

9-30-2011

# Buku Properties v. Clark Clerk's Record v. 1 Dckt. 38561

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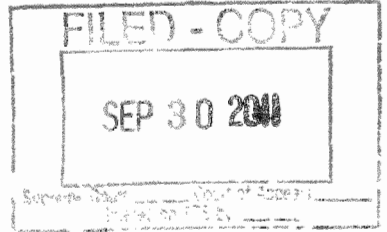
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Vol. 1 of 2

LAW CLERK

Volume 1

IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO



BUKU PROPERTIES, LLC,  
  
Plaintiff-Respondent,  
  
-vs-  
  
RAOEL H. CLARK and JANET C.  
CLARK, ANGUS JERRY PETERSON  
and BETTY JEAN PETERSON,  
  
Defendant-Appellant,

) SUPREME COURT NO. 38561-2011  
)  
) JEFFERSON COUNTY Case No. CV-2008-941  
)  
)  
)

SEE AUGMENTATION RECORD

Appeal from the District court of the 7<sup>th</sup> Judicial District of the State of Idaho, in and for

THE COUNTY OF JEFFERSON  
DANE H. WATKINS, JR.  
DISTRICT JUDGE

ATTORNEY FOR APPELLANT

ATTORNEY FOR RESPONDENT

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DeAnne Casperson  
P.O. Box 50130  
Idaho Falls, ID 83405

Filed this the 24<sup>th</sup> day of August, 2011.

Christine Boulter, Clerk of the District Court

By Nancy Smith  
Deputy



COPY

38561

IN THE SUPREME COURT OF THE STATE OF IDAHO

VOLUME 1

<b>BUKU PROPERTIES , LLC,</b>	)	
	)	
<b>Plaintiff-Respondent,</b>	)	<b>SUPREME COURT NO. 38561-2011</b>
	)	
<b>-vs-</b>	)	<b>Jefferson County Case No. CV-2008-941</b>
	)	
<b>RAOEL H. CLARK and JANET C.</b>	)	
<b>CLARK, ANGUS JERRY PETERSON</b>	)	
<b>and BETTY JEAN PETERSON,</b>	)	
	)	
<b>Defendant-Appellant,</b>	)	
_____	)	

CLERK’S RECORD ON APPEAL

Appeal from the District court of the 7<sup>th</sup> Judicial District of the State of Idaho, in and for

THE  
COUNTY OF JEFFERSON

DANE H. WATKINS  
DISTRICT JUDGE

ATTORNEY FOR APPELLANT

**Robin Dunn**  
**P.O. Box 277**  
**Rigby, ID 83442**

ATTORNEY FOR RESPONDENT

**DeAnne Casperson**  
**P.O. Box 50130**  
**Idaho Falls, ID 83405**

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FILED  
CLERK OF DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV- 2008-941

**VERIFIED COMPLAINT**

Fee Category: A.1.

Fee: \$88.00

Plaintiff Buku Properties, LLC ("Buku"), by and through its counsel of record,  
Holden, Kidwell, Hahn & Crapo, P.L.L.C., as and for a cause of action against the above-  
named Defendants alleges and states as follows:

**I.**

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff Buku is an Idaho limited liability company with its principal place of  
business located in Jefferson County, Idaho.

2. Rael H. Clark and Janet C. Clark, husband and wife (hereinafter "Clarks) are residents of the State of Texas who own property in Jefferson County, Idaho.
3. Angus Jerry Peterson and Betty Jean Peterson, husband and wife (hereinafter "Petersons") are residents of the State of Idaho who own property in Jefferson County, Idaho.
4. Pursuant to Idaho Code § 5-514(c), the State of Idaho has jurisdiction over the Defendants on the basis that they live in and/or own real property in the State of Idaho.
5. Based upon the amount in controversy, jurisdiction is properly before the District Court of the Seventh Judicial District in and for Jefferson County.
6. Pursuant to Idaho Code § 5-401 and 5-404, venue is proper in Jefferson County, Idaho, because the real property that is the subject of the Purchase and Sale Agreements at issue is located in Jefferson County.

**II.**  
**GENERAL ALLEGATIONS**

7. Plaintiff Buku realleges and incorporates by reference the allegations in paragraphs 1 through 6 as though fully set forth herein and further alleges as follows:
8. On or about August 30, 2007, Plaintiff entered into a Purchase and Sale Agreement with Defendants Clarks ("Clark Agreement"), attached hereto as "Exhibit A," for the purchase of approximately 80.17 acres of property located in Jefferson County, Idaho owned by Defendants Clarks. The purchase price for



Defendants Clarks' property was established in the Clark Agreement as \$1,044,075.18. (Exhibit A, ¶ 2).

9. The Clark Agreement required that Plaintiff provide \$25,000.00 in earnest money upon execution of the Clark Agreement and that all such earnest money was refundable until closing. (Exhibit A, ¶ 2(a)).
10. Plaintiff tendered the \$25,000.00 in earnest money to Defendants Clarks on or about August 30, 2007.
11. The Clark Agreement further established that Plaintiff's obligation to purchase the property was subject to a four month due diligence inspection period and Plaintiff's satisfaction with the condition of the property. (Exhibit A, ¶ 3).
12. On or about August 30, 2007, Plaintiff also entered into a Purchase and Sale Agreement with Defendants Petersons ("Peterson Agreement"), attached hereto as "Exhibit B," for the purchase of approximately 73 acres adjacent to Defendants Clarks' property. The purchase price for the property, as established in the Peterson Agreement, was \$980,000.00. (Exhibit B, ¶ 2).
13. The Peterson Agreement established that Plaintiff provide \$327,000.00 in earnest money upon execution of the contract and that all but \$10,000.00 of the earnest money was fully refundable until closing. (Exhibit B, ¶ 2(a)).
14. Plaintiff tendered the \$327,000.00 in earnest money to Defendants Petersons on or about August 30, 2007.

15. The Peterson Agreement established that Plaintiff's obligation to purchase the property was subject to a four month due diligence inspection period and Plaintiff's satisfaction with the condition of the property. (Exhibit B, ¶ 3).
16. At the time the parties entered into each respective Purchase and Sale Agreement, both Defendants Petersons' and Clarks' property was zoned Residential-1 ("R-1"), which would allow a minimum density of one acre lots.
17. At the time of entering into the respective Purchase and Sale Agreements, all parties mutually understood that the sale of both properties was contingent upon Plaintiff being able to develop the property with the density of development accorded to a R-1 zone.
18. Between August 30, 2007 and December 18, 2007, the Jefferson County Planning and Zoning Commission began plans to change the zoning categorization of Defendants Clarks' and Petersons' property to Residential-5 ("R-5"), which would allow a minimum density of five acre lots.
19. Upon performing its due diligence investigation concerning the properties, Plaintiff discovered the Jefferson County Planning and Zoning Commission's plans to change the zoning categorization of Defendants' properties.
20. The appraiser and bank providing Plaintiff with financing for the purchase of Defendants' properties became concerned about financing the purchase of the properties upon notice of the potential change in zoning of the properties. (See Letter from Jeromy L. Hart, Bank of Commerce, attached hereto as "Exhibit C").

21. On December 18, 2007, Plaintiff sent a memorandum to Defendants Clarks, attached hereto as "Exhibit D," and Defendants Petersons, attached hereto as "Exhibit E," giving notice of its objection to the condition of the properties due to the potential of the properties being zoned R-5. The memorandum also contained an offer to extend the closing date to provide Defendants with an opportunity to cure.
22. Defendants responded to the memorandum via a letter from their counsel rejecting the offer to extend the closing date in order to cure, attached hereto as "Exhibit F."
23. Defendants' rejection of Plaintiff's offer to allow time to cure effected a termination of both the Clark Agreement and the Peterson Agreement.
24. Upon termination of the Clark Agreement and Peterson Agreement, Plaintiff was entitled to return of its earnest money provided to Defendants. (Exhibit A, ¶ 2(a); Exhibit B, ¶ 2(a)).
25. On June 17, 2008, demand was made upon Defendants for the return of Plaintiff's earnest money in the amount of \$342,000.00. Defendants did not and have not satisfied the demand.

**FIRST CAUSE OF ACTION**  
**REFUND OF EARNEST MONEY UNDER CONTRACT**

26. Plaintiff Buku realleges and incorporates by reference the allegations in paragraphs 1 through 25 as though fully set forth herein and further allege as follows:

27. Plaintiff and Defendants entered into Purchase and Sale Agreements for the sale of the Defendants Clarks' property and for Defendants Petersons' property, the terms of which are set forth more particularly herein, above.
28. As per the Clark Agreement, Plaintiff paid Defendants Clarks \$25,000.00 in earnest money.
29. Under the terms of the Clark Agreement, the \$25,000.00 earnest money was fully refundable before closing.
30. As per the Peterson Agreement, Plaintiff paid Defendants Petersons \$327,000.00 in earnest money.
31. The Peterson Agreement provided that all but \$10,000.00 of the earnest money under the agreement was refundable before closing.
32. Closing never occurred under either the Clark Agreement or the Peterson Agreement.
33. Under the terms of the Clark and Peterson Agreements, Plaintiff is entitled to a full refund of the \$25,000.00 in earnest money it paid to Defendants Clarks and a refund of \$317,000.00 in earnest money it paid to Defendants Petersons, for a total refund of \$342,000.00.

**SECOND CAUSE OF ACTION**  
**CONVERSION**

34. Plaintiff Buku realleges and incorporates by reference the allegations in paragraphs 1 through 33 as though fully set forth herein and further alleges as follows:

35. Defendants took and exercised dominion over the Plaintiffs' property, the funds provided to Defendants Clarks as earnest money and the funds provided to Defendants Petersons as earnest money.
36. Upon demand by Plaintiff for return of the earnest money prior to closing, Defendants were no longer entitled to hold and exercise dominion and control over Plaintiff's property.
37. Defendants failed to return the funds constituting Plaintiff's property upon Plaintiff's demand.
38. Defendants continue to hold and exercise dominion and control over Plaintiff's property.
39. Based on the Defendants' actions, Plaintiff has been deprived of possession of its property.
40. As a result of Defendants' actions, Plaintiffs have been damaged in an amount to be determined at the trial of this matter.

**THIRD CAUSE OF ACTION**  
**UNJUST ENRICHMENT**

41. Plaintiff Buku realleges and incorporates by reference the allegations in paragraphs 1 through 40 as though fully set forth herein and further allege as follows:
42. Plaintiff conferred benefits upon Defendants by paying Defendants earnest money under the Purchase and Sale Agreements in the amount of \$25,000.00 to Defendants Clarks and \$327,000.00 to Defendants Petersons.

43. The Defendants have appreciated the benefits conferred upon them by continuing to possess the funds.
44. Equity requires Defendants to compensate Plaintiff for the value of such benefits in an amount to be proven at the trial of this matter.

#### **PREJUDGMENT INTEREST**

45. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 44 as though fully set forth herein and further alleges as follows:
46. Plaintiff is owed \$317,000.00 from Petersons and \$25,000.00 from Clarks, which represents the total earnest money refundable under the Purchase and Sale Agreements.
47. Pursuant to Idaho Code § 28-22-104, Plaintiffs are entitled to an award of prejudgment interest as of December 19, 2007, the date of termination of both Agreements, through October 17, 2008, in the amount of \$31,578.42 from Petersons and \$2,490.42 from Clarks. Prejudgment interest continues to accrue at the rate of 12% per annum or \$104.22 per day against Petersons and \$8.22 per day against Clarks.

#### **ATTORNEYS' FEES AND COSTS**

48. Plaintiff Buku realleges and incorporates by reference the allegations in paragraphs 1 through 47 as though fully set forth herein and further alleges as follows:
49. Pursuant to Defendants' actions in this matter, Plaintiff has been required to retain the services of Holden, Kidwell, Hahn & Crapo, P.L.L.C., to obtain a refund of the

earnest money funds to which it is entitled under the Clark and Peterson Agreements.

50. Pursuant to the Peterson Agreement and the Clark Agreement, Plaintiff is entitled to its reasonable attorneys' fees and costs. If this matter is concluded by default, the amount of \$3,000.00 represents reasonable attorneys fees, and a greater amount if this matter is not concluded by default.
51. Pursuant to Idaho Code and the Idaho Rules of Civil Procedure § 12-120(3) and 12-121, Plaintiff is entitled to an award of its attorneys fees in this matter at an amount to be determined upon judgment. If this matter is concluded by default, the amount of \$3,000.00 represents reasonable attorneys fees, and a greater amount if this matter is not concluded by default.

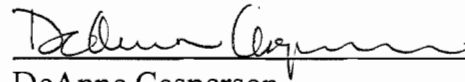
**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for Judgment against the above-named Defendants as follows:

- a. For a money judgment in the principal amount of \$317,000.00 against Petersons and \$25,000.00 against Clarks based on Plaintiffs' claim for refund of earnest money under contract or in any additional amount to be determined at the trial of this matter;
- b. For an award of prejudgment interest in an amount to be determined upon judgment;

- c. For an award of reasonable attorneys fees in the amount of \$3,000.00 if this matter is concluded by default, and a greater amount should be awarded if this matter is contested;
- d. For an award of costs incurred in the prosecution of this matter; and
- e. For such other and further relief as the Court deems just and equitable in the premises.

Dated this 5<sup>th</sup> day of November, 2008.

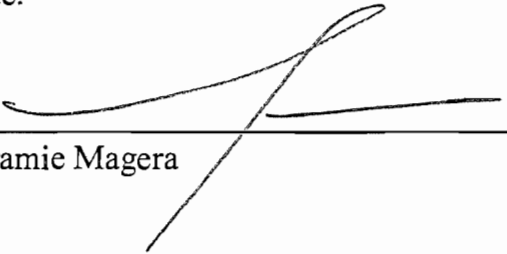


DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



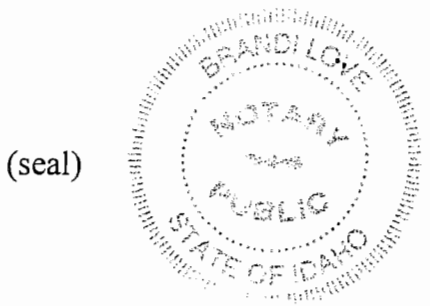
STATE OF IDAHO        )  
                                  )ss.  
County of Bonneville    )

Jaramie Magera, manager and registered agent for Plaintiff Buku Properties, LLC, being first duly sworn, deposes and says: he is the manager and registered agent for Plaintiff in the above-entitled action; that he has read the above and foregoing VERIFIED COMPLAINT, knows the contents thereof and that he believes the facts therein stated to be true.

  
\_\_\_\_\_  
Jaramie Magera

Dated: Oct-15-08

SUBSCRIBED and sworn to before me this 15<sup>th</sup> day of October, 2008.



Brandi Love  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Idaho Falls, ID  
Commission Expires: 4-12-2014

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008-5-11-14  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV- 2008-941

**SUMMONS**

**NOTICE:**

**YOU HAVE BEEN SUED BY THE ABOVE NAMED PLAINTIFF.  
THE COURT MAY ENTER JUDGMENT AGAINST YOU  
WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN  
TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

**TO: DEFENDANT JANET C. CLARK**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within twenty (20) days after service of this Summons on you. If you fail to respond, the court may enter judgment against you as demanded by Plaintiff in the Complaint.

ORIGINAL

23

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

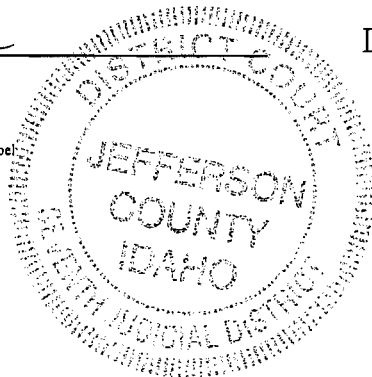
To determine whether you must pay a filing fee with your response, contact the clerk of the above named court.

CLERK OF THE DISTRICT COURT

By: na  
Deputy

Dated: 11/7/08

G:\WPDATA\CAH\14918\Summons JCC.wpd:bel



Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
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Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008-941-5  
JAN 14 2009  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV- 2008-941

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WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN  
TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

**TO: DEFENDANT RAOEL H. CLARK**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within twenty (20) days after service of this Summons on you. If you fail to respond, the court may enter judgment against you as demanded by Plaintiff in the Complaint.

25

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

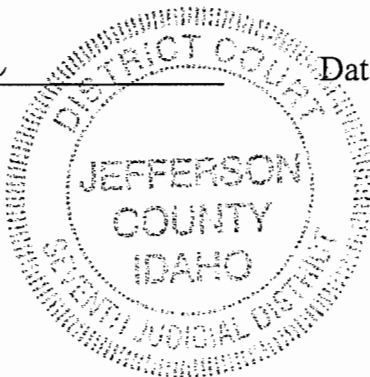
1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the clerk of the above named court.

CLERK OF THE DISTRICT COURT

By: na Deputy Dated: 11/7/08

G:\WPDATA\CAH\14918\Summons RHC.wpd:bel



Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
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P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008-6 P.011 14  
JEFFERSON COUNTY COURT, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV- 2008-941

**SUMMONS**

**NOTICE:**

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THE COURT MAY ENTER JUDGMENT AGAINST YOU  
WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN  
TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

**TO: DEFENDANT ANGUS JERRY PETERSON**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within twenty (20) days after service of this Summons on you. If you fail to respond, the court may enter judgment against you as demanded by Plaintiff in the Complaint.

SNOW

27

A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

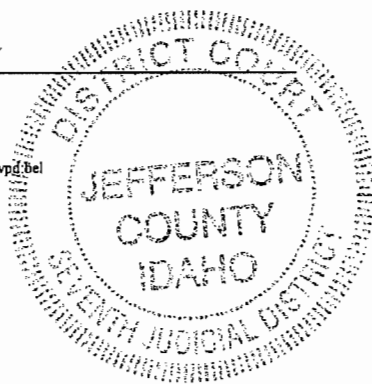
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CLERK OF THE DISTRICT COURT

By: na  
Deputy

Dated: 11/7/08

G:\WPDATA\CAH\14918\Summons AJP.wpd bel



Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
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Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008-5 PAINTING  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV- 2008-941

**SUMMONS**

**NOTICE:**

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THE COURT MAY ENTER JUDGMENT AGAINST YOU  
WITHOUT FURTHER NOTICE UNLESS YOU RESPOND WITHIN  
TWENTY (20) DAYS. READ THE INFORMATION BELOW.**

**TO: DEFENDANT BETTY JEAN PETERSON**

You are hereby notified that in order to defend this lawsuit, an appropriate written response must be filed with the above designated court within twenty (20) days after service of this Summons on you. If you fail to respond, the court may enter judgment against you as demanded by Plaintiff in the Complaint.

29



A copy of the Complaint is served with this Summons. If you wish to seek the advice or representation by an attorney in this matter, you should do so promptly so that your written response, if any, may be filed in time and other legal rights protected.

An appropriate written response requires compliance with Rule 10(a)(1) and other Idaho Rules of Civil Procedure and shall also include:

1. The title and number of this case.
2. If your response is an Answer to the Complaint, it must contain admissions or denials of the separate allegations of the Complaint and other defenses you may claim.
3. Your signature, mailing address and telephone number, or the signature, mailing address and telephone number of your attorney.
4. Proof of mailing or delivery of a copy of your response to Plaintiff's attorney, as designated above.

To determine whether you must pay a filing fee with your response, contact the clerk of the above named court.

CLERK OF THE DISTRICT COURT

By: na  
Deputy

Dated: 11/7/08

G:\WPDATA\CAH\14918\Summons BJP.wpd:bel

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
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Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008 25 P. 3:41  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV-2008-941

**ACKNOWLEDGMENT OF  
ACCEPTANCE OF SERVICE**

COMES NOW Robin D. Dunn of Dunn Law Offices, PLLC, on behalf of the Defendants, Rael H. Clark and Janet C. Clark, and Angus Jerry Peterson and Betty Jean Peterson, in the above entitled proceeding, and hereby acknowledges receipt of service of a copy of the Summons and Complaint issued in the above entitled proceeding pursuant to Rule 4(d)(6) of the Idaho Rules of Civil Procedure and in lieu of any other service under such rules.

Dated this 17 day of November, 2008.



Robin D. Dunn  
Dunn Law Offices, PLLC  
Attorney for Defendants

STATE OF IDAHO            )  
                                          )ss.  
County of Jefferson        )

On the 17<sup>th</sup> day of November, 2008, before me, the undersigned, a notary public in and for said State, personally appeared Robin D. Dunn, known or identified to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

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

(seal)

Janice Field  
Notary Public for Idaho  
Residing at: Crowsville  
My Commission Expires: 11/3/14

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., Prosecutor ISB #2903  
Amelia A. Sheets, Esq., Deputy ISB #5899  
477 Pleasant Country Lane  
P. O. Box 277  
Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

2015 JUL 16 11:13:17  
JEFFERSON COUNTY CLERK

Attorneys for Defendants/Counter-Plaintiffs

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

BUKU PROPERTIES, LLC an Idaho	)	
Limited liability company,	)	Case No. CV-08-941
	)	
Plaintiff,	)	ANSWER
vs.	)	
	)	Fee Category: I.7
RAOEL H. CLARK and JANET C.	)	Fee: \$58.00
CLARK, husband and wife; ANGUS	)	
JERRY PETERSON and BETTY JEAN	)	
PETERSON, husband and wife,	)	
	)	
Defendants.	)	
	)	
RAOEL H. CLARK and JANET C.	)	
CLARK, husband and wife; ANGUS	)	
JERRY PETERSON and BETTY JEAN	)	
PETERSON, husband and wife,	)	
	)	COUNTERCLAIM
Counter-Plaintiffs,	)	
vs.	)	
	)	
BUKU PROPERTIES, LLC an Idaho	)	
Limited liability company; and	)	
JARAMIE MAGERA, an individual,	)	
	)	
Counter-Defendants,	)	
	)	

COMES NOW, defendants Rael H. Clark and Janet C. Clark, hereinafter referred to as "CLARK"; and Angus Jerry Peterson and Betty Jean Peterson, hereinafter referred to as

20

“PETERSON” an answer that Verified Complaint on file herein as follows:

I

These answering defendants deny each and every allegation of the Verified Complaint on file herein unless specifically admitted hereafter.

II

These answering defendants allege that the Complaint on file herein fails to grant a cause of action for which relief may be granted by the above-entitled Court pursuant to the Idaho Rules of Civil Procedure, Rule 12(b)(6).

III

These answering defendants allege and answer each and every numerical paragraph of the plaintiff's Verified Complaint on file as follows:

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.
6. Admit.
7. Defendants re-allege the answers set forth in paragraphs 1 through 6.
8. Admit.
9. Deny.
10. Admit.
11. Deny.
12. Admit.

13. Deny.

14. Admit that the defendants Peterson received the sum of \$327,000.00 and deny the balance thereof.

15. Deny.

16. These answering parties have no opinion and lack information to sufficiently answer and therefore deny the same.

17. Deny.

18. These answering parties have no opinion and lack information to sufficiently answer and therefore deny the same.

19. These answering parties have no opinion and lack information to sufficiently answer and therefore deny the same.

20. These answering parties are without information as to the plaintiff's actions and therefore deny the same.

21. Plaintiff had correspondence with defendants Clark and defendants Peterson and said defendants, therefore, denies the balance of said correspondence and/or allegations.

22. Deny that the memorandum rejected the offer to extend the closing date, but admit correspondence was received and deny the balance of said paragraph.

23. Deny.

24. Deny.

25. Admit that the defendants have made various demands but indicate the demands are without merit, basis or legal foundation and, therefore, deny the same.

26. These answering defendants re-allege the prior answers contained in paragraphs 1 through 25.

27. These answering defendants admit that the contracts labeled Exhibit A and Exhibit B describe the relationship between the parties; and, further allege that additional conversations, actions, documents and the like further were had subsequent to the various written contracts between the parties.

28. Admit that defendants Clark received a sum of money, but deny the balance of said paragraph.

29. Deny.

30. Admit that the defendants Peterson received a sum of money, but deny the balance of said paragraph.

31. Deny.

32. Admit that the plaintiff failed to institute the closing, no fault of either defendant, and that the plaintiff breached the contracts herein.

33. Deny.

34. These answering defendants re-allege the prior answers contained in paragraphs 1 through 33.

35. Deny.

36. Deny.

37. Deny.

38. Deny.

39. Deny.

40. Deny.

41. These answering defendants re-allege the prior answers contained in paragraphs 1 through 40.

42. Deny.

43. Deny.

44. Deny.

45. These answering defendants re-allege the prior answers contained in paragraphs 1 through 44.

46. Deny.

47. Deny.

48. These answering defendants re-allege the prior answers contained in paragraphs 1 through 47.

49. Admit that the plaintiff has, for no appropriate reason, obtained an attorney and denies the balance of said paragraph.

50. Deny.

51. Deny.

#### FIRST AFFIRMATIVE DEFENSE

Specific performance, on the contracts, should be granted to both sets of defendants herein.

#### SECOND AFFIRMATIVE DEFENSE

The plaintiff's cause of action is without merit, not timely instituted and would constitute the defense of laches.

#### THIRD AFFIRMATIVE DEFENSE

The plaintiff's Verified Complaint on file herein is barred by the doctrine of estoppel.

#### FOURTH AFFIRMATIVE DEFENSE

The plaintiff's cause of action is inappropriate based upon the legal theory of



detrimental reliance.

FIFTH AFFIRMATIVE DEFENSE

The plaintiff, through no fault of the defendants, has breached the contract on file herein and has caused irreparable harm and damage to the defendants.

SIXTH AFFIRMATIVE DEFENSE

The defendants have incurred additional time, labor, expense, costs and the like and should be awarded a sum for said additional items as is appropriate and to be proved at trial herein.

SEVENTH AFFIRMATIVE DEFENSE

The defendants are ready, able and willing to perform on the contracts for sale of real property.

EIGHTH AFFIRMATIVE DEFENSE

The defendants have been forced to hire a law firm to defend the Verified Complaint on file herein and are deserving of attorney fees pursuant to statute, rule and case law in the State of Idaho.

COUNTERCLAIM

JURISDICTION AND VENUE

- A. The counterclaim instituted by counter-plaintiffs herein involves real property located in Jefferson County, Idaho.
- B. The real property located in Jefferson County, Idaho and the sum in controversy exceed the sum of \$10,000.00 and confers jurisdiction upon the above-entitled Court by virtue of being real property and exceeding jurisdictional limits to confer

jurisdiction on the above-entitled Court.

- C. Venue is appropriate in Jefferson County, Idaho as the property in question, the counter-defendant and the cause of action all arose in Jefferson County, Idaho.

#### PARTIES

- D. Counter-plaintiffs, Rael H. Clark and Janet C. Clark, are husband and wife, and own real property, the subject of a real estate agreement with said real property being located in Jefferson County, Idaho. Currently, said counter-plaintiffs are residents of Texas.
- E. Counter-plaintiffs, Angus Jerry Peterson and Betty Jean Peterson, are husband and wife, and own real property located in Jefferson County, Idaho which is the subject of a real estate agreement between counter-plaintiffs and counter-defendants. Furthermore, said counter-plaintiffs now reside in Bonneville County, Idaho.
- F. Buku Properties, LLC entered into a real estate agreement with both counter-plaintiffs herein. It is alleged and believed that Buku Properties, LLC is a licensed limited liability company doing business in the State of Idaho and more particularly, in the instant case, within Jefferson County, Idaho. Buku Properties, LLC has failed to completely act on its own accord in all transactions indicated in the plaintiff's Verified Complaint, the defendant's Answer and Counterclaim on file herein.
- G. Jaramie Magera is an individual residing in Jefferson County, Idaho. He has acted outside the scope and authority of Buku Properties, LLC and, has in fact, by his actions and guarantees, led counter-plaintiffs to believe he is acting in his

individual capacity outside of the limited liability company. Further Jaramie Magera has ratified the actions of Buku Properties, LLC as its manager and also made express representations outside of actions of the limited liability company subjecting him to liability as an individual.

CAUSE OF ACTION

COUNT I

SPECIFIC PERFORMANCE

- H. Counter-plaintiffs re-allege paragraphs A-G as though fully set forth herein.
- I. Counter-plaintiffs both entered into binding real estate sale contracts which are attached to the complaint of the plaintiff which is on file in the above-labeled matter.
- J. Both the Clarks, Petersons and counter-defendants understood and agreed to the terms of the contracts.
- K. The contracts were clear and unambiguous; and, prepared by the plaintiffs.
- L. The contracts described all of the necessary terms and conditions of an enforceable agreement.
- M. The counter-plaintiffs have always remained ready, able and willing to perform on the contracts. The counter-plaintiffs have not frustrated the contracts in any manner.
- N. The counter-defendants should be required to perform on the contracts entered into by the parties.
- O. The counter-defendants have exhibited control and domain over the real properties owned by the counter-plaintiffs.

P. The court should order the counter-defendants to perform on the written contracts drafted by the counter-defendants.

COUNT II

BREACH OF CONTRACT

Q. Counter-plaintiffs re-allege paragraphs A-P as though fully set forth herein.

R. Written contracts for the sale of real property were prepared for both sets of counter-plaintiffs.

S. The written contracts are clear and unambiguous and require counter-defendants to purchase real property owned by the counter-plaintiffs.

T. Counter-defendants refuse to complete the written contracts with the counter-plaintiffs and pay the agreed upon price for the subject real property.

U. Counter-defendants have breached the written contracts with counter-plaintiffs.

V. Counter-plaintiffs have been damaged in sums to be presented at trial.

COUNT III

UNJUST ENRICHMENT

W. Counter-plaintiffs re-allege paragraphs A-V as though fully set forth herein.

X. The counter-defendants have failed to honor the written contracts with counter-plaintiffs and have breached the same.

Y. The counter-defendants have gained an unfair advantage upon the counter-plaintiffs.

Z. The counter-plaintiffs have relied upon the representations of the counter-defendants to their detriment. The representations made by the counter-

defendants were written, or if unwritten, were intentional, material and fraudulent.

AA. The counter-defendants have been unduly enriched to the detriment of the counter-plaintiffs.

BB. The counter-plaintiffs have been damaged in a sum to be proven at hearings or trial herein.

