00;"

A review of the court's records in this lawsuit will establish there were no "ditch issues" in this action to enforce two purchase contracts. An additional unrelated entry is:

7/2/08, "Review letter client drafts regarding berm and revise; review letters from Ted Mason 1.00 hour \$225 "

A review of the court's records in this lawsuit will establish there was no "berm" issue in this action. The total time for all of these unrelated entries is 8.3 hours or \$1,867.50.

Furthermore, Plaintiffs have included in their claim for attorney fees to be awarded in this action, all of the time that was spent by their attorney to resist the Appeal in the Supreme Court.

These entries are:

1/13/09 "Review Notice; draft letter to client 0.20 hours \$45.00;"

- 1/21/09 "Review Notice of Appeal and analyze; research enforcement and bond issues; research finality issue; draft Motion to Dismiss; draft Request for Additional Documents; draft letter to client 3.20 hours \$720.00;"
- 1/29/09 "Review Objection to Motion to Dismiss; research jurisdiction of lower court of an improper appeal; research specific performance orders as to finality 1.70 hours \$382.50;"
- 2/9/09 "Research interlocutory judgment issues; draft Motion to Dismiss in Supreme Court; begin draft of supporting Memorandum 2.50 hours \$562.50;"
- 2/10/09 "Continue draft of Memorandum in Support of Motion to Dismiss; research specific performance judgment issues 3.70 hours \$832.50;"
- 2/11/09 "Complete draft of Motion to Dismiss and Memorandum in Support of Motion to Dismiss; draft Affidavit in Support of Motion to Dismiss; draft letter to client; analyze objection to costs and fees 4.30 hours \$967.50;"
- 2/23/09 "Review opposition to Motion to Dismiss and analyze; research case law cited by appellant and analyze; telephone conference with Stephan Kenyon at Supreme Court; research jurisdictional issues 2.40 hours \$540.00;"
- 2/24/09 "Research 'finality' issues; continue draft of Reply to Memorandum in Opposition to Motion to Dismiss; draft letter to client 3.30 hours \$742.50;"
- 3/16/09 "Review Clerk's Record on Appeal; draft Request for Addition; draft letter to Merlyn Clark 1.70 hours \$382.50;"
- 3/24/09 "Review Order Conditionally Dismissing Appeal and analyze; review I.R.C.P. 58(a); draft letter to client; telephone conference with Richard Webber 0.80 hours \$180.00;"
- 3/27/09 "Telephone conference with Richard Webber; review request for certification of interlocutory appeal and analyze 1.40 hours \$315.00;"
- 3/29/09 "Research permissive appeal issues 1.30 hours \$292.50;"
- 3/30/09 "Draft letter to client; continue research as to requirement for interlocutory appeal 0.70 hours \$157.50;"

- 3/31/09 "Draft Objection; draft Affidavit of client; begin draft of Memorandum in Support of Objection 7.50 hours \$1,687.50;"
- 4/1/09 "Continue draft of Memorandum in Support of Objection 2.80 hours \$630.00;"
- 4/2/09 "Review E-mail from client; revise draft of Objection 0.80 hours \$180.00;"
- 4/3/09 "Revise draft of Memorandum in Support of Objection; draft Motion for Entry of Judgment; draft Judgment 2.50 hours \$562.50."

These entries, including at least a part of the last entry, appear to relate to the appeal to the Supreme Court. These fees should not be included in any award of fees by the District Court, but rather should be left to the Supreme Court to determine when the appeal, which is currently pending, is ultimately decided. The total number of hours is 53.4 hours or \$12,015.

There are additional entries that appear to be unrelated to this case. They are:

- 4/17/09 "Draft letter to client; draft letter to John Thornton; continue research on foreclosure of Vendor's Lien 1.70 hours \$382.50;"
- 4/20/09 "Finalize letter to Mr. Thornton; telephone conferences with Richard Webber; research foreclosure issues 2.40 hours \$540.00;"
- 4/21/09 "Telephone conference with Richard Webber; telephone conference with John Thornton; prepare documents for Mr. Thornton; work on Judgment issues 1.40 hours \$315.00."

Neither John Thornton nor Richard Webber have any known relevance to this lawsuit and any fees incurred to communicate with them should be denied. The total hours of these entries is 3.5 hours or \$787.50.