COUNT IV

ESTOPPEL

CC. Counter-plaintiffs re-allege paragraphs A-BB as though fully set forth herein.

DD. (1) The counter-defendants made false representations or concealment of material facts made with actual or constructive knowledge of truth; (2) The counter-plaintiffs asserting estoppel did not and could not have discovered the truth; (3) The counter-defendants had an intent that misrepresentations or concealment be relied upon; and (4) The counter-plaintiff asserting estoppel relied on the misrepresentation or concealment to their prejudice.

EE. Alternatively, quasi-estoppel is alleged in that no concealment or misrepresentation of existing facts on one side and no ignorance or reliance on the other is necessary ingredient.

FF. The doctrine of quasi estoppel applies when it would be unconscionable to allow counter-defendants to assert a right which is inconsistent with their prior position.

GG. The counter-plaintiffs have been damaged in a sum to be proven at hearings

or trial of this matter.

HH. The counter-plaintiffs have been prejudiced and have changed their position as result of representations of the counter-defendants and suffered detriment as result thereof.

#### COUNT V

##### PROMISSORY ESTOPPEL/DETRIMENTAL RELIANCE

II. Counter-plaintiffs re-allege paragraphs A-HH as though fully set forth herein.

JJ. (1) The counter-plaintiffs detriment suffered in reliance was substantial in an economic sense, (2) The counter-plaintiffs have substantial loss to promisee acting in reliance which was or should have been foreseeable by promisor (counter-defendants), and (3) Counter plaintiffs have acted reasonably in justifiable reliance on promise as made by the counter-defendants.

KK. The counter-plaintiffs were damaged thereby in a sum to be proven at hearings or at the trial of this matter.

#### COUNT VI

##### CONSUMER PROTECTION VIOLATIONS

LL. Counter-plaintiffs re-allege paragraphs A-KK as though fully set forth herein.

MM. The counter-defendants used unconscionable methods and acts to induce the counter-plaintiffs to sell and continue to keep their real property open for sale to the counter-defendants.

NN. The counter-plaintiffs were damaged by the unconscionable methods and

practices of the counter-defendants.

OO. The acts complained of by the counter-defendants were knowingly made and the conduct or pattern of the counter-defendants would outrage and offend the public conscience.

PP. Damages should be awarded, along with fees and costs, consistent with the Consumer Protection Act.

### COUNT VII

#### ATTORNEY FEES

QQ. Counter-plaintiffs re-allege paragraphs A-PP as though fully set forth herein.

RR. Attorney fees and costs should be awarded to the counter-plaintiffs based upon statute, rule and case law. Most notably, I.C. Sections, 12-120, 12-121; Rule 54; Contract and Case law should guarantee an award to the counter-plaintiffs.

#### JURY TRIAL

The defendants/counter-plaintiffs request a jury trial on all issues that can be set forth before a jury.

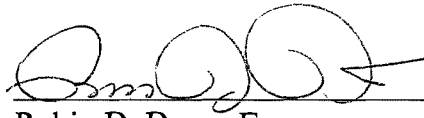
WHEREFORE, defendants, having fully answered the Verified Complaint on file herein, requests as follows:

1. That the Verified Complaint be dismissed with prejudice;
2. That the Court determine a reasonable sum as and for attorney fees and court costs to the defendants for defending the Verified Complaint herein; and,
3. For all further just relief.

WHEREFORE, counter-plaintiffs pray for relief on the Counterclaim as follows:

1. For specific performance;
2. For an award of damages and costs on any breach of contract or unjust enrichment claims;
3. For various findings consistent with the various counts set forth in their Counterclaim above with an award of damages;
4. For reasonable attorney fees pursuant to statute, rule and case law;
5. For costs of Court and other costs reasonably necessary to obtain title reports, conduct business and/or as contained in the Idaho Rules of Civil Procedure;
6. For both pre- and post-judgment interest; and
7. For all further relief which is proper in the premises.

DATED this 9<sup>th</sup> day of December, 2008.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9<sup>th</sup> day of December, 2008, a true and correct copy of the foregoing was delivered to the following person(s) by:

Hand Delivery

Postage-prepaid mail

Facsimile Transmission





Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

Charles A. Homer, Esq.  
P.O. Box 50130  
Idaho Falls ID, 83405

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
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Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008 DEC 29 PM 4:54  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**ANSWER TO COUNTERCLAIM  
BY BUKU PROPERTIES, LLC**

COMES NOW, Counter-Defendant Buku Properties, LLC, (hereinafter referred to as "Buku Properties"), by and through its counsel of record Holden, Kidwell, Hahn & Crapo, P.L.L.C., and hereby answers the Counterclaim of Counter-Plaintiffs Rael H. Clark, Janet C. Clark, Angus Jerry Peterson and Betty Jean Peterson (collectively "Counter-Plaintiffs") as follows:

### **FIRST DEFENSE**

Counter-Plaintiffs fail to state a cause of action against Buku Properties upon which relief may be granted.

### **SECOND DEFENSE**

Buku Properties denies each and every allegation contained in Counter-Plaintiffs' Counterclaim not specifically admitted herein.

### **THIRD DEFENSE**

1. In response to paragraph A of the Counterclaim, Buku Properties admits the allegations.
2. In response to paragraph B of the Counterclaim, Buku Properties admits the allegations.
3. In response to paragraph C of the Counterclaim, Buku Properties admits the allegations.
4. In response to paragraph D of the Counterclaim, Buku Properties admits the allegations.

5. In response to paragraph E of the Counterclaim, Buku Properties admits the first sentence. Buku Properties is without sufficient information and knowledge to admit or deny the remaining allegations, and therefore, denies the same.
6. In response to paragraph F of the Counterclaim, Buku Properties admits that Buku Properties entered into real estate agreements with Counter-Plaintiffs and that Buku Properties is a licensed limited liability company doing business in the State of Idaho and within Jefferson County, Idaho. Buku Properties denies the remainder of the allegations of paragraph F of the Counterclaim.
7. In response to paragraph G of the Counterclaim, Buku Properties admits that Mr. Magera is an individual residing in Jefferson County, Idaho, but denies the remainder of the allegations of paragraph G of the Counterclaim.
8. In response to paragraph H of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through G of the Counterclaim.
9. In response to paragraph I of the Counterclaim, Buku Properties admits that it entered into real estate contracts with Counter-Plaintiffs, copies of which were attached to the Complaint. Buku Properties denies the remaining allegations of paragraph I of the Counterclaim.
10. In response to paragraph J of the Counterclaim, Buku Properties admits it understood and agreed to the terms of the contracts. Buku Properties is without

sufficient information and knowledge to admit or deny the remaining allegations of paragraph J and, therefore, denies the same.

11. In response to paragraph K of the Counterclaim, Buku Properties asserts the contracts speak for themselves and, therefore, no affirmative denial or admission is required.
12. In response to paragraph L of the Counterclaim, Buku Properties asserts the contracts speak for themselves and, therefore, no affirmative denial or admission is required.
13. In response to paragraphs M through P of the Counterclaim, Buku Properties denies the allegations.
14. In response to paragraph Q of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through P of the Counterclaim.
15. In response to paragraph R of the Counterclaim, Buku Properties admits the allegations.
16. In response to paragraph S of the Counterclaim, Buku Properties assert the contracts speak for themselves and, therefore, no affirmative denial or admission is required.
17. In response to paragraph T of the Counterclaim, Buku Properties denies the allegations.

18. In response to paragraph U of the Counterclaim, Buku Properties denies the allegations.
19. In response to paragraph V of the Counterclaim, Buku Properties denies the allegations.
20. In response to paragraph W of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through V of the Counterclaim.
21. In response to paragraphs X through BB of the Counterclaim, Buku Properties denies the allegations.
22. In response to paragraph CC of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through BB of the Counterclaim.
23. In response to paragraphs DD through HH of the Counterclaim, Buku Properties denies the allegations.
24. In response to paragraph II of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through HH of the Counterclaim.
25. In response to paragraphs JJ and KK of the Counterclaim, Buku Properties denies the allegations.

26. In response to paragraph LL of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through KK of the Counterclaim.
27. In response to paragraphs MM through PP of the Counterclaim, Buku Properties denies the allegations.
28. In response to paragraph QQ of the Counterclaim, Buku Properties incorporates its admissions, denials, and responses to paragraphs A through PP of the Counterclaim.
29. In response to paragraphs RR of the Counterclaim, Buku Properties denies the allegations.

**FIRST AFFIRMATIVE DEFENSE**

30. Buku Properties asserts that Counter-Plaintiffs have failed to plead and/or properly serve its Counterclaim on all parties alleged to be subject to Counter-Plaintiff's Counterclaim.

**SECOND AFFIRMATIVE DEFENSE**

31. Buku Properties assert that some or all of Counter-Plaintiffs' claims are barred by Idaho Code § 30-6-304.

**THIRD AFFIRMATIVE DEFENSE**

32. Buku Properties assert that Counter-Plaintiffs' action is barred due to failure of condition precedent.

**FOURTH AFFIRMATIVE DEFENSE**

33. Buku Properties assert that Counter-Plaintiffs' action is barred due to Counter-Plaintiffs' failure to cure the defect in the property.

**FIFTH AFFIRMATIVE DEFENSE**

34. Buku Properties assert that Counter-Plaintiffs' action is barred due to Counter-Plaintiff's breach of the contract.

**SIX AFFIRMATIVE DEFENSE**

35. Buku Properties assert that Counter-Plaintiffs have failed to mitigate their alleged damages.

**SEVENTH AFFIRMATIVE DEFENSE**

36. Buku Properties assert that Counter-Plaintiffs breached an implied covenant of good faith and fair dealing by retaining the earnest monies.

**EIGHTH AFFIRMATIVE DEFENSE**

37. Buku Properties assert that Counter-Plaintiffs' damages, if any, are the result of their own actions or inactions, or the actions or inactions of others for whom Buku Properties is not responsible.

**NINTH AFFIRMATIVE DEFENSE**

38. Buku Properties has considered and believes there may be additional defenses to the Counter-Plaintiffs' Counterclaim, however, do not have sufficient information at this time to assert additional defenses pursuant to Rule 11 of the Idaho Rules of



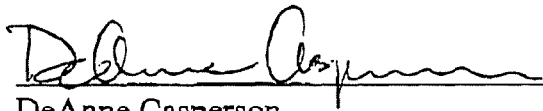
Civil Procedure. Buku Properties does not intend to waive any additional defenses and specifically reserves the right to assert additional defenses as discovery in this matter proceeds.

**PRAYER FOR RELIEF**

WHEREFORE, Buku Properties prays for Judgment against the above-named Counter-Plaintiffs as follows:

- a. That the Counterclaim in this matter be dismissed with prejudice;
- b. For judgment to include an award of reasonable costs and attorney's fees;  
and
- c. For such other and further relief as the Court deems just, proper and equitable in the premises.

DATED this 29<sup>th</sup> day of December, 2008.

  
 \_\_\_\_\_  
 DeAnne Casperson

29

**CERTIFICATE OF SERVICE**

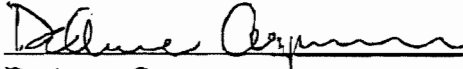
I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 29<sup>th</sup> day of December, 2008.

**DOCUMENT SERVED: ANSWER TO COUNTERCLAIM BY BUKU PROPERTIES, LLC**

**ATTORNEYS AND/OR INDIVIDUALS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2009 APR 15 AM 11:56  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE OF SERVICE**

ORIGINAL

56

PLEASE TAKE NOTICE that the Plaintiff, Buku Properties, LLC, pursuant to the Idaho Rules of Civil Procedure, are this 14<sup>th</sup> day of April, 2009, forwarding a copy of Plaintiff's First Set of Discovery Requests to Defendants Rael H. Clark and Janet C. Clark, by service upon their counsel, Robin D. Dunn, Esq.

Please also be advised that Plaintiff's counsel is retaining the original discovery requests.

Date: 4/14/09

  
\_\_\_\_\_  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of April, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.


**DOCUMENT SERVED:**

**NOTICE OF SERVICE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson, Esq.

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2009 APR 15 AM 11:56  
JEFFERSON COUNTY IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE OF SERVICE**

**ORIGINAL**

59

PLEASE TAKE NOTICE that the Plaintiff, Buku Properties, LLC, pursuant to the Idaho Rules of Civil Procedure, are this 14<sup>th</sup> day of April, 2009, forwarding a copy of Plaintiff's First Set of Discovery Requests to Defendants Angus Jerry Peterson and Betty Jean Peterson, by service upon their counsel, Robin D. Dunn, Esq.

Please also be advised that Plaintiff's counsel is retaining the original discovery requests.

Date: 4/14/09

  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of April, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.


**DOCUMENT SERVED:**

**NOTICE OF SERVICE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
 \_\_\_\_\_  
 DeAnne Casperson, Esq.

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61



DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
PO Box 277  
477 Pleasant county Lane  
Rigby ID 83442-0276  
Telephone: (208) 745-9202  
Facsimile: (208) 745-8160

2008 JUN -3 PM 4:41  
CLERK OF DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

[rdunn@dunnlawoffices.com](mailto:rdunn@dunnlawoffices.com)

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )

Plaintiff, )

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Defendants. )

---

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

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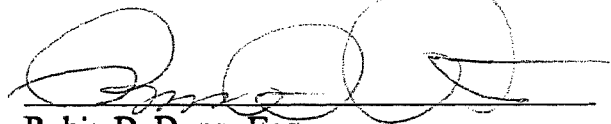
Case No. CV-08-941

NOTICE OF SERVICE

62

I HEREBY CERTIFY that the following document was served, by postage pre-paid mailing, to plaintiff's attorney, DeAnne Casperson, Esq., P.O. Box 50130, Idaho Falls, Idaho 83405 together with a copy of this notice, on the 3rd day of June, 2009:

- 1) *Defendants Peterson Answers to Plaintiff's First Set of Discovery Requests.*



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2009 OCT -6 PM 2:07  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.


Case No. CV-08-941

**MOTION FOR SUMMARY  
JUDGMENT**

64

Plaintiff Buku Properties, LLC, by and through its counsel of record, Charles A. Homer and DeAnne Casperson, of Holden, Kidwell, Hahn & Crapo, P.L.L.C., move the Court pursuant to Rule 56(a) of the Idaho Rules of Civil Procedure for Summary Judgment granting to Plaintiff the relief requested in Plaintiff's Verified Complaint and Answer to Counter-claims filed herein. This Motion is based upon the Affidavit of DeAnne Casperson, Affidavit of Jaramie Magera, and is also supported by the Memorandum in Support of Motion for Summary Judgment, filed simultaneous with this Motion.

DATED this 5<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
DeAnne Casperson, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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**CERTIFICATE OF SERVICE**

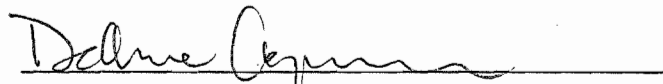
I hereby certify that on this 5<sup>th</sup> day of October, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:                    MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008 OCT -6 PM  
DISTRICT CLERK  
JEFFERSON COUNTY, ID

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

## I. INTRODUCTION

This memorandum is filed in support of Plaintiff Buku Properties, LLC's Motion for Summary Judgment, which seeks judgment as a matter of law as to Plaintiffs' allegations in their Verified Complaint and as to Defendants' Counterclaims.

## II. STATEMENT OF FACTS

Plaintiff Buku Properties, LLC (hereinafter "Plaintiff" or "Buku"), through its Verified Complaint (hereinafter "Complaint") filed November 6, 2008, brought suit for the return of earnest money deposits on the terminated sale of property located in Jefferson County owned by Defendants Rael H. Clark and Janet C. Clark (hereinafter "Clarks") and Angus Jerry Peterson and Betty Jean Peterson (hereinafter "Petersons").

This action arises out of two purchase and sale agreements. On August 30, 2007, Plaintiff entered into a Purchase and Sale Agreement with Defendants Clarks ("Clark Agreement") for the purchase of approximately 80.17 acres of property located in Jefferson County, Idaho, owned by the Clarks (hereinafter the "Clark Property"). (Affidavit of Jaramie Magera ("Magera Aff."), ¶ 4, Ex. A). Pursuant to the Clark Agreement, the purchase price for the property was established as \$1,044,075.18. (Magera Aff., ¶ 5, Ex. A). The Clark Agreement established that Buku's obligation to purchase the property was subject to a four month due diligence inspection period and Buku's satisfaction with the condition of the property and any requirements for Buku's purposes. (Magera Aff., ¶ 6, Ex. A). Subsequent to Buku and Clarks executing the Clark Agreement, Buku and Clarks entered into

negotiations regarding Buku providing an earnest money deposit to Clarks. (Magera Aff., ¶ 7, Ex. A). Buku and Clarks orally agreed that Buku would provide to Clarks an earnest money deposit in the amount of \$25,000 and that such earnest money would be fully refundable until closing. (Magera Aff., ¶ 8, Ex. A). On or about October 15, 2007, Buku tendered to Clarks earnest money in the amount of \$25,000. (Magera Aff., ¶ 9, Ex. A). On or about October 23, 2007, Buku and Clarks amended the Clark Agreement to reflect the oral agreement between the parties regarding the earnest money tendered to Clarks by Buku. (Magera Aff., ¶ 10, Ex. A)

On or about August 30, 2007, Plaintiff also entered into a Purchase and Sale Agreement with Defendants Petersons for the purchase of approximately 73 acres adjacent to Defendant Clarks' property (hereinafter the "Peterson Property"). (Magera Aff., ¶ 11, Ex. B). The purchase price for the property, as established in the Peterson Agreement, was \$980,000.00. (Magera Aff., ¶ 10, Ex. B). The Peterson Agreement established that Plaintiff provide \$327,00.00 in earnest money upon execution of the contract and that all but \$10,000.00 of the earnest money was fully refundable until closing. (Magera Aff., ¶ 11, Ex. B). Plaintiff tendered \$327,000.00 in earnest money to Defendants Petersons on or about August 30, 2007. (Magera Aff., ¶ 12, Ex. B). The Peterson Agreement established that Plaintiff's obligation to purchase the property was subject to a four month due diligence inspection period and Plaintiff's satisfaction with the condition of the property. (Magera Aff., ¶ 13).



At the time both parties entered into each respective Purchase and Sale Agreement, both the Clark Property and the Peterson Property were zoned Residential-1 ("R-1"), which would allow a minimum density of one acre lots. (Magera Aff., ¶ 14). Further, all parties understood at the time of entering into the Purchase and Sale Agreements that the sale of both properties was contingent upon Plaintiff being able to develop the properties with the density of development accorded to an R-1 zone. (Magera Aff., ¶¶ 15-16).

Between August 30, 2007 and December 18, 2007, the Jefferson County Planning and Zoning Commission<sup>1</sup> began plans to change the zoning categorization of the Clark Property and Peterson Property to Residential-5 ("R-5"), which would allow a minimum density of five acre lots. (Magera Aff., ¶ 16, Ex. C). The development as contemplated by the parties could not occur unless Jefferson County "grandfathered" the development to exempt it from the zoning ordinances. (Magera Aff., ¶ 18). Upon performing its due diligence investigation concerning the properties, Plaintiff discovered Jefferson County Planning and Zoning Commission's plans to change the zoning categorization of the two properties. (Magera Aff., ¶ 18). Defendants also knew of the problem because both Plaintiff and Defendants attended the County Zoning meetings. (Magera Aff., ¶ 18). The appraiser and bank providing Plaintiff with financing for the purchase of the properties became concerned about financing the purchase of the properties upon notice of the potential change in zoning the of the properties because the value of the properties was significantly less if the zoning was

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<sup>1</sup>Counsel for the Clarks and Petersons is also counsel for Jefferson County. (Magera Aff., ¶ 17, Ex. C).

made demand upon Defendants for return of the earnest money, at which time Defendants were no longer entitled to exercise dominion and control over Plaintiff's property. Defendants have failed to return the funds upon Plaintiff's demand, and continue to hold and exercise dominion and control over Plaintiff's funds. Thus, pursuant to Idaho case law, Defendants have wrongfully converted Plaintiff's funds, and Plaintiffs are entitled to damages arising from Defendants' actions.

**E. Defendants have been unjustly enriched by keeping Plaintiff's earnest money deposit.**

Defendants have been unjustly enriched by keeping Plaintiff's earnest money deposit. "The elements of unjust enrichment are that (1) a benefit is conferred on the defendant[s] by the Plaintiff, (2) the Defendant[s] appreciate[] the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment of the value of the benefit." *Teton Peaks Investment Co., LLC v. Ohme*, 146 Idaho 394, 195 P.3d 1207, 1211 (2008). Here, Plaintiff deposited with Defendants a total sum of \$352,000.00 as earnest money, of which Plaintiff is entitled to a return of \$342,000.00 pursuant to the Agreements. The \$342,000.00 in earnest money which Defendants continue to hold is a benefit conferred on Defendants' by Plaintiff, and Defendants have appreciated that benefit in continuing to possess those funds. Further, it is inequitable for Defendants to retain the funds, as Defendants have provided nothing in exchange to Plaintiff for the funds. Defendants could have extended closing and cured the zoning defect. Instead, Defendants refused to cure, cancelling the Agreements and wrongfully retained the earnest monies. Thus, Defendants have been unjustly enriched.

changed. The bank would not agree to fund the purchase with the zoning change. (Magera Aff., ¶ 19, Ex. D).

On December 18, 2007, Plaintiff sent a memorandum to Defendants Clarks and Petersons giving notice of its objection to the condition of the properties due to the potential of the properties being zoned R-5. (Magera Aff., ¶ 20, Ex. E and Ex. F). The memorandum also contained an offer to extend the closing date to provide Defendants with an opportunity to cure the unacceptable condition. (Magera Aff., ¶ 20, Ex. E and Ex. F). Defendants responded to the memorandum via a letter from their counsel rejecting the offer to extend the closing date in order to cure, thereby terminating the Clark and Peterson Agreement. (Magera Aff., ¶ 21, Ex. G). Plaintiff made demand upon Defendants for the return of Plaintiff's earnest money in the amount of \$342,000.00 on June 17, 2008. (Magera Aff., ¶ 22, Ex. H). Defendants did not and have not satisfied the demand. (Magera Aff., ¶ 23).

### III. ARGUMENT

#### A. Summary Judgment Standard

Pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, the Court should grant summary judgment based on the pleadings and affidavits where "there [are] no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *see also Idaho Building Contractors Assoc. v. City of Coeur d'Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). The Court will construe all disputed facts in favor of the non-moving party as well as all *reasonable* inferences. *Hayward v. Jacks Pharmacy, Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005).

**B. Plaintiff is entitled to a refund of its earnest money deposits pursuant to the Clark and Peterson Agreements based upon the plain and unambiguous language of the contract.**

“If the language of a contract is unambiguous, then its meaning and legal effect must be determined from its words.” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). In the case at hand, the Clark Agreement and the Peterson Agreement are unambiguous and neither party has asserted otherwise. Therefore, it must be enforced according to its terms.

Plaintiff has complied with all provisions of the Clark and Peterson Agreements so as to entitle it to a refund of the earnest money it deposited pursuant to both Agreements. Paragraph 2(a) of the Clark Agreement specifically states that “all of such earnest Money shall be refundable until closing.” (*See Magera Aff., Ex. A*). Paragraph 2(a) of the Peterson Agreement likewise states “\$10,000.00 of the earnest money shall be non-refundable, the balance fully refundable until closing.” (*See Magera Aff., Ex. B*). Furthermore, pursuant to paragraph 3 of each of the Agreements, Plaintiff had four months to perform its due diligence inspections on the properties as follows:

Prior to closing, it is Buyer’s obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer’s interests and concerns regarding the purchase. Thus, closing will be on or before December 21, 2007.

(*See Magera Aff., Ex. A and Ex. B, ¶ 3*).

In addition, paragraph 25 of the Peterson Agreement states:

Buyer and Seller agree that Buyer intends to develop the property sold under this agreement. Seller's property cannot be developed without an adjacent property known as the Clark property. Buyer and Seller agree that the purchase and sale herein are contingent upon Clark selling to Buyer. If Clark does not sell to Buyer, then Buyer has no obligation to close with Seller, and the earnest money will be returned to Buyer. . . .

(Magera Aff., Ex. B). Paragraph 25 of the Clark Agreement contains similar language, making sale of the Clark Property contingent upon sale of the Peterson Property to Plaintiff.

(See Magera Aff., Ex. A).

During the due diligence period, Plaintiff discovered that Jefferson County was planning to change the zoning of both the Clark Property and Peterson Property from R-1, in which the minimum allowable lot size is one acre, to R-5, in which the minimum allowable lot size is five acres. (Magera Aff., ¶ 16-17; Ex. C). Because the purchase price for the properties was based upon the value of the properties as being zoned R-1, this potential change created serious problems for Plaintiff. (Magera Aff., ¶¶ 15, 19). More specifically, the bank providing Plaintiff with financing for the purchase informed Plaintiff that the zoning had to remain R-1 in order for the Bank of Commerce to fund the loan. (See Magera Aff., ¶ 19, Ex. D).

Plaintiff notified both the Clarks and the Petersons of its issue with the rezoning of the property on December 18, 2007, via a memorandum. The memorandum to the Petersons stated:

Buku Properties, LLC, and A. Jerry Peterson agree that with the recent county zone change, both parties need additional time to review the contract. Because of the County Commissioner's recent proposed county-wide zone change, resulting in this property potentially being zoned R-5. The appraiser and the bank dealing with Buku Properties, LLC have legitimate concerns with

financing. We agree to move our closing date back from December 21, 2007, to March 1, 2008. We will continue to talk and cooperate with each other.

(Magera Aff., Ex. F). The memorandum to the Clarks contained identical language. (See Magera Aff., Ex. E).

In a letter from their counsel dated December 19, 2007, Petersons and Clarks refused to cure the zoning defect and rejected Plaintiff's offer to extend the closing date for the Agreements. (See Magera Aff., Ex. G). Such letter terminated the Clark and Peterson Agreements, as a result of their refusal to cure the concerns, and entitled Plaintiff to the return of the earnest money deposited for each Agreement.

There is no question of fact that Plaintiff complied with all terms of the Agreements. Plaintiff provided Clarks and Petersons with notice of the zoning defect during the contractual due diligence period, and offered Clarks and Petersons the opportunity to potentially cure the defect by providing for the extension of the closing dates of the Agreements. Clarks and Petersons' refusal to cure and rejection of Plaintiff's offer to extend the closing dates was a termination of the Agreements. Because of the termination, closing never occurred. As such, pursuant to paragraph 2(a) of each of the respective Agreements, Plaintiff is entitled to the return of the earnest money it deposited for the purchase of the Clark and Peterson Properties in the amounts of \$25,000.00 and \$317,000.00, respectively.

Based on the plain language of the Agreements, and Defendants' failure to cure, Plaintiff is entitled to a refund of its earnest monies, as well as summary judgment against Defendants on their specific performance and breach of contract claims.

**C. Even if Defendants' failure to cure did not terminate the Agreements, the doctrine of frustration terminated the Agreements.**

Plaintiff was not obligated to close on the properties because the zoning change frustrated the purpose of the Agreements. "The frustration principle operates in a proper situation to excuse a promisor's duty of performance if some supervening event has destroyed the value of the counter-performance bargained for by the promisor, even though the counter-performance is still literally possible." *Twin Harbors Lumber Co.*, 92 Idaho 343, 348, 442 P.2d 753, 758 (1968).

Defendants were well aware that the value of the properties was substantially reduced by the zoning problems. In fact, Plaintiff could not obtain financing based on the zoning change. Consequently, although the Agreements were literally possible, the purpose and value were destroyed. Consequently, Plaintiff is entitled to a refund of its earnest monies and summary judgment on Defendants' specific performance and breach of contract claims, even if the Agreements had not been terminated by Defendants' failure to cure.

**D. Defendants have wrongfully converted Plaintiff's earnest money deposit.**

Generally, conversion is defined as a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with rights therein. *See Luzar v. Western Sur. Co.*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). A right of action accrues in favor of the owner of property as soon as the property is wrongfully taken from his possession or wrongfully converted. *See Davidson v. Davidson*, 68 Idaho 58, 63, 188 P.2d 329, 332 (1947). Defendants currently exercise dominion and control over Plaintiff's property, i.e., the earnest money funds provided to Defendants Clark and Peterson. Plaintiff

**CERTIFICATE OF SERVICE**

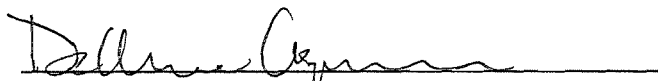
I hereby certify that on this 5<sup>th</sup> day of October, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:                    MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

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selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state.” None of the actions outlined in that definition apply to Plaintiff because Plaintiff was not selling or leasing any goods or services. Plaintiff was always the buyer in the transactions at issue. Therefore, Defendants have no cause of action against Plaintiff.

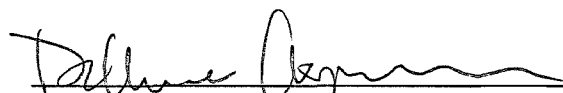
**H. Plaintiff is entitled to attorneys’ fees.**

Plaintiff is entitled to a recovery of attorneys’ fees pursuant to the Idaho Rules of Civil Procedure and Idaho Code §§ 12-120(3), as well as paragraph 23 of the Clark and Peterson Agreements.

**IV. CONCLUSION**

Plaintiff complied with all terms and conditions of the Clark and Peterson Agreements. Because the earnest money deposited by Plaintiff for the purchase of the Clark and Peterson Properties was fully refundable until closing, and because such closing did not occur because a condition found during due diligence was not cured, Plaintiff is entitled to the return of the earnest money. Defendants have converted Plaintiff’s funds and have been unjustly enriched by wrongfully retaining Plaintiff’s funds. Defendants have no viable causes of action against Plaintiff and they should be dismissed.

DATED this 5<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
DeAnne Casperson, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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P.3d 1277, 1279 (2002). Plaintiff assumes that Defendants' alleged reliance was reliance was on completion of the sale of the property pursuant to the Agreements. However, Defendants' reliance was unreasonable. The Agreements themselves set out that there was a possibility that the sales would not ultimately close. This is evident from the term providing for the return of earnest money funds prior to closing, as well as from the term providing for a four month due diligence period. Thus, because Defendants' reliance was unreasonable, Defendant cannot satisfy the necessary elements for promissory estoppel/detrimental reliance.

**G. Plaintiff did not engage in consumer protection violations.**

Defendants allege that Plaintiff has violated the Idaho Consumer Protection Act. However, the Consumer Protection Act does not apply to the Agreements. More specifically, Defendants assert that “[t]he counter-defendants used unconscionable methods and acts to induce the counter-plaintiffs to sell and continue to keep their real property open for sale to the counter-defendants.” This allegation apparently refers to Idaho Code § 48-603C which states:

(1) Any unconscionable method, act or practice in the conduct of any trade or commerce violates the provisions of this chapter whether it occurs before, during, or after the conduct of the trade or commerce.

Idaho Code § 48-603C makes reference to “the conduct of any trade or commerce,” and thus, for the statute to be applicable as against Plaintiff, Plaintiff would have had to engaged in trade or commerce. Idaho Code § 48-602(2) defines “trade” and “commerce” for the purposes of the Idaho Consumer Protection Act to mean “the advertising, offering for sale,

**F. Defendants cannot satisfy the elements of equitable estoppel or promissory estoppel/detrimental reliance.**

Defendants assert the doctrines of estoppel and promissory estoppel/detrimental reliance in their counter-claim. However, neither of these doctrines apply as against Plaintiff.

Although Defendants refer to “estoppel” in Count IV of their counter-claim, based upon Defendants’ allegations, it appears that Defendants are asserting equitable estoppel. The elements of equitable estoppel are (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon, and (4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the representation or concealment to his prejudice. *See Winn v. Campbell*, 145 Idaho 727, 732, 184 P.3d 852, 857 (2008). Plaintiff is unsure as to what alleged false representation or concealment of material fact Defendants are asserting, and, for that matter, how that alleged false representation or concealment of material fact affects the remainder of the elements of estoppel. However, Plaintiff engaged in no false representations or concealment of material fact regarding the Agreements. Therefore, Defendants cannot satisfy the necessary elements for equitable estoppel.

Additionally, Defendants assert promissory estoppel/detrimental reliance. Promissory estoppel requires that (1) one party's reliance on a promise creates a substantial economic detriment, (2) the reliance was or should have been foreseeable, and (3) the reliance was reasonable and justified. *See Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 29, 56

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

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DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**AFFIDAVIT OF JARAMIE MAGERA  
IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

STATE OF IDAHO            )  
                                          )ss  
County of Jefferson        )

Jaramie Magera, being first duly sworn on oath deposes and states as follows:

1. I am over 18 years of age and I make this Affidavit based on my own personal knowledge. I understand that in making this Affidavit, I am providing sworn testimony under oath, which may be provided to the Court in this case and under penalty of perjury.
2. I reside in Jefferson County, Idaho.
3. I am the manager of Buku Properties, LLC (hereinafter “Buku”), an Idaho limited liability company, with its principal place of business located in Jefferson County, Idaho.
4. On or about August 30, 2007, Buku entered into a Purchase and Sale Agreement with Rael H. Clark and Janet C. Clark (hereinafter the “Clark Agreement”), for the purchase of approximately 80.17 acres of property located in Jefferson County, Idaho owned by Rael H. Clark and Janet C. Clark (hereinafter “Clarks”)
5. The purchase price for the Clarks’ property was established in the Clark Agreement as \$1,044,075.18.
6. The Clark Agreement established that Buku’s obligation to purchase the property was subject to a four month due diligence inspection period and Buku’s

- satisfaction with the condition of the property and any requirements for Buku's purposes.
7. Subsequent to Buku and Clarks executing the Clark Agreement, Buku and Clarks entered into negotiations regarding Buku providing an earnest money deposit to Clarks.
  8. Buku and Clarks orally agreed that Buku would provide to Clarks an earnest money deposit in the amount of \$25,000 and that such earnest money would be fully refundable until closing.
  9. On or about October 15, 2007, Buku tendered to Clarks earnest money in the amount of \$25,000.
  10. On or about October 23, 2007, Buku and Clarks amended the Clark Agreement to reflect the oral agreement between the parties regarding the earnest money tendered to Clarks by Buku. A true and correct copy of the Clark Agreement with such amendment is attached hereto as Exhibit A.
  11. On or about August 30, 2007, Buku also entered into a Purchase and Sale Agreement with Angus Jerry Peterson and Betty Jean Peterson (hereinafter "Petersons"), a true and correct copy of which is attached hereto as Exhibit B, (hereinafter "Peterson Agreement") for the purchase of approximately 73 acres adjacent to the Clark property.
  12. The purchase price for the Peterson property, as established in the Peterson Agreement, was \$980,000.00.

13. The Peterson Agreement established that Buku provide \$327,000.00 in earnest money upon execution of the contract and that all but \$10,000.00 of the earnest money was fully refundable until closing.
14. Buku tendered the \$327,000.00 in earnest money to Petersons on or about August 30, 2007.
15. The Peterson Agreement established that Plaintiff's obligation to purchase the property was subject to a four month due diligence inspection period and Buku's satisfaction with the condition of the property and any requirements necessary for Buku's purposes.
16. At the time the parties entered into each respective Purchase and Sale Agreement, both the Peterson property and the Clark property were zoned Residential-1 ("R-1"), which would allow a minimum density of one acre lots.
17. Buku intended to purchase the properties for a residential development. Buku's development plan was based on being able to sell lots of at least as small as one acre. Buku obtained a financial commitment for the purchase of the properties from the Bank of Commerce based on its development plan of approximately one-acre lots.
18. At the time of entering into the respective Purchase and Sale Agreements, all parties mutually understood that the purchase of both properties was subject to Buku being able to develop the property with the density of development accorded to a R-1 zone, i.e., one-acre lots.

19. Between August 30, 2007 and December 18, 2007, the Jefferson County Planning and Zoning Commission began plans to change the zoning categorization of the Clark property and the Peterson property to Residential-5 (“R-5”), which would allow a minimum density of five acre lots. A true and correct copy of a newspaper article is attached as Exhibit C that describes the County’s proposed zone changes, which included the two properties.
20. Upon performing its due diligence investigation concerning the properties, Plaintiff discovered the Jefferson County Planning and Zoning Commission’s plans to change the zoning categorization of the Clark and Peterson properties. The development could not go forward as planned unless Jefferson County “grandfathered” the development to exempt it from the zoning ordinances. Both the Clarks and Peterson’s were aware of the problem because we all attended the zoning meetings.
21. The appraiser and bank providing Buku with financing for the purchase of the Clark and Peterson properties became concerned about financing the purchase of the properties upon notice of the potential change in zoning of the properties. In mid December 2007, I had a telephone conference with Jeromy Hart from the Bank of Commerce. He informed me the Bank of Commerce would not fund the loan if the zoning was changed because the value of the properties would be substantially less. In early January 2008, Mr. Hart confirmed the Bank’s position



in a letter to me. (See Letter from Jeromy L. Hart, Bank of Commerce, a true and correct copy of which is attached hereto as Exhibit D).

22. On December 18, 2007, Buku sent a memorandum to Clarks, attached hereto as Exhibit E, and Petersons, attached hereto as Exhibit F, giving notice of its objection to the condition of the properties due to the potential of the properties being zoned R-5. Because Buku's due diligence period was nearly at an end, the zoning issue for the properties had to be resolved before Buku was willing to proceed to closing. The memorandum also contained an offer to extend the closing date to provide Clark and Peterson with sufficient time to cure the defect identified by Buku during its due diligence period.
23. On December 19, 2007, Clark and Peterson responded to the memorandum via a letter from their counsel rejecting the offer to extend the closing date in order to cure, a true and correct copy of which is attached hereto as Exhibit G.
24. Buku continued to try and resolve the matter, but considered the Agreements terminated as a result of the Clarks and Peterson's refusal to cure the zoning defect as identified by Buku during its due diligence period.
25. The parties could not come to new agreements for the purchase of the properties. Buku sent a letter to the Clarks and Peterson's counsel demanding the return of its earnest money in the amount of \$342,000.00 on June 17, 2008, a true and correct copy of which is attached hereto as Exhibit H. Neither Clarks nor Petersons have satisfied Buku's demand.

DATED this 2 day of October, 2009.

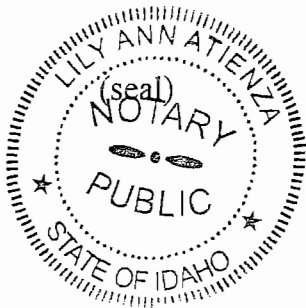


\_\_\_\_\_  
Jaramie Magera  
Manager of Buku Properties, LLC

STATE OF IDAHO            )  
                                          )ss.  
County of Jefferson        )

On the 2nd day of October, 2009, before me the undersigned, a notary public in and for said State, personally appeared Jaramie Magera, known or identified to me to be the manager in the limited liability company of Buku Properties, LLC, and the manager who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that such manager executed the same in said limited liability company name.

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



\_\_\_\_\_  
*Lily Ann Atienza*  
Notary Public for Idaho  
Residing at Idaho Falls, ID  
My Commission Expires: 07/20/2015

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**CERTIFICATE OF SERVICE**

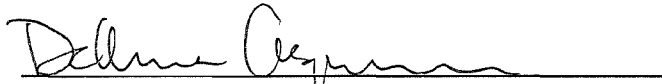
I hereby certify that on this 5<sup>th</sup> day of October, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **AFFIDAVIT OF JARAMIE MAGERA IN  
SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

(  ) *First Class Mail*  
(    ) *Hand Delivery*  
(  ) *Facsimile*  
(    ) *Overnight Mail*

  
DeAnne Casperson, Esq.

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**PURCHASE AND SALE AGREEMENT**

Buku Properties, LLC, a limited liability company, whose address is P.O. Box 506, Rigby, Idaho, 83442, (hereafter referred to as "Buyer") offers to enter into this Purchase and Sale Agreement (referred to as "this agreement") with Raquel H. Clark and Janet C. Clark, husband and wife, whose address is 268 North 4100 East, Rigby, Idaho, 83442, (hereafter referred to as "Seller") upon the following terms and conditions:

**1. Sale of Property.** Seller shall sell, assign, and deliver to Buyer and Buyer shall purchase and accept, on the closing date, the following parcels of property identified below:


Township 4 North, Range 39 East, Boise Meridian, Jefferson County, Idaho  
Section 21: The South Half of the Northwest Quarter,  
Parcel 1 and Parcel 2, according to the Record of Survey dated  
August 27, 2007

Subject to Easements and rights of ways for highways, roads, ditches, canals,  
pole, power and transmission lines as they exist.  
Together with 100 inches of water out of the Burgess Canal and ditch rights  
appurtenant to the land.

The total land being sold representing approximately 80.17 acres.

The sales of the land shall be subject to: 1) Buyer will include a community park accessible to all, 2) a through road will be named for Sgt. Conn K. Clark.

**2. Purchase Price.** In consideration of the sale of the property and assets under this agreement, Buyer shall pay Seller the sum of One Million Forty Four Thousand Seventy Five Dollars and Eighteen Cents (\$1,044,075.18), payable as follows:

 \$25,000.00 upon execution of this agreement as earnest money, all of such earnest Money shall be refundable until closing. The earnest money shall be paid to Seller.

(b) The remaining balance will be paid to Seller at closing. At the time of closing, Buyer and Seller will allocate costs for the purchase, which will allocate \$480,000 for Parcel 1 (the home with 6.51 acres), and the balance for Parcel 2 (73.66 acres).

**3. Buyer's Obligations.** Buyer is obligated to pay the earnest money set forth in this agreement and pay the remaining purchase price at the time of closing. Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus

closing will be on or before December 21, 2007

**4. Title Insurance.** Seller, at their expense, shall furnish Buyer with a standard form "owners" title insurance policy covering the real property subject to this agreement in the amount of the purchase price for the real estate, in form and substance satisfactory to Buyer.

**5. Taxes and Assessments.** Seller shall pay all taxes and assessments including real and personal property taxes, through and including the date of closing, including, but not limited to, utilities, telephone, property tax, and personal property tax. Thereafter, after the date of closing, Buyer shall be responsible for all taxes and assessments.

**6. Date of Possession.** Possession of the real property shall be delivered to Buyer upon the date of closing.

**7. Risk of Loss.** The risk of loss or damage to the real property by fire or other casualty is assumed by Buyer as of the date of closing.

**8. Instruments of Transfer.** The sales, assignments, and deliveries to be made to Buyer pursuant to this agreement shall be effected by warranty deeds, and other instruments of transfer in such form as Buyer shall reasonably request. Seller shall prepare appropriate forms of instruments of transfer and conveyance in conformity with this agreement and shall submit them to Buyer for examination in advance of the closing date, together with all instruments required to be executed by Buyer. At any time after the closing date, on request of a party the other party will do, execute, acknowledge, and deliver all such further acts, deeds, and instruments as may be required to effect this Agreement.

**9. Authority.** Each person executing this agreement represents and warrants that he has authority to do so from or in his respective capacity as an individual or as a managing member or director of the business organization to which he is a party to this agreement.

**10. Closing.** The closing date shall be no later than December 21, 2007, or as soon thereafter as practicable upon approval and written consent of both parties. Closing shall take place at Alliance Title Company in Rigby, Idaho or at such other place as the parties shall agree.

Unless otherwise specified in this agreement, Seller and Buyer shall share equally the closing costs, excluding attorney fees for the preparation of all legal documents necessary or incident to this transaction. The attorney fees associated with preparation of this transaction shall be borne by Buyer for Buyer's attorney fees. If Seller has attorney fees, those attorney fees will be borne by the Seller.

**11. Representations of Seller.** Seller represents, warrants, and agrees that the statements contained in this paragraph are correct and complete to the best of Seller's knowledge and belief as of the date of this agreement and will be true and correct as of the closing date.

(a) Seller are individuals or corporate business organizations who own the property that is being transferred.

(b) Seller has good and marketable title to all of the real and personal property being sold hereunder. The real and personal property will be free and clear of all mortgages, liens, and encumbrances at the time of closing so Seller can deliver to Buyer good and marketable title.

(c) All assets and properties that are being conveyed under this agreement are owned by Seller and will be free and clear of all mortgages, liens, and encumbrances at the time of closing.

(d) Seller will pay and satisfy all mortgages, agreements, lease or other responsibilities to which it is a party at the time of closing to allow the property to be conveyed from the Seller to Buyer.

**12. Representations of Buyer.** Buyer hereby represents and warrants to Seller that:

(a) Buyer is an individual or business organization under the laws of the State of Idaho, with full power and authority to enter into and perform its obligations under this agreement.

(b) The execution, delivery and performance of the agreement by Buyer have been duly authorized by its members, managers or directors.

(c) There is no action, arbitration, suit, notice, order, real estate tax contest or legal, administrative or other proceeding before any court or governmental agency, authority or body pending or to Buyer's knowledge, threatened against or affecting Buyer which would prevent or interfere with the transactions contemplated by this agreement.

**13. Indemnification Provisions for Buyer.** Seller agrees to indemnify the Buyer and Buyer's officers, directors, affiliates, agents, employees, successors and assigns from and against the entirety of any charges, complaints, actions, suits, damages, claims, costs, amounts paid in settlement, taxes, liens, expenses or fees, including all attorneys' fees and court costs, which result from, arising out of, relate to or are caused by:

(a) Any material breach of any of Seller's representations, warranties and covenants contained in this Agreement, and

(b) Seller's conduct of the business at the premises on or prior to the closing date.

**14. Indemnification Provisions for Seller.** Buyer agrees to indemnify the Seller and Seller's affiliates, agents, employees, heirs, personal representatives, successors and assigns, from and against the entirety of any charges, complaints, actions, suits, damages, claims, costs, amounts paid in settlement, taxes, liens, expenses or fees, including all attorneys fees and court

costs, which result from, arising out of, relate to or are caused by:

(a) Any material breach of any of Buyer's representations, warranties and covenants contained in this agreement; and

(b) Buyer's conduct of the business at the premises from and after the closing date.

**15. Other Indemnification Provisions.** The foregoing indemnification provisions are in addition to, and not in degradation of, any statutory common law remedy any party may have for breach of representation, warranty or contract.

**16. Expenses of Negotiation and Transfer.** Except as otherwise provided in this agreement, each party shall pay the party's own expenses, taxes, and other costs incident to or resulting from this agreement, whether or not the transactions contemplated hereby are consummated.

**17. Notices.** Any notice to be given under this agreement shall be given in writing and be delivered personally or by registered or certified mail, postage prepaid, to the party's last known address.

**18. Entire Agreement.** This agreement, including the exhibits and documents referred to herein constitutes the entire agreement between the parties and supersedes any prior understanding, agreements or representations by or between the parties, written or oral, that may have related in any way to the subject matter hereof. This instrument may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**19. Succession.** This Agreement shall be binding upon and inure to the benefit of the parties named herein and their respective, heirs, personal representative, successors and assigns.

**20. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Idaho.

**21. Amendments and Waivers.** No amendment of any provisions of this agreement will be valid unless the same shall be in writing and signed by the parties. No waiver by any party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or effect in anyway any rights arising by virtue of any prior or subsequent such occurrence.

**22. Severability.** Any term or provision of this Agreement that is invalid or unenforceable under law in any situation in any competent jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or

enforceability of these offending term or provisions in any other situation or in any other competent jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the parties agree that the court making the determination of invalidity or unenforceability shall have the power to reform the scope, duration or area of the term or provisions, to delete specific words or phrases, or to replace any invalid or unenforceable term or provisions with a term or provision that is valid and enforceable and that comes closer to expressing the intentions of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified after the expiration of time within which judgment may be appealed.

**23. Attorneys Fees.** The prevailing party in any action to enforce this agreement shall be entitled to recover its reasonable attorneys fees and costs.

**24. Attorney Representation.** Buyer and Seller acknowledge that this agreement has been prepared by attorneys for the Buyer. Seller has the right to representation by their own counsel, and is not relying upon Buyer or Buyer's counsel in negotiating this agreement or in executing this agreement. Seller is not relying on Buyer or Buyer's attorneys for any representation of law or fact not contained in this agreement.

**25. Contingencies.** Buyer and Seller agree that Buyer intends to develop the property sold under this agreement. Seller's property cannot be developed without an adjacent property known as the Peterson property. Buyer and Seller agree that the purchase and sale herein are contingent upon Peterson selling to Buyer. If Peterson does not sell to Buyer, then Buyer has no obligation to close with Seller, and the earnest money will be returned to Buyer. The closing date between Buyer and Peterson will be scheduled at the same time as the closing date herein.

The parties acknowledge that time is of the essence in the completion of this agreement and that failing to complete this agreement in a timely fashion would be a breach of that time of the essence.


Dated: Aug-30-07  
Oct-23-07

Dated: 30 Aug 07  
23 Oct 07

Dated: 10-23-07  
10-23-07

  
Buku Properties, LLC  
JEM

  
Rael H. Clark  
RHE

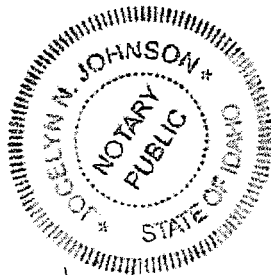
  
Janet C. Clark



State of Idaho )  
 )  
County of Jefferson )

On this 23 day of October, 2007, before me, a Notary Public in and for said state, personally appeared Jaramie Magera, known to me to be a Managing Member of Buku Properties, LLC and the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my office seal, the day and year in this document first above written.

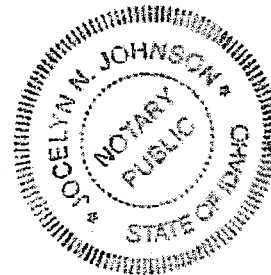


*Jocelyn M. Johnson*  
Notary Public  
Residing: MADISON County  
Term Expires: Feb. 06, 2012

State of Idaho )  
 )  
County of Jefferson )

On this 23 day of October, 2007, before me, a Notary Public in and for said state, personally appeared Rael H. Clark and Janet C. Clark, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my office seal, the day and year in this document first above written.



*Jocelyn M. Johnson*  
Notary Public  
Residing: MADISON County  
Term Expires: Feb 06, 2012

## PURCHASE AND SALE AGREEMENT

Buku Properties, LLC, a limited liability company, whose address is P.O. Box 506, Rigby, Idaho, 83442, (hereafter referred to as "Buyer") offers to enter into this Purchase and Sale Agreement (referred to as "this agreement") with Angus Jerry Peterson and Betty Jean Peterson, husband and wife, whose address is 241 North 4200 East, Rigby, Idaho, 83442, (hereafter referred to as "Seller") upon the following terms and conditions:

**1. Sale of Property.** Seller shall sell, assign, and deliver to Buyer and Buyer shall purchase and accept, on the closing date, the following parcels of property identified below:

Township 4 North, Range 39 East, Boise Meridian, Jefferson County, Idaho  
Section 21: Commencing at the Northeast corner of the southeast quarter of Section 21, and running thence West 160 rods; thence South 37.5 rods; thence East 160 rods; thence North 37.5 rods to the point of beginning, together with all water and water rights, ditch and ditch rights, and permanent improvements appurtenant thereto.

Section 21: The South 42.5 rods of the North  $\frac{1}{4}$  of the Southeast  $\frac{1}{4}$

Excepting therefrom: Beginning at the southeast corner of the North  $\frac{1}{4}$  of the Southeast  $\frac{1}{4}$  of said Section 21 and running thence West 470 feet, more or less to the point of intersection of the East bank of the South Rigby Canal; thence in a Northerly direction along the East bank of said canal to a point 300 feet West and 42.5 rods North of the point of beginning; thence East 300 feet; thence South 42.5 rods to the point of beginning.

Together with 85 inches of water in the South Rigby and Burgess canals.

Together with a right of way for ingress and egress over and across the following described property: Beginning at a point that is north 42.5 rods from the Southeast corner of the North  $\frac{1}{4}$  Southeast  $\frac{1}{4}$  of Section 21, thence West to the point of intersection with the West bank of the South Rigby Canal, said point being the true point of beginning; thence Northeasterly following the meanderings of said West bank of said canal to the point of intersection with the East line of said Section 21; thence North 20 feet; thence Southwesterly 20 feet distance from and paralleling the meanderings of said West bank of said canal to a point that is 20 feet West of the point of beginning; thence East 20 feet to the point of beginning.

Subject to easements and rights of ways for highways, roads, ditches, canals, pole, power and transmission lines as they exist.

Together with any and all water rights and ditch rights appurtenant to the land.

The total land being sold representing approximately 73 acres.

**2. Purchase Price.** In consideration of the sale of the property and assets under this agreement, Buyer shall pay Seller the sum of Nine Hundred Eighty Thousand Dollars (\$980,000.00), payable as follows:

(a) \$327,000.00 upon execution of this agreement as earnest money. \$10,000.00 of the earnest money shall be non-refundable, the balance fully refundable until closing. The earnest money shall be paid to Seller.

(b) The remaining \$653,000.00 will be paid to Seller at closing. At the time of closing, Buyer and Seller will allocate costs for the purchase, which will allocate \$480,000.00 for the home and 2 acres and \$500,000.00 for the remaining property.

**3. Buyer's Obligations.** Buyer is obligated to pay the earnest money as set forth in this agreement and pay the remaining purchase price at the time of closing. Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus, closing will be on or before December 31, 2007. x 4 months

**4. Title Insurance.** Seller shall furnish Buyer with a standard form "owners" title insurance policy covering the real property subject to this agreement in the amount of the purchase price for the real estate, in form and substance satisfactory to Buyer. Buyer shall pay for the title insurance.

**5. Taxes and Assessments.** Seller shall pay all taxes and assessments including real and personal property taxes, through and including the date of closing, including, but not limited to, utilities, telephone, property tax, and personal property tax. Thereafter, after the date of closing, Buyer shall be responsible for all taxes and assessments.

**6. Date of Possession.** Possession of the real property shall be delivered to Buyer upon the date of closing.

**7. Risk of Loss.** The risk of loss or damage to the real property by fire or other casualty is assumed by Buyer as of the date of closing.

**8. Instruments of Transfer.** The sales, assignments, and deliveries to be made to Buyer pursuant to this agreement shall be effected by warranty deeds, and other instruments of transfer in such form as Buyer shall reasonably request. Seller shall prepare appropriate forms of instruments of transfer and conveyance in conformity with this agreement and shall submit them to Buyer for examination in advance of the closing date, together with all instruments required to be executed by Buyer. At any time after the closing date, on request of a party the other party will do, execute, acknowledge, and deliver all such further acts, deeds, and instruments as may be required to effect this Agreement.

**9. Authority.** Each person executing this agreement represents and warrants that he has authority to do so from or in his respective capacity as an individual or as a managing member or

director of the business organization to which he is a party to this agreement.

**10. Closing.** The closing date shall be no later than December 21, 2007, or as soon thereafter as practicable upon approval and written consent of both parties. Closing shall take place at Alliance Title Company in Rigby, Idaho, or at such other place as the parties shall agree.

Buyer will pay all closing costs. The attorney fees associated with preparation of this transaction shall be borne by Buyer for Buyer's attorney fees. If Seller has attorney fees, those attorney fees will be borne by the Seller.

**11. Representations of Seller.** Seller represents, warrants, and agrees that the statements contained in this paragraph are correct and complete to the best of Seller's knowledge and belief as of the date of this agreement and will be true and correct as of the closing date:

(a) Seller are individuals or corporate business organizations who own the property that is being transferred.

(b) Seller has good and marketable title to all of the real and personal property being sold hereunder. The real and personal property will be free and clear of all mortgages, liens, and encumbrances at the time of closing so Seller can deliver to Buyer good and marketable title.

(c) All assets and properties that are being conveyed under this agreement are owned by Seller and will be free and clear of all mortgages, liens, and encumbrances at the time of closing.

(d) Seller will pay and satisfy all mortgages, agreements, lease or other responsibilities to which it is a party at the time of closing to allow the property to be conveyed from the Seller to Buyer.

**12. Representations of Buyer.** Buyer hereby represents and warrants to Seller that:

(a) Buyer is an individual or business organization under the laws of the State of Idaho, with full power and authority to enter into and perform its obligations under this agreement.

(b) The execution, delivery and performance of the agreement by Buyer have been duly authorized by its members, managers or directors.

(c) There is no action, arbitration, suit, notice, order, real estate tax contest or legal, administrative or other proceeding before any court or governmental agency, authority or body pending or to Buyer's knowledge, threatened against or affecting Buyer which would prevent or interfere with the transactions contemplated by this agreement.

**13. Indemnification Provisions for Buyer.** Seller agrees to indemnify the Buyer and Buyer's officers, directors, affiliates, agents, employees, successors and assigns from and against

the entirety of any charges, complaints, actions, suits, damages, claims, costs, amounts paid in settlement, taxes, liens, expenses or fees, including all attorneys' fees and court costs, which result from, arising out of, relate to or are caused by:

(a) Any material breach of any of Seller's representations, warranties and covenants contained in this Agreement; and

(b) Seller's conduct of the business at the premises on or prior to the closing date.

**14. Indemnification Provisions for Seller.** Buyer agrees to Indemnify the Seller and Seller's affiliates, agents, employees, heirs, personal representatives, successors and assigns, from and against the entirety of any charges, complaints, actions, suits, damages, claims, costs, amounts paid in settlement, taxes, liens, expenses or fees, including all attorneys fees and court costs, which result from, arising out of, relate to or are caused by:

(a) Any material breach of any of Buyer's representations, warranties and covenants contained in this agreement; and

(b) Buyer's conduct of the business at the premises from and after the closing date.

**15. Other Indemnification Provisions.** The foregoing indemnification provisions are in addition to, and not in degradation of, any statutory common law remedy any party may have for breach of representation, warranty or contract.

**16. Expenses of Negotiation and Transfer.** Except as otherwise provided in this agreement, each party shall pay the party's own expenses, taxes, and other costs incident to or resulting from this agreement, whether or not the transactions contemplated hereby are consummated.

**17. Notices.** Any notice to be given under this agreement shall be given in writing and be delivered personally or by registered or certified mail, postage prepaid, to the party's last known address.

**18. Entire Agreement.** This agreement, including the exhibits and documents referred to herein constitutes the entire agreement between the parties and supersedes any prior understanding, agreements or representations by or between the parties, written or oral, that may have related in any way to the subject matter hereof. This instrument may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**19. Succession.** This Agreement shall be binding upon and inure to the benefit of the parties named herein and their respective, heirs, personal representative, successors and assigns.

**20. Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Idaho.

**21. Amendments and Waivers.** No amendment of any provisions of this agreement will be valid unless the same shall be in writing and signed by the parties. No waiver by any party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or effect in any way any rights arising by virtue of any prior or subsequent such occurrence.

**22. Severability.** Any term or provision of this Agreement that is invalid or unenforceable under law in any situation in any competent jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of these offending term or provisions in any other situation or in any other competent jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the parties agree that the court making the determination of invalidity or unenforceability shall have the power to reform the scope, duration or area of the term or provisions, to delete specific words or phrases, or to replace any invalid or unenforceable term or provisions with a term or provision that is valid and enforceable and that comes closer to expressing the intentions of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified after the expiration of time within which judgment may be appealed.

**23. Attorneys Fees.** The prevailing party in any action to enforce this agreement shall be entitled to recover its reasonable attorneys fees and costs.

**24. Attorney Representation.** Buyer and Seller acknowledge that this agreement has been prepared by attorneys for the Buyer. Seller has the right to representation by their own counsel, and is not relying upon Buyer or Buyer's counsel in negotiating this agreement or in executing this agreement. Seller is not relying on Buyer or Buyer's attorneys for any representation of law or fact not contained in this agreement.

**25. Contingencies** Buyer and Seller agree that Buyer intends to develop the property sold under this agreement. Seller's property cannot be developed without an adjacent property known as the Clark property. Buyer and Seller agree that the purchase and sale herein are contingent upon Clark selling to Buyer. If Clark does not sell to Buyer, then Buyer has no obligation to close with Seller, and the earnest money will be returned to Buyer. The closing date between Buyer and Clark will be scheduled at the same time as the closing date herein.

The parties acknowledge that time is of the essence in the completion of this agreement and that failing to complete this agreement in a timely fashion would be a breach of that time of the essence.

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Dated: Aug 30 2007

[Signature]  
Buku Properties, LLC

Dated: Aug 30 2007

[Signature]  
Angus Jerry Peterson

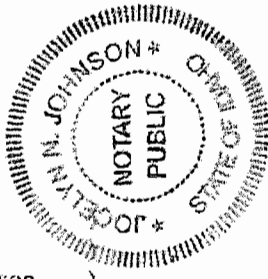
Dated: Aug 30 2007

[Signature]  
Betty Jean Peterson

State of Idaho )  
                          )  
County of Jefferson )

On this \_\_\_\_\_ day of August, 2007, before me, a Notary Public in and for said state, personally appeared Jaramie Magera, known to me to be a Managing Member of Buku Properties, LLC and the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my office seal, the day and year in this document first above written.