I. CONCLUSION

For the foregoing reasons, Plaintiffs' request for an award of attorney fees should be denied or at the very least, reduced to deny the claims for unnecessary or unrelated time and labor

DATED THIS 17th day of June, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



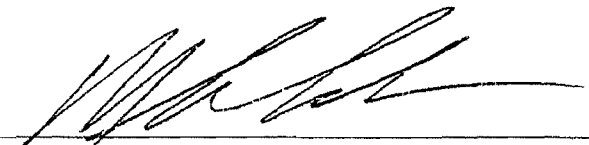
Merlyn W. Clark, ISB No. 1026
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2009, I caused to be served a true copy of the foregoing DEFENDANT'S OBJECTION AND MOTION TO DISALLOW PLAINTIFFS MEMORANDUM OF COSTS AND FEES, and addressed to each of the following:

Derek A. Pica, PLLC
ATTORNEY AT LAW
199 N Capitol Blvd., Ste 302
Boise, ID 83702
[Attorney for Plaintiffs]

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Telecopy - (208) 336-4980



Merlyn W. Clark

| FILE MODE | OPTION | ADDRESS (GROUP) | TTI RESULT | PAGE |
|-----------|-----------|-----------------|---------------|--------|
| 482 | MEMORY TX | 3364980 | OK | P. 9/9 |

REASON FOR ERROR
 E-1) HANG UP OR LINE FAIL
 E-3) NO ANSWER

E-2) BUSY
 E-4) NO FACSIMILE CONNECTION

NO. _____
 FILED
 AM. _____ P.M. _____

JUN 17 2009

J. DAVID NAVARRO, Clerk
 BY L. AMER
 DEPUTY

*file Mason
 Qid BK
 43464-1*

PLEASE CONFORM
 AND RETURN

Merlyn W. Clark, ISB No. 1026
 D. John Ashby, ISB No. 7228
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P O. Box 1617
 Boise, ID 83701-1617
 Telephone: (208) 344-6000
 Facsimile: (208) 342-3829
 Email: mwc@hteh.com
 jash@hteh.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
 FAZZIO, husband and wife, and IDAHO)
 LIVESTOCK COMPANY. LLC. an Idaho)

Case No. CV OC 0801215



AUG 05 2009

J. DAVID NAVARRO, Clerk
By P. BOURNE
DEPUTY

**DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702**

**TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR NO. 3559**

ATTORNEY FOR Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)
)
Plaintiffs,)
)
vs.)
)
EDWARD J. MASON, an individual,)
)
Defendant.)
_____)

Case No. CV OC 0801215

**SUPPLEMENTAL AFFIDAVIT
TO DETERMINE THE
AMOUNT OF ATTORNEY'S
FEES**

STATE OF IDAHO)
) ss.
County of Ada)

DEREK A. PICA, being first duly sworn on oath, deposes and says:

1. That Affiant is the attorney of record for the Plaintiffs in the above entitled action and has personal knowledge of all facts set forth herein.

2. Your Affiant has reviewed the provisions of Rule 54(e)(3) of the Idaho Rules of Civil Procedure, which provides a list of criteria to be utilized by the Court in

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determining reasonable attorney's fees. In evaluating the reasonableness of the fees charged herein, your Affiant would advise the Court as follows:

(a) **Time and Labor Involved:** I keep an accounting of time spent on my cases. I have reviewed all of the billing sheets generated from this case and believe the time and labor reported were reasonably and necessarily incurred to provide a proper prosecution and representation in this matter.

(b) **Novelty and Difficulty:** I believe this case was somewhat complex with respect to the specific performance issues raised at summary judgment.

(c) **Skill, Experience and Ability:** I have been practicing for more than 22 years, during which time I have frequently engaged in civil litigation and have handled many contested matters. I feel I am qualified to act as trial counsel in civil litigation matters based upon my background and experience.

(d) **Prevailing Charges:** The rates charged in this case are standard, customary and comparable to other amounts charged for trial work for private clients for this type of case. As such, I believe that my charges in this case are consistent with, or lower than, the fees charged by other attorneys in the area with comparable experience. In doing so, I would note the recent Supreme Court case of *Bates v. Seldin*, 146 Idaho 772, 203 P.3d 702 (2009). In that case, the Idaho Supreme Court recognized the District Court's finding in another real estate case that trial work in the Boise area ranges from \$250.00 an hour to \$400.00 an hour. *See id.* at 777, 203 P.3d at 707.

(e) **Fee:** The fee agreement among Plaintiffs and me provides for hourly billings consistent with the rate of \$225.00 an hour.

(f) **Time Limitations:** I have time limitations to the extent that I am a solo practitioner, and all of my work on this case was done without help from other attorneys or a paralegal. In contrast, Defendant had more than one attorney handling much of this matter, including attendance at hearings.

(g) **Amount Involved & Results Obtained:** In this action, Plaintiffs sought specific performance of the contracts they had entered into with Defendant. Plaintiffs were granted specific performance and were awarded Judgments totaling \$4,481,648.60. Plaintiffs were awarded all relief requested.

(h) **Undesirability of Case:** I do not know of any undesirable feature of the case.

(i) **Professional Relationship:** I have known the Plaintiffs for several years and have represented them in other matters.

(j) **Award in Similar Cases:** Awards in similar disputes vary widely depending upon the terms of the particular contracts.

(k) **Computer-Assisted Research:** I use, and did utilize in this case, computer-assisted research. The cost of computer research is not inexpensive, but I often view this cost as a part of doing business and did not pass this cost on to the client. As such, I have not requested reimbursement for this cost. I believe computer assisted research is appropriate to maximize an attorney's time and minimize the fees charged to the client.