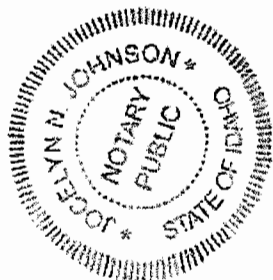


[Signature]  
Notary Public  
Residing: Madison County  
Term Expires: Feb. 06, 2012

State of Idaho  
County of Jefferson )

On this \_\_\_\_\_ day of August, 2007, before me, a Notary Public in and for said state, personally appeared Angus Jerry Peterson and Betty Jean Peterson, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my office seal, the day and year in this document first above written.



[Signature]  
Notary Public  
Residing: Madison County  
Term Expires: Feb 06, 2012

# Commissioners considering possible zoning changes

By REBECCA SQUIRES  
Special to The Jefferson Star

Jefferson County developers may soon have to change the way they build in some parts of the county.

At last week's meeting, the Jefferson County Commission discussed a possible zoning change for the county. Last month, a public hearing was held to address the proposed zone change. Under the proposal, R1 zoning in eastern Jefferson County would be reduced and refocused near city

impact areas.

The result would be that one-acre lots would be permitted near cities, and five-acre lots would be the standard further into the county.

The goal, according to County Commissioner Brett Olaveson, is to achieve balanced growth.

"I don't know of any other way to discourage growth in outlying areas other than a rezone," Olaveson said.

Balanced growth consists of three things, according to Olaveson: a healthy commercial sector that provides a strong tax base; enough hous-

ing to satisfy the needs of the community without straining governmental resources; and the preservation of agricultural land until population centers and services can grow out to those areas.

Businesses place less demand on services like law enforcement, schools, transportation, and utilities, explained County Clerk Christine Boulter.

On the other hand, services costs for homeowners generally exceed the taxes they pay. And, county officials

SEE ZONING PAGE 3

Exhibit "C"

## NEWS

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# ZONING / from page 1

agree that Jefferson County needs more commercial growth.

"What I don't want to see," Olaveson said, "is nothing but houses when I enter Jefferson County. We want people to live here, work here, and spend money here."

At last month's public hearing, developers and landowners largely disagreed with the zoning changes.

Many felt the reduction of R1 zones will stifle growth and take away landowners' abilities to gain the most from their property.

Chairman Tad Hegsted has suggested forming a committee of volunteers representing developers, government, planning and zoning and builders to review the proposal.

Olaveson fears that wouldn't work because those on the committee would look out for the best interests of those who live in their part of the county.

County commissioners agree

the change in zoning could slow growth, but they're not sure that's such a bad thing.

"Zoning the county in a manner that will encourage balanced growth may slow down the current rate of residential growth," said Olaveson. "But it will create conditions that will favor a healthier long-term growth. An approach to managed growth that preserves outlying properties until infrastructure can be provided may coincidentally also preserve or extend business opportunities for many of the best developers."

The zoning change is just one of the ways Jefferson County officials are trying to get a handle on the county's unprecedented growth.

Recently, county commissioners made a change to an ordinance that will prevent developers from justifying smaller lots with individual septic systems.

"We've grown faster than our infrastructure," says county attorney Robin Dunn.

Water and sewer services, as well as traffic congestion, have become a major issue in the county.

Formerly, developers could use a nutrient-pathogen study (NPS) to justify higher housing densities if the study indicated the soil could handle the increased number of septic systems.

Under the purposed change, however, the NPS could be used to require larger lot sizes, but not justify smaller ones.

The change also indicates a concern that county officials share with many residents: the growing number of wells and septic systems across eastern Jefferson County.

High water tables, a growing population, and the close proximity of wells and septic systems have prompted much

public hearings and commissioners' meetings.

"There has been a discussion on requiring central sewer systems in the county and the benefits that they would provide to the growth," said Planning & Zoning Administrator DaNiel Jose.

"The commissioners have requested that we ask an expert from DEQ come to a meeting and provide the education to the commissioners and P&Z board in an effort to help us make better decisions in this matter. We also discussed having a vendor that sells these types of systems to come and teach us about the new technology that is available," she said.

Besides exploring the use of central sewer systems, the county is also looking at developing a Capital Improvement Plan (CIP).

The CIP will assess the county's current services and

impact of growth on those services.

According to Idaho law, a CIP is also required before local governments can initiate impact on development.

"We've contacted some consulting groups that have assisted other community with Capitol Improvement Plans," said Jose. "It has not been determined at this time if an impact fee ordinance will be adopted but the CIP will defiantly be a positive planning tool for the county."

County officials hope their efforts will result in healthier, more balanced growth across the county.

The result of balanced growth should be self-contained and well organized communities with strong tax bases, effective transportation design and systems, and beauty, a theme for development.





January 3, 2008

Exhibit "D"

BUKU Properties, LLC  
Jaramie C. Magera  
Judd A. Ball  
P.O. Box 506  
Rigby, ID 83442

Re: Loan Commitment

To whom it may concern,

This letter is in regards to the purchase of ground currently owned by Rael H. Clark and Janet C. Clark whose address is 268 N. 4100 E., Rigby, ID 83442. Your loan was conditionally approved as of November 20, 2007. One of the conditions of your loan approval is a completed appraisal showing adequate value for the property. As of December 10, 2007, Kelley Real Estate Appraisers, Inc. completed an appraisal on Parcel 2 which contains 78.19 acres of bare ground. Included in the appraisal was an addendum of condition that stated the value was valid only if Jefferson County were to grandfather the property to allow it to be zoned as R-1 Residential. Further, the appraiser indicates that if the property were to be zoned as R-5, the property value would be decreased and the evaluation they completed would be null and void. In order for The Bank of Commerce to fund the loan as agreed, we must receive verification from Jefferson County that this property will remain zoned R-1 Residential.

Please contact me at (208)552-0674 if you have questions or concerns regarding this matter.

Sincerely,

Jeromy L. Hart  
AVP



*Buku Properties, LLC.*

PO Box 506  
652 North 4116 East  
Rigby, ID 83442  
Telephone(208)745-7996/Fax (208)745-5201

December 18, 2007

Buku Properties, LLC and Rael Clark agree that with the recent county zone change, both parties need additional time to review the contract. Because of the County Commissioner's recent proposed county-wide zone change, resulting in this property potentially being zoned R-5. The appraiser and the bank dealing with Buku Properties, LLC have legitimate concerns with financing. We agree to move our closing date back from December 21, 2007, to March 1, 2008. We will continue to talk and cooperate with each other.

Dated: Dec 18 2007

  
\_\_\_\_\_  
Buku Properties, LLC

Dated: \_\_\_\_\_

\_\_\_\_\_  
Rael H. Clark

Dated: \_\_\_\_\_

\_\_\_\_\_  
Janet C. Clark



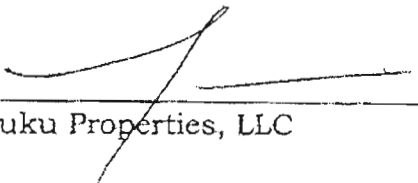
*Buku Properties, LLC.*

PO Box 506  
652 North 4116 East  
Rigby, ID 83442  
Telephone(208)745-7996/Fax (208)745-5201

December 18, 2007

Buku Properties, LLC and A. Jerry Peterson agree that with the recent county zone change, both parties need additional time to review the contract. Because of the County Commissioner's recent proposed county-wide zone change, resulting in this property potentially being zoned R-5. The appraiser and the bank dealing with Buku Properties, LLC have legitimate concerns with financing. We agree to move our closing date back from December 21, 2007, to March 1, 2008. We will continue to talk and cooperate with each other.

Dated : Dec 18-07

  
\_\_\_\_\_  
Buku Properties, LLC

Dated: \_\_\_\_\_

\_\_\_\_\_  
Angus Jerry Peterson

Dated: \_\_\_\_\_

\_\_\_\_\_  
Betty Jean Peterson

# DUNN LAW OFFICES, PLLC

Exhibit "G"

ROBIN D. DUNN  
PENNY NORTH SHAUL  
AMELIA A. SHEETS

Telephone: (208) 745-9202

P.O. Box 277  
477 Pleasant Country Lane  
Rigby, Idaho 83442-0277  
email: rdunn@dunnlawoffices.com

Facsimile: (208) 745-8160

December 19, 2007

Buku Properties, LLC  
c/o Jeremy Magera  
P.O. Box 506  
Rigby, ID 83442

Re: Jerry and Betty Peterson; Rael and Janet Clark

Dear Mr. Magera, agent:

It is my understanding that you are the managing member of Buku Properties, LLC. Our law firm represents Jerry and Betty Peterson along with Rael and Janet Clark. As you are aware, they both have a purchase and sale agreement that was to be finalized with full payment on December 21, 2007. My clients expect performance on this contract and desire to complete the sale pursuant to the terms of the agreement.

We believe that any alterations, changes or modifications could severely impair our clients' best interests and the contract in question.

Any third party actions by other individuals have nothing to do with the contract in question. As such, demand is hereby made to close on December 21, 2007 for both sets of my clients and to have the sum paid in full.

In the event you choose not to close, my clients would declare the contract in default, keep the proceeds placed as earnest money and either sue for the balance or sue for specific performance. By virtue of this letter, my clients are not waiving any other remedies which may be available pursuant to contract or Idaho law.

In the event of litigation, we would seek all attorney fees, court costs along with the contractual arrangement for principal and interest contained therein.

Sincerely,



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

c: Jerry and Betty Peterson  
Rael and Janet Clark

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Thel W. Casper, Esq.  
General Counsel  
PO Box 51298  
Idaho Falls, Idaho 83405  
901 Pier View Drive, Suite 201  
Idaho Falls, Idaho 83402  
Tel: 208-523-3794  
Fax: 208-227-0445  
Email: tcasper@ballventures.com

Exhibit "H"

June 17, 2008

VIA FACSIMILE AND  
CERTIFIED MAIL

Robin D. Dunn, Esq.  
Dunn Law Offices, PLLC  
PO Box 277  
Rigby, Idaho 83442-0277

Re: Buku Properties, LLC - Jerry and Betty Peterson; Rael and Janet Clark

Dear Mr. Dunn:

I am general counsel at Ball Ventures, LLC and often act as counsel to various Ball family entities including Buku Properties, LLC ("Buyer"). I understand that you are counsel to Jerry and Betty Peterson and to Rael and Janet Clark (collectively "Sellers").

I have reviewed the two Purchase and Sale Agreements, both originally dated August 30, 2007, between the Buyer and the Sellers (the "Agreements"). I have also reviewed the following correspondence pertaining to the Agreements: (i) December 18, 2007 memoranda from the Buyer to the Sellers registering the Buyer's objection to the zoning of the property and offering to extend the closing date to March 1, 2008; and (ii) December 19, 2007 letter from you on behalf of the Sellers to the Buyer rejecting the Buyer's offer to extend the closing date and demanding closing on December 21, 2007.

From my review of the Purchase and Sale Agreements, it is clear that (a) all but \$10,000.00 of the Buyer's earnest money was refundable until closing under Section 2, and (b) the Buyer's obligation to purchase the properties was subject to a four-month due diligence period and Buyer's satisfaction with the condition of the properties under Section 3. It is further evident that (i) the Buyer's memoranda of December 18 constituted its objection to the condition of the properties and an offer to extend the closing date to permit the Sellers an opportunity to cure, and (ii) your letter of December 19 constituted a rejection of Buyer's offer and effected a termination of the Agreements.

Therefore, demand is hereby made for a return to the Buyer of earnest money in the amount of \$342,000.00. If such sum is not promptly refunded, the Buyer will pursue its available remedies

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Robin D. Dunn, Esq.

June 17, 2008

Page 2

under contract, at law or in equity. Please confirm that you are authorized to accept service of process on behalf of the Sellers. If the Sellers wish to pursue any legal action against the Buyers, Charles A. Homer at Holden, Kidwell, Hahn & Crapo, P.L.L.C., as litigation counsel for the Buyers, is authorized to accept service of process on behalf of the Buyers.

Please let me know as soon as possible how your clients intend to proceed. Thank you.

Sincerely,



Thel W. Casper

c: Jaramie Magera (via email)  
Charles A. Homer, Esq. (via email)

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107

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008 DEC -6 PM 2:07  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

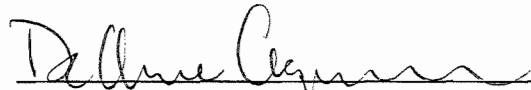
BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE OF HEARING**

PLEASE TAKE NOTICE, that on the 9<sup>th</sup> day of November, 2009, at 3:30 p.m., or as soon thereafter as counsel can be heard, at the Jefferson County Courthouse in Rigby, Idaho, before the Honorable Gregory W. Moeller, Plaintiff Buku Properties, LLC, in the above-entitled action will call up for hearing its Motion for Summary Judgment.

  
\_\_\_\_\_  
DeAnne Casperson, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



**CERTIFICATE OF SERVICE**

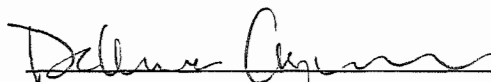
I hereby certify that on this 5<sup>th</sup> day of October, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:                    NOTICE OF HEARING**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson, Esq.

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1/0

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2009 OCT 15 PM 2:06  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE VACATING HEARING AND  
RESETTING HEARING ON  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that Plaintiff Buku Properties, LLC vacates the hearing on its Motion for Summary Judgment scheduled for November 9, 2009 at 3:30 p.m. and rescheduled for December 14, 2009 at 1:30 p.m. at the Jefferson County Courthouse in Rigby, Idaho, before the Honorable Gregory W. Moeller.



DeAnne Casperson, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

**CERTIFICATE OF SERVICE**

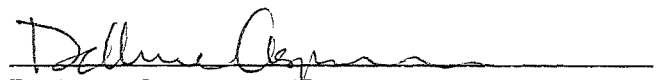
I hereby certify that on this 14<sup>th</sup> day of October, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **NOTICE VACATING HEARING AND  
RESETTING HEARING ON PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS SERVED:**

Robin D. Dunn  
Amelia A. Sheets  
Dunn Law Offices  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

SEP 13 11 50 AM '07  
CLERK OF DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
477 Pleasant Country Lane  
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Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )  
 )  
Plaintiff, )

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

Case No. CV-08-941

DENIAL OF PLAINTIFF'S  
REQUEST FOR SUMMARY  
JUDGMENT AND OBJECTION  
TO CONSIDERATION OF  
SUMMARY JUDGMENT

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

COMES NOW, these answering co-defendants/counter-plaintiffs, by and through

the undersigned attorney, and object to the plaintiff's Motion for Summary Judgment and request that summary judgment be denied based upon the affidavit(s) of these answering defendants filed simultaneous herewith. The basis for the denial and of the objection of these answering co-defendants/counter-plaintiffs are that questions of fact and of law preclude the entry of summary judgment in favor of the plaintiffs.

DATED this 13 day of November, 2009.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

- Hand Delivery  
 Postage-prepaid mail  
 Facsimile Transmission



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

DeAnne Casperson, Esq.  
P.O. Box 50130  
Idaho Falls, ID 83405

Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440

OBJECTION-2-

DUNN LAW OFFICES, PLLC.  
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2008 NOV 13 PM 2:57  
 DISTRICT COURT  
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company, )  
 )  
 Plaintiff, )  
 vs. )

Case No. CV-08-941

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )  
 )  
 Defendants. )

DEFENDANTS' REQUEST FOR  
 SUMMARY JUDGMENT

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )  
 )  
 Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company; and )  
 JARAMIE MAGERA, an individual, )  
 )  
 Counter-Defendants, )

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COMES NOW, these answering co-defendants/counter-plaintiffs, by and through the undersigned attorney, and MOVE the above-entitled court for summary judgment on the issue of liability pursuant to I.R.C.P., Rule 56 as follows:

(c) Motion for Summary Judgment and Proceedings Thereon. The motion, affidavits and supporting brief shall be served at least twenty-eight (28) days before the time fixed for the hearing. If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least 14 days prior to the date of the hearing. The moving party may thereafter serve a reply brief not less than 7 days before the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Such judgment, when appropriate, may be rendered for or against any party to the action. The court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney fees and sanctions against a party or the party's attorney, or both.

IRCP Rule 56, Summary judgment  
----- Excerpt from page 155.

DATED this 13 day of November, 2009.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC



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2009 NOV 13 PM 2:57  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )  
 )  
Plaintiff, )

vs. )

)  
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RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

)  
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RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

)  
 )  
BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

Case No. CV-08-941

MOTION TO STRIKE PORTIONS  
OF MAGERA AFFIDAVIT

COMES NOW, the co-defendants/counter-plaintiffs, by and through the undersigned attorney, and hereby move to strike portions of the Magera Affidavit (paragraphs as numbered below) for the following reasons:

16. Speculation and hearsay;
17. Speculation and hearsay;
18. Speculation and hearsay;
19. The county is not a party and is irrelevant, the newspaper article is hearsay and not reflective of the actual administrative proceedings;
20. Speculation and hearsay;
21. A) The bank's representative statements are hearsay, his opinion is irrelevant and the conversations are hearsay;  
B) Conversations are hearsay and the letter attached as Exhibit D is hearsay.
24. Speculation and hearsay. Defendants did not know of the thought process of plaintiff.

Other: Exhibits E and F are self-serving documents which were not agreed upon nor signed by defendants and should be stricken.

DATED this 13 day of November, 2009.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

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2008/08/13 PM 2:57  
 DISTRICT COURT  
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants/Counter-Plaintiffs

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

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company, )  
 )  
 Plaintiff, )

Case No. CV-08-941

vs. )

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )  
 )  
 Defendants. )

DEFENDANTS' MEMORANDUM  
 RE: SUMMARY JUDGMENT

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company; and )  
 JARAMIE MAGERA, an individual, )

Counter-Defendants, )

COMES NOW, these answering co-defendants/counter-plaintiffs, by and through the undersigned attorney, and submit this memorandum in opposition to the Plaintiff's Motion for Summary Judgment and in support of the Defendants' Motion for Summary Judgment on the issue of liability:

LEGAL STANDARD

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

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

Baxter v. Craney, 135 Idaho 166, 170, 16 P.3d 263, 266 (2000) (citations omitted). The Court should "liberally construe the record in favor of the party opposing the motion for summary judgment, drawing all reasonable inferences and conclusions supported by the record in favor of that party. Walker v. Hollinger, 132 Idaho 172, 175, 968 P.2d 661, 664 (1998).

Notwithstanding, the following also applies to the case herein:

[W]hen a motion for summary judgment which has been properly supported with evidence indicating the absence of material factual issues, the burden shifts to the non-moving party to make a showing of the existence of a genuine material fact which would preclude summary judgment. This standard of review is not affected by the fact that both parties have filed motions for summary judgment. Rather, each motion must be

separately considered on its own merits, with the court drawing all reasonable inferences against the party whose motion is under consideration.

*Treasure Valley Gastroenterology Specialists, P.A., v. Woods*, 135 Idaho 485, 488-489 20 P.3d 21, 24-25 (2001).

Idaho law is very clear on the standard used in summary judgment proceedings that has been cited in numerous cases. That initial standard is as follows:

Summary judgment should be granted if no genuine issue as to any material fact is found to exist after the pleadings, depositions, admissions, and affidavits have been construed in a light most favorable to the party opposing the summary judgment motion. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975).

Thereafter, the court follows often cited points, as follows:

If the court determines, after a hearing on a motion for summary judgment, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. *Barlows, Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

In summary judgment proceedings the facts are to be liberally construed in favor of the party opposing the motion, who is also to be given the benefit of all favorable inferences which might be reasonable drawn from the evidence. *Smith v. Idaho State Federal Credit Union*, 103 Idaho 245, 646 P.2d 1016 (Ct. App. 1982).

When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material fact rests with that party. *Thompson v. City of Idaho Falls*, 126 Idaho 527, 887 P.2d 1094 (Ct. App. 1994).

If a genuine issue of material fact remains unresolved, or if the record contains conflicting inferences and if reasonable minds might reach different conclusions from the facts and inferences presented, summary judgment should not be granted. *Sewell v. Neilsen, Monroe, Inc.* 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

If an action will be tried by a court without a jury, a judge is not required to draw inferences in favor of a party opposing a motion for summary judgment. *Kaufman v. Fairchild*, 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).

Thus, the court has at least two tasks concerning a summary judgment motion. First, the court must determine that no material facts are in dispute. Second, the court must draw reasonable inferences from those facts to determine which party should be granted summary judgment/partial summary judgment.

### INTRODUCTION

The defendants disagree with plaintiff's counsel's version of "Statement of Facts". A simplistic version of the facts is set forth hereafter.

The parties hereto entered into real estate transactions for the sale of real property by each of the two party defendants (husband and wife) to the plaintiff. Those exhibits are attached to the affidavit of Magera as Exhibit A-Clark; and as Exhibit B-Peterson. Both properties were "tied" to the sale and the defendants had been neighbors and friends for numerous years.

The Petersons received a substantial down payment on the real estate transaction as everyone knew that they were purchasing a retirement home in Idaho Falls. The money was needed to complete the purchase on their retirement town house and to allow them to begin the retirement process. The Petersons relied upon the representations of plaintiff in accepting the down payment.

The Clarks received a modest down payment to sell their real property to the defendant and moved to Texas to begin their retirement plans. Neither set of defendants believed any contingencies existed, except for environmental issues or defects in the land, and that the contract was to be completed by a date certain for them to begin retirement activities.

The real estate purchase agreements state the terms and conditions. No oral modifications were made by either set of defendants but multiple promises of payment were

MEMORANDUM ON SUMMARY JUDGMENT-4-



made by the plaintiffs to the defendants—even subsequent to the closing date of the transactions. The defendants did not participate with the plaintiff's bank process nor were the defendants involved in any actions of the plaintiff.

No conditions were placed upon the sale of the real property as it related in any way, shape or form as to the County of Jefferson and any zoning or building requirements. The intent of usage by plaintiff for the subject real properties was irrelevant to the defendants. No mutual agreement or understanding was made by the defendants as to the ultimate usage of the real property being purchased by the plaintiff. In fact, the only understanding was that the down payment to Petersons was critical to their purchase of a retirement home in Idaho Falls.

It is true that the sale of both sets of defendants' property was contemplated by the plaintiff and a condition for both parties defendant. The defendants were aware that the plaintiff was in the business of development. Both set of defendants continued to be ready, able and willing to perform on the sale and were ready, willing and able to close subsequent to the closing date. Neither set of defendants signed any extensions or written documents referred to as Ex. E and F. to the Magera Affidavit.

Plaintiff instituted a lawsuit for refund. Defendants answered and counter-claimed for damages and/or specific performance along with other defenses and claims as set forth in the pleadings.

1. The plaintiff breached the contract between the parties which was Exhibit A and B to the Complaint and Magera Affidavit and, therefore, is not entitled to summary judgment on its cause of action in the complaint.

The breach is very straight forward. Plaintiff failed to pay the contract price to the  
MEMORANDUM ON SUMMARY JUDGMENT-5-

defendants/counter-plaintiffs on or before the date of closing. No factual dispute exists concerning the failure of the plaintiff to pay the defendants on or before the closing date as contained in the written contracts labeled as Exhibits A and B to the Magera affidavit.

Plaintiff relies upon the following language from paragraph 3 of the written contracts to excuse its breach:

Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes.

No factual dispute exists that any claim has or will be made that the condition of the real property was not satisfactory. No factual dispute exists that any claim has or will be made that the real property in question had any environmental concerns. Thus, the plaintiff (buyer) must be relying on the language "and all requirements that the Buyer needs to make for its due diligence purposes."

This non-artfully drafted language is so vague that it would be impossible for any court to know what "buyer needs for its due diligence." Paragraph 24 of the contracts is very clear that the buyer drafted this agreement. As the court is well aware, the court must construe the language against the drafter.

(See, e.g., RESTATEMENT, supra, at § 201 (agreement interpreted in accordance with the meaning assigned by the more "innocent" of the parties); > Luzar v. Western Surety Co., 107 Idaho 693, 692 P.2d 337 (1984) (where trier of fact is unable to determine the intent of the parties, preference is given to the meaning which operates against the party drafting the agreement); RESTATEMENT, supra, at § 207 (preferring an interpretation favoring the public interest).

815 P.2d 469, 120 Idaho 271, USA Fertilizer, Inc. v. Idaho First Nat. Bank, (Idaho App. 1991)

----- Excerpt from page 815 P.2d 474. See, e.g., RESTATEMENT, supra, at § 201 (agreement interpreted in accordance with the meaning assigned by the more "innocent" of the parties); > Luzar v. Western Surety Co., 107 Idaho 693, 692 P.2d 337 (1984) (where trier of fact is unable to determine the intent of the parties, preference is given to the meaning which operates against the party drafting the agreement); RESTATEMENT, supra, at § 207 (preferring an  
MEMORANDUM ON SUMMARY JUDGMENT-6-

interpretation favoring the public interest).

*USA Fertilizer, Inc. v. Idaho First Nat. Bank*, 815 P.2d 469, 120 Idaho 271, (Idaho App. 1991).

----- Excerpt from page 815 P.2d 474.

Further, the court, as a matter of law, must determine if the language is ambiguous.

The existence of ambiguity determines the standard of review of a lower court's interpretation of a contract or instrument. > *Union Pac. R.R. Co. v. Ethington Family Trust*, 137 Idaho 435, 437-38, 50 P.3d 450, 452-53 (2002). "The initial inquiry into whether a ... legal instrument is ambiguous presents a legal question, over which this court exercises free review." > *Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995); > *Union Pac. R.R. Co.*, at 437-38, 50 P.3d at 452-53. "An instrument which is reasonably subject to conflicting interpretation is ambiguous." > *Latham v. Garner*, 105 Idaho 854, 858, 673 P.2d 1048, 1052 (1983). "The legal effect of an unambiguous written document must be decided by the trial court as a question of law." > *Id.* at 857, 673 P.2d at 1051. "If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact." *Id.*

*Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op. Ass'n, Inc.*, 86 P.3d 484, 139 Idaho 770, (Idaho 2004).

----- Excerpt from page 86 P.3d 486.

In the instant case and believing the language to be ambiguous, it still becomes irrelevant for the reason that the plaintiff has relied upon the County of Jefferson's zoning as its only defense. It believes that the subject property could not be zoned R-1. The affidavit of Naysha Foster clearly rebuts this position and the issue of ambiguity becomes irrelevant.

The subject land was to be treated as R-1 purposes for this case. Thus, the only argument of the plaintiff fails. No other defenses or arguments are presented on the direct action of the plaintiff in its summary judgment motion. The plaintiff breached the contract and did not timely pay for the balance of the contract either at closing or subsequent thereto.

2. The defendants/counter-plaintiffs are entitled to summary judgment on the issue of liability

MEMORANDUM ON SUMMARY JUDGMENT-7-

on their counterclaims.

Since the plaintiff breached the contract, the defendants are clearly entitled to liability on their counterclaim for breach of contract. The only issue remains is damages and/or specific performance.

The defendants/counter-plaintiffs have been damaged monetarily in a sum to be established. Specific performance is an alternative for enforcement of the contract against the plaintiff and in favor of the defendants.

3. Other claims in the counter-claims of the counter-plaintiffs also establish liability with the issues of damages to be determined at a later point.

A. Specific Performance

Specific performance is used as follows:

There is no legal right to specific performance. > Suchan v. Rutherford, 90 Idaho 288, 410 P.2d 434 (1966). Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate. > Hancock v. Dusenberry, 110 Idaho 147, 152, 715 P.2d 360, 365 (Ct.App.1986)(citing J. CALAMARI & J. PERILLO, CONTRACTS § 16-1 (2d ed.1977)). 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. > Perron v. Hale, 108 Idaho 578, 701 P.2d 198 (1985). But, specific performance is an equitable remedy and should not be granted when it would be unjust, oppressive, or unconscionable. Suchan. When seeking the remedy of specific performance:

[a party] comes into a court of conscience asking for a remedy beyond the letter of his strict legal right.... To come within the equitable rule he must stand before the court prepared to meet its scrutiny, relying upon the fairness and equitable character of the contract. This must not only be his own position, but he must also show that it is not unjust or oppressive to the defendant to compel him to perform specifically.

> Suchan, at 302, 410 P.2d at 442-43. The decision to grant specific performance is a matter within the district court's discretion. Suchan (citing > Bedal v. Johnson, 37 Idaho 359, 218 P. 641 (1923)). When making its decision the court must balance the equities between the parties to determine whether specific performance is appropriate. Suchan; > Barnard & Son, Inc. v. Akins, 109 Idaho 466, 708 P.2d 871 (1985).

> [15]> [16] Specific performance should be granted under terms and conditions  
MEMORANDUM ON SUMMARY JUDGMENT-8-

reflecting the equities of the case.

A decree of specific performance should be equitable to both the plaintiff and the defendant, and a court of equity, being a court of conscience, is capable of rendering a conditional decree in an action for specific performance, because it can insist that if a party, either plaintiff or defendant, seeks the assistance of such a court, he must do what good conscience demands in the particular case.

71 Am.Jur.2d. Specific Performance § 222 (1973).

In circumstances where an order for specific performance would operate to benefit the petitioner inequitably and unconscionably, a court of equity has discretion to refuse to order specific performance or where possible to condition an order for specific performance so as to account for the petitioner's inequitable conduct.

> Boyd v. Head, 92 Idaho 389, 393, 443 P.2d 473, 477 (1968). This Court has also stated that "once the equitable jurisdiction of the court has attached, the court should retain jurisdiction to resolve all portions of the dispute between the parties and render equity to all parties without regard to the technical niceties of pleading and procedure." > Barnard & Son, Inc. v. Akins, 109 Idaho 466, 708 P.2d 871 (1985)  
1 P.3d 292, 134 Idaho 264, Kessler v. Tortoise Development, Inc., (Idaho 2000)  
----- Excerpt from page 1 P.3d 298.

#### B. Breach of Contract

Breach of contract has been established wherein the plaintiff failed to pay the defendants/counter-plaintiffs. No material facts are in dispute and the court should grant the counter-plaintiffs liability on this issue.

#### C. Unjust Enrichment

As the court is aware, unjust enrichment is an equitable remedy, plead in the alternative, to a breach of contract claim. It is described as follows:

Although defendants argue that no written agreement was executed between the parties, unjust enrichment does not depend upon the existence of a valid contract. > Continental Forest Products v. Chandler, 95 Idaho 739, 518 P.2d 1201 (1974).

The essence of the quasi-contractual theory of unjust enrichment is that the defendant has received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust. > Continental Forest Products v. Chandler, supra; > Bair v. Barron, 97 Idaho 26, 539 P.2d 578 (1975). Cf. > Bastian v. Gifford, 98 Idaho 324, 563 P.2d 48 (1977). No intention is shown to make a gift and it is clear that Hertz's intention was to improve the premises and thus generate more business from which he would profit. The  
MEMORANDUM ON SUMMARY JUDGMENT-9-

Fiscuses approved the work of Hertz from its outset with knowledge of the expenditure of the money and time involved.

567 P.2d 1, 98 Idaho 456, Hertz v. Fiscus, (Idaho 1977)

----- Excerpt from page 567 P.2d 2.

D. Estoppel

The plaintiff should be estopped from asserting rights contrary to the representations made to the counter-plaintiffs. Estoppel ties into the detrimental reliance theory. Estoppel is defined as follows:

Equitable estoppel requires

(1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth;

(2) that the party asserting estoppel did not and could not have discovered the truth;

(3) an intent that the misrepresentation or concealment be relied upon; and

(4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

> Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982). Quasi estoppel is distinguished from equitable estoppel "in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient." > Evans v. Idaho State Tax Comm., 97 Idaho 148, 150, 540 P.2d 810, 812 (1975). The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position. > Mitchell v. Zilog, Inc., 125 Idaho 709, 715, 874 P.2d 520, 526 (1994).

The hearing officer upheld IDHW's collection of the overpayment because he found that Willig had not proved the necessary elements of either equitable or quasi estoppel. As discussed above, to establish equitable estoppel a party must prove prejudicial reliance on the misrepresentation. Although the children are receiving less AFDC benefits than they otherwise would, the hearing officer nonetheless concluded that Willig had not demonstrated the prejudice necessary to establish equitable estoppel.

> [6] To sustain a finding of prejudice in these circumstances it is necessary to show more than the mere obligation to repay the overpayment. In > Brand S Corp. v. King, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981), the Court explained that to demonstrate prejudice the parties asserting equitable estoppel must have "changed their position as a result of the alleged representation and suffered a detriment as a result thereof."

899 P.2d 969, 127 Idaho 259, Willig v. State, Dept. of Health & Welfare, (Idaho 1995)

----- Excerpt from page 899 P.2d 971.

MEMORANDUM ON SUMMARY JUDGMENT-10-

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### E. Detrimental Reliance

Allowing promissory estoppel as a substitute for consideration is permitted in those situations where injustice would otherwise result. The reason for the doctrine also defines its limits. In order to allege the defense of promissory estoppel, it must be shown: (1) the detriment suffered in reliance was substantial in an economic sense; (2) the substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made. Simpson, Contracts § 42 (1954).

See also, Restatement of Contracts, § 90.

388 P.2d 1002, 86 Idaho 531, Mohr v. Shultz, (Idaho 1964)  
----- Excerpt from pages 388 P.2d 1008-388 P.2d 1009.

### F. Consumer Protection

An act or practice is unfair if it is shown to possess a tendency or capacity to deceive consumers. "The law is settled that a finding of 'tendency and capacity to mislead' is sufficient and that actual deception need not be shown." > Vacu-Matic Carburetor Co. v. Federal Trade Commission, 157 F.2d 711, 713 (7th Cir. 1946), cert. denied > 331 U.S. 806, 67 S.Ct. 1188, 91 L.Ed. 1827 (1947). Likewise, proof of intention to deceive[101 Idaho 454] is not required for finding that an act is unfair or deceptive. > Federal Trade Commission v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963). See > Trans World Accounts, Inc. v. Federal Trade Comm'n, 594 F.2d 212 (9th Cir. 1979); > Montgomery Ward & Co. v. Federal Trade Comm'n, 379 F.2d 666 (7th Cir. 1967); > State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash.2d 298, 553 P.2d 423 (1976); > Testo v. Dunmire Oldsmobile, Inc., 16 Wash.App. 39, 554 P.2d 349 (1976). Actual damage to the public need not be shown to establish a trade practice as unfair or deceptive if it is shown that the practice possesses a tendency or capacity to deceive. > Resort Car Rental System, Inc. v. Federal Trade Comm'n, 518 F.2d 962 (9th Cir. 1975), cert. denied sub nom. > McKenzie v. U. S., 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975).

The Supreme Court of the United States has interpreted the impact of the Federal Trade Commission Act in 1934 as follows:

"Competition may be unfair within the meaning of this statute (the Federal Trade Commission Act) and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made." > Federal Trade Comm'n v. Algoma Lumber Co., 291 U.S. 67, 81, 54 S.Ct. 315, 321, 78 L.Ed. 655 (1934).

The effect of the Federal Trade Commission Act on the customs of the marketplace has been stated as follows:

MEMORANDUM ON SUMMARY JUDGMENT-11-

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"The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception." > Federal Trade Comm'n v. Standard Education Society, 302 U.S. 112, 116, 58 S.Ct. 113, 115, 82 L.Ed. 141 (1937).

In > State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wash. 265, 510 P.2d 233 (1973), the Washington Supreme Court discussed > R.C.W. 19.86.080 which is very similar to > I.C. s 48-607:

[101 Idaho 455]

"The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful."

The Washington Supreme Court noted that restitutionary relief was adjunct to the court's general broad and flexible equitable power to compel a wrongdoer to restore the status quo extant prior to his illegal acts.

"Suits for injunctive relief and restitution enforce the laws of the particular jurisdiction in the public interest by restoring the status quo. Restitution orders are appropriate and necessary as a part of equitable relief. . . . The recovery of that which has been illegally acquired and which has given rise to the necessity for the injunctive relief not only restores the property to the party but insures future compliance where it is assured a wrongdoer is compelled to restore illegal gains." > 510 P.2d at 241, citations omitted.

In > People v. Superior Court of Los Angeles County, 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400 (1973), the California Supreme Court similarly interpreted its unfair trade practice statutes to permit the trial court to require the defendants to make or offer to make restitution to consumers falling victim to deceptive or unfair trade practices. At the time the complaint was filed > Section 17535 of the California Business & Professions Code provided that false or misleading advertising "may be enjoined," but the statute did not expressly authorize the trial court to order restitution. The California court, noting that the statute did not restrict the court's general equity jurisdiction, held that

"(i)n the absence of such a restriction a court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved." > 107 Cal.Rptr. at 194, 507 P.2d at 1402.

The Supreme Court of the United States in other statutory contexts has, without specific statutory authority, upheld the power of federal courts to grant restitution as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief. See, e. g., > MEMORANDUM ON SUMMARY JUDGMENT-12-



Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); > United States v. Moore, 340 U.S. 616, 71 S.Ct. 524, 95 L.Ed. 582 (1951); > Porter V. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946). In > Securities Exchange Comm'n v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971), cert. denied, > 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1971), reh. den., > 404 U.S. 1064, 92 S.Ct. 734, 30 L.Ed.2d 753 (1972), it was held that the Securities Exchange Commission Act's failure to authorize equitable relief ancillary to the injunctive relief specifically authorized in the statute did not preclude the district court's granting of restitutionary relief: "(T)he SEC may seek other than injunctive relief in order to effectuate the purposes of the Act, so long as such relief is remedial relief and is not a penalty assessment." > 446 F.2d at 1308. It is our opinion that restitutionary relief is appropriate in an action brought by the Attorney General under the Idaho Consumer Protection Act where such relief would be required to reestablish the status quo ante which existed prior to the defendant's deceptive or unfair acts.

Restitution is not an automatic or mandatory remedy for violations of the Idaho Consumer Protection Act; it is one the courts may invoke. However, the district court's discretion to award restitutionary relief should be exercised with a view toward the purposes of the act. The Idaho Consumer Protection Act indicates a legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices. Businesses faced only with the possibility of a prospective injunctive order would have little incentive to avoid commercial practices of dubious legality. Only a substantial likelihood that defendants who have engaged in unfair or deceptive trade practices will be subject to restitutionary orders will [101 Idaho 456]

deter many with a mind to engage in sharp practices.

"We do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct.

"As one court has stated, 'The injunction against future violations, while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct. To permit the (retention of even) a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement (of the law) is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom.' (Fns. omitted.) (> S.E.C. v. Golconda Mining Co., (S.D.N.Y.1971) 327 F.Supp. 257, 259-60 . . .)" > Fletcher v. Security Pacific Nat. Bank, 23 Cal.3d 442, 153 Cal.Rptr. 28, 33, 591 P.2d 51, 57 (Cal.1979).

Cf. > Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (district court's discretion to award back pay under equal employment opportunity provisions of Civil Rights Act of 1964 must be exercised to promote the statutory purpose of eliminating discrimination and remedying injury suffered through past discrimination; absence of employer's bad faith not sufficient reason to deny back pay award). See > Head v. Timkin Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

615 P.2d 116, 101 Idaho 447, State ex rel. Kidwell v. Master Distributors, Inc., (Idaho 1980)

----- Excerpt from pages 615 P.2d 122-615 P.2d 125.

MEMORANDUM ON SUMMARY JUDGMENT-13-

The Act is designed to prevent fraudulent practices to consumers and applies both through the attorney general and through a private lawsuit. The plaintiff has lead the defendants/counter-plaintiffs down a path that has caused harm and damage to their retirement programs. In good faith, both the Clarks and Petersons have relied upon the plaintiff to their detriment.

Consumer Protection is designed to aid against fraudulent practices or deceptive practices.

### CONCLUSION

The summary judgment matters are two-fold. Plaintiff's request for summary judgment should be denied based upon the affidavits before the court. Counter-plaintiffs request for summary judgment should be requested on the basis of liability. Damages to counter-plaintiffs would need to be established by the fact-finder.

DATED this 13 day of November, 2009.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009 a true and correct copy of the foregoing was delivered to the following persons(s) by:

     Hand Delivery

MEMORANDUM ON SUMMARY JUDGMENT-14-

135

xx Postage-prepaid mail

\_\_\_\_ Facsimile Transmission



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DeAnne Casperson, Esq.  
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Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440

DUNN LAW OFFICES, PLLC.  
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Amelia A. Sheets, Esq., ISB #5899  
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(208) 745-9202 (t)  
(208) 745-8160 (f)

2008 NOV 13 PM 2:57  
DEPT. CLERK  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants/Counter-plaintiffs

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )  
 )  
Plaintiff, )  
vs. )

Case No. CV-08-941

AFFIDAVIT OF JERRY AND  
BETTY PETERSON IN SUPPORT  
OF DEFENDANTS' POSITIONS  
RE: SUMMARY JUDGMENT

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )  
 )  
Counter-Defendants, )

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STATE OF IDAHO )  
 )  
 ) ss.  
COUNTY OF JEFFERSON )

Jerry and Betty Peterson, being duly sworn upon oath, state as follows:

1. They are husband and wife and co-defendants/counter-plaintiffs in the above captioned matter.
2. This affidavit is prepared in opposition to the summary judgment request of the plaintiff and in support of the summary judgment request of the defendants/counter-plaintiffs.
3. This affidavit is prepared with the assistance of their legal counsel and made upon personal knowledge and belief of the undersigned affiants.
4. These affiants entered into a written contract with the plaintiff which is attached to the affidavit of Magera and labeled Exhibit B.
5. This written contract was for the sale of real property in Jefferson County, Idaho as described in the complaint on file and in the contract. The written contract was performed in conjunction with the sale of real property of co-defendants/counter-plaintiffs, Rael and Janet Clark. The Clarks have been neighbors and friends of the undersigned affiants for numerous years. The plaintiff desired to purchase both the real properties of the undersigned and of the Clarks. The Clarks written contract is attached to the affidavit of Magera and labeled Exhibit A. The contracts mirror one another in most material respects.
6. The written contract of the Clarks was signed on August 30, 2007; the written contract of the undersigned (Petersons) was also signed on August 30, 2007.
7. Both parties received earnest money with the Clarks being \$25,000; and the earnest money of the undersigned being \$327,000.00.

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8. Buyer (Plaintiff) was made aware that the undersigned affiants desired the \$327,000.00 to purchase a retirement townhome in Idaho Falls, Idaho. Buyer was comfortable with this position and knew of the intended use by your affiants.

9. Both contracts that are the subject of this lawsuit provided in paragraph 3 of the contracts the following language:

Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes.

10. Your affiants have never been made aware of any problems with the condition of the real property or of any environmental concerns. The plaintiff did not further define due diligence in any manner in the written contract which was prepared by the plaintiff's attorney.

11. At the time of signing the contract, the real properties were both zoned R-1 and remained zoned R-1 up to and including the closing date of the contracts.

12. The purpose of the purchase by the buyers was never communicated to the undersigned affiants nor did the contract state any potential use of the real property being purchased by buyers. Both properties were historically used as farm operations. Your affiants did know, however, that plaintiffs were in the business of land speculation and development. Moreover, the sale of the real property by written contract never contained any language of speculative purposes or of development.

13. In paragraph 6 of the Magera affidavit he states: "and any requirements for Buku's purposes." The undersigned disagree with this assertion as the contract does not state as such nor were your affiants ever informed of "any requirements."

14. Needless-to-say, Jefferson County never changed the zoning requirements during  
AFFIDAVIT OF PETERSONS RE: SUMMARY JUDGMENT-3-

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the time between signing of the agreement and of the closing date. The real properties were zoned R-1 and remained zoned R-1 at the time the contract called for closing.

15. Paragraph 18 of the Magera affidavit is not accurate. The undersigned never “mutually understood” nor did the undersigned care about the plaintiff’s potential use of the real property. The written contract does not contain language agreed to by the undersigned of any “use of the real property.” In fact, the undersigned were lead to believe all was well and the initial deposit of \$327,000.00 was specifically made to allow the transition to retirement for the undersigned.
16. Your affiants did not participate nor have any knowledge of the plaintiff’s involvement with any lending institutions. The financial background of the plaintiff was never an issue of participation by your affiants nor was it any of their concern. Jaramie Magera did, however, telephone your affiants on 12/12/07 and confirmed that the bank loan was approved. Your affiants believed Buku, LLC, to be financially solvent. The \$327,000.00 payment reassured your affiants of the financial viability of the plaintiff.
17. In December of 2007 (12/12/07) during the telephone conversation with your affiants, Magera informed that the County may be re-zoning property. The response issued by your affiant, Jerry Peterson was, “what does that have to do with us, I sold you a house and a farm”. Magera stated: “I would rather take a \$350,000.00 loss than a 2 million dollar loss.”
18. The plaintiff exercised dominion and control over the real properties contained in the written contracts of the defendants/counter-plaintiffs. The real property of the undersigned was listed with a realtor to sell the real property and, in particular, the

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residential home on the real property. That listing continued late into the 2008 year and was listed with ERA with listing agent Kipp Archibald. The listing continued through-out 2008 as the realtor signs were still present as of August 4, 2008. The house was shown by the realtors for plaintiffs as late as June 27, 2008. Your affiants observed the Clark property being used by the plaintiffs through the 2008 farming season; as was your affiants' property being listed and shown by realtors during the same time period.

19. Magera further telephoned in December of 2007 and indicated he had a buyer for the house and would we, the undersigned, take an early pay-off because the property was to sell. That event did not transpire. On January 3, 2008, Kipp Archibald, plaintiff's realtor and agent, telephoned and asked if the house sold did we want it applied to the plaintiff's contract.

20. In March of 2008, Plaintiff and Magera's agent, Brad Foster, telephoned and indicated that he was supposed to operate the farm for the season.

21. On March 31, 2008 Magera, plaintiff's agent, telephoned saying he had good news as follows: "The County Commissioners had grand-fathered in 1 acre lots and the bank ok'd the loan. We need to get together and talk." He was informed by your affiant, Jerry Peterson, that a meeting would be set up with the undersigned's attorney. Your affiants never did hear back from Jaramie Magera.

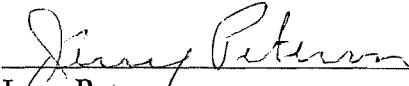
22. Plaintiffs continually informed the undersigned affiants, subsequent to the closing date, that the contract would be fulfilled and that payment would be forthcoming. Plaintiff actually arranged for a meeting with your affiants and their counsel subsequent to the closing date to develop a payment plan for conclusion of the written contract. Plaintiff did not participate or provide any other meeting date.


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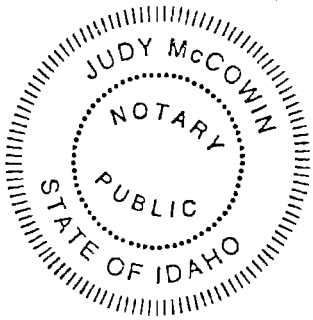
23. On August 6, 2008, Kipp Archibald, agent for plaintiffs, telephoned and indicated plaintiff still wanted the property and was working with its lending institution.
24. On November 12, 2008, the realtor lock-box of Kipp Archibald was still on the home (real property contained in Exhibit B) of your affiants.
25. Your affiants have remained ready, willing and able to sell the real property that is the subject of this lawsuit.
26. Your affiants allege that the plaintiff breached the written contract by non-performance of the payment on the closing date and by continued exercise of dominion and control over the subject real property until as late as November, 2008.
27. Your affiants have been damaged monetarily in the remaining sum of the contract and other miscellaneous costs and billings, including but not limited to, lost revenues on farming practices, lost interest, expenses of upkeep and utilities, tax assessments, attorney fees and costs.
28. Your affiants believe and allege that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).

DATED this 9 day of November, 2009.

  
\_\_\_\_\_  
Jerry Peterson

  
\_\_\_\_\_  
Betty Peterson

SUBSCRIBED AND SWORN to before me this 9 day of November, 2008.



Judy McCowin  
Notary Public  
Residing at: Minan  
Commission: 04-03-15

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission

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Robin D. Dunn, Esq.  
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Idaho Falls, ID 83405

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Madison County Courthouse  
P.O. Box 389  
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2009 NOV 13 PM 2:57  
 DISTRICT COURT  
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants/Counter-plaintiffs

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

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company, )  
 )  
 Plaintiff, )

vs. )

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )  
 )  
 Defendants. )

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company; and )  
 JARAMIE MAGERA, an individual, )

Counter-Defendants, )

Case No. CV-08-941

AFFIDAVIT OF NAYSHA  
 FOSTER, PLANNING AND  
 ZONING COORDINATOR  
 RE: SUMMARY JUDGMENT

STATE OF IDAHO                    )  
                                          ss.  
COUNTY OF JEFFERSON        )

Naysha Foster, being duly sworn upon oath, state as follows:

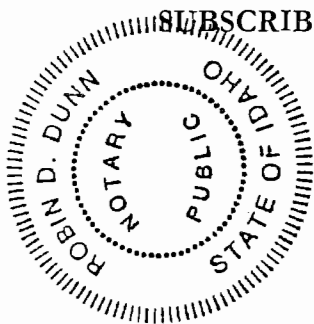
1. They she is employed with Jefferson County, Idaho as its Planning and Zoning Administrator.
2. That she was employed in such capacity prior to August of 2007.
3. That she has checked the zoning and mapping for the real property owned by Rael and Janet Clark, husband and wife. She has also checked the zoning and mapping for the real property owned by Jerry and Betty Peterson, husband and wife. Both properties are contained in Township 4 North, Range 39, East Boise Meridian, Jefferson County, Idaho, Section 21. The property of the Clarks was approximately 80 acres; and the property of the Petersons was approximately 70 plus acres.
4. In August of 2007 both properties were zoned R-1. On December 31, 2007, both properties were zoned R-1.
5. Any applications for Planning and Zoning action rely upon the zoning as of the date of application. Any zone would be treated as it was mapped at the date of application for Planning and Zoning action.
6. Jaramie Magera request plat development by way of a Sketch Plan on the properties described above. Both properties would be and come under the definition of R-1 zoning. His application was dated December 10, 2007. A copy of the cover from the file is incorporated herein by reference as Exhibit 1 identifying the date of December 10, 2007. Further, minutes of the County of Jefferson Planning and Zoning discussed the sketch plan prior to any zone changes. These minutes are attached and

incorporated herein as Exhibit 2 and are for the meeting of March 6, 2008.

7. The real property of this land would be "grandfathered" as R-1 zoning. Attached is a copy of a letter from the Jefferson County Commissioners confirming this position and is attached as Exhibit 3 indicating that this land would be treated as R-1 zoned land for the purpose of application. Exhibits 3 is incorporated herein by reference as though fully set forth.
8. If the subdivision were approved, it would be designated R-1 for zoning purposes.

DATED this 9 day of November, 2009.

Naysha Foster  
Naysha Foster



SUBSCRIBED AND SWORN to before me this 9 day of November, 2008.

[Signature]  
Notary Public  
Residing at: R1684, ID  
Commission: 10/01/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission

[Signature]  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

P.O. Box 50130  
Idaho Falls, ID 83405

Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440



*Blaine*  
COUNTY  
PLANNING AND ZONING

**EXHIBIT** 1

Developer / Engineering Firm	Jaramie Magera / Thompson Engineering
From:	Naysha Foster, Planning and Zoning Administrator
Date:	Friday, February 01, 2008
Re:	A large scale development
Subdivision Name:	Jaramie Magera / Clark-Peterson property
General Location:	4200 / 4100 E 250 N
Items discussed in the pre-application meeting for the above-mentioned subdivision on DATE: December 10, 2007	
Lots Count: 124 Building Lots and 2 Common Lots.	
Lot Size: 1 acre building lots	
Open Space: 6 acres	
Landscaping: Will need to provide a landscaping plan.	

File No.: P2080302 Prepared By: <sup>NE</sup> DJ 2/1/2008 3:13:50 PM

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Walkpaths: Will have walkpaths.
Wetlands: N/A
Wildlife: N/A
Road access/State Hwy access: There will be an access on 4100 E and 4200 E. There will also be a stub road to Clark's property north of the East portion of the Subdivision.
Fire protection:
Irrigation plan/water rights:
Traffic Concerns:
Present land use: Ag
Test holes/water depth:
Other: Leaning to community services.



JEFFERSON COUNTY  
PLANNING AND ZONING MEETING  
March 6, 2008 7:00 PM

---

**Planning and Zoning Commission Present:** Michael Clark Chairman, Clyde Gillespie, Ed Mortensen, Craig Bingham, Lance Moss, Evy Gilstrap and Holly Hancock.

**Staff Present:** Naysha Foster, Planning & Zoning Administrator  
Niressa Shepard, Planning & Zoning Administrative Assistant  
Kristi Schneider, Planning & Zoning Administrative Assistant

**Sketch Meeting**

**Cobblestone Creek Subdivision-** *Kevin Thompson, Thompson Engineering* presented the plat located approximately West of 3700 East on US Hwy 48. The applicant is proposing this subdivision under a clustering permit. The development will equate into 5 acre lots. Total acreage is 36.74 with 7 lots total. The applicant proposed a zone change on this property that was denied. Now they are going back through this with the allowed usage that will have 5 acre lots next to the school. It will have a walk path to the school. Will tie into the neighboring property on the North side for future access.

The Commission discussed the following:

1. Concern with the property next to the school. Kevin Thompson indicated that it is owned by the school.
2. The applicant does not own the land on the east side going to 3700 E.
3. **Ray Keating** – Will need to do test holes and monitor ground water. Concerns with lot 2 block 2.
4. **Kevin Thompson** - there is a drainage ditch that runs through the property.
5. **Jim Deuel**- how wide is the road? Kevin Thompson stated that it will meet county specs. The road will be a 60 foot right-of-way. Will you have fire protection and irrigation plan? Kevin Thompson indicated that there will be none as of now.
6. **Holly Hancock**- How will you water the lots on the west side of the road.
7. **Kevin Thompson**- This is only sketch so I will have to talk with the developer, but they will possibly have to run a ditch along the front of the properties. They will have something figured out for the preliminary plat.
8. **Evy Gilstrap**- would like to see the first two (2) lots along the Hwy screened with some kind of fencing. Needs to be attractive.
9. **Kevin Thompson**- They have left a 40 foot setback for this, to either have burning, trees, or landscaping.

10. **Clyde Gillespie**- Concerns on how the clustering permit was done.
11. **Kevin Thompson**- The property is split into four different fields, so this is how the developer wanted it. The lay of the land is not flat.
12. **Ray Keating** – Concerns with high ground water.
13. **Luke Hicks**- Stated that they have an approved feed lot to the west of this property, but his main concern is the levy ditch that runs along the west side of this property. Concerned with the maintenance of the levy ditch. Also the drain is a recognized wetland.

**Clark & Peterson Subdivision**- *Kevin Thompson, Thompson Engineering* presented the plat located approximately 4200/4100 E 250 N. It is on the North and East side of Sweetwater Subdivision. They propose with the two developments to centralize the parks between the two developments. Proposing one acre lots. Mr. Thompson indicated that he has heard that Mr. Call's property along 4100 E will be annexed into the city. So keep in mind that we are proposing individual wells and sewer, but if this annexation goes through then we would like to propose central sewer and water hooked into the city of Rigby. The developer proposes to connect to neighboring properties.

The Commission discussed the following:

1. **Clyde Gillespie**- When you have this many lots, they need to have adequate sewer systems not just septic tanks.
2. **Kevin Thompson**- We will follow whatever the ordinance says.
3. Will have irrigation plan.
4. **Jim Deuel** would like to see water for fire protection plan.
5. **Evy Gilstrap**- Where is the fifth common area lot? Kevin Thompson indicated that it is lot 10. Lot 37 is a buffer lot for a neighbor.
6. **Evy Gilstrap**- doesn't like where the parks are located and the road going through them. Doesn't seem conveniently located for kids.
7. **Kevin Thompson**- We had to obtain land from the property owner in Sweetwater to make this road, so this was a way to buffer that owner.
8. **Ed Mortensen**- I would per see the majority of the traffic going through this park to access 4100 E. This might be a public hazard with kids running through there.
9. **Evy Gilstrap**- I can see where they are trying to make it best for everyone, but sometimes for the better good you might have to sacrifice a lot or two to make it a descent looking subdivision in the long term.
10. **Kevin Thompson**- The developer might have the option in the future to buy the property that is NE to the development. So then he would dedicate the park in the corner of that property to have one big park.
11. **Evy Gilstrap**- Walkpaths.
12. **Ray Keating**- Concerns with how rocky the ground is in this area, and concerns with lots 11 & 12 of block 1 when they put the septic in. Concern with the ground water.
13. **Kevin Thompson**- The developer wants to hook up to the city so he is not in any hurry.
14. **Jim Archibald**- (**Attorney for Jeremy Magera**) Wants to clarify on the utilities. They are negotiating with city and the school district to bring the city utilities out

to the new school that will be on the corner of 4100 E and 300 N. So with that Jeremy Megea hopes to bring the city utilities down 4100 E to hook up that way or if the Call's property gets annexed then run city sewer and water across the road to hook up. One of Jeremy Megea's goals here is to provide central sewer and water, but he does hope to hook up to the city with this subdivision.

15. **Evy Gilstrap**- Would like Road and Bridge input on this to see if this works especially if they go denser.
16. Concern with ditch.

**Ridge Point Division 1- Perry Ward- Kevin Thompson, Thompson Engineering** presented the plat approximately located off of 500 N and 4200 E the Labelle area. The golf course is about 2 miles to the west of this property. This was approved last year and some of you may remember that we would have a dead end road connecting to the future development. What we are proposing is to come off of 500 N and tie into the Deer Hollow Estates. With these two subdivisions together they will create a looping system. This area is zoned R-1 right now. We are proposing one acre lots. Individual wells and sewer. We have the Long Island Canal about 400 feet along lots 16 & 17. For future access we tied into the Reed's property.

The board discussed the following:

1. **Craig Bingham**- Where is your green area?
2. **Kevin Thompson**- We have park that is located by the Deer Hollow Estates road. It is about ½ acre.
3. **Ed Mortensen**- The zoning on the property.
4. Concern with the new zone change.
5. Comprehensive Plan
6. A checklist from the Comprehensive Plan for the goals and policies.
7. We are a recommending body.
8. **Ed Mortensen**- Looks like a good area for 2 acre lots.
9. **Clyde Gillespie**- Sewers a concern.
10. Monitoring wells.
11. **Ray Keating**- High ground water.

**Michael Clark** called the Jefferson County Planning and Zoning Meeting to order.

**Holly Hancock** led the audience in the pledge of allegiance.

**Evy Gilstrap** made a motion to postpone approval of the February 6, 2008 minutes. **Craig Bingham** seconded the motion. Motion carried unanimously.

**Michael Clark** stated that the Zone Map Amendment for Shane and Elizabeth Mallard will not be heard for hearing tonight. The application was withdrawn.

**EXHIBIT** 3



March 26, 2008

Regarding: Proposed Development by Jaramie Magera located approximately 268 N 4100 E and 241 N 4200 E Jefferson County, ID.

To whom it may concern,

This letter is to inform you that the proposed development was presented to the Jefferson County Planning and Zoning Administrator on December 10, 2007 and to the Jefferson County Planning & Zoning Commission on March 6, 2008 as a sketch plan. This is the second step to the County's subdivision procedure. The County Commissioners adopted the new county wide zoning map on March 24, 2008. Prior to the adoption of the new zoning map the above mentioned property was located in a Residential- one zone. The area in question is now zoned Residential- five. The density of the development that was purposed March 6, 2008, if approved, would be grandfathered.

If I can answer any questions please feel free to e-mail me or call me at the number listed below during normal business hours.