(l) **Other Factors:** I know of no other factors.

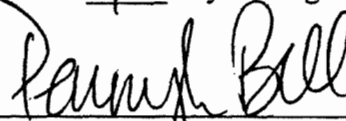
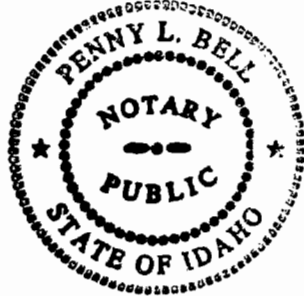
3. Based upon the foregoing, Affiant has billed Plaintiffs \$51,367.50 in attorney's fees and \$88.00 in costs in providing Plaintiffs legal services in this action.

DATED this 4th day of August, 2009.



Derek A. Pica

SUBSCRIBED AND SWORN to before me this 4th day of August, 2009.



NOTARY PUBLIC FOR IDAHO

Residing at: Boise, ID

My Commission Expires: 9/20/2010

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 4th day of August, 2009, I caused a true and correct copy of the foregoing SUPPLEMENTAL AFFIDAVIT TO DETERMINE THE AMOUNT OF ATTORNEY'S FEES to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Merlyn W. Clark
Hawley, Troxell, Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617

Hand Deliver
U.S. Mail
Facsimile
Overnight Mail



Derek A. Pica

In the Supreme Court of the State of Idaho

FRANK J. FAZZIO, JR., and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC,) ORDER GRANTING MOTION TO
) AUGMENT THE RECORD
Plaintiffs-Respondents,)
) Supreme Court Docket No. 36068-2009
v.) Ada County Docket No. 2008-1215
)
EDWARD J. MASON, an individual,)
)
Defendant-Appellant.)

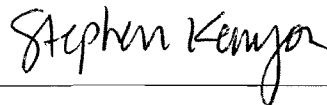
A MOTION TO AUGMENT THE RECORD AND STATEMENT IN SUPPORT THEREOF was filed by counsel for Respondents on October 1, 2009. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Supplemental Judgment for Attorneys Fees and Costs, file-stamped September 17, 2009.

DATED this 6th day of October 2009.

For the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record

COPY

NO. _____ FILED _____
A.M. _____ P.M. _____

SEP 17 2009

J. DAVID NAVARRO, Clerk
By JENNIFER KENNEDY
DEPUTY

DEREK A. PICA, PLLC
ATTORNEY AT LAW
199 N. CAPITOL BLVD., SUITE 302
BOISE, ID 83702

TELEPHONE: (208) 336-4144
FACSIMILE NO.: (208) 336-4980
IDAHO STATE BAR NO. 3559

ATTORNEY FOR Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FRANK J. FAZZIO, JR. and CINDY ANN)
FAZZIO, husband and wife, and IDAHO)
LIVESTOCK COMPANY, LLC, an)
Idaho Limited Liability Company,)

Case No. CV OC 0801215

Plaintiffs,)

vs.)

**SUPPLEMENTAL JUDGMENT
FOR ATTORNEY'S FEES AND
COSTS**

EDWARD J. MASON, an individual,)

Defendant.)

On September 9, 2009, the above-entitled action came before the Court on Plaintiffs' Amended Memorandum of Costs filed June 4, 2009 and Defendant's Second Objection and Motion to Disallow Plaintiffs' Memorandum of Costs and Fees and Amended Memorandum of Costs and Fees filed June 17, 2009. Plaintiffs, Frank J. Fazzio, Jr. and Cindy Ann Fazzio, husband and wife, and Idaho Livestock Company, LLC appeared by and through their attorney of record, Derek A. Pica. Defendant,

Edward J. Mason, appeared by and through his attorney of record, Merlyn W. Clark of the firm Hawley, Troxell, Ennis & Hawley, LLP. The Court, having heard the arguments of each party's counsel; having reviewed the record on file herein; having determined that Plaintiffs are entitled to attorney's fees and costs pursuant to Idaho Code § 12-120(3) and the respective agreements entered into by the parties; having determined that the Idaho Supreme Court has jurisdiction over attorney's fees claimed by Plaintiffs that were incurred in the Idaho Supreme Court in the amount of \$12,015.00; having disallowed \$2,529.00 in attorney's fees claimed by Plaintiffs; and for good cause appearing;

HEREBY ORDERS, ADJUDGES AND DECREES:

That Plaintiffs are awarded attorney's fees in the amount of \$36,911.50 and costs in the amount of \$88.00 for a total Judgment against Defendant, Edward J. Mason, in the sum of \$36,999.50 plus statutory interest thereon at the rate of 5.625% from the date of filing of this Judgment until paid.

DATED this 17 day of September, 2009.

RICHARD D. GREENWOOD

RICHARD D. GREENWOOD
DISTRICT JUDGE