Sincerely,

*Naysha Foster*

Naysha Foster  
Jefferson County  
Planning & Zoning Administrator

[nfoster@co.jefferson.id.us](mailto:nfoster@co.jefferson.id.us)

*Brett Olaveson*  
County Commissioner  
Chairman Olaveson

*Robin Dunn*  
Prosecuting Attorney Jefferson  
County, Robin Dunn

DUNN LAW OFFICES, PLLC.  
 Robin D. Dunn, Esq., ISB #2903  
 Amelia A. Sheets, Esq., ISB #5899  
 477 Pleasant Country Lane  
 P. O. Box 277  
 Rigby, ID 83442  
 (208) 745-9202 (t)  
 (208) 745-8160 (f)

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 COUNTY OF JEFFERSON CO

Attorneys for Defendants/Counter-plaintiffs

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

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company, )  
 )  
 Plaintiff, )

Case No. CV-08-941

vs. )

AFFIDAVIT OF RAOEL  
 CLARK IN SUPPORT  
 OF DEFENDANTS' POSITIONS  
 RE: SUMMARY JUDGMENT

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )  
 )  
 Defendants. )

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company; and )  
 JARAMIE MAGERA, an individual, )

Counter-Defendants, )

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STATE OF TEXAS )  
 )  
 COUNTY OF \_\_\_\_\_ )  
 )

Rael Clark, being duly sworn upon oath, states as follows:

1. He is one of the co-defendants/counter-plaintiffs in the above captioned matter. His wife is Janet Clark.
2. This affidavit is prepared in opposition to the summary judgment request of the plaintiff and in support of the summary judgment request of the defendants/counter-plaintiffs.
3. This affidavit is prepared with the assistance of his legal counsel and made upon personal knowledge and belief of the undersigned affiant.
4. The undersigned and his wife entered into a written contract with the plaintiff which is attached to the affidavit of Magera and labeled Exhibit A.
5. This written contract was for the sale of real property in Jefferson County, Idaho as described in the complaint on file and in the contract. The written contract was performed in conjunction with the sale of real property of co-defendants/counter-plaintiffs, Jerry and Betty Peterson. The Petersons have been neighbors and friends of the undersigned affiant for numerous years. The plaintiff desired to purchase both the real properties of the undersigned and of the Petersons. The Petersons written contract is attached to the affidavit of Magera and labeled Exhibit B. The contracts mirror one another in most material respects.
6. The written contracts of all parties were signed on August 30, 2007.
7. Both parties received earnest money with the undersigned (Clarks) being \$25,000; and the earnest money of the Petersons being \$327,000.00.
8. Both contracts provided in paragraph 3 of the contracts the following language:  
 AFFIDAVIT OF CLARK RE: SUMMARY JUDGMENT-2-

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Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes.

9. Your affiants have never been made aware of any problems with the condition of the real property or of any environmental concerns. The plaintiff did not further define due diligence in any manner in the written contract of the undersigned.
10. At the time of signing the contract the real properties were both zoned R-1 and remained zoned R-1 up to and including the closing date of the contracts.
11. The purpose of the purchase by the buyers was never communicated to the undersigned affiant nor did the contract state any potential use of the real property being purchased by buyers. Both properties were historically used as farm operations. Your affiant did know, however, that plaintiff was in the business of land speculation and development. Moreover, the sale of the real property by written contract never contained any language of speculative purposes or of development.
12. In paragraph 6 of the Magera affidavit he states: "and any requirements for Buku's purposes." The undersigned disagrees with this assertion as the contract does not state as such nor was your affiant ever informed of "any requirements."
13. Needless-to-say, Jefferson County never changed the zoning requirements during the time between signing of the agreement and of the closing date. The real properties were zoned R-1 and remained zoned R-1 at the time the contract called for closing.
14. Paragraph 18 of the Magera affidavit is not accurate. The undersigned never "mutually understood" nor did the undersigned care about the plaintiff's potential use of the real property. The written contract does not contain language agreed to by

the undersigned of any "use of the real property." In fact, the undersigned was lead to believe all was well and continued to believe the same after the closing date had passed.

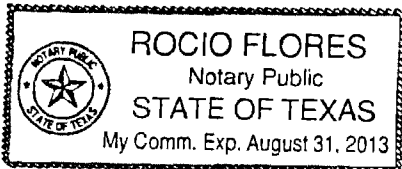
15. Your affiant did not participate nor have any knowledge of the plaintiff's involvement with any lending institutions. The financial background of the plaintiffs was never an issue of participation by your affiant nor was it any of his concern.
16. The plaintiff exercised dominion and control over the real properties contained in the written contracts of the defendants/counter-plaintiffs. The real property of the undersigned was used for farming by buyer throughout the 2008 farm year.
17. Brad Foster, agent of Magera and of the plaintiff, farmed the real property in the 2008 year.
18. Plaintiff continually informed the undersigned affiant, subsequent to the closing date, that the contract would be fulfilled and that payment would be forthcoming.
19. Your affiant and his wife have remained ready, willing and able to sell the real property that is the subject of this lawsuit.
20. Your affiant alleges that the plaintiff breached the written contract by non-performance of the payment on the closing date and by continued exercise of dominion and control over the subject real property until as late as November, 2008.
21. Your affiant has been damaged monetarily in the remaining sum of the contract and other miscellaneous costs and billings, including but not limited to, lost revenues on farming practices, lost interest, expenses of upkeep and utilities, tax assessments, attorney fees and costs.
22. Your affiant believes and alleges that the plaintiff is liable for damages and/or is requested to perform on the contract (Specific Performance).



DATED this 11th day of November, 2009.

Raoel H Clark  
Raoel Clark

SUBSCRIBED AND SWORN to before me this 10th day of November, 2008.



Rocio Flores  
Notary Public  
Residing at:  
Commission:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

- Hand Delivery
- Postage-prepaid mail
- Facsimile Transmission

Robin D. Dunn  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

DeAnne Casperson, Esq.  
P.O. Box 50130  
Idaho Falls, ID 83405

Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440

DUNN LAW OFFICES, PLLC.  
 Robin D. Dunn, Esq., ISB #2903  
 Amelia A. Sheets, Esq., ISB #5899  
 477 Pleasant Country Lane  
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 Rigby, ID 83442  
 (208) 745-9202 (t)  
 (208) 745-8160 (f)

2009 NOV 13 PM 3:04  
 DISTRICT COURT  
 JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company, )

Case No. CV-08-941

Plaintiff, )

HEARING NOTICE

vs. )

ON DEFENDANTS'

SUMMARY JUDGMENT;

MOTION TO STRIKE

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )

Defendants. )

RAOEL H. CLARK and JANET C. )  
 CLARK, husband and wife; ANGUS )  
 JERRY PETERSON and BETTY JEAN )  
 PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
 Limited liability company; and )  
 JARAMIE MAGERA, an individual, )

Counter-Defendants, )

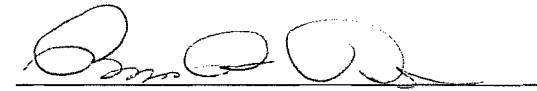
COMES NOW, the co-defendants/counter-plaintiffs, by and through the

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undersigned attorney, and hereby give notice of hearing on the Defendants/counter-plaintiffs' Summary Judgment Request and upon the Motion to Strike Portions of the Magera Affidavit.

Said hearing is scheduled at the same time scheduled for the Summary Judgment Motion of the Plaintiff at the Jefferson County Courthouse, Rigby, Idaho at the hour of 1:30 p.m. on the 14<sup>th</sup> day of December, 2009 before the above-entitled court.

DATED this 13 day of November, 2009.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

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Rexburg, ID 83440

Charles A. Homer, Esq. (ISB No. 1630)  
 DeAnne Casperson, Esq. (ISB No. 6698)  
 HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
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 Facsimile: (208) 523-9518

FILED -7 E. 11 01  
 DEPT. OF CLERK & DISTRICT CLERK  
 JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho limited  
 liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C. CLARK,  
 husband and wife; ANGUS JERRY  
 PETERSON and BETTY JEAN PETERSON,  
 husband and wife,

Defendants.

Case No. CV-08-941

**REPLY MEMORANDUM IN  
 SUPPORT OF PLAINTIFF'S  
 MOTION FOR SUMMARY  
 JUDGMENT**

RAOEL H. CLARK and JANET C. CLARK,  
 husband and wife; ANGUS JERRY  
 PETERSON and BETTY JEAN PETERSON,  
 husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho limited  
 liability company,

Counter-Defendants.

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COMES NOW Buku Properties, LLC ("Buku"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, PLLC, and submits this Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment.

### I. STATEMENT OF FACTS

Because Plaintiff has already provided a thorough statement of facts to the Court in its Memorandum in Support of Summary Judgment, Plaintiff will not repeat those arguments. Plaintiff will simply address the additional factual allegations set forth by Defendants Rael and Janet Clark and Jerry and Betty Peterson (collectively "Defendants") in their Denial of Plaintiff's Request for Summary Judgment and Objection to Consideration of Summary Judgment and associated affidavits.<sup>1</sup>

Defendants state that both Petersons and Clarks received down payments on the real estate transactions because both parties were using the down payments to begin their retirements. Whatever plans Defendants made for use of the earnest money deposit were not of Buku's concern. Neither the Purchase and Sale Agreement with the Clarks nor the Purchase and Sale Agreement with the Petersons (collectively the "Agreements") make any

---

<sup>1</sup> Defendants also filed Defendants' Request for Summary Judgment, but have not noticed it for hearing. Consequently, the only motions noticed for hearing on December 14, 2009, is Plaintiff's Motion for Summary Judgment and Defendants' Motion to Strike. In response to Plaintiff's Motion for Summary Judgment, Defendants appear to argue only questions of fact. However, for purposes of their own Summary Judgment, Defendants claim there are no material facts in dispute.

mention of Defendants' intentions regarding use of the earnest money deposit. Additionally, the Agreements contain a merger clause, stating:

This agreement, including the exhibits and documents referred to herein constitutes the entire agreement between the parties and supercedes any prior understanding, agreements or representations by or between the parties, written or oral, that may have related in any way to the subject matter hereof.

(Magera Affidavit, Ex. A, ¶ 18; Ex. B, ¶ 18). Thus, any facts related to Defendants' use of the earnest money or plans they had at the time of execution for use of the earnest money should not be considered in interpreting the Agreements.

Further, Defendants' assertion on page 5 of their Memorandum Re: Summary Judgment that "[n]o conditions were placed upon the sale of the real property as it related in any way, shape or form as to the County of Jefferson and any zoning or building requirements" is inaccurate and incorrect. Paragraph 3 of the Purchase and Sale Agreement states in pertinent part:

Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase. Thus, closing will be on or before December 21, 2007.

(Magera Affidavit, Ex. A, ¶ 3; Ex. B, ¶ 3). This paragraph ponders whatever requirements the Buyer (i.e., Buku) found necessary to satisfy its concerns for due diligence purposes, and can, and did for Buku's purposes, include the zoning of the property. Thus, Defendants' statement that no conditions were placed upon the sale of the property as related to zoning

requirements should not be considered by the Court, due to the fact that it misstates the language of the Agreements.

## II. ARGUMENT

**A. The language of the Agreements is unambiguous, the Agreements should be enforced as written, and Buku is entitled to a refund of its earnest money pursuant to the plain language of the Agreements.**

Defendants contend that the language in the Agreements related to Buku's due diligence rights is "so vague as to be impossible for any court to know what 'buyer needs for its due diligence'" (Defendants' Memorandum Re: Summary Judgment, p. 6) and that the contract must be construed against Plaintiff as the drafter. Defendants cite *USA Fertilizer, Inc. v. Idaho First National Bank*, 815 P.2d 469, 474, 120 Idaho 271 (Ct. App. 1991) in support of their argument. However, *USA Fertilizer* addresses a situation in which the contractual language was found to be ambiguous. *Id.* Here, the language in question is not ambiguous. Paragraph 3 of the Agreements, in pertinent part, states:

Prior to closing, it is Buyer's obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer's interests and concerns regarding the purchase.

(Magera Affidavit, Ex. A, ¶ 3; Ex. B, ¶ 3). While the phrase "all of the requirements that Buyer needs to make for its due diligence purposes" may not specifically state what the Buyer's requirements are, nothing about the statement is ambiguous. The language covers all requirements the Buyer may have for its due diligence purposes, whatever those may be. This unambiguously encompasses concerns about zoning and financing. Undoubtedly, the

provision was broadly written to encompass a variety of concerns. Defendants' objection to such language after the fact, however, does not make the language ambiguous.

Further, the Agreements are unambiguous with regard to the disposition of earnest money if the sale of the properties did not close. The Agreement with Clarks states:

[I]n consideration of the sale of the property and assets under this agreement, Buyer shall pay Seller the sum of One Million Forty Four Thousand Seventy Five Dollars and Eighteen Cents (\$1,044,075.18) payable as follows:

- (a) \$25,000.00 upon execution of this agreement as earnest money all of such earnest money shall be refundable until closing.

(Magera Affidavit, Ex. A, ¶ 2). Likewise, the Agreement with the Petersons states:

In consideration of the sale of the property and assets under this agreement, Buyer shall pay to Seller the sum of Nine Hundred Eighty Thousand Dollars (\$980,000.00) payable as follows:

- (a) \$327,000.00 upon execution of this agreement as earnest money, \$10,000.00 of the earnest money shall be non-refundable, the balance fully refundable until closing.

(Magera Affidavit, Ex. B, ¶ 2). The contractual language regarding the disposition of earnest money is clear: if the sale fails to close, Buku is entitled to a return of its earnest money.

"If the language of a contract is unambiguous, then its meaning and legal effect must be determined from its words." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Thus, because the language of the Agreements is unambiguous, the Agreements should be enforced based upon the clear meaning and legal effect of the language of the contract, and Buku is entitled to a refund of its \$25,000.00 earnest money deposit to Petersons, and a refund of \$317,000.00 of its earnest money deposit to Clarks.



Defendants also argue that “[i]n the instant case and believing the language to be ambiguous, it still becomes irrelevant for the reason that the plaintiff has relied upon the County of Jefferson’s zoning as its only defense.” (Defendants’ Memorandum Re: Summary Judgment, p. 7). Defendants then go on to state that “[i]t [Plaintiff] believes that the subject property could not be zoned R-1. The affidavit of Naysha Foster clearly rebuts this position and the issue of ambiguity becomes irrelevant.” (Defendants’ Memorandum Re: Summary Judgment, p. 7). First, in response to Defendants’ arguments, Buku notified Defendants of its concerns with the zoning of the property and financing, because of the zoning, pursuant to its due diligence, and offered to extend the closing date from December 21, 2007 to March 1, 2008, in order to allow time for Defendants to cure. (Magera Affidavit, Ex. F). In a letter from their counsel dated December 19, 2007, Defendants refused to cure the zoning defect and rejected Buku’s offer to extend the closing date. (Magera Affidavit, Ex. G). Defendants’ refusal to cure terminated the Agreements and entitled Buku to a return of the earnest money. The exhibits to Naysha Foster’s affidavit, which allegedly rebut Buku’s position, are dated well after Plaintiff requested Defendants cure the zoning issues with the properties, and well after the Agreements were terminated by the letter from Defendants’ counsel on December 19, 2007. Thus, Naysha Foster’s testimony and the exhibits to her affidavit are irrelevant to the issue of whether the properties would be zoned R-1 or R-5 during the relevant time or grandfathered to allow a higher density zoning.

Further, and alternatively, if Naysha Foster’s testimony has any relevance at all, it is that it evidences even more strongly that at the time Buku requested Defendants provide

assurance that the property would remain zoned R-1, there was uncertainty as to the future zoning of the properties. The application included as Exhibit 1 to Naysha Foster's affidavit is dated February 1, 2008, a month and a half after the termination of the Agreements. (Affidavit of Foster Re: Summary Judgment, Ex. 1). The minutes of the Jefferson County Planning and Zoning meeting are dated March 6, 2008, two and a half months after the termination of the Agreements. (Affidavit of Foster Re: Summary Judgment, Ex. 2). Finally, the letter from Jefferson County Planning and Zoning which claims that the development of the properties, if approved, would be grandfathered in as R-1, was dated March 26, 2008, nearly three months after the Agreements terminated. (Affidavit of Foster Re: Summary Judgment, Ex. 3). Thus, the zoning of the properties was not resolved roughly three months after the Agreements terminated.

Additionally, and perhaps more importantly, Buku could have terminated the Agreements if it was unable to "satisfy its interests and concerns regarding the purchase." (Magera Affidavit, Ex. A, ¶ 3; Ex. B, ¶ 3). Buku's interests and concerns could include any issue Buku had with the property for any reason. Thus, whether the property was or was not zoned R-1 at the time in question is ultimately irrelevant. Buku was able to walk away from the Agreements for any reason that kept Buku from satisfying its interests and concerns regarding the property, based upon the clear and unambiguous language of paragraph 3 of the Agreements. Buku timely identified a legitimate concern that Defendants refused to cure and the sale never closed. Plaintiff is entitled the refund of its earnest money.

**B. Defendants are not entitled to summary judgment on any of the issues presented by Defendant for summary judgment.<sup>2</sup>**

Defendants assert entitlement to summary judgment against Buku on a number of issues, including breach of contract, specific performance, unjust enrichment, estoppel, detrimental reliance, and violation of the Consumer Protection Act. However, Defendants are not entitled to summary judgment on any of these claims.

**1. Buku did not breach the Agreements. Rather, Buku's satisfaction was a condition precedent to the closing of the Agreements and the Agreements terminated as a result of Defendants' failure to cure.**

Defendants state that "[s]ince the plaintiff breached the contract, the defendants are clearly entitled to liability on their counterclaim for breach of contract." (Defendants' Memorandum Re: Summary Judgment, p. 8). Defendants argue that Plaintiff breached the Agreements because Buku failed to pay the contract price on or before the date of closing. (Memorandum Re: Summary Judgment, p. 5-6). However, this argument ignores the due diligence clause in paragraph 3 of the Agreements providing that Buku had four months to perform the due diligence inspections to satisfy Buku's interests and concerns regarding the purchase. (Magera Aff., Ex. A, ¶ 3; Ex. B, ¶ 3). If Buku was unsatisfied, Buku could choose not to close, and was entitled to the return of its earnest money, pursuant to the Agreements. (Magera Aff., Ex. A, ¶ 2(a) ¶ 3; Ex. B, ¶ 2(a) ¶ 3).

Buku's satisfaction with the properties upon completion of its due diligence was a condition precedent to the closing of the sales. As the Idaho Supreme Court has stated:

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<sup>2</sup> Although Defendants' Motion for Summary Judgment has not been noticed for hearing, Plaintiff has responded in the event the Court desires to address both motions.

A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due. *Steiner v. Ziegler Tamura Ltd., Co.*, 138 Idaho 238, 242, 61 P.3d 595, 599 (2000) (citing *World Wide Lease, Inc. V. Woodwoth*, 111 Idaho 880, 887, 728 P.2d 769, 776 (Ct.App. 1986)). A condition precedent may be expressed in the parties' agreement. *Id.* When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract. *Id.* Where a party is the cause of the failure of a condition precedent, he cannot take advantage of the failure. *Fish v. Fleishman*, 87 Idaho 126, 133, 391 P.2d 344, 348 (1964) (citing 3A CORBIN ON CONTRACTS, § 767 (1960)) ("One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of a condition on which was promised.") Where a party has control over the happening of a condition precedent he must make a Idaho reasonable effort to cause the condition to happen. *Schleuter v. Nelson*, 74 Idaho 396, 399, 263 P.2d 386, 387 (1953); see also *Wade Baker & Sons Farms v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 136 Idaho 922, 42 P.3d 715 (Ct.App. 2002).

*Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 128, 106 P.3d 449, 455 (2005).

In the case that a condition precedent does not occur, the contract is terminated at the option of the obligor. As Farnsworth on Contracts § 8.3 Effects of Nonoccurrence of a Condition (2004) notes:

Allowing the obligor to suspend performance follows from the very definition of a condition. If a home purchaser conditions the duty to close the deal on the bank's approval of the purchaser's mortgage application, the purchaser is under no duty to take the deed and pay for the house if the bank has not approved the application. The purchaser may choose to suspend performance on the ground that the condition has not occurred.

Allowing the obligor to treat its duty as discharged follows because ordinarily the suspension cannot last indefinitely. There is usually some period of time within which the condition must occur if it is to occur at all. This may be stated in a provision of the agreement or it may be a reasonable time under an implied term. Once the period has passed, it is too late for the condition to occur, and the party whose duty was originally conditional may choose to treat that duty as discharged - as no longer enforceable. If the bank does not

approve the purchaser's mortgage application within the appropriate period of time, the purchaser may treat the duty to take the deed and pay for the house as discharged. If the purchaser does so, the home owner's duty to tender a deed to the house is also discharged. The purchaser is entitled to restitution of any down payment or part payment.

In this case, Buku's satisfaction with the properties upon completion of its due diligence was a condition precedent. When Buku became aware Jefferson County was in the process of rezoning the area in which the properties were located, Buku made Defendants aware of its concern and specifically requested that Defendants cure or extend the closing date in order to provide Defendants time to cure. Thus, Defendants were given an opportunity to cure the failure of the condition precedent of Buku's satisfaction. Defendants, however, refused to cure. Defendants' refusal to cure resulted in the failure of Plaintiff's condition precedent of satisfaction, and after the date for closing passed without such closing, all of Plaintiff's contractual duties were discharged, the Agreements were terminated, and Buku was entitled to a refund of its earnest money.

Thus, there was no breach of contract on the part of Buku because it timely identified a problem during its due diligence period which Defendants refused to cure or provide time to address, and the Agreements terminated as a result of Defendants' failure to cure before closing. Defendants breached the Agreements by failing to return the earnest money after Buku made demand for those funds.

**2. Defendants are not entitled to specific performance of the Agreements.**

As Defendants noted in their Memorandum Re: Summary Judgment, "specific performance is an equitable remedy and should not be granted when it would be unjust,

oppressive, or unconscionable.” *Suchan v. Rutherford*, 90 Idaho 288, 301, 410 P.2d 434, 442 (1966). Buku has complied with every aspect of the Agreements. Buku provided Defendants with notice of the zoning issues it had with the property. (Magera Aff., Ex. F). Defendants refused to cure and refused to agree to an extension of the closing date, despite Buku’s offer to extend the closing date. (Magera Aff., Ex. F) Thus, the Agreements terminated. Pursuant to the Agreements, Buku is entitled to a refund of its earnest money. Therefore, specific performance of the contract requires that the earnest money be returned to Buku. Any other form of specific performance as related to the Agreements would be unjust, oppressive and/or unconscionable due to Defendants’ refusal to cure when requested by Buku or extend the closing date.

**3. Defendants are not entitled summary judgment on the issue of unjust enrichment.**

Defendants provide no argument as to why they would be entitled to summary judgment on the issue of unjust enrichment. They merely provide a few case law quotes and then provide no explanation of their applicability, or how Buku was allegedly unjustly enriched. As Buku provided in its Memorandum in Support of Motion for Summary Judgment, “[t]he elements of unjust enrichment are that (1) a benefit is conferred on the defendant[s] by the Plaintiff, (2) the Defendant[s] appreciate[] the benefit; and (3) it would be inequitable for the defendant to accept the benefit without payment for the value of the benefit.” *Teton Peaks Investment Co., LLC v. Ohme*, 146 Idaho 394, 195 P.3d 1207, 1211 (2008). Buku is unsure what, if any benefit, Defendants have conferred upon Buku. Rather, Buku conferred a benefit upon Defendants through the earnest money deposits. Defendants

have retained a sum of \$342,000.00 between the two of them, and have used those funds for their own purposes, all the while aware of the fact that if the Agreements did not close, Defendants were required to return those funds. Thus, it is Defendants, not Buku, which have been unjustly enriched, and Buku is entitled a return of the earnest money, due to the fact that the sale of the properties did not close.

**4. Defendants cannot satisfy the elements of equitable estoppel or promissory estoppel/detrimental reliance, and are therefore not entitled to summary judgment on those issues.**

Defendants set forth case law regarding the doctrines of equitable estoppel and, presumably, promissory estoppel/detrimental reliance, but provide no explanation as to how that law applies to their situation. As Buku pointed out in its Memorandum in Support of Motion for Summary Judgment, the elements of equitable estoppel are (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting the estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon, and (4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the representation or concealment to his prejudice. *See Winn v. Campbell*, 145 Idaho 727, 732, 184 P.3d 852, 857 (2008). Buku does not know what false representations or concealment of material facts Defendants are alleging. Buku engaged in no false representations or concealment of material facts regarding the Agreements. Buku made Defendants well aware of the issues it had with the zoning of the properties. (*See Magera Affidavit, Ex. F*). Defendants have failed to carry their burden of demonstrating they

are entitled to summary judgment and have completely failed to establish why summary judgment should not be granted to Plaintiff on this issue. Consequently, Defendants cannot satisfy the necessary elements for equitable estoppel.

Further, Defendants cannot meet the required elements of promissory estoppel. Promissory estoppel requires that (1) one party's reliance on a promise creates a substantial economic detriment, (2) the reliance was or should have been foreseeable, and (3) the reliance was reasonable and justified. *See Gillespie v. Mountain Park Estates, LLC*, 138 Idaho 27, 29, 56P.3d 1277, 1279 (2002). Buku assumes that Defendants' alleged reliance was reliance upon the closing of the sale of the properties. While Defendants may have used the earnest money funds for their own retirement purposes, including the Clarks' alleged purchase of a retirement home (Defendants' Memorandum Re: Summary Judgment, p. 4), it was unreasonable for Defendants to do so before the closing of the sale. Defendants were well aware that the Agreements contemplated that the sale would not close and that Defendants would be required to return the earnest money to Buku. In fact, generally, earnest monies are held in escrow and only disbursed upon closing. Defendants' use of the earnest money prior to closing was unreasonable and irresponsible. Thus, because Defendants reliance upon the closing of the sale of the properties was unreasonable, Defendants cannot satisfy the necessary elements for promissory estoppel/detrimental reliance.



**5. Buku did not engage in consumer protection violations, and neither the Idaho Consumer Protection Act nor the Federal Trade Commission Act of 1934 apply to the Agreements.**

Although Defendants do not state how they allege Buku has violated either the Idaho Consumer Protection Act or the Federal Trade Commission Act, such argument would be irrelevant as neither the Idaho Consumer Protection Act nor the Federal Trade Commission Act apply to the transaction contemplated by the Agreements. In their Counterclaim, Defendants assert that, “[t]he counter-defendants used unconscionable methods and acts to induce the counter-plaintiffs to sell and continue to keep their real property open for sale to the counter-defendants.” As Buku stated in its Memorandum Re: Summary Judgment, this allegation apparently refers to Idaho Code § 48-603C, which states:

(1) Any unconscionable method, act or practice in the conduct of any trade or commerce violates the provisions of this chapter whether it occurs before, during or after the conduct of the trade or commerce.

Idaho Code § 48-602(2) defines “trade” or “commerce” for the purposes of the Idaho Consumer Protection Act to mean “the advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or services or distributing goods or services, either to or from locations within the state of Idaho, or directly or indirectly affecting the people of this state.” In this transaction, Buku was not selling or leasing any goods or services. Buku was the buyer in the transaction and this transaction involved real property, not goods or services. Therefore, the Idaho Consumer Protection Act does not apply.

Further, because Defendants present case law referring to the Federal Trade Commission Act, Buku assumes that Defendants are attempting to assert a cause of action under that act as well. Plaintiff objects to Defendants' attempt to assert a federal cause of action not plainly appearing in its counterclaim. Consequently, if Defendants are asserting such a claim, Plaintiff reserves the right to remove this action to federal court based on original jurisdiction.

The Federal Trade Commission Act (the "Act") prohibits "unfair methods of competition in or affecting commerce." *See* 15 U.S.C. § 45(1). The Act defines "commerce" as:

...commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

15 U.S.C. § 44. The Act does not apply to the situation at hand for a multitude of reasons, the most obvious of which is that the transaction contemplated by the Agreements involves no interstate or inter-territorial commerce as required in the Act's definition of "commerce." Rather, the parties were all Idaho residents at the time, and the real property in question is located in the State of Idaho. Consequently, Defendants have no cause of action under the Federal Trade Commission Act against Buku.

**C. Defendants' Counsel is a witness in this action.**

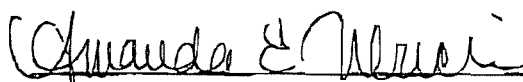
Defendants' counsel should have known since early in this case that, due to the significant role of the Jefferson County Planning and Zoning Commission in this matter, he

would likely have a conflict of interest due to his position as Jefferson County prosecutor. Now, in Defendants' response to Buku's Motion for Summary Judgment, Defendants' counsel has included as a primary piece of evidence a letter from Jefferson County Planning and Zoning. This letter was signed by Defendants' counsel in his capacity as Jefferson County Prosecutor. (Affidavit of Foster Re: Summary Judgment, Ex. 3). Defendants' counsel is a material witness in this case and is the person who can speak to the zoning issues. Consequently, if Plaintiff is not entitled to summary judgment as a matter of law based upon the plain language of the Agreements, it seems apparent that Defendants' counsel cannot continue in this representative capacity based on his role as a material witness.

### III. CONCLUSION

Based upon the foregoing, Buku respectfully requests that this Court grant Buku's Motion for Summary Judgment and dismiss all claims set forth by Defendants.

Dated this 27<sup>th</sup> day of December, 2009

  
for DeAnne Casperson, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

**CERTIFICATE OF SERVICE**

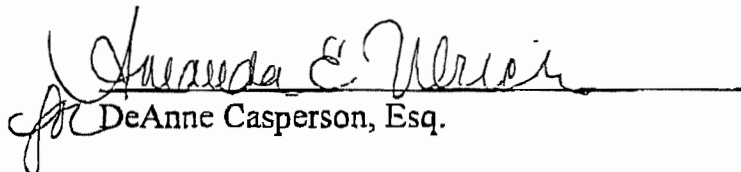
I hereby certify that on this 1<sup>st</sup> day of December, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**            **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

*First Class Mail*  
 *Hand Delivery*  
 *Facsimile*  
 *Overnight Mail*

  
DeAnne Casperson, Esq.

G:\WPDATA\CAHN1491\H\ldgs\MSJ.REPLY.wpd

177

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2008-07-10  
PETERSON, JERRY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV-08-941

**MEMORANDUM IN OPPOSITION  
TO DEFENDANTS' MOTION TO  
STRIKE PORTIONS OF MAGERA  
AFFIDAVIT**

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

COMES NOW Buku Properties, LLC ("Buku"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, PLLC, and submits this Memorandum in Opposition to Defendants' Motion to Strike.

## I. STATEMENT OF FACTS

Buku submitted its Motion for Summary Judgment on October 6, 2009. In support of its Motion for Summary Judgment, Buku submitted the Affidavit of Jaramie Magera ("Magera Affidavit"). Defendants Rael and Janet Clark and Jerry and Betty Peterson (collectively "Defendants") have now objected to portions of the Magera Affidavit. Buku provides the following in response to Defendants' objections.

## II. ARGUMENT

Defendant sets forth several portions of the Magera Affidavit which it requests the Court to strike. Defendants' objections are vague and not well explained and the vast majority of Defendants' objections are that the named paragraphs are "speculation and hearsay." However, as addressed below, the bases for those objections as provided by Defendants are not applicable to the statements addressed by Defendants, and Defendants' motion to strike should be denied.

Defendants' first objection to the Magera Affidavit is that paragraph 16 contains speculation and is hearsay. Buku is unsure how the statement in paragraph 16 that "[a]t the time the parties entered into each respective Purchase and Sale Agreement, both the Peterson property and the Clark property were zoned as Residential-1 ("R-1"), which would allow a

minimum density of one acre lots" is speculative or is hearsay. It is a statement of fact, admitted by Defendants, as to the zoning of the Peterson property and Clark property during the time stated. Therefore, paragraph 16 should not be stricken.

Defendants' next objection is that paragraph 17 contains speculation and hearsay. Paragraph 17 states, "Buku intended to purchase the properties for a residential development. Buku's development plan was based on being able to sell lots of at least as small as one acre. Buku obtained a financial commitment for the purchase of the properties from the Bank of Commerce based on its development plan of approximately one-acre lots." These statements are not speculative. They articulate the details of Buku's intent for development of the properties and the related financing Buku obtained. Furthermore, these statements are not hearsay. Magera, as the agent for Buku, may testify as to Buku's intent and actions.

Defendants also object to paragraph 18 on the grounds that it contains speculation and hearsay. Paragraph 18 states: "[A]t the time of entering into the respective Purchase and Sale Agreements, all parties mutually understood that the purchase of both properties was subject to Buku being able to develop the property with the density of development accorded to a R-1 zone, i.e., one-acre lots." Buku may testify as to Defendants' understanding of the details of the agreement based upon its interactions with Defendants. Such testimony is admissible as an admission by a party-opponent. *See Idaho Rule of Evidence 801(d)(2)*. Additionally, Buku's testimony is not speculative. It is a conclusion drawn by Buku based upon its interactions with Defendants. Therefore, there is nothing in the Idaho Rules of Evidence that prohibits Jaramie Magera's testimony in paragraph 18 of the Magera Affidavit.

Additionally, Defendants object to paragraph 19 on the grounds that “[t]he county is not a party and is irrelevant, the newspaper article is hearsay and not reflective of the actual administrative proceedings.” First, any actions taken by the county regarding zoning are extremely relevant because those actions affected Buku’s ability to develop the properties and obtain financing. Additionally, the newspaper article, which Defendants claim is hearsay, was provided to Buku by Defendants themselves during discovery. Further, the newspaper article is not asserted for the truth of its content, but only for purposes of documentation that Buku had a legitimate concern over the zoning.

Defendants also object to paragraph 20 on the grounds that it contains speculation and hearsay. Paragraph 20 states:

Upon performing its due diligence investigation concerning the properties, Plaintiff discovered the Jefferson County Planning and Zoning Commission’s plans to change the zoning categorization of the Clark and Peterson properties. The development could not go forward as planned unless Jefferson County “grandfathered” the development to exempt it from the zoning ordinances. Both the Clarks and Petersons were aware of the problem because we all attended the zoning meeting.

(Magera Affidavit, ¶ 20). This paragraph does not contain speculation. Magera merely states the facts as they occurred. Magera, as agent for Buku, learned that Jefferson County was planning to change the zoning ordinances to decrease the allowable density of lots and Buku would be unable to go forward with developing the properties unless the properties were grandfathered in under the ordinance. Additionally, Magera’s statement that “[b]oth Clarks and Petersons were aware of the problem because we all attended the zoning meeting,” is not speculation or hearsay. Magera witnessed the Clarks and Petersons at the meetings, as is



indicated by his testimony. The zoning changes were discussed at those meetings. Therefore, it is not speculative for Magera to testify that Clarks and Petersons were aware of the zoning changes and that this would create problems with Buku's plans for development of the properties.

Next, Defendants object to paragraph 21 on the grounds that "[t]he bank's representative statements are hearsay, his opinion is irrelevant, and the conversations are hearsay" and that "[c]onversations are hearsay and the letter attached as Exhibit D is hearsay." Although Magera's statements regarding his mid-December telephone conversation with Jeromy Hart from the Bank of Commerce may qualify as hearsay, the contents of that conversation were reiterated in the January 2008 letter from Jeromy Hart attached to the Magera Affidavit as Exhibit D. Contrary to Defendants' contention, the letter is not hearsay. It simply summarizes the loan approval process by the Bank of Commerce up to the date of the letter, and informs Buku that the Bank must receive verification from Jefferson County that the properties will remain zoned R-1 residential. Therefore, the letter is not hearsay, and is admissible. Further, Magera can testify that Buku could not obtain financing with the zoning change and that he received this information from the bank.

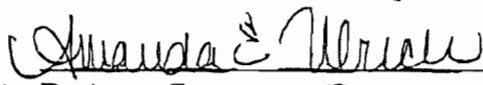
Finally, Defendants object to paragraph 24, stating that it contains speculation and hearsay. Paragraph 24 states: "Buku continued to try and resolve the matter, but considered the Agreements terminated as a result of the Clarks and Peterson's refusal to cure the zoning defect as identified by Buku during its due diligence period." There is nothing speculative about this statement. It clearly states that Buku considered the Agreements terminated due

Defendants' failure to cure the defect identified by Buku. Further, nothing in paragraph 24 is hearsay. It contains no statement of any other party. Therefore, the statements in paragraph 24 are admissible.

### III. CONCLUSION

Based on the foregoing, Buku respectfully requests that the Court deny Defendants' Motion to Strike Portions of Magera Affidavit.

Dated this 1<sup>st</sup> day of December, 2009.

  
for DeAnne Casperson, Esq.  
HOLDEN, KIDWELL, HAHN & CRAPO,  
P.L.L.C.

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CERTIFICATE OF SERVICE


I hereby certify that on this 7<sup>th</sup> day of December, 2009, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:** MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- First Class Mail
- Hand Delivery
- Facsimile
- Overnight Mail

  
for DeAnne Casperson, Esq.

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Filed Dec. 14, 2011

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

BUKU PROPERTIES, LLC,	)	
	)	
	)	Case No. CV-2008-941
-vs.-	)	
	)	<b>MINUTE ENTRY</b>
RAOEL CLARK, ETAL,	)	<b>MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
	)	
Defendants.	)	
	)	

---

December 14, 2009, at 2:39 P.M., this motion to strike came on for hearing before the Honorable Gregory W. Moeller, District Judge, sitting in open court at Rigby, Idaho.

Mr. David Marlow, Court Reporter, and Ms. Nancy Andersen, Deputy Court Clerk, were present.

Ms. Deanne Casperson appeared on behalf of the plaintiff.

Mr. Robin Dunn appeared on behalf of the defendants.

Mr. Dunn presented argument in support of the motion to strike.

Ms. Casperson presented argument in objection to motion to strike.

Mr. Dunn responds.

The Court will take the matter under advisement.

Ms. Casperson presented argument on motion for summary judgment.

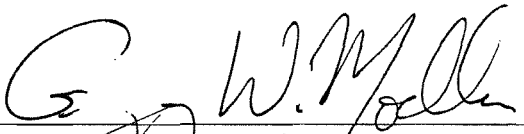
Mr. Dunn presented argument objecting to summary judgment.

Ms. Casperson responds.

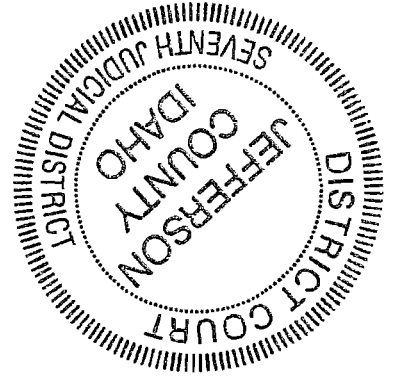
The Court will take the matter under advisement.

185

Court was thus adjourned.

  
GREGORY W. MOELLER  
District Judge

c: Deanne Casperson, Esq.  
Robin Dunn, Esq.



Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 JAN -6 PM 4:57  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.


Case No. CV-08-941

**NOTICE OF SERVICE**

PLEASE TAKE NOTICE that the Plaintiff, Buku Properties, LLC, pursuant to the Idaho Rules of Civil Procedure, are this 6<sup>th</sup> day of January, 2010, forwarding a copy of Plaintiff's Second Set of Discovery Requests to Defendants Rael H. Clark and Janet C. Clark, by service upon their counsel, Robin D. Dunn, Esq.

Please also be advised that Plaintiff's counsel is retaining the original discovery requests.

Date: 1/6/2010

  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

200 023-8810 1-814 P.005/008 F-198

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of January, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.


**DOCUMENT SERVED:**

**NOTICE OF SERVICE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

*First Class Mail*  
 *Hand Delivery*  
 *Facsimile*  
 *Overnight Mail*

  
DeAnne Casperson, Esq.

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 JAN -6 PM 4:57  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE OF SERVICE**

PLEASE TAKE NOTICE that the Plaintiff, Buku Properties, LLC, pursuant to the Idaho Rules of Civil Procedure, are this 6<sup>th</sup> day of January, 2010, forwarding a copy of Plaintiff's Second Set of Discovery Requests to Defendants Angus Jerry Peterson and Betty Jean Peterson, by service upon their counsel, Robin D. Dunn, Esq.

Please also be advised that Plaintiff's counsel is retaining the original discovery requests.

Date: 1/6/2010

  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

191

**CERTIFICATE OF SERVICE**

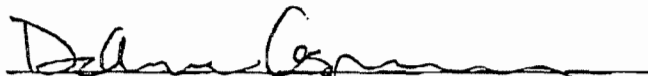
I hereby certify that on this 1<sup>st</sup> day of January, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED: NOTICE OF SERVICE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
 477 Pleasant Country Lane  
 P.O. Box 277  
 Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
 DeAnne Casperson, Esq.

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DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
PO Box 277  
477 Pleasant county Lane  
Rigby ID 83442-0276  
Telephone: (208) 745-9202  
Facsimile: (208) 745-8160

2010 JAN 13 AM 8:06  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

[rdunn@dunnlawoffices.com](mailto:rdunn@dunnlawoffices.com)

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )

Case No. CV-08-941

Plaintiff, )

NOTICE OF SERVICE

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

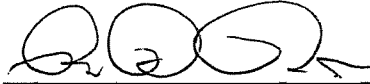
vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

I HEREBY CERTIFY that the following document was served, by postage pre-paid mailing, to plaintiff's attorney, DeAnne Casperson, Esq., P.O. Box 50130, Idaho Falls, Idaho 83405 together with a copy of this notice, on the 12 day of January, 2010:

- 1) *Defendants Clarks' Answers to Plaintiff's Second Set of Discovery Requests.*



---

Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
PO Box 277  
477 Pleasant county Lane  
Rigby ID 83442-0276  
Telephone: (208) 745-9202  
Facsimile: (208) 745-8160

2010 JAN 13 AM 8:06  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

[rdunn@dunnlawoffices.com](mailto:rdunn@dunnlawoffices.com)

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )

Case No. CV-08-941

Plaintiff, )

NOTICE OF SERVICE

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

I HEREBY CERTIFY that the following document was served, by postage pre-paid mailing, to plaintiff's attorney, DeAnne Casperson, Esq., P.O. Box 50130, Idaho Falls, Idaho 83405 together with a copy of this notice, on the 12 day of January, 2010:

- 1) *Defendants Petersons Answers to Plaintiff's Second Set of Discovery Requests.*



---

Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

12

Date: January 27, 2010

Time: 12:15 p.m.

By: G. W. Mullen  
DISTRICT JUDGE

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

BUKU PROPERTIES, LLC, an Idaho )  
limited liability company, )  
 )  
Plaintiff, )

Case No. CV-08-941

v. )

MEMORANDUM  
DECISION

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

2010 JAN 28 PM 1:21  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Counter-Plaintiffs )

v. )

BUKU PROPERTIES, LLC, an Idaho )  
limited liability company, )  
 )  
Counter-Defendants. )

**I. THE FACTS**

Buku Properties, LLC has filed a verified complaint which seeks the return of earnest money deposits on a terminated sale of two properties: one owned by Raoel and Janet Clark ("Clark Property") and the other owned by Angus and Jerry Peterson ("Peterson Property"). Buku entered into separate purchase and sale agreements with the Clarks ("Clark Agreement") and



Parkinsons (“Parkinson Agreement”). Both agreements were signed on August 30, 2007.

At issue in this case are provisions from the Agreements pertaining to the earnest money paid by Buku. On October 23, 2007 Buku and the Clarks amended their purchase and sale agreement to reflect the oral agreement between the parties regarding the previously tendered \$25,000 earnest money.<sup>1</sup> Under Peterson Agreement, Buku tendered \$327,000 in earnest money. The contract provided that all but \$10,000 was fully refundable until closing. The \$327,000 was tendered on August 30, 2007.<sup>2</sup>

Both Purchase and Sale Agreements afforded Buku four months, from August 30 until December 30, to perform its due diligence inspections “to satisfy [Buku’s] interests and concerns regarding the purchase.”<sup>3</sup> During the four month period, Buku learned of a proposed zoning change which might affect the Clark and Peterson properties. The change could potentially decrease the value of the properties. It is undisputed that at time of entering into both Purchase and Sale Agreements, the Clark Property and the Peterson Property were zoned Residential-1 (“R-1”).

Both parties acknowledge that between August 30, 2007 and December 18, 2007, issues arose regarding the Jefferson County Planning and Zoning Commission’s possible plans to change the zoning categorization of the Clark Property and Peterson Property. While the parties strongly dispute the relevance and import of the zoning to the Agreements, they acknowledge that the zoning of the properties was discussed. Several letters and notices between the parties and their counsel were exchanged prior to the closing date and have been submitted to the Court.

Buku’s dealings with the Defendants and their property continued after January 2008. The Affidavit of Rael Clark states, “The real property of the

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<sup>1</sup> Magerra Aff., Ex. A, ¶ 2 (Oct. 6, 2009).

<sup>2</sup> Id. at Ex. B, ¶ 2.

<sup>3</sup> Id. at Ex. A, ¶ 3; Ex.B, ¶ 3.

[Clarks] was used for farming by buyer throughout the 2008 farm year.”<sup>4</sup>

Promises were made by Buku, subsequent to closing, that “the contract would be fulfilled and that payment would be forthcoming.”<sup>5</sup> The Clark affidavit also alleges that Buku maintained control over the property until November 2008.<sup>6</sup>

The Affidavit of Jerry and Betty Peterson state similar positions. Additionally, the Petersons allege that Buku’s real estate agent listed the Peterson Property for sale, posted for sale signs on the property, and had a lock box on the home until November 2008.<sup>7</sup> The Petersons’ affidavit also states that there were ongoing negotiations between the parties throughout 2008 on matters concerning sale of the property and zoning issues.

Buku has filed a motion for summary judgment and the Court has heard oral argument. This decision addresses Buku’s motion.

## II. STANDARD OF REVIEW

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law.<sup>8</sup> The moving party bears the burden to prove the absence of material facts. To meet this burden the moving party must challenge in its motion and establish through evidence that no issue of any material fact exists for an element of the nonmoving party’s case.<sup>9</sup> If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the

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<sup>4</sup> Aff. of Rael Clark in Support of Defendants’ Positions Re: Summary Judgment, ¶16 (Nov. 13, 2009).

<sup>5</sup> Id. at ¶18.

<sup>6</sup> Id. at ¶20.

<sup>7</sup> Aff. of Jerry and Betty Peterson in Support of Defendants’ Positions Re: Summary Judgment, ¶¶ 18, 24 (Nov. 13, 2009).

<sup>8</sup> I.R.C.P. 56(c).

<sup>9</sup> *Smith v. Meridian Joint Sch. Dist. No.2*, 128 Idaho 714, 918 P.2d 583 (1996).

nonmoving party and the nonmoving party is not required to respond with supporting evidence.<sup>10</sup>

In considering a motion for summary judgment, the court must liberally construe the facts in the existing record, and draw all reasonable inferences in favor of the nonmoving party.<sup>11</sup> Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented.

### III. DISCUSSION

#### 1. Defendants' motion to suppress portions of the Magera Affidavit is denied.

In support of Buku's summary judgment motion, it submitted the affidavit of Jaramie Magera. Defendants have moved to strike the following paragraphs and exhibits from that affidavit: Paragraphs 16, 17, 18, 19, 20, 21, 24; and Exhibits C, D, E, and F.

Jaramie Magera was Buku's manager at the time of the events at issue in this case. He was involved in negotiating the Agreements with Defendants and arranging for financing to purchase the properties. He also attended planning and zoning meetings regarding the zoning of the Clark and Peterson properties.

Defendants object to Paragraphs 16, 17, 18, 20 and 24 because they claim these paragraphs contain "speculation and hearsay." Having the paragraphs, the Court finds that each involves matters that Mr. Magera would be expected to know in his capacity as Buku's manager. The Court notes that Mr. Magera's affidavit merely states the facts as Mr. Magera perceives them; his affidavit only reflects his opinion and belief. Any reference by Mr. Magera to Defendants' thoughts or motives are understood by the Court as only Mr. Magera's personal

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<sup>10</sup> *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1038 (1994).

<sup>11</sup> *Bear Island Water Ass'n. v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

understanding of the Defendants' intentions, nothing more. The Court can sort through these speculative statements and disregard them as appropriate. Defendants' motion is denied as to those paragraphs, but any speculative statements about the thoughts and intentions of others will be given little, if any, weight.

Defendants' also object to a newspaper article attached as Exhibit C to the Magera Affidavit on hearsay grounds. The Magera Affidavit cites Exhibit C in Paragraph 19 of his affidavit. It appears to the Court from both the affidavit and the parties oral argument that the Exhibit is being proffered not to establish the truth of the matter asserted, but rather, merely to show that the zoning of the properties was a matter going on at the time of the article.<sup>12</sup> Defendants' objection to Exhibit C is denied.

Paragraph 21 deals with conversations between Mr. Magera and the Bank of Commerce where Buku was to receive financing to purchase the properties. Mr. Magera's affidavit states that the bank "would not fund the loan if the zoning was changed because the value of the properties would be substantially less." Exhibit D to Mr. Magera's affidavit is a letter from the bank to Mr. Magera stating concerns about the financing. To the extent that Paragraph 21 and Exhibit D are offered to establish the truth of the matter asserted (i.e., the bank's thinking or positions), the paragraph and exhibit are stricken as hearsay. To the extent they are offered only to establish Mr. Magera's knowledge about Buku's position with the bank and Buku's receipt of a letter from the bank, Defendants' objection is overruled.

As to Exhibits E and F (unsigned offers by Buku to Defendants offering to extend the closing date) the Court sees no reason to strike them at this point. Certainly the Court notes that neither the Clarks nor Petersons signed the offers. Defendants' concerns go more to the weight of the evidence, and not their

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<sup>12</sup> See also Idaho Rule of Evidence 902(6).

admissibility. However, the Exhibits could be admissible to establish other facts, such as notice. Therefore, the motion to strike these exhibits is denied.

**2. The Agreements are neither ambiguous nor indefinite “when applying the instrument[s] to the facts as they exist.”**

Buku seeks summary judgment in its favor and return of earnest money it paid to the Clarks and the Petersons. According to Buku, there are no issues of fact as to the terms of the Clark and Peterson Agreements or Buku’s entitlement to recover under the Agreements. The Court agrees with Buku that the terms of the Agreements are unambiguous; however, the Court finds that there are issues of fact regarding Buku’s entitlement to recover under the contracts. First, the Court will address the language of the contracts.

Both Buku and Defendants cite Paragraph 3 of the respective Agreements. Both Agreements contain the same language.

Prior to closing, it is Buyer’s obligation to make sure that they are fully satisfied with the condition of the property, also any requirements, environmental requirements, and all of the requirements that the Buyer needs to make for its due diligence purposes. Buyer will have four months to perform the due diligence inspections to satisfy Buyer’s interests and concerns regarding the purchase.<sup>13</sup>

It is the last phrase that Defendants claim is ambiguous or indefinite—Buku had four months to perform due diligence inspections “to satisfy [Buku’s] interests and concerns regarding the purchase.” According to Defendants, Buku’s “interests and concerns” could be so broad as to include anything. According to the Defendants, such open language makes the clause so ambiguous or indefinite as to be unenforceable.

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<sup>13</sup> Magera Aff., Ex. A, ¶ 3; Ex.A, ¶ 3; Ex.B ¶ 3.

It is well settled that “ambiguous earnest money agreements will not support an award of specific performance or damages.”<sup>14</sup> A good summary of the law pertaining to ambiguity in contracts is contained in the 2007 Idaho Supreme Court case of *Swanson v. Beco Const. Co., Inc.*<sup>15</sup> The Court explains that ambiguities in a contract can be either patent or latent. “Idaho courts look solely to the face of a written agreement to determine whether it is [patently] ambiguous.”<sup>16</sup> “A latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.”<sup>17</sup>

To determine whether a contract is patently ambiguous, a court reads the contract’s words or phrases given their established definitions in common use or settled legal meanings. For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical.<sup>18</sup> The Idaho Supreme Court clarified,

A party's subjective, undisclosed interpretation of a word or phrase cannot make the contract ambiguous. If it could, then all contracts would be rendered ambiguous merely by a party asserting a misunderstanding of the meaning of one or more of the words used. The voluntary failure to read a contract does not excuse a party's performance.<sup>19</sup>

After applying the law as stated by the Supreme Court, this Court finds that neither the Clark nor the Peterson Agreement is so ambiguous or indefinite as to render the Agreement unenforceable.

The Contracts are not patently ambiguous. The language at issue— “[Buku] will have four months to perform the due diligence inspections to satisfy

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<sup>14</sup> *Hilbert v. Hough*, 132 Idaho 203, 969 P.2d 836 (Idaho App., 1998) (citing several Idaho Supreme Court cases).

<sup>15</sup> *Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 175 P.3d 748 (2007).

<sup>16</sup> *Id.* (quoting *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996); *Accord, Valley Bank v. Christensen*, 119 Idaho 496, 808 P.2d 415 (1991)).

<sup>17</sup> *Swanson v. Beco Const. Co.* (quoting *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Buyer's interests and concerns regarding the purchase"—is straightforward and clear. That Buku's "interests and concerns" could potentially be quite broad is true, but Defendants do not claim the terms have "at least two different reasonable interpretations." Nor do Defendants claim the terms are "nonsensical." The Court finds no patent ambiguity.

The Court further finds that the terms have no latent ambiguity. When applying the Agreements "to the facts as they exist," the Court finds the Agreements unambiguous. Buku was given four months to conduct due diligence concerning the properties. Potential zoning changes and their impact on financing are precisely the type of issues typically dealt with during the due diligence phase of a real estate transaction. In short, under the facts of this case, it is reasonable that Buku would look into potential zoning problems, and that uncertainty regarding the properties' zoning would affect its "interests and concerns." There is no latent ambiguity in the contract.

The Court finds that the wording above is unambiguous and not so indefinite as to make the contract illusory. "If the language of a contract is unambiguous, then its meaning and legal effect must be determined from its words."<sup>20</sup> However, despite the Court's finding that the written contract is unambiguous, the Court cannot grant summary judgment in Buku's favor at this time. As will be explained below, there are issues of fact in the record, when construed in a light most favorable to Defendants, that suggest Buku may not be entitled to recover under the unambiguous contracts.

**3. There are issues of fact as to the parties' relations after the closing date.**

The written contracts between the parties are unambiguous and definite; however, issues of fact remain as to Buku's entitlement to the earnest money under the contracts. The behavior of the parties after the December 2007 closing

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<sup>20</sup> *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007).

date persuades the Court that the “agreement” between the parties may not have ended after the closing date. After the failed closing, the parties’ behavior suggests that an arrangement possibly still existed between the parties for the sale and purchase of the property. It is unclear what that arrangement was or what it means. Nevertheless, it seems clear to the Court that the parties’ behavior subsequent to closing could be due to a later agreement that might affect Buku’s entitlement to earnest money under the earlier Agreements.

The Clark and Peterson affidavits explain that Buku was involved in farming the property throughout 2008. The Clark affidavit states, “The real property of the [Clarks] was used for farming by buyer throughout the 2008 farm year.”<sup>21</sup> The affidavit continues stating that promises were made by Buku, subsequent to closing and that Buku’s control over the Clark Property continued until November 2008.<sup>22</sup> Rael Clark also states that throughout 2008, not only were there negotiations concerning the property, but that Buku communicated that “the contract [presumably the Purchase and Sale Agreement] would be fulfilled and that payment would be forthcoming.”<sup>23</sup> All of these statements suggest that an agreement existed between Buku and the Clarks subsequent to the December 2007 closing date. Before the Court decides Buku’s entitlement to earnest money under the Clark Agreement, the Court must understand the entire arrangement between the parties.

Summary judgment is similarly premature on the Peterson Agreement. Buku and the Petersons had an arrangement similar to the arrangement between Buku and the Clarks. The Petersons affidavit alleges that Buku’s real estate agent listed the Peterson Property, posted signs on the property, and had a lock box on the home as late as November 2008.<sup>24</sup> Additionally, the Petersons’ affidavit states that there were ongoing negotiations between the parties throughout 2008 on matters concerning the sale of the property and zoning issues. Certainly some

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<sup>21</sup> Aff. of Rael Clark ¶16.

<sup>22</sup> Id. at ¶20.

<sup>23</sup> Id. at ¶18.

<sup>24</sup> Aff. of Jerry and Betty Peterson, ¶¶ 18, 24.



kind of arrangement existed between Buku and the Petersons after December 2007.

It would be premature for the Court to rule that a written contract with a December 2007 closing date is the final word when so much of the parties' "agreement" occurred during the eleven months after the scheduled closing. Before the Court enforces the terms of the parties earlier written agreement, the Court must be satisfied as to the arrangement of the parties after the closing date. Even if the earlier agreements are unambiguous, there is a genuine issue of material fact as to what the parties intended while Buku possessed the property from December 30, 2007 until November 2008.

Based on the material issues of fact stated above, the Court finds that summary judgment is premature. Although Clarks' and Petersons' pleadings and summary judgment brief are unclear as to how the legal and equitable principles they cite apply to these facts, the Court still finds that Defendants' have raised sufficient issues of fact to preclude summary judgment at this point. Summary judgment is denied as to all of Buku's claims and all of Defendants' counterclaims, with one exception which the Court will address next.

**4. Summary judgment is granted in Buku's favor as to Defendants' counterclaim involving the Idaho Consumer Protection Act.**

The Defendants filed a counterclaim alleging that Buku violated the Idaho Consumer Protection Act. The Court grants summary judgment in Buku's favor as to that claim.

The statute Defendants rely upon was intended to protect *consumers*. Section 48-601 states, "The purpose of this act is to protect both consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce...." The next section of the Act defines "trade" and "commerce" as "the advertising, offering for sale, selling, leasing, renting, collecting debts arising out of the sale or lease of goods or

services or distributing goods or services....” The Act is clearly inapplicable to the facts in this case.

Defendants’ brief states, “The Act is designated to prevent fraudulent practices to consumers and applies both through the attorney general and through a private lawsuit. The plaintiff has lead the defendants/counter-plaintiffs down a path that has caused harm and damage to their retirement programs.”<sup>25</sup>

Defendants ignore the fact that the Clarks and Petersons are *sellers* of the real property at issue, and they cite no authority to support the position that the Act provides a remedy for a *seller* of real property. Therefore, Buku is entitled to summary judgment on this counterclaim as a matter of law.

**5. Counsel for Defendants could be disqualified as attorney for Defendants on conflict of interest grounds if he is listed as a material witness in the trial of this case.**

Buku argues in its Reply Memorandum in Support of Plaintiff’s Motion for Summary Judgment that Defendants’ counsel, Mr. Robin D. Dunn, has a conflict of interest in that he is both a witness and an advocate in this case. In addition to representing Defendants, Mr. Dunn also represents Jefferson County. Jefferson County is not party to this suit; however, actions by Jefferson County Planning and Zoning appear to be an important issue in the case. Mr. Dunn has submitted a March 26, 2008 letter to the Court signed by him in his capacity as Jefferson County’s Prosecuting Attorney.<sup>26</sup> The letter appears to address a potential material issue in this case—the zoning status of the Clark and Peterson properties.

An attorney’s job is to submit legal arguments on behalf of his client; he is an advocate. A witness is an individual who submits evidence concerning the material facts in the case. Conflicts of interest arise when one acts both as an advocate for a position and as a witness to factual information supporting that

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<sup>25</sup> Defendants’ Memorandum Re: Summary Judgment, p. 14 (Nov. 13, 2009).

<sup>26</sup> Aff. of Foster Re: Summary Judgment, Ex. 3 (Nov. 13, 2009).

position. An attorney can be either an advocate or a witness, but normally he cannot be both.<sup>27</sup> Idaho Rule of Professional Conduct 3.7 states in pertinent part:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

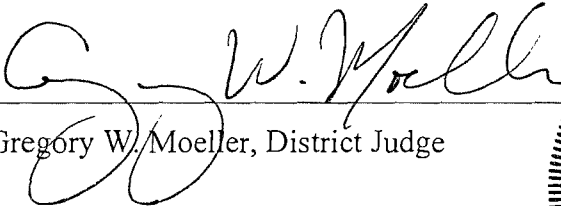
It would be premature for the Court to disqualify Defendants' counsel now because he has not been listed as a trial witness by either side. If Mr. Dunn is listed as a trial witness by Defendants, the Court will take up the issue again, if necessary. However, if Mr. Dunn is listed as a trial witness by Buku, a hearing will be necessary to ascertain whether or not Mr. Dunn's testimony is necessary and/or material to Buku's case.

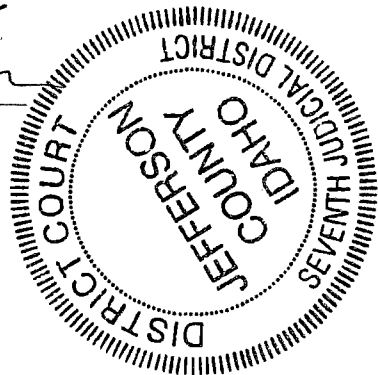
#### IV. CONCLUSION

For the reasons set forth above, Buku's Motion for Summary Judgment is DENIED on all grounds except for Defendants' counterclaim regarding the Idaho Consumer Protection Act. Defendants' motion to strike is DENIED.

So Ordered.

DATED this 27<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
Gregory W. Moeller, District Judge



<sup>27</sup> Idaho Rule of Professional Conduct 3.7.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing MEMORANDUM DECISION was served upon the individuals listed below via U.S. Mail, postage prepaid, on this 27 day of January, 2010:

Charles A. Homer  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
Idaho Falls, ID 83405  
*Attorneys for Plaintiff*

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442  
*Attorney for Defendant*

By: 

\_\_\_\_\_  
Law Clerk

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
477 Pleasant Country Lane  
P. O. Box 277  
Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

2010 FEB 22 PM 4:47  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )  
 )  
Plaintiff, )

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )  
 )  
Counter-Defendants, )

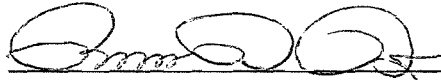
Case No. CV-08-941

NOTICE OF TAKING  
DEPOSITION DUCES TECUM

PLEASE TAKE NOTICE that ROBIN D. DUNN, ESQ., attorney for defendants, RAOEL H. CLARK, JANET C. CLARK, JERRY PETESON and BETTY JEAN PETERSON, shall take the deposition upon oral examination, pursuant to the Idaho Rule of Civil Procedure of JARAMIE MAGERA, commencing at 9:30 o'clock a.m. on the 17<sup>th</sup> day of March, 2010, at the office of DUNN LAW OFFICES, PLLC, 477 Pleasant Country Lane, Rigby, Idaho, before a qualified court reporter and officer authorized to administer oaths.


Please bring any and all documents you intend to utilize at any hearing/trial of this matter.

DATED this 22<sup>nd</sup> day of February, 2010.

  
\_\_\_\_\_  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am a duly licensed attorney for the State of Idaho, resident of and with my office at Rigby, Idaho; that I served a copy of the foregoing NOTICE OF TAKING DEPOSITION DUCES TECUM by mailing, with postage prepaid thereon, a true and correct copy thereof to the following person(s) this 22<sup>nd</sup> day of February, 2010.

  
\_\_\_\_\_  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

Dick Telford Reporting Service  
P. O. Box 51020  
Idaho Falls, ID 83405-1020

DeAnne Casperson, Esq.  
P. O. Box 50130  
Idaho Falls, ID 83405

NOTICE OF TAKING DEPOSITION DUCES TECUM -2-

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 MAR -3 PM 4:10

JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

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RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,


Counter-Defendants.

Case No. CV-08-941

**NOTICE OF DEPOSITION OF  
ANGUS JERRY PETERSON**

YOU WILL PLEASE TAKE NOTICE That Plaintiff Buku Properties, LLC, and its counsel of record, will take the deposition of Defendant Angus Jerry Peterson, pursuant to Idaho Rules of Civil Procedure 26 and 30(a), before a duly authorized court reporter and notary public, on Wednesday, March 17, 2010, at 2:30 p.m., at the offices of Dunn Law offices, 477 Pleasant Country Lane, Rigby, Idaho, and will continue from time to time until completed, at which place and time you are invited to appear and take part in such deposition.

Date: 3/3/2010

  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

214



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **NOTICE OF DEPOSITION OF ANGUS JERRY PETERSON**

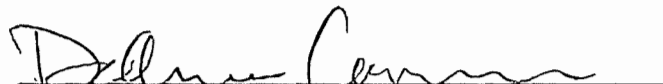
**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
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2010 MAR -3 PM 4: 10  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
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Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
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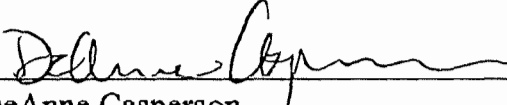
Counter-Defendants.

Case No. CV-08-941

**NOTICE OF DEPOSITION OF  
RAOEL H. CLARK**

YOU WILL PLEASE TAKE NOTICE That Plaintiff Buku Properties, LLC, and its counsel of record, will take the deposition of Defendant Rael H. Clark, pursuant to Idaho Rules of Civil Procedure 26 and 30(a), before a duly authorized court reporter and notary public, on Wednesday, March 17, 2010, at 11:30 a.m., at the offices of Dunn Law offices, 477 Pleasant Country Lane, Rigby, Idaho, and will continue from time to time until completed, at which place and time you are invited to appear and take part in such deposition.

Date: 3/3/2010

  
\_\_\_\_\_  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

211

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                      **NOTICE OF DEPOSITION OF RAOEL H. CLARK**

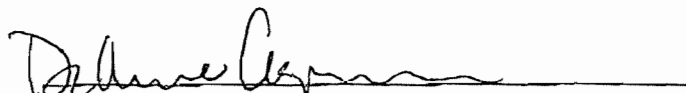
**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

G:\WPDATA\CAIR\14918\Pldgs\Depo Clark.NOT.wpd

218

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
477 Pleasant Country Lane  
P. O. Box 277  
Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

2010 MAR -9 PM 4: 46

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )

Plaintiff, )

vs. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )

Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )

Counter-Defendants, )

Case No. CV-08-941

DEFENDANTS' OBJECTION  
TO "NOTICE OF DEPOSITION  
OF RAOEL H. CLARK" AND  
REQUEST FOR PERMISSION TO  
TAKE TESTIMONY VIA TELEPHONE


OBJECTION-1-

20

COMES NOW, Robin D. Dunn, Esq., attorney for Rael H. Clark, and objects to that Notice of Deposition of Rael H. Clark for the following reasons:

1. The plaintiff is aware that Rael H. Clark does not reside in the State of Idaho. He resides in Texas with his wife during their retirement years. Rael H. Clark makes periodic visits to Idaho and cannot be available at the time indicated in the Notice of Deposition of Rael H. Clark scheduled for March 17, 2010 at Dunn Law Offices, PLLC in Rigby, Idaho.
2. Other depositions have been sought and scheduled on that date after the defendants scheduled the deposition of agents for the plaintiff. As an accommodation, the undersigned indicated that Jerry Peterson could be deposed on said date and requested that telephonic deposition be set for Rael H. Clark. The plaintiff's have objected to that matter and the defendants ask for permission of the above-entitled Court to set this matter by telephonic deposition.
3. This matter needs to be heard as soon as possible, preferably telephonically, with the Court in Chambers in Madison County, Idaho to determine the procedure as Rael H. Clark is not available on the date set by plaintiff.

DATED this 9 day of March, 2010.

  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

**OBJECTION-2-**


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of March, 2010, a true and correct copy of the foregoing was delivered to the following person(s) by:

     Hand Delivery

  X   Postage-prepaid mail

  X   Facsimile Transmission (208) 523-9518

  
\_\_\_\_\_  
Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

DeAnne Casperson, Esq.  
P.O. Box 50130  
Idaho Falls, ID 83405

Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440

**OBJECTION-3-**

DUNN LAW OFFICES, PLLC.  
Robin D. Dunn, Esq., ISB #2903  
Amelia A. Sheets, Esq., ISB #5899  
477 Pleasant Country Lane  
P. O. Box 277  
Rigby, ID 83442  
(208) 745-9202 (t)  
(208) 745-8160 (f)

2010 MAR -9 PM 4: 46

DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Defendants

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

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company, )  
 )  
Plaintiff, )  
vs. )

Case No. CV-08-941

NOTICE OF TELEPHONIC  
HEARING

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Defendants. )

RAOEL H. CLARK and JANET C. )  
CLARK, husband and wife; ANGUS )  
JERRY PETERSON and BETTY JEAN )  
PETERSON, husband and wife, )  
 )  
Counter-Plaintiffs, )

vs. )

BUKU PROPERTIES, LLC an Idaho )  
Limited liability company; and )  
JARAMIE MAGERA, an individual, )  
 )  
Counter-Defendants, )

PLEASE TAKE NOTICE, that on the 12<sup>th</sup> day of March, 2010, at 10:00 a.m.,  
or as soon thereafter as counsel can be heard, telephonically, before the Honorable



Honorable Greg Moeller, counsel for Defendants, Rael H. Clark, Janet C. Clark, Angus Jerry Peterson and Betty Jean Peterson, Robin D. Dunn, Esq., Dunn Law Offices, in the above-entitled action will call up for hearing their *Objection to "Notice of Deposition of Rael H. Clark" and Request for Permission to Take Testimony Via Telephone.*

DATED this 9 day of March, 2010.



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of November, 2009, a true and correct copy of the foregoing was delivered to the following person(s) by:

Hand Delivery

Postage-prepaid mail

Facsimile Transmission - 523-9518



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

DeAnne Casperson, Esq.  
P.O. Box 50130  
Idaho Falls, ID 83405

Courtesy Copy: Judge Gregory Moeller  
Madison County Courthouse  
P.O. Box 389  
Rexburg, ID 83440

223

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

BUKU PROPERTIES, LLC an Idaho,  
Limited liability company,

Plaintiff,

-vs.-

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendant.

Case No. CV-2008-941

**MINUTE ENTRY**

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiff,

-vs.-

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendant.

2010 MAR 12 PM 12:25  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

March 12, 2010, at 10:00 A.M., the defendant's Objection to "Notice of Deposition of Rael H. Clark" and Request for Permission to Take Testimony Via Telephone came on for hearing before the Honorable Gregory W. Moeller, District Judge, sitting in open court at Madison, Idaho.

The parties stipulated to proceeding without a court reporter present.

Ms. Angie Wood, Deputy Court Clerk, was present.

Ms. DeAnne Casperson appeared telephonically on behalf of the plaintiff.

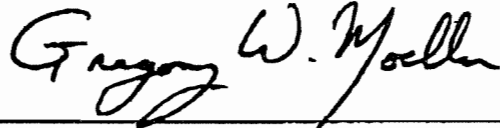
224

Mr. Robin Dunn appeared telephonically on behalf of the defendant.

Counsel indicated that they had reached a resolution.

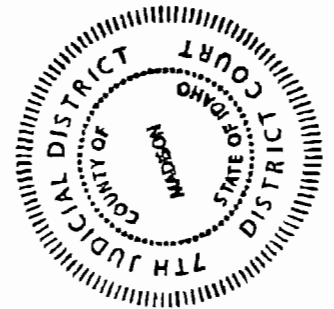
Mr. Dunn withdrew his Objection.

Court was thus adjourned.



\_\_\_\_\_  
GREGORY W. MOELLER  
District Judge

c: Robin D. Dunn, Esq.  
DeAnne Casperson, Esq.



Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 MAR 12 PM 1:52  
JEFFERSON COUNTY IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

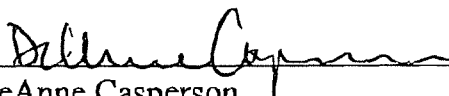
Case No. CV-08-941

**NOTICE OF VACATING  
DEPOSITION OF RAOEL H. CLARK**

2/26

COMES NOW Plaintiff Buku Properties, LLC, and its counsel of record, and hereby gives notice that the deposition on oral examination of Defendant Rael H. Clark scheduled for the 17<sup>th</sup> day of March, 2010 at 11:30 a.m. is hereby vacated.

Dated this 12<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
DeAnne Casperson  
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

2010

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12 day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED: NOTICE OF VACATING DEPOSITION OF  
RAOEL H. CLARK**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

*First Class Mail*  
 *Hand Delivery*  
 *Facsimile*  
 *Overnight Mail*

T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

*First Class Mail*  
 *Hand Delivery*  
 *Facsimile*  
 *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson, Esq.

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*2/2*

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2013 MAR 12 PM 1:52  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**NOTICE OF VACATING  
DEPOSITION OF ANGUS JERRY  
PETERSON**

COMES NOW Plaintiff Buku Properties, LLC, and its counsel of record, and hereby gives notice that the deposition on oral examination of Defendant Angus Jerry Peterson scheduled for the 17<sup>th</sup> day of March, 2010 at 2:30 p.m. is hereby vacated.

Date: 3/12/2010

  
\_\_\_\_\_  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:            NOTICE OF VACATING DEPOSITION OF  
ANGUS JERRY PETERSON**


**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson, Esq.

G:\WPDATA\CA\114918\Wldgs\Depo Vacate Peterson.NOT.wpd

*2/25/10*

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 MAR 12 AM 8:57  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

Case No. CV-08-941

**MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S OBJECTION TO  
"NOTICE OF DEPOSITION OF  
RAOEL H. CLARK" AND REQUEST  
FOR PERMISSION TO TAKE  
TESTIMONY VIA TELEPHONE**

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

COME NOW Plaintiff/Counter-Defendant Buku Properties, LLC and Counter-Defendant Jaramie Magera (collectively "Counter-Defendants"), by and through their counsel of record Holden, Kidwell, Hahn & Crapo, P.L.L.C., and submit this Memorandum in Opposition to Defendant's Objection to "Notice of Deposition of Rael H. Clark" and Request for Permission to Take Testimony via Telephone.

### I. INTRODUCTION

The parties agreed upon dates for the depositions of Mr. Magera, Mr. Clark, and Mr. Peterson. On February 17, 2010, counsel received a letter from Mr. Clark's counsel, indicating his deposition might have to be taken telephonically because he lives out of state. (Casperson Aff., ¶ 2). On March 3, 2010, counsel for Counter-Defendants responded, indicating Mr. Clark needed to appear at the deposition so he could be asked questions about documents relevant to this matter. (Casperson Aff., ¶ 3). On March 3, 2010, Counter-Defendants also served the Notice of Deposition of Rael H. Clark on Mr. Clark's counsel. Such deposition notice stated that Counter-Defendants' counsel would take the deposition of Rael H. Clark on Wednesday, March 17, 2010, at 11:30 a.m. at Dunn Law offices located in Rigby, Idaho. On March 9, 2010, counsel for Mr. Clark filed an Objection to "Notice of Deposition of Rael H. Clark" and Request for Permission to Take Testimony Via Telephone ("Objection"). In his objection, Mr. Dunn asserted that Mr. Clark resides in Texas and that although he makes periodic visits to Idaho, he cannot be available at the time and place indicated in the deposition notice. Mr. Dunn then requested that Mr. Clark be permitted to provide deposition testimony via telephone. Counter-Defendants now object to Mr. Dunn's request that Mr. Clark be able to provide deposition testimony telephonically, and ask that

1 000 10000/0010 F-004

this Court order Mr. Clark to appear in person, in Jefferson County, for his deposition on a mutually agreeable date on which both Mr. Clark and Mr. Peterson's depositions can be taken.

## II. ARGUMENT

### A. **Mr. Clark has not demonstrated undue burden or expense would result from being required to appear for his deposition in Jefferson County.**

Although Idaho law does not provide much guidance regarding where persons must be made available for their depositions, federal cases have addressed this issue. For example, in *Clayton v. Volociti, Inc.*, the District of Kansas Court noted, "As a general rule, the plaintiffs must make themselves available for examination in the district in which they brought suit. Since the plaintiff has selected the forum, he or she will not be heard to complain about having to appear there for a deposition. This rule is not followed if the plaintiff can show good cause for not being required to come to the district where the action is pending." *Clayton v. Volociti, Inc.*, 2009 WL 1033738, \*2 (D. Kan. 2009); *see also Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416, 422 (E.D.Wash. 1976). In *Clayton*, the plaintiffs sought a protective order requiring that plaintiffs be deposed where they resided, as opposed to being deposed in Kansas City, the jurisdiction in which they filed suit. *Clayton*, 2009 WL 1033738 at \*2. Plaintiffs asserted that they should not be required to travel to Kansas City to be deposed because of undue burden and expense. *Id.* In support of this contention, the plaintiffs submitted affidavits attesting to why traveling to Kansas City

would impose undue burden and expense, generally stating that the cost of travel, hotel expenses, and car rental, along with lost wages, was more than they could bear. *Id.* Two of the named plaintiffs included statements regarding medical reasons for their inability to travel, which were unaccompanied by doctor's notes. *Id.* at \*4. The Kansas Court noted that in order to meet the requirements for a protective order under Fed.R.Civ.P. 26(c)(1), the plaintiffs had to show not merely an ordinary burden of expense and loss, but "undue burden or expense." *Id.* Ultimately, the Kansas Court denied the plaintiffs' request for a protective order, finding that plaintiffs did not meet that burden. *Id.* Importantly, the Kansas Court noted "[d]epositions usually involve some burden to all participants. They often involve expense for transportation, sometimes overnight lodging, and often some loss of income. Such expense and loss constitute part of the ordinary burden of litigation that each party must bear. Only in unusual circumstances would the Court shift the ordinary burden of litigation to the opposing party." *Id.* at \*3.

In the case at hand, Mr. Clark is a counter-plaintiff and is requesting specific performance regarding the purchase of the Property. The forum for the dispute is Jefferson County, Idaho, as the property at issue is located there. The fact that Mr. Clark has since moved to Texas and only makes periodic trips to Idaho is insufficient to show good cause or demonstrate an undue burden that he cannot appear in person. Simply living in a far-away location is not enough, especially considering that he resided in Idaho during the relevant portions of this litigation and seeks to have the Court order Buku to purchase the property.

Additionally, Mr. Clark himself has not provided an affidavit indicating any undue burden beyond that of the ordinary burden of litigation that would entitle him to avoid having his deposition taken in the location where the suit is filed and the property is located. Mr. Clark filed suit as a Counter-Plaintiff in Jefferson County, Idaho. He must make himself available for examination in Jefferson County.

**B. Deposition by Telephone Would Be an Insufficient Method of Deposition and Mr. Clark Has Failed to Demonstrate the Extreme Hardship Necessary to Order Deposition by Telephone.**

Idaho Rule of Civil Procedure 30(b)(7) provides that “[t]he parties may stipulate in writing or the court may upon motion order that a deposition may be taken by telephone.” Idaho R. Civ. P. 30(b)(7). As the Kansas Court in *Clayton* noted of the identical federal rule, “[w]hile Rule 30(b)(4) permits the taking of depositions by telephone, nothing in the Federal Rules of Civil Procedure requires the Court to order that depositions be taken telephonically.” *Id.* at \*5. Moreover, as noted in *Clayton*,

[R]emote depositions are most often used for relatively brief examinations that do not involve numerous documents. Depositions by telephone, particularly of parties, deprive the opposing party of the opportunity to evaluate the nonverbal responses and demeanor of the witness and deny the opportunity for face-to-face confrontation. They create difficulty when the testimony requires the deponent to examine numerous, lengthy, or complex documents. Given these legitimate disadvantages of telephonic depositions, the party seeking such procedure must make a specific showing of hardship, tied to an individual’s circumstances.

*Id.* “Absent a specific showing of hardship tied to an individual’s circumstances, a general order requiring that the depositions of out-of-town plaintiffs be taken telephonically is not

warranted.” *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867471, \*3 (citing *United States v. Rock Springs Vista Dev.*, 185 F.R.D. 603, 603-04 (D. Nev. 1999); *Clem v. Allied Van Lines Int’l Corp.*, 102 F.R.D. 938, 940 (S.D.N.Y. 1984).

Mr. Clark has made no specific showing of hardship regarding his circumstances to justify an order for telephonic deposition. He has submitted no affidavit, and has presented no evidence that being required to attend his deposition in person would result in any burden beyond that of normal litigation. Additionally, this case is a contract dispute and involves numerous documents about which Counter-Defendants’ counsel will need to question Mr. Clark. A telephonic deposition would make questioning Mr. Clark about these documents incredibly difficult. Therefore, given that Mr. Clark has made no specific showing of hardship necessitating that his deposition be taken telephonically, and given that Mr. Clark will need to be questioned about numerous documents during the course of his deposition, the Court should deny Mr. Clark’s request that he be deposed telephonically and should order that he must appear in person in Jefferson County to be deposed. Plaintiff has no objection to rescheduling both depositions on a date in the near future for Mr. Clark’s convenience.

### III. CONCLUSION

Based on the foregoing, Counter-Defendants request that the Court deny Defendant/Counter-Plaintiff Rael H. Clark’s request that he be deposed telephonically, and order Mr. Clark to appear in person in Jefferson County for his deposition.

Dated this 14<sup>th</sup> day of March, 2010.



DeAnne Casperson, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.



**CERTIFICATE OF SERVICE**

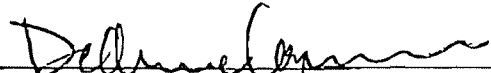
I hereby certify that on this 14<sup>th</sup> day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **MEMORANDUM IN OPPOSITION TO DEFENDANT'S OBJECTION TO "NOTICE OF DEPOSITION OF RAOEL H. CLARK" AND REQUEST FOR PERMISSION TO TAKE TESTIMONY VIA TELEPHONE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
\_\_\_\_\_  
DeAnne Casperson, Esq.

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Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 MAR 12 AM 8:57  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**AFFIDAVIT OF DEANNE  
CASPERSON IN SUPPORT OF  
MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S OBJECTION TO  
"NOTICE OF DEPOSITION OF  
RAOEL H. CLARK" AND REQUEST  
FOR PERMISSION TO TAKE  
TESTIMONY VIA TELEPHONE**

STATE OF IDAHO            )  
                                          )ss.  
County of Bonneville        )

DeAnne Casperson, being first duly sworn on oath, deposes and states as follows:

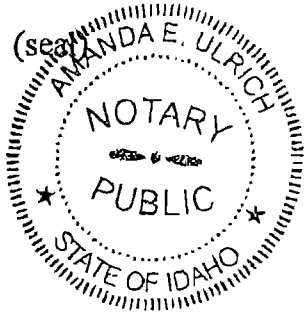
1. I am an attorney with the firm of Holden, Kidwell, Hahn & Crapo, P.L.L.C., and an attorney of record on behalf of Buku Properites, LLC. I submit this Affidavit based upon my own personal knowledge unless otherwise stated, and in support of the Counter-Defendants' Memorandum in Opposition to Defendant's Objection to "Notice of Deposition of Rael H. Clark" and Request for Permission to Take Testimony via Telephone.
2. On February 17, 2010, I received a letter from Rael H. Clark's counsel, indicating his deposition might have to be taken telephonically because he lives out of state. A true and correct copy of such correspondence is attached hereto as Exhibit "A."
3. On March 3, 2010, I responded to Mr. Clark's counsel's February 17, 2010, letter indicating that Mr. Clark needed to appear at the deposition so he can be asked questions about documents relevant to this matter. A true and correct copy of such correspondence is attached hereto as Exhibit "B."

Dated this 11<sup>th</sup> day of March, 2010.

DeAnne Casperson  
DeAnne Casperson

SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of March, 2010.

Amanda E. Ulrich  
Notary Public for Idaho  
Residing at: Idaho Falls ID  
My commission expires: Oct. 31, 2014



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of March, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

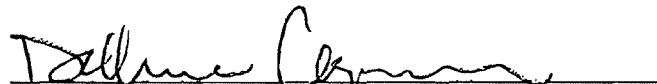
**DOCUMENT SERVED:**

**AFFIDAVIT OF DEANNE CASPERSON IN SUPPORT OF MEMORANDUM IN OPPOSITION TO DEFENDANT'S OBJECTION TO "NOTICE OF DEPOSITION OF RAOEL H. CLARK" AND REQUEST FOR PERMISSION TO TAKE TESTIMONY VIA TELEPHONE**

**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

(  ) *First Class Mail*  
(  ) *Hand Delivery*  
(  ) *Facsimile*  
(  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

G:\WPDATA\CAHN\4918\Pldgs\Telephone.Depo.DC.AFF.wpd

149

# DUNN LAW OFFICES, PLLC

ROBIN D. DUNN

AMELIA A. SHEETS

Telephone: (208)745-9202

P.O. Box 277  
477 Pleasant Country Lane  
Rigby, Idaho 83442-0277  
email: rdunn@dunnlawoffices.com

2010 MAR 12 AM 8:58  
Facsimile: (208) 745-8168  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

February 17, 2010

DeAnne Casperson, Esq.  
P.O. Box 50130  
Idaho Falls, ID 83405

Re: *Buku Properties, LLC v. Peterson/Clark*  
*Jefferson County Case No. CV-08-941*

Dear DeAnne:

Enclosed please find a copy of the Notice of Taking Deposition of Jaramie Magera regarding the above matter. I understand you want to depose my clients as well. However, you will probably have to depose Mr. Clark telephonically because he lives out of state. There should not be a problem in deposing Mr. Peterson in person.

If there are questions, please call.

Sincerely,



Robin D. Dunn, Esq.  
DUNN LAW OFFICES, PLLC

RDD/jn  
enclosure  
cc: clients

Exhibit "A"



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

LAW OFFICES  
DeAnne Casperson  
Licensed in Idaho, Missouri and Kansas  
E-mail: dcasperson@holdenlegal.com

1000 Riverwalk Drive, Suite 200  
PO Box 50130  
Idaho Falls, Idaho 83405

Tel: (208) 523-0620  
Fax: (208) 523-9518  
www.holdenlegal.com

2010 MAR 12 AM 8:58  
DISTRICT COURT  
JEFFERSON COUNTY, IDAHO

March 3, 2010

VIA FACSIMILE

Robin D. Dunn  
DUNN LAW OFFICES, PA  
P.O. Box 277  
Rigby, ID 83442

Re: *Buku Properties, LLC v. Rael H. Clark and Janet C. Clark, et al.*  
*Jefferson County Case No. CV-2008-941*

Dear Robin:

In scheduling the deposition of your client, Mr. Clark, you have indicated that this deposition can only be scheduled telephonically. As you are aware, Rule 30 of the Idaho Rules of Civil Procedure allow us to take the deposition of a party. Pursuant to Rule 30(b)(7), "the parties may stipulate in writing or the court may upon motion order that a deposition may be taken by telephone." For purposes of this Rule and Rules 28(a), 37(a)(1), 37(b)(1) and Rule 45(f)(1), a deposition taken by telephone is taken in the state, territory or insular possession and at the place where the deponent is to answer questions propounded to the deponent. We have neither stipulated in writing nor have you sought protection from the Court in order to have Mr. Clark's deposition taken by telephone. In addition, because the arrangements for a court reporter would have to be made in Texas, it would require my client to incur additional costs.

Mr. Clark is a party to this action. He has been well aware of this pending action. We believe that he is required to appear in order to be able to ask him questions and have him review documents associated with this case. We do not believe that this can be adequately done over the phone. Consequently, we are hereby demanding that Mr. Clark physically appear at his deposition. If he fails to do so, we will seek sanctions against him.

If you have any questions or comments, please contact me.

Best regards,

DeAnne Casperson

Enclosures

c: Buku Properties, LLC

G:\WPDATA\CAH\14918\Correspondence (Litigation)\Dunn 030310.ltr.wpd:bal

Exhibit "B"

*Established in 1896*

245

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 APR -1 PM 4: 06

JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

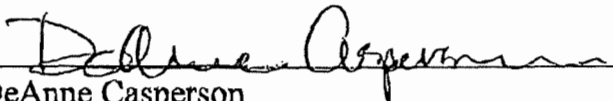
**AMENDED NOTICE OF  
DEPOSITION OF ANGUS JERRY  
PETERSON**

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YOU WILL PLEASE TAKE NOTICE That Plaintiff Buku Properties, LLC, and its counsel of record, will take the deposition of Defendant Angus Jerry Peterson, pursuant to Idaho Rules of Civil Procedure 26 and 30(a), before a duly authorized court reporter and notary public, on Tuesday, April 13, 2010, at 1:30 p.m., at the offices of Dunn Law offices, 477 Pleasant Country Lane, Rigby, Idaho, and will continue from time to time until completed, at which place and time you are invited to appear and take part in such deposition.

Date: 4/11/2010

  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

2469

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of April, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:                    AMENDED NOTICE OF DEPOSITION OF ANGUS JERRY PETERSON**


**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

247

Charles A. Homer, Esq. (ISB No. 1630)  
DeAnne Casperson, Esq. (ISB No. 6698)  
HOLDEN KIDWELL HAHN & CRAPO, P.L.L.C.  
P.O. Box 50130  
1000 Riverwalk Drive, Suite 200  
Idaho Falls, ID 83405  
Telephone: (208) 523-0620  
Facsimile: (208) 523-9518

2010 APR -1 PM 4:06

JEFFERSON COUNTY, IDAHO

Attorneys for Plaintiff

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

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Plaintiff,

v.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Defendants.

RAOEL H. CLARK and JANET C.  
CLARK, husband and wife; ANGUS  
JERRY PETERSON and BETTY JEAN  
PETERSON, husband and wife,

Counter-Plaintiffs,

v.

BUKU PROPERTIES, LLC, an Idaho  
limited liability company,

Counter-Defendants.

Case No. CV-08-941

**AMENDED NOTICE OF  
DEPOSITION OF RAOEL H. CLARK**

24/8

YOU WILL PLEASE TAKE NOTICE That Plaintiff Buku Properties, LLC, and its counsel of record, will take the deposition of Defendant Rael H. Clark, pursuant to Idaho Rules of Civil Procedure 26 and 30(a), before a duly authorized court reporter and notary public, on Tuesday, April 13, 2010, at 10:00 a.m., at the offices of Dunn Law offices, 477 Pleasant Country Lane, Rigby, Idaho, and will continue from time to time until completed, at which place and time you are invited to appear and take part in such deposition.

Date: 4/1/2010

  
\_\_\_\_\_  
DeAnne Casperson  
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

249

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of April, 2010, I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

**DOCUMENT SERVED:**                    **AMENDED NOTICE OF DEPOSITION OF RAOEL H. CLARK**

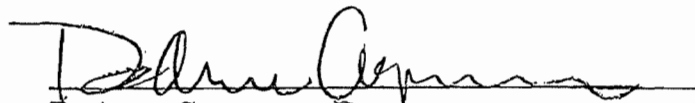
**ATTORNEYS SERVED:**

Robin D. Dunn  
477 Pleasant Country Lane  
P.O. Box 277  
Rigby, ID 83442

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
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T&T Reporting  
525 Park Avenue  
Idaho Falls, ID 83402

- (  ) *First Class Mail*
- (  ) *Hand Delivery*
- (  ) *Facsimile*
- (  ) *Overnight Mail*

  
DeAnne Casperson, Esq.

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